OPINION OF ADVOCATE GENERAL TESAURO
delivered on 17 November 1994 *

1. In submitting for a preliminary ruling two identical questions which have arisen in the context of similar criminal proceedings pending before it, the Juzgado Central de lo Penal de la Audiencia Nacional (Central Criminal Court, National High Court) of the Kingdom of Spain seeks a ruling from this Court on the interpretation of various Community provisions regarding the free movement of goods, services and capital in order to determine whether a provision of domestic law concerning the export of banknotes is compatible with them.

Article 4(1) of Royal Decree 1816/91 [1] governing economic transactions with other countries requires that, before exporting banknotes whose value is in excess of specified amounts, a declaration must be made or prior administrative authorization obtained. The national court has doubts regarding the compatibility of those obligations with Articles 30 and 59 of the Treaty and Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (hereinafter 'the Directive'). [2]

Facts

2. The facts which gave rise to Case C-358/93 may be summarized as follows.

On 10 November 1992 the defendant, Mr Bordessa, arrived by motor vehicle at the Gerona frontier crossing, travelling towards France. After the usual 'nothing to declare', the Spanish customs officials nevertheless inspected the vehicle, where they discovered — hidden in various ways — banknotes worth a total of nearly PTA 50 million. Further investigations carried out on the spot disclosed that Mr Bordessa was exporting the money on behalf of third parties and for a consideration. Nothing more was ascertained with regard to the destination of the money.

* Original language: Italian.

1 — As amended by Royal Decree 42/93.

2 — OJ 1988 L 178, p. 5: the Directive concerns the implementation of Article 67 before amendments in the matter were made by the Treaty of Maastricht.

In the absence of the relevant administrative authorization required under Spanish law for the export of banknotes of a value in excess of PTA 5 million, the customs officials immediately confiscated the cash and arrested Mr Bordessa.

3. The facts which gave rise to Case C-416/93 are similar.

On 19 November 1992 Marí Mellado and Barbero Maestre, a married couple, travelled by motor vehicle into France, crossing the frontier at Gerona, making no declaration when they did so. On the following day they were stopped on French territory for an inspection by police officers. In the course of their inspection of the motor vehicle, the officers found banknotes worth a total of PTA 38 million. It was later learned that the money belonged to the couple, who had withdrawn it from a branch of a Spanish bank but, as in the case of Mr Bordessa, nothing was ascertained concerning its final destination.

The relevant national and Community legislation

4. As previously mentioned, the relevant Spanish legislation in the present case is Royal Decree 1816 of 20 December 1991 on economic transactions with other countries.

In particular, the original version [3] of Article 4(1) of the Decree provides that 'the export of metal coin, banknotes and bank cheques payable to the bearer, whether made out in pesetas or in foreign currencies, and of gold coin or gold ingots is to be subject to prior declaration when the amount is in excess of PTA 1 million per person and per journey and subject to prior administrative authorization when the amount is in excess of PTA 5 million per person and per journey'.

5. So far as the relevant Community legislation is concerned, it will be sufficient to note here the text of Articles 1 and 4 of the Directive:

'*Article 1*

1. Without prejudice to the following provisions, Member States shall abolish restric-

3 — The text of Article 4 was amended by Royal Decree 42 of 15 January 1993. However, the amendment constitutes — at least in so far as concerns us here — no more than a clarification of the law and in any case, as was expressly recognized by the national court, the alterations made entail no new consequences for the present case.

tions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex 1.

(...)

Article 4

This 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.

Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.'

Member States were required to ensure the transposition of the Directive no later than 1 July 1990 (Article 6(1)). However, in respect of certain capital movements, Spain was allowed an extended period. More specifically, pursuant to Article 6(2) of, in conjunction with Annex IV to, the Directive, Spain was authorized to postpone until 31 December 1992 the liberalization *inter alia* of precisely the form of physical import and export of means of payment which concerns us here.

