In Case 7/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal (Criminal Division), for a preliminary ruling in the action pending before that court between

REGINA

and

ERNEST GEORGE THOMPSON, BRIAN ALBERT JOHNSON and COLIN ALEX NORMAN WOODIWISS

on the interpretation of the term "capital" within the meaning of Part Two, Title III, Chapter 4 of the Treaty of Rome,

THE COURT,

composed of: H. Kutscher, President, Lord Mackenzie Stuart, (President of Chamber), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The appellants were charged before the Crown Court at Canterbury with being knowingly concerned in a fraudlent evasion of the prohibition on importation imposed by the Import of Goods (Control) Order 1954, contrary to section 304 (b) of the Customs and Excise Act 1952, in relation to certain goods, namely 1 500 Krugerrand gold coins. The appellant Johnson was also charged with seven other offences of a similar nature (in relation to 1 900 Krugerrand gold coins), and the appellants Johnson and Woodiwiss were charged with conspiracy to evade the prohibition imposed by the Export of Goods (Control) Order 1970, on the exportation of 40.39 tonnes of coins of silver alloy minted in the United Kingdom.

At an early stage in the trial the appellant Woodiwiss pleaded guilty to Court 1. Subsequently all three submitted that there was no case for them to

answer, on the basis that the relevant prohibitions on importation and exportation were invalid as being in conflict with the Treaty of Rome. The trial Judge rejected the submission and refused to refer the question which arose to this Court for a preliminary interpretation under Article 177 of the Treaty. The appellants then pleaded guilty to the remaining counts.

They subsequently appealed to the Court of Appeal (Criminal Division) which by Order of 15 December 1977, registered in the Court Registry on 16 January 1978, referred the following questions to the Court under Article 177 of the Treaty:

1. Are the following coins in principle "capital" within the meaning of Part Two, Title III, Chapter 4 of the Treaty of Rome:

   a) gold coins which are produced in a third country such as Krugerrands, but which circulate freely within a Member State;

   b) silver alloy coins, which are legal tender in a Member State;

   c) silver alloy coins of a Member State, which have been, and which although no longer legal tender in that State are protected as coin from destruction in that State?

2. If so, can the quantity and manner in which and the purposes for which such coins are traded result in such coins ceasing to be within the term "capital" in Part Two, Title III, Chapter 4?

3. Do the provisions of Part Two, Title III, Chapter 4 of the Treaty of Rome apply to such of the aforesaid coins as are "capital" to the exclusion of the provisions of Part Two, Title I, Chapter 2 of the Treaty?

4. If the answers to all or any of the above questions are such as to determine that the articles in this case fall within Part Two, Title I, Chapter 2, does the term "public policy" in Article 36 of the Treaty of Rome mean that a Member State may seek to justify restrictions on:

   (a) The import of gold coins on either or both of the following grounds:

      (i) to prevent the drain on its balance of payments,

      (ii) to prevent the speculation and hoarding of unproductive assets,

   (b) the export of its own silver alloy coinage on any or all of the following grounds:

      (i) to ensure that there is no shortage of current coins for use of the public,

      (ii) to ensure that any profit resulting from any increase in the value of metal content of the coin accrues to the Member State rather than to an individual,

      (iii) to prevent the destruction of its coins occurring outside its jurisdiction, which if it occurred within its jurisdiction would be a criminal offence?

Pursuant to Article 20 of the Statute of the Court written observations were submitted on behalf of the appellants, the United Kingdom, Italy and the Commission of the European Communities.

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

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the appellants

The appellants point out that the coins exported were sixpences, shillings, florins and half-crowns. All but the latter were still current legal tender, but were no longer in circulation as such. They had been withdrawn by private persons who, since the value of their silver content so greatly exceeded their face value, freely traded them in the United Kingdom at prices matching the market value of their silver content. The silver coins the subject of the criminal charges in the indictment had all been obtained from numerous residents in the United Kingdom, by means of lawful advertisement and offer in a periodical circulating in the United Kingdom. The Government in the United Kingdom had taken no measures to prevent or even discourage such a trade. No system existed initiated or approved by the Government whereby a citizen could obtain from the Government the value of the silver content of the coins. The Royal Mint which is in effect the Government Department responsible for these matters will buy all these silver alloy coins at face value only. The silver alloy coins exported from the United Kingdom were sold to the German company AGOSI at the prevailing market price of their silver content.

The price at which Krugerrands were delivered to one of the appellants was determined by the market price at which these coins then lawfully and freely circulated in Germany. Throughout the period covered by the charges in the indictment and to the present time, Krugerrands lawfully and freely circulate in the United Kingdom at prices determined by a free market in common with all other gold coins whatever the country of origin and date of origin. Krugerrands may be imported into the United Kingdom by any person or corporation licensed for this purpose by the Government of the United Kingdom. A Government Department determines the time at which such licence shall be effective and the nature and quantity of the coins to be imported. No restriction is thereafter placed on the trading in the coins in the United Kingdom which can be undertaken by that person or corporation. The United Kingdom coins concerned in this case may be exported from the United Kingdom by any person or corporation licensed for this purpose by the Government of the United Kingdom. The Department of the Government determines the time at which such licence shall be effective and the quantity of coins to be exported.

Section 10 of the Coinage Act 1971 enables the courts in the United Kingdom exercising criminal jurisdiction to act against any person who melts down or breaks up any metal coin which is current in the United Kingdom or which has been current in the United Kingdom at any date after the 16 May 1969. (All the silver alloy coins concerned in this case were within this definition). In the period in question they would also be able to act against any persons who conspired to commit such offences outside the territory of the United Kingdom, provided, as in this case, some acts of the conspirators were carried out in the United Kingdom (*Director of Public Prosecution* v *Doot*, 1973, A. C. 807)

Dealings in gold currency in the United Kingdom, or outside the United Kingdom by United Kingdom residents are subjected to controls by the Exchange Control Act 1947.

The appellants submit that Questions 1 and 2 posed for the Court cannot be answered "in principle" since the status of the coins depends on the transactions to which they are subject. Question 3

required the Court to consider Part Two, Title Three of the Treaty before considering Part Two, Title One. They submit further that it is more convenient for the Court, to examine the questions raised on this Appeal in the following order: (a) Articles 30 to 35, (b) Article 36, (a) Capital. These submissions are made having regard, first, to the nature and extent of the criminal charges preferred against the appellants under the domestic legislation of the United Kingdom, namely, that the appellants were trading in "goods" and, secondly, to the concession made in the Court of Appeal (Criminal Division) by the Solicitor-General appearing on behalf of the Respondents to the Appeal, Her Majesty's Commissioners of Customs and Excise, and accepted by the Court set out in the Judgment as follows:

"This Solicitor-General conceded that, if coins of the kind in question are properly to be regarded as goods to which Title One of Part Two of the Treaty (of Rome) applies, the prohibitions imposed invalidate the relevant restriction unless they can be justified under Article 36 . . .".

The relevant United Kingdom legislation in respect of the importation of goods arises from an Act of Parliament dated 1939. The order giving authority for the issue of licences to import goods is dated 1954. General licences were subsequently issued until 15 April 1975 when it became unlawful by this domestic law to import goods of the class concerned in this case and other gold items except under the authority of a licence. It will be noticed that the Common Customs Tariff nomenclature and numbering is used for all the items. The relevant United Kingdom legislation in respect of the exportation of goods also arises from the Act of Parliament of 1939. The Order giving authority for the issue of licences to export goods is dated 1970. General Licences were issued subsequently until 15 July 1974, when it became unlawful by this domestic legislation to export "goods" of the class concerned in this case except under the authority of a licence.

The Community law by which such purported prohibitions must be judged is found, in the first place, in Article 42 of the Act of Accession annexed to the Treaty of Accession of 22 January 1972, which provides:

"Quantitative restrictions on imports and exports shall, as from the date of accession, be abolished between the Community as originally established and the new Member States and between the new Member States themselves.

Measures having equivalent effect to such restrictions shall be abolished by 1 January 1975 at the latest".

It follows that, as from the dates specified in Article 42, quantitative restrictions on imports and exports and measures of equivalent effect must be justified, if at all, by some provision of Community law applicable to the present case.

