OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 4 JULY 1978 [1]

Mr President,
Members of the Court,

I — Thanks to the very comprehensive report for the hearing presented by the Judge-Rapporteur Your Lordships undoubtedly have in mind the facts giving rise to this reference for a preliminary ruling by the Court of Appeal (Criminal Division) and also the wording of the questions referred to Your Lordships by that court.

The three appellants in the main action were charged before the Crown Court at Canterbury with having been concerned with the illegal importation of 3 400 Krugerrands into the United Kingdom. Two of them, who had between 7 August 1974 and 26 May 1975 exported 40.39 tonnes of coins of silver alloy minted in the United Kingdom, are charged with conspiracy to evade the prohibition, in force at that time, on the exportation of such coins.

One of the appellants pleaded guilty before the court of first instance, but, subsequently, all three pleaded that there was no case for them to answer owing to the fact that the prohibitions relating to the importation and exportation of the said coins were in conflict with the provisions of the Treaty of Rome. That court rejected this submission without having recourse to the procedure under Article 177.

Subsequently the appellants, while pleading guilty, appealed and the court of second instance decided to ask Your Lordships for a preliminary ruling.

The subject-matter of the offences is gold and silver coins.

A — The gold coins are Krugerrands. They are still, at the present time, minted in the ordinary course by the Chamber of Mines, Johannesburg, which disposes of part of the gold produced in the Republic of South Africa in this form; they are a not inconsiderable export from that country. These coins are disposed of particularly in the Federal Republic of Germany by International Gold Corporation (Inter-Gold) of Stuttgart.

The legal status of Krugerrands is as follows: In the country where these coins are issued they are in principle legal tender. In general a coin is only such an instrument in the country in which it has been issued. However it may happen that it is legal tender elsewhere (this is so in the case of the Belgian franc in the Grand Duchy of Luxembourg). Nevertheless it would be advisable to take things as we find them: in order to obtain Krugerrands in South Africa, in quantities which are moreover limited, private individuals must register a long time in advance and pay the consideration in hard currencies and they obviously do not use the Krugerrands obtained in this way to pay for their current purchases. Therefore these coins are not in fact used "in the ordinary course" as legal tender.

The legal status of Krugerrands within the European Economic Community seems to me to be far from clear. In some Member States they can be freely bought and sold in unlimited quantities subject to payment of value-added tax (VAT) if it is due; when the events in this case happened the basis of the assessment and the rate of the VAT affecting these coins had not been standardized. I will return later to this point.

Transactions in Krugerrands, at least when large quantities are involved, are in

[1] — Translated from the French.

general carried out at banks which then in fact perform the function of commodity exchanges similar to those which exist for raw materials such as cereals, sugar, coffee, etc.

These transactions may take the form either of obtaining a certificate of ownership of a certain number of these coins which remain deposited in the vaults of the bank or of a purchase accompanied by actual delivery of the coins. But in either case the transaction is fundamentally the same.

B — *As far as concerns the silver coins at issue* they consist of English coins of sixpence, one shilling, one florin (two shillings) and half a crown (two shillings and sixpence). None of these coins has been minted since 1947 but they may still be used as legal instruments of payment in the United Kingdom up to a specific amount, with the exception since 31 December 1969 of half-crowns, although the latter are still readily accepted by the Bank of England. All these coins are actively sought after because with inflation the value of the pure metal which they contain exceeds their nominal value. In this case a total of 40.39 tonnes is involved and the "profit netted" would amount to nearly one million pounds sterling.

On reading the judgment of the court of first instance and the judgment of the Court of Appeal it appears that the appellants were simply couriers working for the AGOSI (Allgemeine Gold- und Silberscheideanstalt) firm of Pforzheim in the Federal Republic of Germany and perhaps for certain English firms of bullion brokers, in particular Ayrton Metals of London.

AGOSI's field of activity covers the purchase and sale of precious metals, the refining of these metals and the production of their alloys for all kinds of uses. Forty per cent of its capital is owned by the celebrated Degussa, formerly Roessler, of Frankfurt which, for its part, operates both in the fields of precious metal and also of chemical products. Moreover it is a special feature of this firm that it is an authorized banking business and carries out exchange operations. It is one of the few undertakings whose gold and silver ingots are accepted on all markets of the world and on the bullion markets of London, New York and Chicago.

