

JUDGMENT OF THE COURT
14 December 1995 *

In Joined Cases C-163/94, C-165/94 and C-250/94,

REFERENCES to the Court under Article 177 of the EC Treaty by the Juzgado Central de lo Penal de la Audiencia Nacional (Spain) for a preliminary ruling in the criminal proceedings pending before that court against

Lucas Emilio Sanz de Lera,

Raimundo Díaz Jiménez,

Figen Kapanoglu,

on the interpretation of Articles 73b, 73c(1) and 73d(1)(b) of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, P. J. G. Kapteyn (Rapporteur), C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm and L. Sevón, Judges,

* Language of the case: Spanish.

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Ministerio Fiscal (C-250/94), by Florentino Orti Ponte, Fiscal de la Audiencia Nacional,
- the Spanish Government, by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado for Community Matters, acting as Agents,
- the Belgian Government (C-163/94 and C-165/94), by Jan Devadder, Directeur d'Administration, Legal Department of the Ministry of Foreign Affairs, acting as Agent,
- the French Government, by Edwige Belliard, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, Catherine de Salins, Deputy Director in the same directorate, and Philippe Martinet, Foreign Affairs Secretary in the same directorate, acting as Agents,
- the Portuguese Government (C-163/94 and C-165/94) by Luis Fernandes, Director of Legal Services in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and Jorge Santos, Legal Adviser with the Bank of Portugal, acting as Agents,
- the Commission of the European Communities, by Blanca Rodríguez Galindo and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Spanish Government, represented by Miguel Bravo-Ferrer Delgado, and the Commission, represented by Blanca Rodríguez Galindo, at the hearing on 11 July 1995,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1995,

gives the following

Judgment

- 1 By orders of 24 May, 26 May and 1 July 1994, received at the Court on 16 June, 17 June and 13 September 1994 respectively, the Audiencia Nacional (High Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 73b, 73c(1) and 73d(1)(b) of the EC Treaty.
- 2 Those questions were raised in three sets of criminal proceedings. In Case C-163/94 Mr Sanz de Lera, a Spanish national residing in Spain, was apprehended in France on 27 October 1993 whilst driving his car to Geneva. Although he stated that he had nothing to declare, French officers searched his vehicle and found in it PTA 19 600 000 in banknotes.
- 3 In Case C-165/94, on 28 October 1993 during a security check at the international terminal at Barajas Airport, Madrid, where he was intending to board a flight to Zurich with a connecting flight to London, Mr Díaz Jiménez, a Spanish national

residing in Great Britain, was found to be carrying PTA 30 250 000 in banknotes in his hand baggage.

- 4 Finally, in Case C-250/94, Mrs Kapanoglu, a Turkish national residing in Spain, was arrested by police officers on 10 May 1993 at Barajas Airport, Madrid, when boarding a flight for Istanbul, in possession of PTA 11 998 000 in banknotes.
- 5 Since no authorization had been sought from the Spanish authorities for the export of those sums, criminal proceedings were commenced in the Spanish courts against the three persons concerned.
- 6 Under Article 4(1) of Royal Decree No 1816 of 20 December 1991 on economic transactions with other countries, the export of, *inter alia*, any coins, banknotes and bank cheques payable to bearer, made out in pesetas or in foreign currencies, is subject to a prior declaration when the amount concerned exceeds PTA 1 000 000 per person and per journey and to a prior administrative authorization when the amount concerned is in excess of PTA 5 000 000 per person and per journey.
- 7 The wording of Article 4(1) of that decree was amended by Royal Decree No 42 of 15 January 1993 which, according to the national court, constitutes no more than a technical improvement.
- 8 The national court considers that it is necessary to determine the validity in the light of Community law of Article 4(1) of Royal Decree No 1816 before making a finding of a criminal offence under Law No 40 of 10 December 1979 on the

regulations governing exchange control, as amended by Organic Law No 10 of 16 August 1983.

- 9 The national court also points out that, by contrast with Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Others* [1995] ECR I-361, which concerned movements of capital between Member States, this case involves movement of capital from a Member State to a non-member country. The national court refers, however, to the entry into force on 1 January 1994 of Article 73b of the Treaty, which also covers capital movements between Member States and non-member countries.
- 10 In *Bordessa* the Court held that Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) preclude the export of coins, banknotes or bearer cheques being made conditional on prior authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration.
- 11 In those circumstances, the national court stayed the proceedings and in all three cases referred the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Are rules of a Member State which require a person leaving national territory carrying coins, banknotes or bearer cheques to make a prior declaration if the amount is in excess of PTA 1 000 000 and to obtain prior administrative authorization if the amount exceeds PTA 5 000 000, and apply a penalty for breach of those requirements which may include imprisonment, compatible with Article 73b(1) and (2) of the Treaty establishing the European Community, interpreted in relation to Articles 73c(1) and 73d(1)(b) of that Treaty?

