OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 21 October 1999 *

I — Purpose of the reference for a preliminary ruling

1. By the present reference for a preliminary ruling the French Conseil d'État (Council of State) is asking the Court to interpret Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC) and, in particular, to establish whether a system of prior authorisation for direct investments from abroad may be regarded as justified as a restrictive measure intended to safeguard internal public policy, where such a system provides that, in the absence of an express rejection of the application for authorisation within one month from the date of receipt of that application, authorisation must be deemed to have been definitively granted.

II — The legislative framework

The relevant Community provisions

2. Before the entry into force of the Treaty on European Union, which profoundly modified the Community provisions on free movement of capital, Article 67(1) of the EEC Treaty did not, unlike other sectors in which the common market was being established, impose on the Member States any obligation to open up their frontiers to capital from other Member States, except for such capital consisting of 'payments connected with the movement of goods, services or capital';[1] it provided only for the progressive abolition, '[D]uring the transitional period and to the extent necessary to ensure the proper functioning of the common market', of restrictions on the movement of capital (Article 67(1)). Articles 69 and 70(1) of the Treaty gave the Council the task of undertaking, by specific directives, 'the progressive implementation of the provisions of Article 67' and of attaining the 'highest possible degree of liberalisation'.

3. On the basis of those provisions, the Council, by Directive 88/361/EEC of 24 June 1988 for the implementation of

* Original language: Italian.

1 — Before the entry into force of the Treaty on European Union, which completely modified Chapters 1, 2 and 3 of Title II, that is, Articles 103 to 113 of the EEC Treaty, Article 106(1) of the EEC Treaty provided that 'each Member State undertakes to authorise, 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 liberalised pursuant to this Treaty'.

Article 67 of the Treaty,[2] brought about the liberalisation of the movement of capital by requiring Member States to abolish 'restrictions on movements of capital taking place between persons resident in Member States' (Article 1) as from 1 July 1990 (Article 6). The non-exhaustive list of operations to be regarded as definitively liberalised is annexed to the text of the directive. Those operations include direct investments.

However, Article 4 of Directive 88/361 provides that the directive 'shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, *inter alia* in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information'.

4. As from 1 January 1994, the Treaty on European Union replaced Articles 67 to 73 of the EC Treaty with Articles 73b to 73g.[3]

Article 73b (now Article 56 EC) provides that '[w]ithin the framework of the provisions set out in [Chapter 4 of Title III, relating specifically to capital and payments], all restrictions on the movement of capital between Member States ... shall be prohibited'.

Article 73d (now Article 58 EC) provides that '[t]he provisions of Article 73b [now Article 56 EC] shall be without prejudice to the right of Member States:... (b) to take 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, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security'.

The relevant national provisions

5. In France, Law No 66-1008 of 28 December 1966 governing financial relations with foreign countries (hereinafter: 'Law No 66-1008') provides in Article 1 that: 'Financial relations between France and foreign countries shall be free. That freedom shall be exercised in accordance with the detailed rules laid down in this Law, in compliance with the international commitments entered into by France'.

Article 3(1)(c) confers on the French Government in particular the power, 'for the

2 — OJ 1988 L 178, p. 5.

3 — The Treaty of Amsterdam has since definitively repealed Articles 67 to 73a of the EC Treaty (Article 6(39) of the Treaty of Amsterdam).

purpose of ensuring the defence of national interests', to 'make the establishment and realisation of foreign investments in France subject to declaration, prior authorisation or supervision ...'.

Article 5-1, inserted by Law No 96-109 of 14 February 1996, provides that: 'If the Minister for Economic Affairs finds that a foreign investment is being made or has been made in activities which in France are connected, even occasionally, with the exercise of official authority, or that a foreign investment could adversely affect public policy, public health or public security or that it is being made in research, production or commercial activities relating to arms, munitions, explosive powders and substances intended for military purposes or military hardware, in the absence of an application for prior authorisation required on the basis of Article 3(1)(c) of this Law or in spite of a refusal of authorisation or without satisfying the conditions to which such authorisation is subject, he may order the investor not to proceed with the operation, or to modify or arrange for the restoration at his expense of the situation which existed before [the investment].' It further provides that: 'Such an order may be issued only after the sending of a formal notice to the investor giving him 15 days within which to make known his observations'.