It is AGOSI which delivered the gold coins in question to the appellants and it appears that the accused endeavoured to dispose of them, or were going to dispose of them, to Ayrton Metals which no doubt would itself in turn try to sell them to customers resident in the United Kingdom.

The silver coins were intended to be melted down by AGOSI in order to extract the pure metal from them. The appellants sold them to it at the prevailing market price of their silver content.

The appellants state that in order to pay this price AGOSI used four different means of payment:

- by cheque in pounds sterling drawn on the company's account in London,
- in cash in German marks,
- by transfer to the bank account in London of one of the appellants,
- partly by using one of the above-mentioned means and partly by the delivery of Krugerrands to one of the appellants (1 900 units).

The delivery price of the Krugerrands was fixed on the basis of the market price at which these coins were freely circulating legally in the Federal Republic of Germany.

AGOSI claims that, as far as it was concerned, it is still the owner of the remaining 1 500 Krugerrands, since the cheques handed over by the appellants in payment have not apparently been honoured.

The Court of Appeal only gave the grounds of its decision with reference to the first question referred to Your Lordships. As far as concerns the question relating to the possible application of Article 36 and the scope of the provisions in Chapter 4 of Title III of Part two of the Treaty of Rome, that is to say, to the free movement of capital, it is advisable to refer to the decision of the court of first instance.

II — The answer to the first question *determines the outcome of the dispute.* By this question the Court of Appeal requests you to classify the coins in question, Krugerrands and English silver coins, under Community law: in short it would like to know whether they are *goods* or *capital.* If under Community law they are goods they fall within the provisions of Chapter 2 of Title I of Part two relating to the elimination of quantitative restrictions between Member States and measures having equivalent effect, which hinder the free movement of goods, both on imports (Article 30) and also on exports (Article 34), unless the provisions of Article 36 of the Treaty are applicable to them.

If on the other hand they are capital within the meaning of Community law then the transfers of which the coins are the subject-matter fall within Chapter 4 of Title III (that is to say within Articles 67 to 73 of the Treaty) and the English Court of Appeal would like to know what was the effective scope of these provisions when the events which gave rise to the prosecution occurred.

I do not think that it is possible for the Court to answer this question in the direct form in which it has been referred. Nevertheless I will approach the problem squarely for reasons of clarity.

The following considerations may be put forward in support of the designation "goods".

In the first place, from the point of view of the domestic law of the United Kingdom, one argument can be based on the actual wording of the provisions relating both to importation and exportation which the appellants are charged with having infringed.

The aim of the Import, Export and Customs Powers (Defence) Act 1939, passed in the political situation prevailing at that time, was "to control the importation, exportation and carriage coastwise of *goods* and the shipment of *goods* as ship's stores, to facilitate the enforcement of the law relating to the matters aforesaid and the law relating to trading with the enemy ...".

This Act is still in force *vis-à-vis* non-Member States but it must be regarded as having been repealed or at least amended by the European Communities Act 1972 on the accession of the United Kingdom in so far as it contravenes the provisions of the Treaty of Rome.

Statutory Instrument No 23 of 1954 entitled "The Import of Goods (Control) Order 1954" which provides "Subject to the provisions of this order, all goods are prohibited to be imported into the United Kingdom" was made on the basis of the 1939 Act.

Naturally the legislature did not stop there, because such a general provision would have meant the strangulation of a country such as the United Kingdom. That is why Article 2 immediately goes on to say: "Nothing in Article 1 hereof shall be taken to prohibit the importation of any *goods* under the authority of any licence granted by the Board of Trade under this article and in accordance with any condition thereto".

Thus the Minister was empowered to authorize some importations *specifically* and others generally.

