OPINION OF ADVOCATE GENERAL TESAURO

delivered on 19 September 1995 *

1. The Juzgado Central de lo Penal de la Audiencia Nacional of the Kingdom of Spain has, by three similar judgments, referred to the Court of Justice for a preliminary ruling two questions as to the compatibility with Article 73b et seq. of the EC Treaty of Article 4(1) of Royal Decree No 1816/91 on economic transactions with other countries. That provision requires any person exporting banknotes representing sums in excess of PTA 1 000 000 to declare the fact and requires prior authorization to be obtained for the export of sums in excess of PTA 5 000 000. [1]

2. Three separate criminal prosecutions were commenced before the national court against the three defendants. They were apprehended when, in differing circumstances, they were in the process of exporting banknotes representing amounts in excess of PTA 5 000 000.

Cases C-163/94 and C-165/94 concern Spanish citizens, Mr Sanz de Lera, who lives in Spain, and Mr Díaz Jiménez, who lives in Great Britain; both were taking banknotes to Switzerland, one in his car and the other in the hand baggage he was carrying when boarding a flight to Zurich at Barajas airport, Madrid. [2]

In Case C-250/94, on the other hand, the defendant is a Turkish citizen living in Spain, who was apprehended at Barajas airport when about to board a flight to Istanbul.

3. According to the information provided by the national court, Mr Sanz de Lera was exporting the money concerned in order to deposit it in the account in his name with a Swiss credit establishment, whilst there is some doubt as to the ultimate destination of the money which Mr Díaz Jiménez was preparing to export to Switzerland. The order for reference gives no information on that point in Mr Kapanoglu's case.

* Original language: Italian.

1 — The wording of Article 4 was amended by Royal Decree No 42 of 15 January 1993. However, at least as far as is relevant here, the amendment merely clarifies the rule and, in any event, the changes made do not, as the national court expressly acknowledges, affect the present case.

2 — The fact that Mr Sanz de Lera was stopped on French territory, by French officers, does not appear to be relevant, since, as will be seen, it seems clear that the money was intended to be deposited in a Swiss bank.

4. The defendants contended that their conduct did not constitute a criminal offence, since the Spanish legislation was contrary to the Community provisions on the free movement of capital.

The Spanish court therefore stayed the proceedings and asked the Court of Justice for an interpretation of Articles 73b, 73c(1) and 73d(1)(b) of the EC Treaty and to rule whether or not Article 73b has direct effect.

5. It should be noted, as a preliminary point, that the Spanish legislation at issue in this case was recently the subject of a preliminary ruling, in which the Court considered whether it was compatible with Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 on the implementation of Article 67 of the Treaty. [3] Those provisions are similar in content to Articles 73b and 73d(1)(b) of the EC Treaty.

In its judgment of 23 February 1995 in Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others*, [4] the Court held that the provisions of Council Directive 88/361 preclude the application of legislation which makes the export of banknotes subject to prior *authorization* but does not preclude such a transaction being made conditional upon a prior *declaration*.

6. In particular, the Court considered that the requirement of a prior *declaration* was lawful in that it may be one of the requisite measures to enable the Member States to exercise effective supervision and effectively prevent unlawful activities such as money laundering, drug trafficking and terrorism, without thereby impeding capital movements carried out in accordance with Community law. [5] On the other hand, it considered that the requirement of *authorization* was disproportionate, since, although pursuing the same aim, such an obligation has the effect of unjustifiably impeding the export of currency by making it conditional upon the consent of the administrative authorities. [6]

In the same judgment, the Court stated that Articles 1 and 4 of the abovementioned directive have direct effect. [7]

7. The circumstances of the case now before the Court are substantially similar to those which gave rise to the judgment in *Bordessa*; however, there are two differences.

3 — OJ 1988 L 178, p. 5.
4 — [1995] ECR I-361.
5 — *Bordessa*, paragraph 27.
6 — Ibid., paragraphs 24 and 25.
7 — Ibid., paragraph 35.