6. Decree No 89-938 of 29 December 1989, adopted pursuant to Article 3 of Law No 66-1008, provides in Article 11 that 'Foreign direct investments undertaken in France shall be free. Such investments shall be the subject, at the time they are undertaken, of an administrative declaration'.

Article 11a of that decree further provides that 'the system [of full liberalisation] in Article 11 shall not apply to the investments referred to in Article 5-1(1)(I) of Law No 66-1008 of 28 December 1966 governing financial relations with foreign countries, as amended, in particular, by Law No 96-109 of 14 February 1996'.

Article 12 provides that 'foreign direct investments undertaken in France which are covered by Article 11a shall be subject to prior authorisation by the Minister for Economic Affairs', that 'this authorisation shall be deemed to have been obtained one month after the date of receipt of the investment declaration submitted to the Minister for Economic Affairs unless the latter, within the same period, declares that the transaction in question has been deferred' and, finally, that 'the Minister for Economic Affairs may waive the right of deferment before the expiry of the period laid down by this Article'.

Finally, Article 13 provides that a series of operations closely connected with the formation or modification of companies, investments of a limited amount, investments in specific categories of enterprise or undertaken for the purpose of acquiring agricultural land 'shall be exempt from the

administrative declaration and the prior authorisation provided for in Articles 11 and 12'. [4]

III — The national proceedings and the question referred for a preliminary ruling

7. On 1 February 1996 the Association 'Église de Scientologie de Paris' and the Scientology International Reserves Trust submitted to the Prime Minister an 'application for the repeal' of Articles 11b and 11c of the Decree of 29 December 1989 relating to the system of prior authorisation for certain categories of foreign direct investment.

8. It is apparent from the observations submitted by the French Government that the action giving rise to those proceedings was brought following two measures taken by the Minister for French Economic Affairs, deferring the implementation of foreign investments intended for the Église de Scientologie de Paris. The first measure dates back to 27 April 1995 and concerns sums of money paid by the American Church of Scientology in order to take over the entire assets of the Église de Scientologie de Paris. The second measure, adopted on 29 November 1995, concerns investments by the English Church of Scientology which intended, on behalf of the American Church, to extinguish all the debts of the French Church. [5]

On 29 January 1996 the applicants in the main proceedings contested the decision of 27 April 1995 before the Tribunal Administratif de Paris (Administrative Court, Paris). At the same time they submitted to the Prime Minister the application for repeal which gave rise to the main proceedings.

Articles 11b and 11c of the 1989 decree were repealed by decree of 14 February 1996. However, the system of prior authorisation contested by the applicants in the main proceedings remained unchanged.

4 — I reproduce below the text of Article 13: 'Sont dispensés de la déclaration administrative et de l'autorisation préalable prévues aux articles 11 et 12: la création de sociétés, de succursales, ou d'entreprises nouvelles; l'extension d'activité d'une société, succursale, ou entreprise existante; les accroissements de participations dans une société française sous contrôle étranger lorsqu'ils sont effectués par un investisseur détenant déjà plus de 66,66 p 100 du capital ou des droits de vote de la société; la souscription à une augmentation de capital d'une société française sous contrôle étranger par un investisseur, sous réserve qu'il n'accroisse pas à cette occasion sa participation; les opérations d'investissements directs réalisés entre les sociétés appartenant toutes au même groupe; les opérations relatives à des prêts, avances, garanties, consolidations ou abandons de créances, subventions ou donations de succursales, accordées à une entreprise française sous contrôle étranger par les investisseurs qui la contrôlent; les opérations d'investissements directs réalisés dans des entreprises exerçant une activité immobilière autre que la construction d'immeubles destinés à la vente ou à la location; les opérations d'investissements directs réalisés, dans la limite d'un montant de 10 millions de francs, dans des entreprises artisanales, de commerce de détail, d'hôtellerie, de restauration, de services de proximité ou ayant pour objet exclusif l'exploitation de carrières ou gravières; les acquisitions de terres agricoles.'