The Treaty of Maastricht has restructured the entire subject-matter of the movement of capital and payments, replacing — so far as is relevant for our purposes — Articles 67 to 73 of the EEC Treaty with Articles 73b to 73g. However, those articles do not add anything of importance to the requirements already contained in the Directive; rather they restate the essential points and reaffirm in particular the general scope of the prohibition of restrictions on the free movement of capital.

6. The national court, as mentioned above, puts the question whether, to what extent and with what consequences, the requirements laid down by Article 4 of Royal Decree 1816/91 must be considered compatible with Articles 30 and 59 of the Treaty (Questions 1 and 2) and/or with Articles 1 and 4 of Directive 88/361 (Question 3). The fourth question submitted by the national court asks whether Articles 1 and 4 of the Directive have been endowed with direct effect.

The first and second questions

7. In order to answer the questions concerning the compatibility of the domestic legislation at issue with Community provisions on the movement of goods and services, I think I need only make a few brief observations. Since the two questions cover common ground, it seems to me appropriate to consider them together.

First of all, I would remind the Court that it has already had occasion to point out that both the general scheme of the Treaty (as it existed before the Treaty of Maastricht entered into force) and a comparison between Articles 67 and 106 show that the transfer of banknotes may not be classified as a movement of capital 'where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services'. [4]

That plainly means that measures restricting movements of capital are to be regarded as obstacles to the free movement of goods or to the freedom to provide services only when the capital is intended for the purchase of goods or as payment for services.

The orders for reference make it clear, however, that in the case before us it is common ground that the transfers in question are not related to any trade in goods or services. The matter must therefore be examined only in the light of the rules on the free movement of capital contained in the Treaty or in the relevant provisions of secondary law, without there being any need to take Articles 30 and 59 into consideration.

8. One last doubt remains to be dispelled, regarding the possibility that cash may itself be classified as goods, which would make it necessary to appraise any restrictions on the movement of banknotes by reference to Article 30. In that respect, it is sufficient to note that the Court has already had occasion to deal with the point, holding that, in view of their particular nature, means of payment which are legal tender are not to be regarded as goods and therefore do not as such fall within the purview of Articles 30 to 36 of the Treaty. [5]

4 — See the judgment in Joined Cases 286/82 and 26/83 *Luisi and Carboni* [1984] ECR 377, paras 21 and 22.

5 — See the judgment in Case 7/78 *Regina* v *Thompson* [1978] ECR 2247, para. 25 (but see the earlier judgment in Case 7/68 *Commission* v *Italy* [1968] ECR 423).

The third question

9. Thus we come to the central problem in this case, which is that posed by the third question submitted for a preliminary ruling.

I would first of all point out that the facts which gave rise to the proceedings before this Court took place before 31 December 1992 and therefore before the end of the (extended) period prescribed for the transposition of the Directive in Spain. It might accordingly seem unnecessary to provide the national court with an interpretation of provisions whose application, in relation to the State in question, was not obligatory at the time when the matters complained of occurred.

10. Nevertheless, in view of the fact that the national court mentioned in its orders for reference the principle of the retroactive effect of a subsequent criminal statute which is more favourable to the defendant, it is appropriate to proceed with an examination of the provisions of the Directive.

In that connection, however, it should be noted that the most recent Community legislation on this subject, which entered into force after the orders for reference now before the Court, consists — so far as the matters here in point are concerned — of Articles 73b and 73d of the Treaty, as amended at Maastricht. Accordingly, should those articles lay down a different regime from that of the Directive, it would be appropriate to provide an interpretation of them for the national court. This situation will therefore be taken into account in the course of the following analysis.

In any case, it will clearly be for the national court — guided also by the general principles of its own legal system — to establish the consequences which the interpretation of Community law will have for the present case, especially with regard to the subsequent decriminalization of the offence with which the defendant is charged.