In order to apply Article 42 of the Act of Accession, it is necessary to have regard to Articles 30 to 37 of the EEC Treaty dealing with the same matters. Those Articles are in principle applicable in and to the United Kingdom (Article 2 of the Act of Accession) subject only to any special provisions in the Act of Accession. Also, Articles 30 to 37 have to be read in the light of the EEC Treaty as a whole, including Articles 3 (a), 5 and 9 and also Articles 67 to 73, 103, 108 and 109. Having regard to all the relevant provisions and to the jurisprudence of the Court of Justice, the appellants submit that: (a) the transactions involved were the movement of goods; (b) the prohibitions involved were quantitative restrictions; (c) the prohibitions were quantitative restrictions which violated Article 42 of the Act of Accession and Articles 30, 31 and 34 of the EEC Treaty; (d) those articles have direct effect and prohibitions which violate them are legally invalid.

The word "goods" is not used in Article 42 of the Act of Accession or in Articles 30, 31 (first sentence) or 34 of the Treaty. But it is clear that the word should be read into those provisions, having regard to the Articles 3 (a) and 9 and the wording of Title One of Part Two of the Treaty. The appellants refer to the definition of goods in Case 7/68, *Commission* v *Italy:*

"By goods, within the meaning of Article 9, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions".

Both the pre-1947 silver alloy coins and the Krugerrands were valued in money terms by the parties to the transactions. Such coins, notwithstanding that they may be legal tender (respectively, in the United Kingdom and South Africa), have a separate value as goods within the commercial transactions, a price determined by market forces, including supply and demand.

The Community's Common Customs Tariff shows that gold and silver and coins are recognised prima facie as being the subject of transactions to which that tariff applies (Regulation No 2500/77, Official Journal 1289 — headings 71.05, 72.01 and 99.05). For the purpose of applying the Common Customs Tariff, Regulation No 803/68 provides that the value of goods is taken to be:

"the normal price, that is to say, the price which they would fetch ... on a sale in the open market between a buyer and a seller independent of each other".

These provisions reflect the fact, illustrated by the present case, that gold and silver coins do have a value on an open market as goods which form the subject of commercial transactions. Furthermore, the prohibitions to which the present case relates were orders for the control of the import and export of "goods", the charges in the present case refer specifically to the import and export of "goods", as do the Act of Parliament, the orders and licensing systems under which these charges were preferred.

Thus the relevant Treaty provisions prohibit quantitative restrictions which were in effect on the date of accession and those which are introduced thereafter. The revocation of the Open General Licences with effect, respectively from 16 April 1975 (import) and 15 July 1974 (export) created new quantitative restrictions as from those dates. After the date of accession of the United Kingdom to the EEC on 1 January 1973 the importation of gold coins was freely permitted between 5 July 1973 and 16 April 1975. Similarly the export of all coins from the United Kingdom was freely permitted from the date of accession to 15 July 1974. These then can only be regarded as quantitative restrictions rather than measures having equivalent effect. According to the well-established principles of Community law relating to the direct effect and the supremacy of Community law, national courts should not apply national provisions which are incompatible with Community law. Article 42 of the Act of Accession and Articles 30, 31 (first sentence) and 34 are all covered by those fundamental principles of Community law. The provisions impose a clear and precise obligation on the Member States; they are unconditional; and they do not call for supplementary implementing legislation (at least after the end of the Community's original transitional period — cf. Submissions of Advocate General Mayras in *Van Duyn* v *Home Office* — Case 41/74; *Salgoil* v *Italian Ministry for Foreign Trade* — Case 13/68).

As to Article 36 of the Treaty the appellants submitted:

(i) The onus of justifying the prohibitions particularly by reference to Article 36 of the EEC Treaty rests on the Government of the United Kingdom.

(ii) The prohibitions were not necessary for any of the purposes specified in Article 36.

(iii) If the prohibitions related to the enforcement of United Kingdom criminal law relating to British coinage, it was a purpose which should have been pursued by regulation at the Community level or, if it might validly have been pursued at the national level, it should have been pursued through the amendment and/or regular enforcement of the criminal law and not by hindering the free movement of goods.

(iv) If the purpose of the prohibitions related to the protection of economic interests of the United Kingdom, the prohibitions could not be justified by reference to Article 36.

(v) If the purpose of the prohibitions related to the protection of the United Kingdom balance of payments, it should have been pursued through use of the Treaty provisions relating to the balance of payment problems.

The prohibitions in question include, in the first place, the two Acts of Parliament, the Act of 1939 and the Customs and Excise Act of 1952, under which the prosecution was brought. These are general in form. Neither of these acts could be expected to, or in fact does, encompass or envisage the principles governing the Treaty or the Act of Accession. The orders which are similarly general in form and which are made under the authority of the first Act of Parliament and are dated respectively 1954 and 1970 similarly cannot be expected to encompass or envisage the principles governing the Treaty or the Act of Accession. It is difficult to see how these acts, orders, or licences subsequently issued could conceivably be justified on any of the grounds envisaged by Article 36. The prohibitions in question include, secondly, the revocations of the general licences in respect of coins.

The only ground in Article 36 which it is necessary to consider in relation to these prohibitions is the ground of "public policy" since this is the sole justification put forward by the Government of the United Kingdom for invoking Article 36. The term "public policy" has not been defined by United Kingdom legislation. It has been used by United Kingdom courts to justify the restriction of any activity which might be thought to be contrary to the general welfare of society. The United Kingdom acceded to the Treaty without securing any redefinition of the term as it appears in the original texts. The appellants rely on the fact that all the language texts of the Treaty are equally authentic. (Article 248 of the Treaty and Article 160 of the Act of Accession). The French and German equivalent of "public policy" are "ordre publique" and "öffentliche Ordnung". Neither has the same wide meaning traditionally given to the phrase in the United Kingdom. The appellants also rely on the fact that the same words are now in Article 48 (3) and 56 (1) of the Treaty, where the same meaning ought to be given to them. They should be narrowly as well as strictly interpreted. They refer to Case 41/74, *Van Duyn.*

The appellants submit that that which the prohibitions and restrictions permitted under Article 36 have in common is that they are intended to protect substantial national interests which are shared by all Member States, which can more appropriately be protected at the national rather than the Community level, which can be protected without any distortion of trade or discrimination against other Member States, and which cannot reasonably be protected by some means other than a prohibition or restriction on imports or exports. It would follow that the phrase "public policy" cannot have been intended to be a phrase to cover any other policy interests of a Member State beyond those listed in the rest of the article. The French and German versions

of the phrase should be preferred, since they make it clear that the phrase is intended to refer to the public order of the State, an interest in protecting the political and social structure of the State which is shared by all the Member States. The phrase could not cover specific economic interests of a particular Member State which must be protected, if at all, through the use of the many other provisions, relating to economic matters (cf. *Commission* v *Italy* — Case 7/61).

The Government of the United Kingdom seeks to justify the importation prohibition on the ground of preventing a drain on its balance of payments. It is difficult to see how such a ground could conceivably be covered by the "public policy" exception in Article 36. In the case *Commission* v *Italy* 7/61, the Court said:

"Article 36, as distinct from Article 226, is directed to eventualities of a non-economic kind which are not liable to prejudice the principles laid down by Articles 30 to 34 as the last sentence of the article confirms".

There were no circumstances existing at the relevant time which could justify the Government of the United Kingdom's imposing any unilateral restrictions or prohibitions on imports of Krugerrands, or would require (whether of its own volition or at the request of the United Kingdom Government) the Commission's undertaking investigation or action under Article 108. It is not claimed by the Government of the United Kingdom that such circumstances existed, nor was it the action undertaken under Article 109 or Article 135 of the Act of Accession. It would threaten to undermine the general structure of the Treaty and the principles on which the customs union of the Member States was founded if it were open to any Member State to take unilateral measures (possibly undisclosed to other Member States) in derogation from the principle of the free movement of goods, and if it were able subsequently to justify these measures by unverifiable reference to the protection of its balance of payments.

Question 4 (a) (ii) raises a wholly social consideration, the merits or demerits of which are wholly irrelevant to a proper consideration of the extent of Article 36. It cannot be right to allow weight to be given to an attitude which is wholly at variance with the spirit and intent of the Treaty. This is particularly so when a lawful and free market exists within the United Kingdom for trade in silver and gold coins whether of domestic or foreign manufacture. It must plainly be an "arbitrary discrimination" for one Member State to prohibit a trade in such articles with other Member States but to permit such a trade within its own boundaries.