5 — The French Government also points out that the Minister for the Interior has renewed his request for deferment of the investments intended to finance the activities of the Church of Scientology, on the grounds that various sets of criminal proceedings are pending against members of that Church, who are charged with practising medicine illegally, fraud and violence, and that there is a widespread risk that the methods used by those people could 'deceive an unsuspecting public, and especially young people'.

9. The associations in question brought the matter before the Conseil d'État, requesting that it set aside the decision of refusal implied by the Prime Minister's silence concerning their application for repeal. They pleaded *ultra vires* and incompatibility of the French legislation with Articles 73b, 73c of the EC Treaty (now Article 57 EC), 73d, 73e of the EC Treaty (repealed by the Treaty of Amsterdam), 73f and 73g of the EC Treaty (now Articles 59 EC and 60 EC).

10. Taking the view that the case raised doubts as to the interpretation of those provisions of the Treaty, the national court asked the Court, by way of a reference for a preliminary ruling, whether 'the provisions of Article 73d of the Treaty ..., according to which the prohibition of all restrictions on movements of capital between Member States is without prejudice to the right of Member States "to take measures which are justified on grounds of public policy or public security", allow a Member State, in derogation from the system of full freedom or the declaration system applicable to foreign investments within its territory, to maintain a system of prior authorisation for such investments as may adversely affect public order, public health or public security, it being specified that this authorisation is deemed to have been obtained one month after receipt of the investment declaration submitted to the Minister unless the latter, within the same period, declares that the transaction in question has been deferred.'

IV — Substance

11. The question referred by the Conseil d'État is effectively an application for review of the legality of a system, such as the French system of prior authorisation of foreign investments, the legality of which is dependent solely on whether it can be regarded as 'justified' within the meaning of Article 73d(1)(b) of the Treaty.

The Community case-law on prior supervision procedures relating to capital movements

12. The Court has already had occasion to rule on the compatibility of national systems for the supervision of imports and exports of capital with the provisions of the Treaty. As is well known, until the date of full liberalisation of the movement of capital, namely 1 July 1990, systems of prior authorisation were considered compatible with the Community rules, in so far as the conditional nature of that freedom left unaltered the competence of national authorities to subject the movement of capital to supervision — and if necessary prior authorisation [6] — and also permitted the continued existence of systems having restrictive effects on movements from and to foreign countries. It is with that in mind that the *Casati* judgment, in which the Court held that Italian rules requiring the

6 — Provided that such a measure was necessary for the protection of a specific national interest.

re-exportation of money to be declared on a form prescribed by the administrative authorities were compatible with the former Article 67 of the Treaty, must now be interpreted. On that occasion the Court declared that '... capital movements are also closely connected with the economic and monetary policy of the Member States' and that therefore 'it cannot be denied that complete freedom of movement of capital may undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby impairing the proper functioning of the common market'. For those reasons, the Court interpreted that article as meaning that the obligation to liberalise capital movements 'varies in time and depends on an assessment of the requirements of the common market and on an appraisal of both the advantages and risks which liberalisation might entail for the latter'.[7] That judgment is therefore not capable of being applied in the present situation in which the Member States now have only a — I would say residual — power of supervision, which may be exercised only on the grounds expressly provided for in Article 73d of the Treaty.

13. I shall therefore move on to the judgments given in the 1990s, once the process of liberalisation of the movement of capital had been completed. In those judgments, the Court examined the lawfulness of the Spanish system which provided that the export of capital with a value in excess of ESP 5 million was subject to prior administrative authorisation. In interpreting the provisions of the Treaty on the free movement of capital, the Court did not base its assessment on the extent of State competence which still existed, but on the possibility of justifying the restrictions imposed by the Member State in question in terms of the requirement to carry out checks in the circumstances expressly provided for by Community law.