11. That said, let me begin by reminding the Court that, in laying down the time-limits for the liberalization of movements of capital — which did not automatically come about at the end of the transitional period — and in carrying further the process set in motion by the first two Council directives on the matter, [6] the directive in question in the present case placed Member States under a general obligation to abolish restrictions on movements of capital taking place between persons resident within the territory of the common market (Article 1).

6 — See the Council Directive of 11 May 1960, First Directive for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1960, p. 49), and Council Directive 63/21/EEC of 18 December 1962, Second Council Directive adding to and amending the First Directive for the implementation of Article 67 of the Treaty (OJ, English Special Edition 1963, p. 5).

Nevertheless the Directive reserved to the Member States the right to adopt (or maintain) all requisite measures to prevent infringements of their laws and regulations (the first part of the first paragraph of Article 4) and expressly authorized them to lay down procedures for the declaration of capital movements 'for purposes of administrative or statistical information' (the second part of the first paragraph of Article 4). Lastly, the Directive states that the application of those measures or procedures may not, however, have the effect of impeding capital movements carried out in accordance with Community law (the second paragraph of Article 4).

12. Plainly, the principle of free movement of capital is to be coupled with a supervisory power of the Member States for the purpose of attaining specific objectives: the monitoring of tax-related matters, prudential supervision of financial institutions and compilation of administrative or statistical information, as well as, generally speaking, compliance with national laws and regulations.

The legitimacy of national measures for the supervision of capital transfers has not only been expressly confirmed as early as the first Council directive on the subject, [7] but has also been repeatedly confirmed through the interpretation which the Court has given to that directive. [8] It is of course true that the Court's rulings were given in a legal context which existed before the adoption of the Directive now under consideration and which is therefore now obsolete. However, a different interpretation of Article 4 of the Directive would be incompatible with the system as a whole and, what is more, in view also of the fact that the wording of the corresponding provision in the earlier directive is similar in all respects, unjustified.

Furthermore it would be odd if, unlike the other three freedoms guaranteed by the Treaty, the free movement of capital enjoyed total immunity from supervision, to the extent that Member States were deprived of the right to adopt measures designed to attain objectives which — provided that those measures are proportionate to the aim pursued by the Directive — the Directive itself recognizes as being worthy of protection.

13. Furthermore, the real intention disclosed by the general reference to compliance with laws and regulations is to include among the objectives which may legitimately be pursued one which in other sectors and as a general rule is covered — by means of variously framed provisions — by requirements pertaining to the protection of public policy. Once again, it would be odd if the rules relating to the free movement of capital were

7 — Article 5(1) of the Council Directive of 11 May 1960, cited above, provided that: 'the provisions of this Directive shall not restrict the right of Member States to verify the nature and genuineness of transactions or transfers (...)'.

8 — See the judgment in *Luisi and Carbone*, cited above, para. 31; see also the judgment in Case 157/85 *Brugnoni and Ruffinengo* [1986] ECR 2013, para. 23.

not in harmony with those governing the common market as a whole.

On that point, it should further be noted that the Court has affirmed the legitimacy of restrictions on the movement of capital when they result indirectly from restrictions on other fundamental freedoms. [9] That provides further confirmation that, in so far as movements of capital may be subject to limitations by reason of (legitimate) restrictions on the freedom with which they are associated, it must *a fortiori* be possible for them to be subject to restrictions justified on grounds of public policy.

14. With regard to Articles 73b and 73d of the Treaty, as amended at Maastricht, it should be noted that the wording of those articles corresponds almost literally to that of Article 1 and the first paragraph of Article 4 of the Directive, save for the fact that Article 73d(1)(b) expressly lists among the measures which Member States have the right to adopt those 'which are justified on grounds of public policy or public security'.

However, that fact is not such as to alter the terms of the problem. Quite the contrary. Far from introducing a new exception to the principle of the free movement of capital, Article 73d does nothing other than confirm the interpretation of the law as it previously stood, which could already be deduced from the Directive and in particular from the first paragraph of Article 4. In those circumstances, it would therefore seem to be going too far to envisage applying the relevant provisions of the Treaty of Maastricht to the present case.