As to Question 4 (b) (i) the supply of current coins in the United Kingdom lies wholly within the control of the Government and the silver alloy coins had been out of circulation for many years. This was not the purpose stated publicly in the United Kingdom by the Government when the prohibition was in introduced. It cannot apply to some of the coins namely the half-crowns, since they have not been legal tender from a date prior to the introduction of decimalization in 1971, and after 16 May 1969. There is and has been no shortage in the United Kingdom of current coin, either in fact or claimed.

As to Question 4 (b) (ii) the appellants submit that it cannot have been the object of the Treaty to provide a Member State with the legal means of acquiring an economic advantage by requiring that the value of an article should accrue to the State rather than to an individual. If it is acceptable that trade in articles whatever their source or their original valuation within a Member State should be controlled by the domestic legislation of that State, then a failure to exercise that control should

not permit the State to restrict or prohibit trade between residents of different Member States. The restriction or prohibition on trade between individuals in Member States on the grounds that a Member State might at some unspecified time in the future introduce domestic legislation requiring the surrender by residents of that State of coin current in that State could not justify action under Article 36.

As to Question 4 (b) (iii), assuming that the effect of Section 10 of the Coinage Act 1971, which creates the relevant offence, is related to acts committed within the United Kingdom it is apparent that the provision could be amended to cover acts committed abroad. Principles of public international law concerning criminal jurisdiction would not prevent or inhibit the assumption of jurisdiction over such acts. United Kingdom law already includes many such instances, namely the Exchange Control Act 1947. The assumption of jurisdiction over an offence of this nature committed abroad would not, in the appellants' submission, constitute a restriction on trade for the purposes of the Treaty at least so far as it related to current coinage. On the other hand, to use a general export ban as the method for achieving such a purpose involves a direct restriction of trade. It also goes far beyond the achievement of the specific purpose, in that it covers the export of coins for the purposes other than physical destruction, that is to say, export in the normal course of trade. For all these reasons the appellants submit that the prohibition involved in the present case cannot properly be justified by reference to Article 36.

So far as the appellants are aware the Court has not had occasion to define the expression "movement of capital" used in the Treaty. The expression should be interpreted in the light of the wording and purpose of the provisions in which it is used and the place of those provisions in the overall structure of the Treaty, and also in the light of the implementation of the provisions by the institutions of the Community. It is apparent that coins are capable of being used as means of payment, or as part of a barter deal, or as goods bought and sold for a price, or as a form of investment asset. Secondly, it must be the circumstances of any given transaction which determine the particular role which coins are playing in that transaction. Thirdly, it is probable that the EEC Treaty will contain provisions affecting coins in all four different roles, to the extent that such provisions are necessary for the proper functioning of the Common Market. Accordingly, the Treaty provisions applicable to a transaction involving coins will depend on the nature and circumstances of the transaction. The appellants submit that it is possible to form a view as to the "movement of capital" covered by Articles 67 to 73, in the first place, by elimination of transactions covered by other provisions. Such other transactions would include the movement of goods and current payments connected with the movement of goods, service, capital or persons — those transactions being dealt with in the Treaty in a form which makes it clear that they are themselves distinguishable from the "movements of capital". The transactions involved in the present case are properly included in such other transactions. It is further submitted that it cannot have been the intention of the Treaty to submit products which in practice may be traded as goods to the application of other sections of the Treaty, (particularly those whose operations after the transitional period has finished are unclear and unresolved).

The meaning of "movements of capital" for present purposes may be found with the assistance of acts of Community institutions implementing the Treaty provisions. Such acts cannot be a conclusive interpretation of the Treaty, but they provide useful guidance as to

the interpretation given to the provisions by the institutions and by the Member States. In the First Directive for the implementation of Article 67 (11 May 1960; consolidated version, as amended by the Second Directive, in Official Journal No 62 of 1963), List D of Annex I includes the item —

"Physical import and export of financial assets"

referring to item XIII in the Nomenclature in Annex II —

"XIII Import and export of financial assets.

A. Securities (not included under IV) and means of payment of every kind.

B. Gold".

The appellants submit that the words "Financial assets" indicate the kind of transactions to which these provisions relate. So far as they relate to coins, they are concerned with the coins used as assets, that is to say, not with coins when they are being transferred as goods. The expression "means of payment" in Item XIII, is used as a generic term to describe the objects in question ("moyens de paiement") not to identify the nature of the transaction in which they are used. This classification can therefore have reference only to the transfer of assets in circumstances where none of the features of trade exist. Otherwise the directive would permit a very substantial derogation from the principles of free trade set out in Articles 30 to 36 in respect of any of the items containing gold set out in items 71.07, 71.08 and 99.05 of the C.C.T. and possibly in respect of any goods which might be described within the wide phrase "means of payment of every kind". The appellants rely on a statement contained in a Commission Memorandum of March 1969 —

"Free movement of capital is necessary for the achievement of a number of objectives included in, or implied by, the Treaty (steady and balanced expansion throughout the Community, freedom of establishment, equality of conditions of competition among firms, development of an industrial policy and advances in industrial combination)".

(Bulletin of the European Communities, May 1969, p. 21).

This statement places the "movement of capital" provisions in a context which is quite different from the unambiguous commercial character of the transactions involved in the present case. The appellants further rely on the indisputable fact that all the prohibitions in question were not, in substance or in form, controls on the movement of capital. They were created and applied wholly within the context of the import and export of goods. It is not material to this question that those exported were by the domestic law protected from destruction or that some were legal tender within the United Kingdom. These considerations throw no light on the question whether they were being dealt with as goods or capital.

Finally, if, contrary to the above submission, the Court should consider that there was an element of "movement of capital" in the transactions involved in the present case, the appellants respectfully suggest that the Court should now hold that Article 67 has direct effect to the extent that the items in this case have a dual function as "goods" and as "capital". Having regard to a series of decisions of the Court (*Reyners* — Case 2/74, *Commission* v *France* — Case 67/73, *Van Binsbergen* — Case 33/74, *Defrenne* — Case 43/75), there would seem to be ground for holding that, since the end of the transitional period, Article 67 cannot have become defunct and must have some direct effect, imposing some obligation on the Member States which cannot simply be ignored. The expression "to the extent necessary to ensure the proper functioning of the Common Market" makes the determi-

nation of the extent of the direct effect difficult and means that that extent may change as the Common Market develops, but it cannot deprive the provision of all obligatory effect.

B — Observations of the Government of the United Kingdom

Article 67 and the succeeding articles in the chapter headed "Capital" do not define the term "capital" and this Court has so far not been called upon to define or construe the term. However the word "capital" as internationally understood ordinarily applies to precious metals such as gold and silver and money including coins. The articles of the chapter with their references to "exchange authorizations", "the capital market", "loans", "exchange restrictions" and "the Monetary Committee" are clearly using the word in this sense. This is confirmed by the First Directive of the Council issued under Article 69 for the implementation of Article 67 on 11 May 1960 (Official Journal 921/60) for the purpose of "the greatest possible freedom of movement of capital between Member States and therefore the widest and most speedy liberalization of capital movements". Although the term "capital" was not defined in this directive, there are listed in Annex I various transactions to which the directive applies. The directive does not require restrictions to be abolished in respect of those capital movements set out in List "D" of Annex I, but under Article 4 the Monetary Committee is required to examine such restrictions and under Article 7 Member States must make known to the Commission any amendment of the provisions governing the capital movements set out in List "D". The United Kingdom in fact notified the Commission orally on 4 July 1974 and in writing on 15 July 1974 of the restrictions on the export of pre-1947 silver alloy coin which came into force on the latter date, and in writing on 15 April 1975 of the restrictions on the import of, *inter alia*, gold coins, which came into force on 16 April 1975.

List "D" covers, *inter alia*, "physical import and export of financial assets" which by reference to the explanatory notes in Annex II includes:

"A. Securities (not included under IV) and means of payment of every kind.