In the *Bordessa* case in 1995,[8] the facts had arisen on 10 November 1992, before the entry into force of the Maastricht Treaty, and the national court had therefore raised the question of interpretation with reference only to Directive 88/361, and not to the provisions of the EC Treaty as well. However, both the Court and the Advocate General interpreted not only Article 4 of the directive, but also Article 73d(1)(b) of the EC Treaty, although the latter provision had not in fact been in force at the time of the facts of the case.

Article 4 provides that Member States may take (or maintain) measures to prevent infringements of their laws and regulations or lay down procedures for the prior declaration of capital movements for pur-

7 — Judgment in Case 203/80 *Casati* [1981] ECR 2595, paragraphs 9 and 10. In the *Luisi and Carbone* judgment (Joined Cases 286/82 and 26/83 [1984] ECR 377, paragraph 34), the Court again proposed this interpretation of the provisions on free movement of capital, declaring that it must be 'acknowledged that Member States are empowered to verify that transfers of foreign currency purportedly intended for liberalised payments are not diverted from that purpose and used for unauthorised movements of capital. In that connection, Member States are entitled to verify the nature and genuineness of the transactions or transfers in question' (paragraph 33).

8 — Judgment in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361. The case arose from the fact that Spanish customs officials had arrested Mr Bordessa and confiscated the ESP 5 000 000 in his possession at the frontier because the export of that sum had not been previously authorised by the competent authorities.

poses of administrative or statistical information. Article 73d(1)(b) expressly acknowledges that Member States have the more general right to adopt in this connection 'measures which are justified on grounds of public policy or public security'.

In support of the lawfulness of its system, the Spanish Government argued that the requirement of authorisation for transfers of vast sums of cash was justified by reasons connected with the fight against the illegal activities frequently associated with such operations, such as money laundering, drug trafficking, tax evasion and terrorism, and therefore on grounds of public policy.

The Advocate General observed in this regard that 'the objectives invoked by the Spanish Government can be attained just as effectively by means of a requirement to make a declaration. Such a declaration would fully satisfy the dual need to identify the individuals who transfer vast sums of money across frontiers (and, as a result, to prevent such operations from being carried out anonymously) and to arrange for any additional investigations designed to verify possible links between the transaction in question and certain crimes. That would be achieved, furthermore, quite certainly, without in any way infringing the obligations imposed on the Member States in this matter by Community law'.[9]

The Court endorsed those observations and declared that 'authorisation has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application' and that that 'would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory'. The requirement of authorisation 'might have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive'. The Court therefore concluded that 'pursuant to that provision, the application of the measures and procedures referred to in the first paragraph "may not have the effect of impeding capital movements carried out in accordance with Community law"'; on the

9 — Point 21 of the Opinion. In support of that interpretation, the Advocate General pointed out that, as early as its judgment in *Luisi and Carbone*, the Court had declared that the power of the Member States (which was linked to the incomplete liberalisation of the movement of capital) to impose controls for the purpose of verifying the nature and genuineness of liberalised capital movements did not authorise them to subject the transfer to 'the discretion of the administrative authorities' and that, at any event, in the matter of the free movement of goods, any power to make it subject to an import or export authorisation was not permissible. In particular, in the judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, at paragraph 18, the Court had declared that 'a system requiring the issue of an administrative authorisation necessarily involves the exercise of a certain degree of discretion and creates legal uncertainty for traders'. The Court had also added that the objective pursued could be attained if the authorities confined themselves 'to obtaining the information ... of use ... , for example, by means of declarations signed by the importers, accompanied if necessary by the appropriate certificates' (point 19 of the Opinion).

other hand, 'a prior declaration... may be one of the requisite measures which Member States are permitted to take since, unlike prior authorisation, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations' [10] (paragraphs 24 to 27).