15. Having regard to the foregoing considerations, the compatibility with Article 4 of the Directive of a requirement to make a declaration or obtain authorization in respect of the export of banknotes should therefore be appraised by reference to the proportionality test, which is familiar in the context of barriers to trade in general. It will therefore be necessary, in accordance with the principles of what is by now settled case-law, [10] to establish whether the measures imposed by the legislation at issue are in fact necessary in order to attain the objectives pursued, or whether those objectives might just as effectively be attained by measures less restrictive of intra-Community trade.

16. The declaration undoubtedly satisfies the proportionality test. Administrative declarations, such as that required under Spanish law in respect of the export of capital of a

9 — See judgment in Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, para. 34.

10 — See *inter alia* the judgment in Case 104/75 *De Peijper* [1976] ECR 613, paras 16 to 18 and, more recently, in Case C-169/91 *B&Q* [1992] ECR I-6635, para. 15.

value greater than PTA 1 million, are not only expressly contemplated in Article 4 of the Directive, but are also perfectly adapted to the supervisory objective pursued in that provision. Although obligatory and to be made in advance, such a declaration does not entail the suspension of the operation to which it refers, which may be carried out independently of the approval of the competent national authority. However, if the need arises, that authority will always be able to set in motion the necessary investigations whenever suspicions arise regarding the origin or the destination of the capital, or regarding the possible infringement of any other law (criminal, fiscal or other) which is considered to be applicable.

17. On the other hand, serious doubts arise with respect to the legitimacy of the obligation to seek prior authorization from the competent authority in order to export sums in excess of PTA 5 million.

In the first place, the first paragraph of Article 4 — which, as we have seen, expressly makes provision for the requirement of a declaration — does not mention the possibility of authorization. Compared to the declaration, the latter undeniably constitutes a more radical step, since its effects on trade are certainly more restrictive. Authorization entails suspending currency exports and makes them contingent in each case upon the consent of the administrative authorities, which must be sought by means of the appropriate application. That does not merely constitute an obstacle, but ultimately contradicts the very idea of the free movement of capital.

18. As early as its judgment in *Luisi and Carbone*, the Court, ruling on the limits placed by Community law on the power which the Member States are expressly acknowledged as having to verify the nature and genuineness of liberalized capital movements, confirmed that controls introduced for that purpose could be considered legitimate only if they were carried out in such a manner as not to subject the capital transfer to 'the discretion of the administrative authorities'. [11]

Furthermore, on several occasions the Court has made findings to the same effect with regard also to other fundamental freedoms guaranteed by the Treaty, affirming in particular that a Member State 'must ... not adopt administrative or judicial measures which would have the effect of limiting the full exercise of the rights which Community law guarantees to the nationals of other Member States'. [12] It follows that any such controls are legitimate only in so far as they do not constitute a condition for the exercise of rights conferred by Community law. [13] This is precisely what is expressly provided in the last paragraph of Article 4 of the Directive.

11 — Judgment in *Luisi and Carbone*, cited above, para. 34.

12 — Judgment in Case 8/77 *Sagulo* [1977] ECR 1495, para. 5. On the same point see the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, para. 54, and in Case C-68/89 *Commission* v *Netherlands* [1991] ECR I-2637, paras 11 to 13.

13 — On that point see the judgment in Case 321/87 *Commission* v *Belgium* [1989] ECR 997, in particular paragraph 15.

19. In the matter of the free movement of goods the Court has also often had occasion to rule on the requirement to obtain authorization (even where this would be granted promptly and automatically). Such a requirement is nevertheless regarded as not permissible, in particular because 'a system requiring the issue of an administrative authorization necessarily involves the exercise of a certain degree of discretion and creates legal uncertainty for traders'. The Court went on to add that the objective pursued could be attained if the authorities had confined themselves 'to obtaining the information which is of use to them, for example, by means of declarations signed by the importers, accompanied if necessary by the appropriate certificates'. [14]

That means, and it is worth repeating, that as a matter of principle a measure imposing controls may not have the effect of precluding or even suspending the exercise of a fundamental freedom guaranteed by Community law, by making such exercise contingent upon the consent of the administrative authorities: the degree of discretion involved in giving the consent is of no consequence.

