JUDGMENT OF THE COURT

14 March 2000 *

In Case C-54/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Conseil d'État, France, for a preliminary ruling in the proceedings pending before that court between

Association Église de Scientologie de Paris,

Scientology International Reserves Trust

and

The Prime Minister

on the interpretation of Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC),

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann (Rapporteur), J.-P. Puissochet, G. Hirsch, H. Ragnemalm, M. Wathelet and V. Skouris, Judges,

Advocate General: A. Saggio,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Association Église de Scientologie de Paris and Scientology International Reserves Trust, by E. Piwnica and J. Molinié, *Avocats* having right of audience before the Conseil d'État and the Cour de Cassation,

— the French Government, by R. Abraham, Director of Legal Affairs in the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in the Legal Affairs Directorate of that Ministry, acting as Agents,

— the Commission of the European Communities, by M. Patakia, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, represented by R. Abraham and S. Seam; the Greek Government, represented by F. Spathopou-

los, Head of the Legal Service in the Ministry of Economic Affairs, acting as Agent; and the Commission, represented by M. Patakia, at the hearing on 7 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 21 October 1999,

gives the following

Judgment

1 By decision of 6 January 1999, received at the Court on 16 February 1999, the French Conseil d'État (Council of State) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question concerning the interpretation of Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC).

2 This question has arisen in proceedings between, on the one hand, Association Église de Scientologie de Paris, an association constituted under French law, and Scientology International Reserves Trust, a trust established in the United Kingdom, and, on the other, the Prime Minister of France, concerning the latter's implied decision rejecting the applicants' request for repeal of the provisions governing the system of prior authorisation laid down by French law for certain categories of direct foreign investments.

The relevant Community law

3 Article 73b(1) of the EC Treaty (now Article 56(1) EC) provides:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

4 Article 73d of the Treaty provides as follows:

'1. The provisions of Article 73b shall be without prejudice to the right of Member States:

(a) ...

(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.

2. ...

3. The measures and procedures referred to in paragraphs 1 and 2 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.'

The French legislation

5 Article 1 of Law No 66-1008 of 28 December 1966 on financial relations with foreign countries ('Law No 66-1008') provides:

'Financial relations between France and other countries shall be free. This freedom shall be exercised in accordance with the arrangements set out in this Law and in compliance with international commitments entered into by France.'

6 Article 3(1)(c) of Law No 66-1008 provides:

'The Government may, with a view to ensuring the defence of national interests and by decree adopted following a report by the Minister for Economic and Financial Affairs:

1. make the following subject to declaration, prior authorisation or control:

...

(c) the making and realisation of foreign investments in France;

...'.

7 Article 5-1(I)(1) of Law No 66-1008, introduced by Law No 96-109 of 14 February 1996 on financial relations with foreign countries in regard to foreign investments in France, provides:

'If he should establish that a foreign investment is being or has been made in activities which are connected, even on an occasional basis, with the exercise of public authority in France, or that a foreign investment is such as to represent a threat to public policy, public health or public security, or if that investment has been made in activities involving research into, production of or trade in arms, munitions, explosive powders or substances intended for military purposes, or materials designed for warfare, the Minister responsible for the economy may, in the absence of a request for prior authorisation required under Article 3(1)(c) of the present Law or despite a refusal of authorisation, or where the conditions attached to authorisation have not been satisfied, order the investor to discontinue the transaction, or modify or restore, at his own expense, the situation previously obtaining.

Such an order may be issued only after the investor has been given formal notice to submit his comments within 15 days.'

8 Article 11 of Decree No 89-938 of 29 December 1989, adopted for the purpose of applying Article 3 of Law No 66-1008, as amended by Decree No 96-117 of 14 February 1996 ('Decree No 89-938'), provides:

'Direct foreign investments made in France shall be free. When they are being made, these investments shall be the subject of an administrative declaration.'

9 Under Article 11a of Decree No 89-938:

'The system defined in Article 11 shall not apply to the investments covered by Article 5-1(I)(1) of Law No 66-1008 of 28 December 1966 governing financial relations with foreign countries, as amended by, *inter alia*, Law No 96-109 of 14 February 1996.'

10 Article 12 of Decree No 89-938 adds:

'Direct foreign investments made in France which are covered by Article 11a shall be subject to prior authorisation by the Minister responsible for the economy. That authorisation shall be deemed to have been obtained one month after receipt of the investment declaration submitted to the Minister responsible for the economy, unless the latter has, within that same period, declared that the transaction in question is to be deferred. The Minister responsible for the economy may waive the right of deferment before the period laid down in the present article has expired.'