2. If the first question is answered in the negative, may Article 73b of the Treaty be relied upon as against the Spanish State before the national courts, or be applied by those courts on their own initiative, and render any national provisions that are incompatible with them inapplicable?
- 12 By order of the President of 27 June 1994, Cases C-163/94 and C-165/94 were joined, pursuant to Article 43 of the Rules of Procedure, for the purposes of the written and oral procedure and judgment. By order of the President of 6 June 1995, Joined Cases C-163/94 and C-165/94 and Case C-250/94 were joined for the purposes of the oral procedure and judgment.
 - 13 Since the facts of the three cases occurred before 1 November 1993, the date of entry into force of the Treaty on European Union, and before 1 January 1994, the date of entry into force of the provisions of which the national court seeks an interpretation, the French Government expressed doubts as to their applicability to those facts. It considers that only the provisions of Directive 88/361 are relevant.
 - 14 It is clear nevertheless from the order for reference that the national court considered it necessary to seek a ruling from the Court of Justice on the interpretation of Articles 73b to 73d of the Treaty on the ground that the principle recognized in Spanish law of the retroactive effect of the more favourable criminal provision would render inoperative national provisions under which allegedly criminal offences were committed if such provisions were found to be incompatible with Articles 73b to 73d.
 - 15 Consequently it is necessary to answer the questions submitted since it is for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

The first question

- 16 By this question the national court asks essentially whether Articles 73b(1) and (2), 73c(1) and 73d(1)(b) of the Treaty preclude rules which make the export of coins, banknotes and bearer cheques conditional upon authorization or a prior declaration and make that requirement subject to criminal penalties.
- 17 As regards, first, Article 73b(2) of the Treaty, it is apparent from the orders for reference that the exports of banknotes at issue do not represent payments for trade in goods or services. Consequently, those transfers cannot be regarded as payments within the meaning of Article 73b(2).
- 18 It is therefore necessary to examine rules of the kind concerned in the light only of Articles 73b(1), 73d(1)(b) and 73c(1) of the Treaty.

Articles 73b(1) and 73d(1)(b)

- 19 Article 73b(1) of the Treaty gave effect to the liberalization of capital movements between Member States and between Member States and non-member countries. To that end, it provides that, within the framework of the provisions of Chapter 4 of the Treaty, entitled 'Capital and payments', all restrictions on the movement of capital between Member States and non-member countries are to be prohibited.

- 20 By virtue of Article 73d(1)(b) of the Treaty, Article 73b(1) is to be without prejudice to the right of the Member States 'to take all requisite measures to prevent infringement 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'.
- 21 Pursuant to Article 73d(3) of the Treaty, those measures and procedures 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital ... as defined in Article 73b'.
- 22 It follows from paragraphs 21 and 22 of *Bordessa* that the measures which are necessary to prevent the commission of certain infringements and are permitted by Article 4(1) of the directive, in particular those designed to ensure effective fiscal supervision and to prevent illegal activities such as tax evasion, money laundering, drug trafficking or terrorism, are also covered by Article 73d(1)(b).
- 23 It is therefore necessary to consider whether the requirement of an authorization or a prior declaration for the export of coins, banknotes or bearer cheques is necessary in order to uphold the objectives pursued and whether those objectives might be attained by measures less restrictive of the free movement of capital.
- 24 As the Court held in paragraph 24 of *Bordessa*, authorization 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.

- 25 The effect of such a requirement is to 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 (see *Bordessa*, paragraph 25, and Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 34).
- 26 However, the restriction on the free movement of capital resulting from that requirement could be eliminated without thereby detracting from the effective pursuit of the aims of those rules.
- 27 As the Commission has rightly pointed out, it would be sufficient to set up an adequate system of declarations indicating the nature of the planned operation and the identity of the declarant, which would require the competent authorities to proceed with a rapid examination of the declaration and enable them, if necessary, to carry out in due time the investigations found to be necessary to determine whether capital was being unlawfully transferred and to impose the requisite penalties if national legislation was being contravened.
- 28 Thus, unlike prior authorization, such a system of declarations would not suspend the operation concerned but would nevertheless enable the national authorities to carry out, in order to uphold public policy, effective supervision to prevent infringements of national law and regulations.
- 29 As regards the Spanish Government's argument that only a system of authorization makes it possible to establish that a criminal offence has been committed and impose penalties under criminal law, such considerations cannot justify the maintenance of measures which are incompatible with Community law.

30 It follows that Articles 73b(1) and 73d(1)(b) of the Treaty preclude rules which make the export of coins, banknotes or bearer cheques conditional on prior authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration.