Arguments of the parties

14. In the present case, the French Government argues that its system, unlike the Spanish system, does not impose a requirement of authorisation for all transactions involving movements of capital to or from foreign countries, but only for those which are expressly mentioned in Article 11a of the Law of 1966. According to the French Government, whereas Article 3(1) of Law No 66-1008 of 28 December 1966 provided that, 'in order to defend national interests', the Government may introduce a system of prior declarations or authorisations or of supervision in relation to the establishment or realisation of foreign investments in France, Decree No 89-938, which defines the limits of the authorisation system, expressly provides that authorisation is required only in specific cases, which include such investments 'as may adversely affect public policy'. Law No 96-109, which modified the system established by Law No 66-1008, and Decree No 96-117, which amended the 1989 decree, therefore inverted the logic of the French system of supervision of foreign investments, in so far as the provisions now in force are based on a system *of ex post facto* declarations of investments and not of prior authorisation thereof. In the present system, a declaration has the same status as an application for authorisation. Consequently, the fact of providing for prior authorisation meets the objective of safeguarding national public policy; on the one hand, the transaction is suspended only for a limited period — one month at the most — and, on the other, deferment measures concern only extreme cases where there is a genuine threat to public policy.

According to the French Government, prior authorisation is essentially designed purely to protect the trader, who is uncertain as to the legality of the investment, from any subsequent measure which might jeopardise the transaction already carried out.

15. The Commission, on the other hand, argues that the French system involves suspension of the investment and that that in itself constitutes a restriction on the free movement of capital. Such a restriction cannot be regarded as justified, since it

10 — This case-law was subsequently confirmed by the judgment in Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821. In that judgment, which concerned transfers of banknotes to Switzerland, the Court declared that Article 73c(1) (relating to the movement of capital to or from third countries) and Article 73d(1)(b) preclude 'rules which make the export of coins, banknotes or bearer cheques conditional on prior authorisation but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration'.

operates not only in cases where there is an actual threat to public policy, public health and public security, but also on the basis of mere suspicion that the transaction may produce such effects. According to the Commission, however, mere suspicion is not sufficient to justify the restrictive measure since it involves conferring on the administrative authorities power arbitrarily to block foreign investments. In order to prevent such a consequence, the national legislation should provide for assessment criteria which are sufficiently precise and objective, that is, which are also amenable to review, where appropriate, by the courts.

Consideration of the question

16. By the question referred for a preliminary ruling under consideration, the French court is essentially seeking to ascertain whether a State may adopt or maintain a system of prior authorisation without requiring such authorisation for all movements of capital to and from foreign countries (such as the Spanish system at issue in the *Bordessa* case), but only for specific categories of transaction, and in particular only for those transactions which may involve non-compliance with national provisions or result in threats to public policy or public security, and for which recourse to a system based on declaration would not be sufficient to prevent the risk of such consequences.

The answer to the question must, in my opinion, be in the affirmative. Article 73d(1)(b), interpretation of which is sought, refers to measures intended to prevent infringements of national provisions or justified on grounds of public policy or public security. That provision does not absolutely and unconditionally preclude such measures from being of a prior nature and involving the suspension of an investment transaction or the temporary blocking of capital at the frontier. The phrase 'requisite measures to prevent' refers to measures of a preventive rather than a punitive nature, which, in principle, are not incompatible with authorisation measures which entail obstacles — even if for a limited period of time — to the import or export of capital into or from national territory.

I note in this regard that in the *Richardt* judgment in 1991 [11] the Court interpreted Article 36 of the EC Treaty (now, after amendment, Article 30 EC) as meaning that national legislation which requires a special authorisation to be obtained for the transport or transit of strategic material is justified on public security grounds and therefore compatible with Community law, pursuant, in particular, to Article 36.

The extreme difficulty of identifying and blocking capital once it has been brought into a Member State makes it highly

11 — Judgment in Case C-367/89 [1991] ECR I-4621.

necessary to block suspect transactions from the outset. This is a different situation from situations which may arise through the absence of prior supervision of the movement of goods and persons, and more difficult to monitor.

Moreover, the fact that the authorities of the Member States can check the origin, nature and purpose of a suspect transaction before it is concluded and before such verification entails the suspension of the transaction is in line not only with national interests but also with Community interests, since safeguarding public policy and public security in one Member State may also be important to the rest of the Community, given that the effects of transactions which jeopardise public policy in one country very often extend beyond national frontiers.

I am therefore of the opinion that, as Community law stands at present, the provisions of the Treaty, and in particular Article 73d(1)(b), do not automatically preclude the Member States from introducing checks on investments coming from other countries, in the form of an appropriate authorisation procedure.