First, the Spanish court [8] now wishes the Court of Justice to interpret the relevant provisions of the EC Treaty, as amended by the Maastricht Treaty with effect from 1 January 1994. [9] Secondly, the present case involves the export of banknotes to non-member countries.

8. Regarding the first point, the Spanish and French Governments submit that the relevant provisions of the EC Treaty must be interpreted so as to take account of the fact the Article 73d(1)(b), unlike Article 4 of Directive 88/361, specifically lists, among the restrictions on movements of capital which the Member States are authorized to keep in force, those that are 'justified on grounds of public policy or public security'. [10]

In their view, that also makes it permissible to require prior authorization for certain transfers of capital, as a measure needed to safeguard those needs, now embodied in the Treaty.

9. Let me say straight away that the difference between Article 73d(1)(b) of the Treaty and Article 4 of Directive 88/361 is not such, in my opinion, as to suggest any conclusion different from that already reached by the Court in interpreting the last-mentioned provision.

Indeed, as I pointed out in my Opinion in *Bordessa*, to which reference may be made for a more detailed analysis, [11] the Maastricht Treaty, in restructuring entirely the manner in which capital movements and payments are dealt with, did not add anything new to the principles already laid down in Directive 88/361. [12]

10. In particular, Articles 73b and 73d, which almost literally repeat the wording of Article 1 and the first paragraph of Article 4 of the directive, merely reiterate the principles which the latter had introduced as from

8 — The same court, in fact, as the one that sought the ruling in *Bordessa*.

9 — Incidentally, I would point out that, as in *Bordessa*, although the material events occurred before the entry into force of the Community provisions of which an interpretation is sought, an interpretation seems necessary since the national court expressly stated that it wished, in the proceedings before it, to apply the principle whereby the most favourable criminal law should be applied retroactively.

10 — Namely, 'all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions' and 'procedures for the declaration of capital movements for purposes of administrative or statistical information' — restrictions which, as indicated, were expressly authorized by Directive 88/361 as well.

11 — See, in particular, paragraphs 5 and 14.

12 — Except the rules on trade with non-member countries, which I shall discuss in paragraph 11 et seq. below.

its entry into force: the free movement of capital must not be impeded, except by those restrictions which the Member States are authorized to maintain, which, of course, include those justified on grounds of public policy or public security. [13]

The express reference to those two concepts in Article 73d(1)(b) should therefore be seen merely as a clarification and not an extension of the possible restrictions on capital movements which the Member States are allowed to introduce. [14]

The system therefore, at least in general terms, has remained essentially unchanged, whether analysed in the light of Directive 88/361 or in the light of Articles 73b to 73g, inserted by the Maastricht Treaty; therefore, the application of those provisions to the facts of this case, at least as regards the first aspect outlined above, cannot lead to different conclusions from those which follow from application of the directive.

11. There remains to be considered, however, the second point mentioned earlier, namely the real difference between the circumstances of this case and those in *Bordessa*: the fact that the defendants sought to transfer money to non-member countries.

In that respect, the rules introduced by the Maastricht Treaty do incorporate numerous innovations.

12. In the first place, Article 73b expressly prohibits all restrictions on capital movements, including those between Member States and non-member countries.

Secondly, Article 73c(1) authorizes the Member States to keep in force all the restrictions on the movement of capital to or from third countries which existed on 31 December 1993 'involving direct investment — including real estate — establishment, the provision of financial services or the admission of securities to capital markets'.

13. Finally, Article 73c(2) confers on the Council, acting by a qualified majority (or unanimously in the case of measures which constitute a step back as regards the liberalization so far achieved), the power to adopt

13 — Provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.

14 — Furthermore, the Court, which made a ruling to that effect in *Bordessa* (paragraphs 21 and 22), expressly stated that Article 4 of Directive 88/361 allows the Member States to adopt, in addition to the measures expressly provided for therein, measures justified on grounds of public policy, also making it clear that that interpretation is confirmed by the new wording of Article 73d of the EC Treaty.

any measures necessary on the movement of capital to and from third countries involving such direct investments.