20. The justifications put forward by the Spanish Government to support its claim that the requirement of prior authorization is legitimate must, therefore, be examined also in the light of that case-law.

14 — Judgment in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, para. 18.

The Spanish Government maintains that, where transfers of vast sums of money are concerned, a requirement to obtain prior authorization is justified for reasons relating to the fight against crimes often associated with such transfers, such as money laundering, drug trafficking, tax evasion and terrorism — that is to say, therefore, on grounds of public policy. The Spanish Government further considers that the measure in question is proportionate, since it is necessary for the attainment of the objective pursued, having regard to the general scope and the importance of that objective.

21. I take the view 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.

22. Consequently it is impossible, in my opinion, to share the view of the Spanish Government, according to which a simple obligation to make a declaration would con-

stitute in practice an ineffective form of protection, since an obligation of that nature is principally directed at potential criminals, who are the very persons most likely to ignore it. Even if, for argument's sake, I were willing to accept that premiss, I do not see why such persons should be more disposed to comply with a requirement to complete a request for authorization than with the requirement to fill out a declaration, especially as such a request would automatically entail prior investigations to which those individuals might understandably be even more reluctant to expose themselves.

23. Nor, in that respect, do I attach much importance to the fact that under the Spanish system failure to comply with the requirement to make a declaration leads to a simple administrative sanction whereas breach of the obligation to obtain an authorization, inasmuch as it constitutes a criminal offence, attracts a criminal penalty. The objective to which Article 4 of the Directive refers, namely to enable the administrative authorities to verify the 'genuineness' of the transaction in question (and to take further steps where there are suspicions), remains adequately assured even by means of a simple declaration, the request for prior authorization offering no further advantage. Secondly, the deterrent effect of a criminal penalty could usefully be linked to the breach of the obligation to make a declaration, a possibility which has not been shown to be impracticable.

24. Lastly, it may just be worth mentioning that Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering ('the anti-laundering directive'), [15] which however concerns only transactions which take place with the assistance of financial agencies and is therefore irrelevant to the case now before the Court, pursues objectives similar to those which we have been considering: to prevent infringements of the laws of Member States without thereby preventing or, in any event, hindering legitimate transactions. On the contrary, it is quite clear that the premiss underlying the anti-laundering directive is the complete freedom of capital transfers. However, that directive confines itself to requiring that, when conducting transactions exceeding certain thresholds, credit and financial institutions obtain proper identification of their customers. The suspension of capital transfers is authorized (or indeed required) only in so far as the institutions concerned know or suspect that those transactions relate to money laundering.

25. In short, there are only two possibilities: either the transfer of cash is legitimate and unconnected with criminal offences of any kind, or the transfer of cash is the instrument for committing or represents the proceeds of a criminal offence. In both cases the administrative authorities will be able to undertake an investigation to ascertain the existence of possible criminal offences, and only need to have been adequately informed beforehand

15 — OJ 1991 L 166, p. 77.

with regard to the terms of the transfer and the manner in which it is made, and also the particulars of the person making it. For that purpose a declaration seems more than sufficient and accords perfectly with the *ratio* of the Directive, without there being any need to require suspension of the transaction by means of the ritual of the request for prior authorization and consent given by the administrative authorities in the exercise of their discretion.