11 Article 13 of Decree No 89-938 states that certain direct investments are exempt from the administrative declaration and prior authorisation provided for under Articles 11 and 12; these include the establishment of companies, subsidiaries or new undertakings, direct investments between companies all belonging to the same group, direct investments made, up to a maximum limit of FRF 10 million, in craft-based undertakings, undertakings engaged in retail and hotel trades, and purchases of agricultural land.

The dispute in the main proceedings and the question submitted for a preliminary ruling

12 On 1 February 1996 the applicants in the main proceedings requested the Prime Minister of France to repeal certain legislative provisions laying down a system of prior authorisation for direct foreign investments. Having subsequently found that legislative amendments made on 14 February 1996 maintained in force a prior authorisation system, they concluded that this constituted a decision by the Prime Minister equivalent to a refusal of their request and challenged that decision before the Conseil d'État as being *ultra vires*. In support of their action, they submitted that there had been a failure to comply with the rules of Community law governing the free movement of capital.

13 Taking the view that it was unclear how Article 73d of the Treaty was to be construed, the Conseil d'État decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the provisions of Article 73d of the Treaty of 25 March 1957 establishing the European Community, as amended, 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 investments which are such as to represent a threat to public policy, public health or public security, such authorisation being 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 is to be deferred?'

14 A provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the movement of capital within the meaning of Article 73b(1) of the Treaty (see, to this effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 24 and 25).

15 Such a provision remains a restriction even if, as in the present case, authorisation is deemed to have been obtained one month after receipt of the request where the competent authority does not declare a deferment of the transaction in question within the same period. Similarly, it is irrelevant that, as the French Government asserts in this case, failure to comply with the obligation to request prior authorisation attracts no penalty.

16 The question which arises is therefore whether Article 73d(1)(b) of the Treaty, which provides that Article 73b thereof is without prejudice to the right of Member States to take any measures which are justified on grounds of public policy or public security, permits national legislation, such as that at issue in the main proceedings, which merely requires prior authorisation for direct foreign investments which are such as to represent a threat to public policy or public security.

17 It should be observed, first, that while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to this effect, Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraphs 26 and 27). Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, to this effect, *Rutili*, cited above, paragraph 28, and Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 21). Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends (to this effect, see *Rutili*, paragraph 30). Further, any person affected by a restrictive measure based on such a derogation must have access to legal redress (see, to this effect, Case 222/86 *Unectef* v *Heylens and Others* [1987] ECR 4097, paragraphs 14 and 15).

18 Second, measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, to this effect, *Sanz de Lera and Others*, cited above, paragraph 23).

19 However, although the Court has held, in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361 and in *Sanz de Lera and Others*, which concerned the exportation of currency, that systems of prior authorisation were not, in the circumstances particular to those cases, necessary in order to enable the national authorities to carry out checks designed to prevent infringements of their laws and regulations and that such systems consequently constituted restrictions contrary to Article 73b of the Treaty, it has not held that a system of prior authorisation can never be justified, particularly where such authorisation is in fact necessary for the protection of public policy or public security (see judgment of 1 June 1999 in Case C-302/97 *Konle* v *Austria* [1999] ECR I-3099, paragraphs 45 and 46).

20 In the case of direct foreign investments, the difficulty in identifying and blocking capital once it has entered a Member State may make it necessary to prevent, at the outset, transactions which would adversely affect public policy or public security. It follows that, in the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, a system of prior declaration may prove to be inadequate to counter such a threat.

21 In the present case, however, the essence of the system in question is that prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy [and] public security', without any more

detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required.

22 Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty. That being so, the system established is contrary to the principle of legal certainty.

23 The answer to the question submitted must therefore be that Article 73d(1)(b) of the Treaty must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.

Costs

24 The costs incurred by the French and Greek Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 question referred to it by the Conseil d'État by decision of 6 January 1999, hereby rules:

Article 73d(1)(b) of the EC Treaty (now Article 58(1)(b) EC) must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.

Rodríguez Iglesias		Moitinho de Almeida
Edward	Schintgen	Kapteyn
Gulmann	Puissochet	Hirsch
Ragnemalm	Wathelet	Skouris

Delivered in open court in Luxembourg on 14 March 2000.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President