B. Gold."

Thus the physical import and export of financial assets includes import and export of gold and means of payment of any kind. As well as being covered by this directive it should be noted that gold is classified in the Common Customs Tariff under heading 71.07 and coin (which is a means of payment) is classified under 72.01 of the Tariff. It is submitted that while financial assets may for the purposes of customs control be classified on import and export as goods, this does not mean that such assets are not regarded as capital within the meaning of Part Two, Title III, Chapter 4 of the Treaty. It merely means that on the import and export of such financial assets it would appear that both Community instruments apply.

With regard to paragraph (a) of Question 1, the gold coins in this case are Krugerrands and are "capital" being coins containing one ounce fine gold, which are legal tender in South Africa where they are minted. They are covered by the said directive both as gold and as means of payment of any kind. The term "gold" in the said directive must be interpreted as including not only gold bullion but also gold coin other than coin which is classifiable as "a collector's piece of numismatic interest" under heading 99.05 of the Tariff. In this particular case the Krugerrands which formed the subject of counts 2 to 8 of the indictment were used as means of payment for the silver coin which the appellants sold to Allgemeine Gold- und Silberscheideanstalt.

With regard to paragraph (b), silver alloy coins which are legal tender in a Member State are "capital" within the meaning of the said chapter of the Treaty. They are "means of payment of any kind" and thus covered by the said directive. The fact that the silver content of United Kingdom coins minted before 1947 exceeds the face value of such coins emphasizes the status of the coins as capital. Furthermore, silver being a metal which historically has been used as money means that such coins should be regarded as capital and means of payment irrespective of whether they are legal tender.

With regard to paragraph (c), silver alloy coins which have been but are no longer legal tender in a Member State do not automatically cease to be capital on ceasing to be legal tender. They can be considered to be "means of payment of any kind" while they are still accepted by the central bank concerned (in this case the Bank of England still accepts the half-crown) and they are still protected as if they were legal tender. Because of silver's historic role as a medium of currency the fact that (as in the case of the half-crown) the silver content of the silver alloy coins exceeds their face value means that they will still be accepted as a means of payment.

It should be noted that the term "legal tender" in the above two paragraphs has a technical meaning in United Kingdom law and although coins may not be legal tender for certain purposes, under United Kingdom law this does not affect their status as means of payment.

Question 2 relates only to such of the coins as are, as the United Kingdom contends, "capital". It is submitted that the quantity and manner in which, and the purposes for which, the coins in this case were traded cannot for the purposes of Part Two, Title III, Chapter 4 of the Treaty affect the essential nature of such coins as capital. Whether the coins were capital has, for the purposes of this case, to be judged at the time when they were imported or exported. The transactions which took place in regard to the silver coins subsequent to their export are irrelevant. Items which are capital for the purpose of the Treaty do not cease to be capital by reason only of the nature of the commercial transactions in which they are involved. Coins may (but do not necessarily) cease to be capital as a result of their being subjected to a process which changes their identity, but the fact that it is intended to carry out such a process cannot be sufficient to achieve this result and the coins will remain "capital" at least until the process is carried out.

As to Question 3 the jurisprudence of this Court has demonstrated that where more than one set of Treaty provisions could apply to a given set of circumstances, if such provisions are in conflict then those provisions which relate specifically to those circumstances apply to the exclusion of any of the more general conflicting provisions *(generalia specialibus non derogant). Deutschmann* v *Germany* (Case 10/65) [1965] ECR 469 and *Iannelli & Volpi* (Case 74/76) [1976] ECR 557 are referred to.

The provisions of Part Two, Title III, Chapter 4 of the Treaty and the provisions of Part Two, Title I, Chapter 2 of the Treaty cannot both apply at the same time because there are fundamental differences between the provisions which would give rise to insoluble conflicts if they were both to apply. The liberalization of capital movements is subject to a qualification to which the movement of goods is not; namely, they are to be liberalized to the extent necessary to ensure the proper functioning of the Common Market. It should also be noted that the provisions of the chapter on capital refer not merely to the nationality of persons but also to "residence". The provisions of the chapter on the elimination of quantitative restrictions do not refer to the residence of persons. Between the two sets of

provisions referred to in this question the "capital" provisions of Chapter 4 should apply. They are the provisions dealing directly with capital and must, where they are capable of applying, exclude the more general provisions of Part Two, Title I, Chapter 2 of the Treaty. Alternatively, the United Kingdom submits that at least where there is conflict between those two sets of provisions it is the "capital" provisions which must prevail.

Question 4 need be considered only if and in so far as it is decided that the provisions of Part Two, Title I, Chapter 2 of the Treaty apply to any of the coins, whether alone or together with Part Two, Title III, Chapter 4 of the Treaty. In Article 36 of the Treaty the term "public policy" is intended to cover a variety of circumstances. The concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty. The term should not be construed narrowly so that it prevents Member States from taking action in novel circumstances some of which it is impossible to anticipate. It is preferable that the Court, instead of laying down general rules, should retain a discretion to consider each specific situation as it arises in the light of the objects of the Treaty. Any disadvantage in adopting this construction of the term is avoided by the specific safeguard contained in the last sentence of Article 36, which provides:

"Such prohibition or restriction should not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

The Court is asked if necessary to clarify the limitation which appears to be laid down in *Commission* v *Italy* (Case 7/61) and consider whether matters of a purely or partly economic nature can afford justification of restrictions on the grounds of public policy. In this case the items concerned are money and means of payment and so the justification of any restriction on the import or export of them on the grounds of public policy will inevitably involve some economic matters. If Articles 30 to 36 apply to capital, and in particular to money and means of payment, this must influence the proper interpretation of the term "public policy" in Article 36 in relation to the movement of capital. This consideration did not arise in *Commission* v *Italy*.

As regards paragraph (a) of Question 4, the prohibition on the import of certain gold coins in the United Kingdom was imposed for the following reasons.

(i) to prevent a drain on its balance of payments;

(ii) to prevent speculation in and hoarding of unproductive assets.

At that time, substantial sums were being invested in the purchase of gold coins, particularly Krugerrands. This was resulting in a considerable burden on the balance of payments and therefore adding to constraints on the United Kingdom Government's economic policy. It also represented a diversion of resources away from uses which could be of economic benefit to the United Kingdom into capital investment of a character either purely sterile, in that hoarded gold yields no return, or undesirably speculative to the extent that purchasers simply sought to profit from hedging against a decline in the internal or external value of the national currency.

It is relevant in this context to recall Article 104 of the Treaty which provides:

"Each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure

a high level of employment and a stable level of prices."

As regards Question 4, paragraph (b), the prohibition on the export of pre-1947 United Kingdom silver alloy coins was imposed for the following reasons:

(i) to ensure that there was no shortage of current coins for use of the public;

(ii) to ensure that any profit resulting from any increase in the value of the silver content of such coins accrued to the Member State which had minted the coins rather than to any individual;

(iii) to prevent the destruction of United Kingdom coins occurring outside its jurisdiction when it would be a criminal offence if its coins were destroyed within the United Kingdom.

The functions of a State include minting of coins and protecting the coins that it mints to ensure that those within its jurisdiction are able to carry on trade. It is submitted that unless and until the coins of one Member State are protected from destruction in other Member States, Member States should be entitled to take such steps as are necessary to ensure that their coinage is not destroyed indiscriminately. At the time the prohibition on the export of silver coins was imposed, the value of the silver content of these coins was considerably higher than their face value. No licences were given under Section 10 of the Coinage Act 1971 which would have enabled individuals to obtain any profit from destroying these coins within the United Kingdom. As a result large quantities of similar coins were being exported purely for the purpose of destruction and not for any numismatic purpose. Although the proportion of such coins was small in relation to the total amount of coinage in circulation, the amounts of such coins being exported were significant. Thus the United Kingdom took steps to prevent such significant amounts of coins being removed from circulation by private individuals. The measures taken by the United Kingdom are not arbitrary or a disguised restriction on trade between Member States. They do not conflict with the objectives of the Treaty and cause no disturbance to the proper functioning of the Common Market. They were imposed by the United Kingdom as a matter of public policy.

C — *Observations of the Government of Italy*

The EEC Treaty does not directly give a precise legal definition of "capital". However, such a concept may be held to be "common" to the Member States and may be deduced from their legislative provisions. Some indications towards a legal definition of "capital" have moreover been provided in the context of the Community system by a directive of the Council of the EEC of 11 May 1960 and in particular by the lists annexed to the said directive.