17. But what conditions must such a restrictive measure satisfy in order to be 'justified' within the meaning of Article 73d(1)(b), and therefore compatible with the relevant Community provisions? It is clear from the Court's case-law that, in order to establish whether a national measure which produces restrictive effects on the free movement of goods, persons or capital within the Community is lawful, it is necessary to assess: (a) the nature of the national interests which the Member State intends to protect, (b) whether there is a genuine threat to the interest which the State intends to protect, (c) the need for, or rather the indispensable nature of, the measure in terms of the objective to be attained and (d) the absence of discriminatory effects with respect to goods, persons or capital moving to or from other countries. [12]

18. With regard to condition (a), Article 4 of Directive 88/361 acknowledges that Member States have the right to 'take all requisite measures to prevent infringements of their laws and regulations, *inter alia* in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information'. The Maastricht Treaty inserted that provision

12 — The existence of these conditions is required not only in relation to measures concerning exclusively national provisions relating to importation and exportation, but also in relation to internal provisions of a general nature which may have restrictive effects on the movement of goods, persons and capital. In the *Gebhard* judgment, concerning the compatibility with Community law of national rules on opening chambers, the Court stated, with reference to the previous case-law on the subject, that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it' (judgment in Case C-55/94 [1995] ECR I-4165, in particular paragraph 37).

in the EC Treaty, adding to the list of possible circumstances in which restrictive measures may be taken those involving 'measures which are justified on grounds of public policy or public security' (Article 73d). It is in the light of this last category of restrictive measures that the Conseil d'État and the French Government wish to know whether the French system of authorisation can be regarded as justified.

With regard to public policy, it should be borne in mind that, according to settled case-law, that concept must be interpreted strictly and is subject to control by the Community institutions and therefore by the Court. Indeed, as early as 1974, in the *Van Duyn* judgment, [13] the starting point for a line of settled case-law, the Court vastly reduced the function of that safeguard clause, stating in paragraph 18 that 'the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community'. The Court therefore, on the one hand, declared that restrictive national measures constitute derogations from the general Community system and must therefore be interpreted restrictively and, on the other hand, made the concept of national public policy subject to its judicial control.

13 — Judgment in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

In particular, interests of a typically economic nature are to be regarded as excluded from that concept. [14] Such a principle must also be extended to the matter under consideration, since accepting derogations for national economic interests would mean reviving the rules which preceded the amendments in the Maastricht Treaty, under which Member States were allowed to maintain, and also to adopt, national measures intended to safeguard general national interests in controlling capital movements.

Consequently, the content of the flow of investments to and from foreign countries cannot in itself constitute sufficient justification for restrictive measures. However, bearing in mind that the provisions of the Treaty now in force relating to the free movement of capital and the liberalisation of payments are not separate but are in fact included together in Chapter 4 of Title II, the State may have recourse to the measures referred to in Article 109i of the EC Treaty (now Article 120 EC) when the crisis in the balance of payments is caused either by capital flows or by sums in payment for goods or services. [15]

14 — In the judgment in Case 36/75 *Rutili* [1975] ECR 1219, concerning freedom of movement for persons, the Court, in the course of interpreting Article 48(3) of the EC Treaty (now, after amendment, Article 39(3) EC), points out, with reference to Article 2 of Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-64 (I), p. 117), that grounds of public policy shall not be put to improper use by being 'invoked to service economic ends'. See, in addition, the Court's judgments in Case 7/61 *Commission* v *Italy* [1961] ECR 317 and Case 72/83 *Campus Oil* [1984] ECR 2727.

15 — Article 109i(1) of the EEC Treaty provides that '[w]here a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 109h(2) is not immediately taken, the Member State concerned may, as a precaution, take the necessary protective measures'.