With respect to non-member countries, therefore, the new rules lay down the general principle of freedom of trade, subject to the specific restrictions envisaged in Article 73c regarding direct investments, in addition to the general restrictions allowed, in relation to intra-Community trade as well, by Article 73d.

14. However, it is absolutely clear — and not denied by the parties — that the present case falls outside the scope of Article 73c of the EC Treaty since, as stated earlier, there is nothing in the order for reference to suggest that the capital movements at issue are classifiable as direct investments.

The general view is that the main feature of direct investments is the intention of the investor to establish or maintain enduring links with the undertaking for which the funds are intended for the pursuit of an economic activity. However, that feature is not present in this case. [15]

15. Even though there is no specific definition of the concept of direct investment in the Treaty, I see no reason to depart from the interpretation given above, which, moreover, corresponds to that contained in the explanatory notes to the list in Annex I to Directive 88/361. [16]

That list, which subdivides the various kinds of capital movements into appropriate categories for application of the directive, can of course also be relied on to help clarify the concept of direct investment for the purposes of the Treaty.

On the basis of that list, moreover, transfers of liquid funds are expressly included in the category of 'Physical import and export of financial assets' (Category XII) and not in the category 'Direct investments' (Category I).

15 — It will be remembered that, whilst in the first case the destination of the funds was a Swiss bank account, the destination was uncertain in the other two cases.

16 — There, direct investments are defined broadly as 'investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity'.

16. It is clear from the foregoing that the export of banknotes, to the extent to which it falls within the general scope of Article 73b of the Treaty and, at the same time, falls outside the specific rules of Article 73c, may be subjected to restrictions only if they are justified under Article 73d.

17. That conclusion might, however, appear strange. The question might in fact be asked whether the purpose of a direct investment may not also be achieved by first transferring banknotes and whether that might not ultimately be a way of circumventing the provisions of Article 73c of the Treaty.

18. There is no doubt, however, that the Community legislature expressly granted the Member States a greater degree of latitude only with regard to direct investments and, on the other hand, left transfers of capital under all other headings outside the scope of that exception (which, as such, is to be interpreted restrictively).

A systematic reading of the provision, and also its literal wording, leave no room for any other conclusion. There is no doubt, therefore, that transfers of banknotes to non-member countries are to be regarded as covered by the same rules as movements within the Community.

19. I am of the opinion that the Court's analysis in *Bordessa*, referred to earlier, should be applied, *mutatis mutandis*, to the present case. There is no reason to dissent from the considerations put forward by the Court in adjudging a prior declaration to be acceptable and the requirement of authorization to be disproportionate.

20. Similarly, I do not think there can be any reasonable doubts as to the direct effect of Article 73b, even with regard to capital movements to and from non-member countries other than those representing direct investments.

The obligation laid down in that article is expressed in clear and unconditional terms and needs no implementing measure, whereas Article 73d lays down the cases and specific and limited circumstances in which the Member States are authorized to adopt the restrictions mentioned. Furthermore, the permissibility of such measures, as significantly observed by the Court, is amenable to review by the courts. [17] The power available to the Member States in that connection is not therefore such that it can be used to deprive individuals of the right to rely on the principle embodied in Article 73b of the Treaty.

17 — *Bordessa*, paragraph 34, with reference to Article 4 of Directive 88/361.

21. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the questions submitted by the Juzgado Central:

1. Articles 73b and 73d(1)(b) of the EC Treaty are to be interpreted as precluding the application of national legislation which makes the export of banknotes subject to the requirement of prior authorization but do not preclude the application of national legislation which makes such operations subject to the requirement of a prior declaration.

2. Article 73b of the EC Treaty may be relied on by individuals before the national courts in order to ensure that a national law incompatible with it is not applied.