As is well known, in almost every period, "movements of capital" from one State to another have been subject to strict controls which primarily serve two objectives: (a) to integrate and render effective controls on the international value of the national currency and thus on its rate of exchange; and (b) to prevent foreign subjects from disposing, in a manner which is difficult to control, of one of the factors of production used in the national business economy.

The former of those two objectives has retained all its importance within the European Community order. One of the fundamental provisions of the EEC Treaty is Article 104, according to which "Each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain (international) confidence in its currency ...". That provision, which has sometimes not been

given full effect by the courts, imprints on the Community system one of its most significant characteristic traits, since it gives the individual Member States all (or almost all) the *responsibility* for the equilibrium of their balance of payments and therefore, by implication, all (or almost all) the *powers* to pursue that aim and, in more general terms, to regulate their national currency. This is a fact which must not be underestimated as it is not possible to evaluate the obligations of the Member States towards the Community independently and separately from an evaluation of the responsibilities which, particularly with regard to monetary policy, have remained virtually the exclusive task of the Member States; thus it would be quite wrong even from the juridical point of view merely to establish in a formalistic spirit specific and circumscribed obligations on the Member States without taking account of the above-mentioned more general responsibilities of the States themselves.

Article 67 et seq. of the EEC Treaty are marked with great caution: in contrast to the free movement of "goods" and "persons", the free movement of "capital" is pursued solely *"to the extent necessary"* to ensure the proper functioning of the Common Market" and primarily in order to exclude "discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested". It may therefore be said that in this regard circumspection is the fundamental criterion laid down by the EEC Treaty for any interpretation.

The functional connexion observed above between control of the "movement of capital" and monetary policy is relevant for the formation of a legal concept of "capital". Capital within the meaning of Article 67 *et seq.* of the EEC Treaty is not so much "real capital" or capital goods serving as factors of productions as "monetary capital" or a quantity of money (or of goods equivalent to money) which is used or which may be used for the acquisition of capital goods or which may be such as to give rise to "investments" which produce returns; the returns may in their turn take the form either of "physical" property (flow of goods) or of monetary property (for example "interest").

Where, with regard to the objectives sought by Article 67 *et seq.* of the EEC Treaty, reference is made to "monetary capital" this is intended to mean quantities of precious metals or quantities of national currencies which, in the form of "currency" or "currency credits" are, in effective terms, used as international means of payment.

There can be no doubt that the legal concept of "capital" within the meaning of Article 67 *et seq.* of the EEC Treaty as delineated above must include precious metals (gold, platinum and silver) and "physical (import and export of) financial assets" in general (this is the term used in list D annexed to the said directive of 11 May 1960) considered on the basis of their intrinsic value (and thus not when they are incorporated in goldsmiths' or silversmiths' wares). For many centuries precious metals have been regarded as being suitable to serve as an international means of payment as they incorporate a considerable "value", which is generally recognized, in units (ingots, coins etc.) of relatively small dimensions.

Thus when gold and silver coins are exchanged primarily on the basis of the value of the metal contained in them or when they are exchanged in quantities of substantial gross value they constitute "capital" independently of their legal exchange rate and thus of the legal value assigned to them by governmental measures. This does not however conflict with the inclusion in the customs tariff of coins which are not legal tender. The latter may be considered as "goods" when they are imported or exported in small quantities, not exclusively for their

intrinsic value (for example, as objects of numismatic or archaeological interest): in such circumstances coins may reasonably be compared to goldsmiths' or silversmiths' wares.

In this respect Italian law (Article 1 of the D.L. Lgt. No 343 of 26 April 1946) prohibits the *exportation* from the national territory of gold, platinum, silver and other precious metals whether in ingots or granules or in the form of coins.

Moreover, under Italian law (Articles 1, 2 and 8 of the R.D.L. No 1935 of 14 November 1935) the Ufficio Italiano dei Cambi (the Italian exchange office), a public body, has the monopoly of the acquisition abroad of unwrought gold (but not silver in granules).

The position is different for foreign metal coins which are legal tender. With the exclusion of subsidiary coinage which does not contain substantial quantities of precious metals, such coins must be considered for the present purposes as equivalent to "currency" and therefore, to the extent stated above, to "capital": a gold coin, especially one of substantial value (such as for example a Krugerrand), is as suitable to serve as an international means of payment as a note of a central bank or even more so than such a note. Therefore it would be paradoxical to apply a more liberal rule to money which is legal tender or is made of metal than that applied to money which is also legal tender but which is in the form of a paper note.

The Italian provisions make the acquisition for consideration of foreign metallic money which is legal tender subject to permission from the Ministero per il Commercio Estero (Ministry for Foreign Trade). In fact such permission is given without any difficulty for silver currency (generally intended for melting down) while, at present, it is given for gold currency only within strict limits and for proven numismatic interests.

With regard to the exportation of currency, the export of gold coins is subject to permission from the Ministero per il Commercio Estero while for other coins there is no restriction "for reasonable imports" (circular No A 360 of 8 August 1977 of the aforesaid Ministry).

Apart from the fact that they are in conformity with the parallel provisions in force in other Member States, the said rules on the import and export of gold and silver coinage appear to be compatible with the EEC Treaty and in particular with Article 67 of that Treaty: the restrictions referred to do not conflict with the "proper functioning of the Common Market", as any hypothetical free movement of coinage would in no way promote intra-Community trade or the Common Market in general: moreover, the restrictions do not give rise to "discrimination" between residents of the various Member States of the Community.

It is arguable, however, that the reasons of "public policy" set out by the British court have a serious and real substance and as such may be relied upon by each Member State (with the sole exception of the second reason, to the effect that the increase in the value of the metal incorporated in a coin of silver alloy should accrue to the State which minted the coin rather than to the individual who owns it).

D — Observations of the Commission

The Commission, having examined the relevant national legislative provisions, remarks that the free movement of capital may be distinquished from the free movement of goods, persons and services in that it is subordinate to those other foundations of the Community, but is, nevertheless, an essential adjunct to them, since complete freedom in the movement of goods, persons and services cannot be achieved in the absence of the

free movement of capital. The interdependence of the freedom of movement of capital, on the one hand, and the freedom of movement of goods, persons and services on the other, is also borne out by the wording of Article 67, which contains the proviso, "to the extent necessary to ensure the proper functioning of the Common Market". The freedom of movement of capital is therefore concerned with providing part of the basic economic framework in which the other freedoms laid down by the Treaty can flourish.

The provisions of Part Three of the Treaty concerning economic policy (Articles 103 to 116), and particularly those dealing with balance of payments (Articles 104 to 109 inclusive), demonstrate the balance which has to be struck in creating the Community between the freedom to transfer capital and the control which Member States need to exercise over economic policy. Thus in Article 104 Member States are required to "ensure the equilibrium of their overall balance of payments", whilst in Article 106 the Member States "undertake to authorize . . . any transfers of capital . . ., to the extent that the movement of goods, services, capital and persons between Member States has been liberalized pursuant to this Treaty". Articles 108 and 109, however, provide for safeguard measures to be taken at Community or, if necessary, national level if balance of payments difficulties do in fact arise.

"Capital" as such is not defined in the Treaty. Although Articles 67 to 73 are headed "capital"; they are primarily concerned, not with the precise nature of "capital" itself, but with certain activities concerning capital. Nevertheless, those articles do refer to a number of matters which are affected by restrictions on the movement of capital, and thus help to show what meaning is to be attributed to "capital" for the purposes of the Treaty. Thus reference is made to:

— "capital belonging to persons resident in Member States" (Art. 67),

— "the place where capital is invested" (Art. 67),

— "the capital market and credit system" (Art. 68 (2)),

— "loan for the direct or indirect financing" (Art. 68 (3)),

and

— "the functioning of the capital market" (Art. 73).

As far as the implementing directives to Chapter 4 are concerned, although they do not seek to define "capital", it may be noted that, for example, the First Directive for the implementation of Article 67 (Official Journal 43 of 12 July 1960, p. 921) lists in Annex I thereto a great many capital movements to which it applies.