Moreover, unlike the Community provisions on free movement of goods or persons, those on the free movement of capital permit not only the safeguarding of public policy and public security, but also protective measures designed to prevent 'infringements of national law and regulations'. It follows that, in the case of capital, the Member States retain more scope for action than they enjoy with regard to the movement of goods and persons, inasmuch as, in the context of movement of capital, the actual threat of infringement of national provisions, of whatever nature they may be, may justify the adoption of restrictive measures by the State. [16] There is no doubt, as the Court clearly stated in the *Bordessa* judgment, cited above, that the first example of possible measures to which Article 73d(1)(b) refers includes those 'justified on grounds of public policy or public security'.

On the basis of those considerations, I am of the opinion that national legislation, such as the French provisions which are the subject-matter of the question referred for a preliminary ruling, which is intended to prevent infringements of national provisions or to safeguard public policy (in the abovementioned sense) or public security must be regarded as justified, from the point of view of its objectives [condition (a)], within the meaning of Article 73d and is therefore compatible with the provisions of the Treaty.

19. I now move on to conditions (b) and (c) relating respectively to the seriousness of the threat and to the proportionality of the measure in relation to the objective pursued. I shall deal with these two points together because they concern closely interrelated circumstances.

With regard to the threat of infringements of domestic provisions or of adverse effects on national public policy, it is well known that, as the Commission has pointed out, in order to justify the adoption of restrictive national measures it is not sufficient for a general risk to exist but there must be an actual threat to public policy and public security or a threat of infringement of national provisions and therefore an absolute certainty that the capital could jeopardise specific interests.

The national measure constituting an obstacle to the movement of capital must, moreover, as with goods and persons, be the only effective measure, in that it must be proportionate to the threat of possible infringement of domestic provisions and principles, and must also be the sole instrument of prevention.

16 — Article 73d(1)(a) of the EC Treaty acknowledges that Member States have the right 'to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

The genuineness of the risk and the proportionality of the measure limit the discretion of national authorities to adopt restrictive measures, with the obvious consequence that there can be no possibility of the measure giving rise to discrimination in the treatment of movements of capital to or from other countries.

In the *Richardt* judgment, cited above, the Court, reiterating what it had stated in its *Campus Oil* judgment of 1984, [17] declared that 'the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States, but merely to allow national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the article'; in addition, that article, 'as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure'. [18]

In the *Bouchereau* judgment, which concerned the free movement of persons, the Court held that the existence of such a threat must be assessed 'in each individual case in the light of the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons'. [19]

It is therefore obvious that a measure adopted in order to prevent the infringement of national provisions — such as, in particular, a prior authorisation procedure — can refer only to types of transaction, or to specific types of capital movement, which are genuinely likely to give rise to an infringement of national provisions. In other words, the system must be concerned with established or ascertainable facts. [20] Accepting national preventive measures for general categories of transactions would therefore amount to reproducing a generalised system of authorisation for investments originating in other countries, similar to the Spanish system at issue in the *Bordessa* judgment, and would therefore, to a certain extent, be incompatible with the provisions of the Treaty.

20. That is precisely the case with the French law which, even though it identifies

17 — *Campus Oil* judgment (cited in footnote 14), paragraphs 32 to 37.

18 — Paragraphs 19 and 20. I note moreover that in the *Rutili* judgment, which concerned a German measure restricting the right of a foreign national to move within the national territory, the Court, in the context of interpreting Article 48(3) of the Treaty, pointed out that the restriction on freedom of movement could not be justified unless the presence or conduct of the person concerned constituted 'a genuine and sufficiently serious threat to public policy'.

19 — Case 30/77 [1977] ECR 1999. In particular, the Court pointed out that the existence of a criminal conviction 'can ... only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy' and that such a threat is not identical with the commission of an offence but exists where the individual continues to act in a particular way in the future (paragraphs 28 to 30).

20 — With regard to the free movement of persons, Advocate General Mayras, in his Opinion delivered on 13 November 1974 in the *Van Duyn* case, cited above, ruled out any possibility that a decision based on the safeguarding of public policy which took the form of a 'collective' measure could be regarded as lawful under Article 48 of the Treaty.

certain categories of financing transaction, does not give any details of their content (except in the case of transactions relating to the purchase and sale of arms). Legislation such as the French legislation, which makes it a requirement to apply for prior authorisation for all transactions which 'may adversely affect public policy, public health or public security', includes an indeterminate and general series of transactions and is therefore not connected with a genuine risk of serious infringements of national provisions.