Article 73c(1) of the EC Treaty

31 It must next be considered whether national rules such as those at issue are covered by Article 73c(1) of the Treaty, according to which 'the provisions of Article 73b shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national law or Community law adopted in respect of the movement of capital to or from third countries involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets'.

32 Rules such as those at issue apply to exports of coins, banknotes or bearer cheques.

33 However, the physical export of means of payment cannot itself be regarded as a capital movement involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets.

34 That finding is confirmed by the list in Annex I to Directive 88/361 of capital movements, which places transfers of means of payment in the category 'Physical

import and export of financial assets' (Category XII), whereas the operations listed in Article 73c(1) of the Treaty appear in other categories of that list.

- 35 Moreover, rules such as those at issue in this case apply generally to all exports of coins, banknotes or bearer cheques, including those which do not involve, in non-member countries, direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets.
- 36 It follows that national rules such as those at issue in this case do not fall within the scope of Article 73c(1) of the Treaty.
- 37 However, since Article 73c of the Treaty authorizes, under the conditions laid down therein and notwithstanding the prohibition laid down in Article 73b(1), certain restrictions on capital movements between Member States and non-member countries, the Member States are entitled to verify the nature and reality of the transactions and transfers in question, with a view to satisfying themselves that such transfers will not be used for the purposes of the capital movements which are specifically covered by the restrictions authorized by Article 73c (see, to that effect, *Luisi and Carbone*, paragraphs 31 and 33).
- 38 A prior declaration, giving useful information as to the nature of the planned operation and the identity of the declarant, would enable the Member States to verify the actual use to which means of payment exported to non-member countries was put, without impeding liberalized capital movements, and thereby to ensure

observance of any restrictions on capital movements authorized by Article 73c of the Treaty.

- 39 It follows that the answer to the first question must be that Articles 73b(1) and 73d(1)(b) of the Treaty preclude rules which make the export of coins, banknotes or bearer cheques conditional on prior authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration. Such rules do not fall within the scope of Article 73c(1) of the Treaty.

The second question

- 40 By this question the national court asks whether the provisions of Article 73b(1) of the Treaty may be relied on before national courts and render national rules contrary to them inoperative.
- 41 Article 73b(1) of the Treaty lays down a clear and unconditional prohibition for which no implementing measure is needed.
- 42 The expression 'within the framework of the provisions set out in this Chapter' in Article 73b relates to the whole chapter in which it appears. The provision must therefore be interpreted in that context.

- 43 Exercise of the right reserved to Member States by Article 73d(1)(b) is amenable to judicial review, and therefore the fact that a Member State is able to rely on it does not prevent Article 73b(1) of the Treaty, which lays down the principle of free movement between the Member States and between Member States and non-member countries, from conferring rights on individuals which they may rely on before the courts and which the national courts must uphold.
- 44 The exception provided for in Article 73c(1) of the Treaty concerning the application to non-member countries of the restrictions existing on 31 December 1993 under national law or Community law regarding the capital movements listed in it to or from non-member countries is precisely worded, with the result that no latitude is granted to the Member States or the Community legislature regarding either the date of applicability of the restrictions or the categories of capital movements which may be subject to restrictions.
- 45 Furthermore, the power to adopt measures granted to the Council by Article 73c(2) of the Treaty relates only to the categories of capital movements to or from non-member countries listed in that provision.
- 46 Nor is the adoption of such measures a prerequisite for implementing the prohibition laid down in Article 73b(1) of the Treaty, since that provision relates to restrictions that do not come within the scope of Article 73c(1) of the Treaty.

47 It follows that that exception cannot preclude Article 73b(1) of the Treaty from conferring on individuals rights which they can rely on before the courts.

48 Consequently, the answer to the second question must be that Article 73b(1), in conjunction with Articles 73c and 73d(1)(b) of the Treaty, may be relied on before national courts and may render inapplicable national rules inconsistent therewith.

Costs

49 The costs incurred by the Spanish, Belgian, French and Portuguese Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Juzgado Central de lo Penal de la Audiencia Nacional by orders of 24 May, 26 May and 1 July 1994, hereby rules:

1. Articles 73b(1) and 73d(1)(b) of the EC Treaty preclude rules which make the export of coins, banknotes or bearer cheques conditional on prior

authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration. Such rules do not fall within the scope of Article 73c(1) of the Treaty.

2. Article 73b(1), in conjunction with Articles 73c and 73d(1)(b) of the Treaty, may be relied on before national courts and may render inapplicable national rules inconsistent therewith.

Rodríguez Iglesias

Kakouris

Hirsch

Mancini

Schockweiler

Kapteyn

Gulmann

Murray

Jann

Ragnemalm

Sevón

Delivered in open court in Luxembourg on 14 December 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President