It has been suggested that the notion of movement of capital concerns the unilateral transfer of value from one Member State to another, or within a Member State to a non-resident person or body, by way of investment usually for productive purposes, and that it is of no importance whether the transfer effected takes the form of goods or money.

This is contrasted with the movement of goods or the movement of services, where some consideration is received within a relatively short time in return for doing or providing something, so that the value which has entered the Member State is counterbalanced by an equivalent value leaving it.

On the basis of all the above considerations, and without seeking to define every circumstance in which a movement of capital can take place, it is consered that in many cases a movement of capital will occur when financial resources situated in one country are used to make an investment in another country, and the investment is not transferred to the country where those

resources were originally situated within a reasonable period. In such cases, nothing of equivalent value is received in the country where the resources were originally situated to counterbalance the resources which left it in order to make the investment and, in fact, no matter what form the investments take, no goods cross a national frontier.

The position would be different if, within a reasonable time of being acquired, the actual investment is physically brought back to the country where the resources with which it was acquired were originally situated. In such cases the resources would have the country where they were originally situated but would be counterbalanced by something of equivalent value (the actual investment) being received back into the original country. Furthermore, an actual physical movement of goods from one country to another would occur, and in those circumstances the operation would be indistinguishable from any other commercial transaction amounting to a "trade in goods" which is subject to the provisions of Title I of Part Two of the Treaty.

Again, a movement of capital can take place when resources owned by a person or body resident in a particular country are transferred to a body or person which is not resident there, provided that the non-resident person does not give something of equivalent value in return. In that case also the resources would pass from the resident to the non-resident person or body and would not be counterbalanced by something of equivalent value received in return. Furthermore, no movement of goods would need to take place, though the operation could involve the actual physical movement of goods from one country to another. However, the transfer would, in any event, be made without anything being received in return and would therefore not amount to a trade in goods. Of course, if something were received in return, the operation would then assume the character of "trade in goods" and, it is submitted, cease to be a movement of capital.

It is also considered that a movement of capital can, exceptionally, be effected by the actual physical transfer of assets from one country to another. Such cases must however be clearly distinguishable in principle from those constituting a "trade in goods". Thus, in order for such a movement to be considered as a movement of capital it would be necessary for the resources to pass from one country to another without anything being received in the first country in return, so that the value of the resources leaving that country would not be counterbalanced by an equivalent value returning to that country, and the transfer would have the character of an investment and not of trade.

Thus the concept of "movement of capital" embodied in Title III of Part Two of the Treaty is different in nature from the concept of movement of goods embodied in Title I thereof. Article 9 in Title I provides that the Community is based on a customs union,

"which shall cover all trade in goods ..."

and the Court has in this context stated in case 7/68, *Commission* v *Italy* ([1968] ECR 423):

"by goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions".

The concept of "goods" and the freedom of movement which is accorded to them by Title I of Part Two is very wide, and is also a quite different concept to the concept of "movement of capital". The two concepts of "movement of goods" and "movement of capital" are not analogous or parallel concepts. On the contrary they are quite different in nature one from the other

and the use of the word "movement" in both is perhaps misleading.

It is clear that tangible objects which are the subject of a commercial transaction, and which cross a border from one Member State to another as a result of that commercial transaction, are subject to the provision of the Treaty concerning the free movement of goods. In such cases no question of movement of capital arises, as the movement is made by way of trade and not in order to effect an investment in another country.

However, where movements of capital are effected by means of the physical transfer from one Member State to another of assets which may be classified as goods, it is clear that the actual assets concerned will not be regarded as capital for all purposes. Thus, for example, they will still be subject to customs formalities and, where appropriate, value added tax.

Nevertheless, it is considered that where the transfer is not made by way of trade and amounts to movement of capital then it will be subject to the provisions of Title III rather than Title I of Part Two of the Treaty. If this were not so, the provisions of the Treaty relating to capital movements would be deprived of their meaning. This is because the provisions relating to the freedom of movement of goods would override the provisions relating to the liberalization of capital movements, even though the former provisions are contained in a different Title of the Treaty to the latter provisions. Moreover, even if the former provisions were held to apply to capital movements, this would only be so in cases where the individuals concerned chose to effect the capital movement by means of the physical transfer of goods from one Member State to another, and would not be so if they chose to effect it by other means. It would therefore fall to the individuals concerned to decide which provisions of the Treaty should apply in their case, even though there was only one single object which they had in contemplation, that is to say the unilateral transfer of value of some kind from one country to another for investment purposes.

The First Directive is, on the implementation of Article 67 of the Treaty, concerned only with capital movements within the meaning of Chapter 4 of Title III, and in so far as a "movement" is of "goods" rather than of "capital" it will not be affected by the directive, even though the movement may concern objects made out of, or containing, gold. Similarly, the fact that the movement concerns gold or silver coins having the status of legal tender in a third country or in a Member State and which, therefore, may be considered as a "means of payment" cannot be decisive, provided that such coins may legally form the subject-matter of a commercial transaction and be traded. That is to say, that the coins may legally be exchanged for a consideration which reflects their open market value. The open market value would, of course, reflect such diverse factors as the condition of the particular coin, its metal content and its numismatic interest, and this would by no means necessarily be the same as its face value. If, therefore the coins are traded for their market value (as opposed to being used as tokens to transfer the value represented by their face value), it is considered that the resulting movement of the coins from one Member State to another will be a movement of goods and not of capital.

Movements from one Member State to another of gold or of coins must be classified according to the kind of movement which is being undertaken or effected, and cannot be regarded as a movement of capital simply because the "thing" (to use a neutral expression) being moved is gold or coin.

Two further points should perhaps be mentioned which indicate that the movement of objects made out of or containing gold are capable of being

(and very often are) movements of "goods" within Title I of Part Two of the Treaty.

(1) Gold objects, including coins, are included in the Common Custom Tariff. The Common Customs Tariff is of course an essential part of the customs union which is dealt with in Title I of Part Two of the Treaty and is not concerned with regulating movements of capital.

(2) In the United Kingdom legislation itself, the Import of Goods (Control) Order 1954 and the Open General Import Licence dated 5. 7. 1973 (as amended by Amendment No 10), which have the effect of prohibiting the importation of gold coins, are concerned with a wide range of goods. The word "goods" is used in the title to the order and frequently in the text. Nowhere in these provisions is it indicated that they are instruments of monetary policy and it would therefore seem difficult even for the Government of the United Kingdom to maintain that all transactions involving gold, no matter what their effect, can only be regarded as movements of capital within the meaning of Articles 67 to 73 of the Treaty.

If it is accepted that the physical movements of coins from one Member State to another can be subject to the provisions of Title I of Part Two of the Treaty concerning the free movement of goods, the question still remains to be considered whether the national provisions prohibiting or restricting such movements may be justified by the provisions of Article 36 of the Treaty and, in particular, may be justified on the grounds of "public policy" within the meaning of that article.

Article 36, which constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated, must be interpreted strictly. It does not establish a generic safeguard clause which is in addition to other safeguard clauses contained in the Treaty. Where, therefore, a specific safeguard clause exists, a Member State which wishes to benefit from its provisions must follow the procedure laid down in the safeguard clause in question, and cannot, instead, rely generally on the provision of Article 36. Its provisions deal with exceptional cases which are clearly defined. National rules or practices do not, in any event, fall within the exceptions specified in Article 36 if the same objects can be achieved by measures which do not restrict intra-Community trade so much. In order to avail themselves of Article 36, Member States must observe the limitations imposed by that provision both as regards the objective to be obtained and as regards the nature of the means used to attain it. The scope of the concept of "public policy", as referred to in Article 36, cannot (it is submitted) be determined unilaterally by each Member State without being subject to control by the Institutions of the Community, just as the scope of that concept as provided for in Article 48 (3) of the Treaty cannot be so determined, though the particular circumstances justifying recourse to the concept of public policy may vary from one country to another so that the competent national authorities enjoy an area of discretion within the limits of the Treaty. Nevertheless, even where restrictions on the free movement of goods is capable of being justified on the grounds of public policy, recourse by a national authority to that concept presupposes the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society, in the same way as recourse to that concept would presuppose such considerations in the context of Article 48 (3) of the Treaty.

It is considered that the following observations may be made concerning paragraph 4 of the questions put to the Honourable Court by the Court of Appeal.