The French system provides for the adoption of measures consisting in the refusal of authorisation and therefore in the prohibition of bringing capital into the national territory. Such measures are adopted only after the administrative authorities have established the existence of the risk of a threat to public policy or public security or of infringement of national provisions. The lawfulness of such measures must be assessed in relation to the circumstances of the particular case.

There is also another restrictive measure at issue in this case; it is the suspension, for a maximum period of one month, of all transactions which fall within the categories specified in Article 11a. As the Commission rightly notes, this type of measure is unconnected with any genuine threat of infringement of national provisions or with any grounds of public policy, since the administrative authority's verification of these matters is carried out only after the transaction has been blocked, which, because of the nature of the transactions concerned, takes place as soon as the applications are submitted by the investors. That renders the measure itself manifestly disproportionate to the objective and therefore unjustified.

France draws attention to the fact that authorisation is in any event deemed to have been obtained if the administrative authority is silent on the investor's application. In my opinion, that fact does not cancel out the restrictive effects of the national legislation, since the suspension of the investment for a period of one month, a relatively long period of time in which to bring an investment transaction to completion, in itself produces restrictive effects on the inflow of capital into the national territory.

Moreover, contrary to the French Government's observation, such a system puts the investor in a state of uncertainty as to whether or not he is actually required to apply for authorisation and confers on the administrative authority an element of discretion to adopt this kind of measure, which is incompatible with Community law. Even *ex post facto* review by the national courts would not eliminate the restrictive effect produced by the system as a whole.

21. I would also add that an investment does not in itself constitute a 'threat'. The restrictive measure must therefore be justified, in each individual case, in relation to the person providing the capital or to the

object and purpose of the investment. It is therefore only in relation to specific transactions or to particular and well-defined fields of activity that national authorities can consider that there is a genuine threat to public policy and public security or a risk of infringement of national provisions, and that they are therefore entitled to adopt measures, including the requirement of prior authorisations. This observation certainly applies to investments in fields under exclusive State control, such as, in particular, national defence.

It follows that, in circumstances such as those of this case, in which a religious association is called to answer charges of fraud and tax evasion, the Member State concerned may, by means of a measure adopted specifically for the purpose, subject the investments intended to finance that association to prior verification where it establishes that there is a risk that the association may infringe national provisions, especially those of criminal law.

22. I now move on to the last condition (d) which must be fulfilled in order justify a restrictive measure: the national measure must not discriminate against foreign capital or capital destined for other countries.

I would point out in this regard that Article 73d(3) of the EC Treaty (like Article 36, moreover) provides that national protective measures 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b'.

In the *Conegate* judgment, concerning the interpretation of Article 36, the Court held that 'a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory'. The Court added that 'although it is not necessary ... that the manufacture and marketing of the products whose importation has been prohibited should be prohibited in the territory of all the constituent parts, it must at least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products'. [21]

It is obvious that a preventive measure establishing a prior authorisation procedure for investments from abroad intended to finance high-risk sectors and activities must be accompanied by national measures relating to domestic investments with similar content.

21 — Judgment in Case 121/85 *Conegate* [1986] ECR 1007, paragraphs 16 and 17; see also judgments in Case 34/79 *Henn and Darby* [1979] ECR 3795 and Case 4/75 *Rewe-Zentralfinanz* [1975] ECR 843.

That means that, in circumstances such as those of this case, a measure which lays down a requirement to apply for authorisation for investments from abroad intended to finance the activities of the Church of Scientology must be matched by a measure, having similar effects, applicable to national investments.

V — Conclusion

23. On the basis of those observations, I propose that the Court answer the question referred by the French Conseil d'État for a preliminary ruling as follows:

Article 73d(1)(b) of the EC Treaty (now Article 58 EC) must be interpreted as not authorising a Member State to introduce or maintain in force a system of prior authorisation applicable to direct investments from abroad, where such investments may adversely affect public policy or public security, without defining the types of investment for which an application for authorisation must be submitted to the national authorities.