26. Nor is anything to be gained by objecting that capital transfers are permitted without any restriction when they are carried out through a bank. In the first place, it is common knowledge that in those circumstances the transfer is subject to the bank's commission which may make the transaction more costly and possibly lead to its rejection as an option. Secondly, of decisive importance is the fact that the Directive makes no distinction between transfers of means of payment according to the mode of transfer. As has been emphasized on several occasions, the principle of liberalization is laid down in general terms. This means that all cases of restriction must be expressly provided for in advance. In the Community legal system, the days when everything not expressly permitted was forbidden are gone. Nowadays it is the very opposite principle that prevails.

In short, I believe that a system of compulsory authorization applied generally to the transfer of banknotes constitutes an impermissible restriction on the free movement of capital. A restriction of that nature is not absolutely necessary for the attainment of the objectives of the Directive, which may also be pursued by means of other measures, equally effective, which hinder to a lesser degree the movement of capital within the common market.

Direct effect

27. The last doubt raised by the national court forms a corollary to the question which has just been discussed and concerns the direct effect of the provisions examined above.

As is known, the provisions of a directive have direct effect and may therefore be relied upon by individuals before the national courts if, so far as their substance is concerned, they are sufficiently precise and unconditional. [16] The next prerequisite is that the directive has not been transposed (or correctly transposed) within the period prescribed.

It is quite clear that the obligation under which the Member States are placed by Arti-

16 — Among the numerous judgments, see those in Case 8/81 *Becker* [1982] ECR 53 and in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

cle 1 of the Directive — to abolish, by the end of the period prescribed for implementation, restrictions on movements of capital taking place between persons resident in those States — is clear, precise and independent of measures to be taken subsequently by the Member States. The unconditional nature of Article 1 is not diminished by virtue of Article 4 since the latter does not permit Member States arbitrarily to limit the scope of the principle expressed in general terms in Article 1. Article 4 in fact sets out the — specific and delimited — circumstances in which Member States may adopt the measures provided for, measures which nevertheless must not be such as to prevent or impede unjustifiably capital movements that are in conformity with Community law.

Thus the provisions under consideration satisfy the requirements to be met for individuals to be able to rely on them before the national courts: that is to say, they have direct effect.

28. Furthermore, the conclusion just put forward is entirely in line with, and even carries a stage further, the Court's decision in *Casati*. [17] It is true that in that judgment the Court denied that Article 67 of the EEC Treaty had direct effect and stated that, by contrast with the other three fundamental freedoms, the free movement of capital could not be regarded as automatically operative even after the expiry of the transitional period. It is equally true, however, that in the same judgment the Court accepted that the liberalization which had already been effected in relation to certain capital movements by the first two Council directives implementing Article 67 had to be regarded as 'unconditional'. [18]

That confirms, should confirmation be needed, that the provisions of the directive now under consideration, which completed the implementation of Article 67 of the Treaty by liberalizing those forms of capital movement which had remained outside the scope of the abovementioned directives adopted in the early 1960s, have the same direct effect as the provisions of those directives.

To summarize, as from the date of expiry of the period prescribed for transposition (a date which, I repeat, was put back for some States, including Spain), Articles 1 and 4 of the Directive may be relied upon by individuals concerned for the purpose of contesting the application of any provision of domestic law which conflicts with those articles.

17 — See the judgment in Case 203/80 *Casati* [1981] ECR 2595.

18 — See judgment in *Casati*, cited above, para. 11.

29. I therefore propose that the Court give the following answers to the questions submitted to it by the Juzgado Central for a preliminary ruling:

(1) Articles 30 and 59 of the Treaty are not applicable to capital movements unconnected with trade in goods or services.

(2) Articles 1 and 4 of Directive 88/361/EEC are to be construed as not precluding the application of rules of a Member State which make the export of banknotes subject to the lodging of a prior administrative declaration but as precluding the application of national rules which make the export of banknotes subject to prior administrative authorization.

(3) On a proper construction of Articles 1 and 4 of Directive 88/361/EEC the provisions contained therein are sufficiently precise and unconditional to be invoked before national courts by individuals as against the administrative authorities in support of a plea that a national law which conflicts with those provisions is inapplicable.