(1) (a) With regard to the prohibition on the importation of gold coins in order to prevent the drain on its balance of payments. Specific provision is made in Chapter 2 of Title II ("economic policy") of Part Three of the Treaty, concerning Policy of the Community, in respect of balance payments. In particular, Articles 108 and 109 in that chapter provide detailed procedure to be followed by the Institutions of the Community and by Member States when certain difficulties arise or threaten with regard to a Member State's balance of payments, or where a sudden crisis in the balance of payments occurs. It is therefore considered that Article 36 cannot serve as a basis for justifying national measures designed to ensure the equilibrium of its overall balance of payments, any more than it could have served, during the transitional period, as a legal basis for measures which should properly have been taken under Article 226 of the Treaty.

(b) "To prevent the speculation and hoarding of unproductive assets". It does not appear to be the case that speculation and hoarding in general are activities which are either defined or regulated by United Kingdom legislation. Nor is it apparent that speculation and hoarding in the United Kingdom have assumed such proportions that public policy demands that they be regulated. It may, therefore, be doubted whether, in present circumstances, measures to prevent the speculation and hoarding of gold coins are within the discretion which the national authorities enjoy in implementing measures of public policy in derogation from the rules of the Treaty. However, even if it were to be admitted that Member States may, at their discretion, derogate from the fundamental rules of the Treaty in order to prohibit or control speculation and hoarding, it is doubtful whether such measures could be justified in the context of Article 36. This is because:

(i) "Speculation" and "hoarding" (apart from any possible moral implications) seem to be concerned primarily with economic matters, whereas Article 36

> "... aims at hypothetical events of a non-economic nature that are not likely to affect the principles laid down in Articles 30 to 34 as confirmed by the last sentence of this article".

(ii) If the true object of the prohibition by United Kingdom legislation of the importation of gold coins is to prevent speculation and the hoarding of unproductive assets, the means adopted seem to be remarkably inept.

(iii) In any event, measures which affect the free circulation of goods, in derogation from the fundamental rules of the Treaty, by prohibiting the importation of one class of goods, would constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (contrary to the provisions of Article 36) if comparable goods in free circulation in the Community could still be imported freely, or sales of the same goods on the domestic market were not restricted in the same way.

(2) With regard to the prohibition on the exportation from the United Kingdom of silver alloy coinage in order

(a) "to ensure that there is no shortage of current coins for use of the public":

(i) It may be observed first of all that such an objective can only apply in respect of those coins which remain legal tender (sixpences, shillings, florins);

since coins which have ceased to be legal tender (halfcrowns) are no longer used by the public as money (though it seems they can be traded as goods). In so far as this policy is applied to the coins which are legal tender it would seem that a Member State which is, of course, responsible for its own currency does have a legitimate interest in ensuring that its coins remain in sufficient quantities in the territory where it can be tendered legally.

(ii) However, even though a Member State may have a legitimate interest in prohibiting the exportation of its own current coinage, it is submitted that in so far as such exportation can be regarded as being governed by the provisions of the Treaty concerning the free movement of goods (and in all probability this will seldom be the case) any justification for such measures based on "public policy" must be the true justification, and not be merely an incidental matter of presentation.

Thus, a prohibition on the exportation of coins traded as goods can only be justified on the grounds that it prevents a shortage of current coins for the public's use if in fact, that is the reality of the situation. If, on the other hand, the reality of the situation is that the prohibition is intended to prevent the exportation of a minute proportion of current coins (those few coins remaining in circulation which have a higher silver content), then it is submitted that the prohibition cannot be justified on the grounds of preventing a shortage of current coinage, though, of course, the prohibition may be justified on other grounds relating to public policy.

(iii) It is, nevertheless, still possible that in such a situation a prohibition on the exportation of current coinage could be justified as a measure of public policy imposed to meet some other threat to the interests of society provided that the threat was a genuine and sufficiently serious one. But in such cases, it is submitted that the consequent derogation from Articles 30 to 34 of the Treaty would have to be justified by reference to the real and serious threat which is actually being posed to the interests of society and which the measure, as a matter of public policy, is designed to meet, and should not be justified by reference to matters which pose threats of a theoretical nature only.

(iv) In fact, it could be argued that a Member State does have a legitimate interest, as a matter of public policy, in preventing its coinage from being removed from its territory without authorization. However, it is submitted that the Member State would not be justified in imposing a prohibition on the export of coins if those coins could be freely traded as goods within the national territory but the prohibition would need to be applied fairly without discrimination, and, indeed, it would be a far less effective instrument of public policy if it were not so applied.

(b) "To ensure that any profit resulting from any increase in the value of metal content of the coin accrues to the Member State rather than to an individual".

(i) As the Member States are entirely responsible for the issue of their own coinage, the value of the metal content of the coins which they issue is of legitimate interest to them, and may reasonably be regarded as a matter of public policy upon which they may exercise their discretion within the limits imposed by the Treaty. However, it is considered that a Member State would be justified in prohibiting the exportation of its own coinage (whether current legal tender or not) in order to prevent the profit resulting from the increase in value of the metal content accruing to an individual only if individuals were prohibited in all cases from obtaining that profit.

(c) "To prevent the destruction of its coins occurring outside its jurisdiction, which if it occured within its jurisdiction would be a criminal offence".

As has been noted above, the Member States are entirely responsible for the issue of their own coinage. The destruction of its coinage would therefore seem to be a matter of legitimate interest to any Member State, and one which may reasonably be regarded as a matter of public policy upon which it is entitled to exercise its discretion within the limits imposed by the Treaty. Moreover, in the United Kingdom, the destruction of the coinage is forbidden by the criminal law. It is therefore considered that a prohibition on the exportation of coins which may not be melted down or broken up within the national territory, in order to prevent such melting down or breaking up occuring in another Member State, is a matter of "public policy" within the meaning of Article 36 of the Treaty and that in the circumstances set out in the Statement of Facts no arbitrary discrimination or disguised restriction on trade between Member States would arise.

The Commission adds a short summary of the exchange restrictions in force in Member States at the end of 1976 concerning gold.

At the hearing on 14 June 1978 the appellants, represented by R. Du Cann O.C. and R. Alun Jones, the Government of the United Kingdom, represented by P. Archer O.C., Solicitor General and H. Woolf and the Commission, represented by its Legal Adviser, T. Townsend, acting as Agent, submitted their oral observations.

The Advocate General delivered his opinion at the hearing on 4 July 1978.

Decision

1 The Court of Appeal of England and Wales (Criminal Division), by an order of 15 December 1977 received at the Court on 16 January 1978 referred to the Court under Article 177 of the EEC Treaty several questions on the interpretation of Articles 30 to 37 and Articles 67 to 73 of the Treaty.

2 These questions were raised in a criminal appeal by three British nationals (hereinhafter referred to as "the appellants") who had been found guilty by the Crown Court at Canterbury of being knowingly concerned in a fraudulent evasion of the prohibition on importation of gold coins into the United Kingdom and on the export of silver alloy coins minted before 1947 from the United Kingdom.

3 The importation of gold coins into the United Kingdom is prohibited by the Import of Goods (Control) Order 1954 made by the Board of Trade in exercise of its powers under the Import, Export and Customs Powers (Defence) Act 1939.

4 By virtue of an Open General Licence granted by the Secretary of State for Trade and Industry and dated 5 July 1973 the importation of all goods was authorized with certain exceptions not including gold coins. However, pursuant to an amendment to the said licence entitled "Amendment No 10" dated 15 April 1975, which came into operation on 16 April 1975, gold coins were included among the goods the importation of which was prohibited except under the authority of a licence granted by the Board of Trade.

5 By virtue of the Export of Goods (Control) Order 1970, made in exercise of powers under the said Act of 1939, the export from the United Kingdom, except under licence, of silver alloy coins minted before 1947 in a quantity exceeding ten in number and not more than 100 years old at the date of exportation is prohibited.

6 The export of such coins to another Member State of the EEC was authorized by an Open General Licence dated 20 December 1972 which was granted by the Secretary of State and which, as far as such coins are concerned, was revoked and replaced by another Open General Licence dated 25 June 1973.

7 This second Open General Licence was revoked by another Open General Licence dated 5 July 1974 which came into operation on 15 July 1974 and had the effect of taking such coins out of the ambit of the Open General Licence with the result that as from 15 July 1974 they could not be exported except under licence.

8 The appellants arranged for 3 400 South African Krugerrands which came from the Agosi firm in Pforzheim in the Federal Republic of Germany to be brought into the United Kingdom between 24 April 1975 and 30 June 1975.

9 They also exported between 7 August 1974 and 26 May 1975 for the same German firm 40.39 tonnes of silver alloy coins minted in the United Kingdom before 1947, namely sixpences, shillings, florins and half-crowns.

10 The appellants, having pleaded guilty before the court of first instance, appealed to the Court of Appeal (Criminal Division) before which they submitted that the provisions of British law prohibiting the imports and exports in question infringe Articles 30 and 34 of the Treaty.

11 Article 30, as complemented by Article 42 of the Act of Accession, prohibits, as from 1 January 1975 at the latest, in the case of the United Kingdom, any measure having an effect equivalent to a quantitative restriction on imports from other Member States.

12 Article 34, as complemented by the said Article 42, prohibits, as from 1 January 1975 at the latest, in the case of the United Kingdom, any measure having an effect equivalent to a quantitative restriction on exports to other Member States.

13 The appellants also submitted that the restrictions on exports and imports contained in British legislation cannot be justified on grounds of public policy on the basis of Article 36 of the Treaty.

14 On the other hand the British Government has maintained that the coins imported and those exported are "capital" within the meaning of Article 67 *et seq.* of the Treaty and that the provisions of Articles 30 and 34 are consequently inapplicable.

15 Even if the coins in question were to be regarded as goods falling within the scope of Article 30 *et seq.* of the Treaty the restrictions on imports and exports would be authorized under Article 36 of the Treaty, since they could be justified on grounds of public policy.

16 As far as concerns the restrictions on imports the ban on the importation of certain gold coins into the United Kingdom was, according to the British Government, enacted in order:

(i) to prevent the drain on its balance of payments and

(ii) to prevent the speculation and hoarding of unproductive assets.

17 As far as concerns the restrictions on exports the ban on exports from the United Kingdom of silver coins minted before 1947 was enacted in order:

(i) to ensure that there is no shortage of current coins for use of the public;

(ii) to ensure that any profit resulting from any increase in the value of metal content of the coin accrues to the Member State rather than to an individual and

(iii) to prevent the destruction of these United Kingdom coins — which if it occurred within its jurisdiction would be a criminal offence — from occurring outside its jurisdiction.

18 In these circumstances the Court of Appeal has asked the following questions:

1. Are the following coins in principle "capital" within the meaning of Part Two, Title III, Chapter 4 of the Treaty of Rome:

   (a) gold coins which are produced in a third country such as Krugerrands, but which circulate freely within a Member State;

   (b) silver alloy coins, which are legal tender in a Member State;

   (c) silver alloy coins of a Member State, which have been, and which, although no longer legal tender in that State are protected as coin from destruction in that State?

2. If so, can the quantity and manner in which and the purposes for which such coins are traded result in such coins ceasing to be within the term "capital" in Part Two, Title III, Chapter 4?

3. Do the provisions of Part Two, Title III, Chapter 4 of the Treaty of Rome apply to such of the aforesaid coins as are "capital" to the exclusion of the provisions of Part Two, Title I, Chapter 2 of the Treaty?

4. If the answers to all or any of the above questions are such as to determine that the articles in this case fall within Part Two, Title I, Chapter 2, does the term "public policy" in Article 36 of the Treaty of Rome mean that a Member State may seek to justify restrictions on:

(a) The import of gold coins on either or both of the following grounds:

(i) to prevent the drain on its balance of payments,

(ii) to prevent the speculation and hoarding of unproductive assets,

(b) the export of its own silver alloy coinage on any or all of the following grounds:

(i) to ensure that there is no shortage of current coins for use of the public,

(ii) to ensure that any profit resulting from any increase in the value of metal content of the coin accrues to the Member State rather than to an individual,

(iii) to prevent the destruction of its coins occurring outside its jurisdiction, which if it occurred within its jurisdiction would be a criminal offence?

19 An examination of the questions asked shows that, even if these questions have been formulated so as to lay emphasis on the description of the coins in question as "capital", their actual purpose is to find out whether these coins are goods falling within the provisions of Articles 30 to 37 of the Treaty or constitute a means of payment falling within the scope of other provisions.

20 Understood in this way, these questions must be considered in the context of the general system of the Treaty.

21 An analysis of this system shows that the rules relating to the free movement of goods and, in particular, Articles 30 *et seq.* concerning the elimination of quantitative restrictions and measures having equivalent effect, must be considered not only with reference to the specific rules relating to transfers of capital but with reference to all the provisions of the Treaty relating to monetary transfers, which can be effected for a great variety of purposes, of which capital transfers only comprise one specific category.

22 Although Articles 67 to 73 of the Treaty, which are concerned with the liberalization of movements of capital, assume special importance as far as one of the aims set out in Article 3 of the Treaty is concerned, namely the abolition of obstacles to freedom of movement for capital, the provisions of Articles 104 to 109, which are concerned with the overall balance of payments and which for this reason relate to all monetary movements, must be considered as essential for the purpose of attaining the free movement of goods, services or capital which is of fundamental importance for the attainment of the Common Market.

23 In particular, Article 106 provides that "Each Member State undertakes to authorize, in the currency of the Member State in which the creditor or the beneficiary resides, any payments connected with the movement of goods, services or capital, and any transfers of capital and earnings, to the extent that the movement of goods, services, capital and persons between Member States has been liberalized pursuant to this Treaty".

24 The aim of this provision is to ensure that the necessary monetary transfers may be made both for the liberalization of movements of capital and for the free movement of goods, services and persons.

25 It must be inferred from this that under the system of the Treaty means of payment are not to be regarded as goods falling within the purview of Articles 30 to 37 of the Treaty.

26 Silver alloy coins which are legal tender in a Member State are, by their very nature, to be regarded as means of payment and it follows that their transfer does not fall within the provisions of Articles 30 to 37 of the Treaty.

27 Although doubts may be entertained on the question whether Krugerrands are to be regarded as means of legal payment it can nevertheless be noted that on the money markets of those Member States which permit dealings in these coins they are treated as being equivalent to currency.

28 Their transfer must consequently be designated as a monetary transfer which does not fall within the provisions of the said Articles 30 to 37.

29 Having regard to the above-mentioned considerations it is unnecessary to deal with the question under what circumstances the transfer of these two categories of coins might possibly be designated either as a movement of capital or as a current payment.

30 Question 1 (c) refers to silver alloy coins of a Member State, which have been legal tender in that State and which, although no longer legal tender, are protected as coinage from destruction.

31 Such coins cannot be regarded as means of payment within the meaning stated above, with the result that they can be designated as goods falling within the system of Articles 30 to 37 of the Treaty.

32 It is for the Member States to mint their own coinage and to protect it from destruction.

33 The Court's file shows that in the United Kingdom the melting down or destruction of national coins is prohibited, even if they are no longer legal tender.

34 A ban on exporting such coins with a view to preventing their being melted down or destroyed in another Member State is justified on grounds of public policy within the meaning of Article 36 of the Treaty, because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State.

Costs

35 The costs incurred by the Italian Government, the Government of the United Kingdom and the Commission of the European Communities which have submitted written observations are not recoverable.

36 As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Court of Appeal (Criminal Division) by order of 15 December 1977, hereby rules:

1. **The provisions of Articles 30 to 37 of the Treaty do not apply to**

   (a) silver alloy coins which are legal tender in a Member State,

   (b) gold coins such as Krugerrands which are produced in a non-member country but which circulate freely within a Member State.

2. **A ban on the export from a Member State of silver alloy coins, which have been but are no longer legal tender in that State and the melting down or destruction whereof on national territory is forbidden, which has been adopted with a view to preventing such melting down or destruction in another Member State, is justified on grounds of public policy within the meaning of Article 36 of the Treaty.**

Kutscher Mackenzie Stuart Donner

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 23 November 1978.

I. A. Pompe
Deputy Registrar
For the Registrar

J. Mertens de Wilmars
President of the First Chamber
For the President