After the entry into force on 1 January 1973 of the Act of Accession and pursuant to the general principle of the free movement of goods laid down by the Treaty of Rome, the Secretary of State for Trade and Industry granted a

general licence for imports (an Open General Import Licence) on 5 July 1973 to take effect on 16 July following. Pursuant to this licence the importation of all "gold articles", or what I will call "gold goods", was authorized. But on 15 April 1975 the same Department adopted a measure (Amendment No 10) prohibiting as from 16 April following, except with a *specific* licence, the importation of gold medals, gold medallions, gold tablets and other gold pieces in pictorial relief or bearing inscriptions as well as *gold coins.*

It has therefore been established, as moreover the judge of the court of first instance points out, that under the system introduced on 5 July 1973 the importation into the United Kingdom of Krugerrands, which are *goods* within the meaning of the 1939 Act, *was not subject to any restriction* and that, since 16 April 1975, importation of these coins has been subject to a system of specific licences as importation of *goods,* any importation of these coins in contravention of the said provisions falling within section 304 (b) of the Customs and Excise Act, 1969.

As far as exportation is concerned a similar trend may be noted.

Pursuant to the Export of Goods (Control) Order 1970 the exportation of certain goods is prohibited except under the authority of a general or specific licence.

On 20 December 1972 on the eve of accession the Secretary of State *granted a general authorization* for the export of many categories of *goods* (Open General Licence of 20 December 1972) including coins, apparently in order to bring the laws of the United Kingdom into line with the provisions of Article 34 of the Treaty. This licence was confirmed on 25 June 1973.

However pursuant to two measures adopted on 5 July 1975 and 20 December 1975 the export of more than ten silver coins of the kind at issue (United Kingdom coins in circulation before 1947) was prohibited except *with a specific authorization.*

It has therefore also been established that after the accession of the United Kingdom the exportation of the silver coins at issue in this case had for some time been licensed under the 1939 Act relating to *goods;* it was perhaps by taking advantage of these rules that the appellants were able to export between 7 August 1974 and 26 May 1975 more than 40 tonnes of silver coins without attracting the attention of the customs.

Consequently, if the designation *goods,* used at the time in the laws of the United Kingdom, is taken, any quantitative restriction on imports and exports of the coins in question between the Community as originally constituted and the United Kingdom, and similarly between the new Member States, was abolished on accession. Measures having an effect equivalent to such restrictions had to be abolished by 1 January 1975 at the latest pursuant to Article 42 of the Act of Accession.

From the point of view of Community law the Common Customs Tariff drawn up in accordance with the nomenclature for the classification of *goods* (Brussels Convention of 15 December 1950) provides that coins which are not of the nature of collector's pieces (heading number 72.01), like moreover the latter pieces (heading number 99.05) and signed and numbered bank notes (heading number 49.07), are free of import duty. This exemption from duty enjoyed by coins may be explained by the wish of each State not to be deprived of receipts from gold and silver.

III — *If* the coins in question are in fact goods the second question referred by the national court is whether certain of the provisions of Article 36 afford justification for the restrictions in this case. Although for reasons which I will give later the answer to this question does not

appear to be necessary for the determination of the appeal, I submit the following observations on this aspect of the matter:

A distinction must be drawn between the import of Krugerrands and the export of silver coins.

(1) As far as concerns the import of gold coins, and still assuming that they may be classified as goods, I think that contrary to the view of the court of first instance, but in keeping apparently with the prosecution in the court of first instance and in any case with the Commission and the case-law of the Court (in particular the judgment of 19 December 1961 in Case 7/61 *Commission of the European Economic Community* v *Government of the Italian Republic* [1961] ECR 317) the "grounds of public policy" in question in Article 36 cannot be effectively invoked.

In fact the concept of public policy used in Article 36 cannot cover any and every decision taken for economic reasons, or at least it only refers to considerations which, while they are all-important for each Member State, they are not, or are only to a lesser extent, of a strictly economic nature. In the Treaty establishing the European *Economic* Community the reference to public policy in Article 36 is irrelevant if the measures to be taken for the preservation of order, for reasons of urgency or of *economic* expediency are dealt with in other provisions of the Treaty and if specific provisions, derogating from the general rules of the Treaty in the interests of the Member States or of the Community as a whole, have been prescribed for this purpose. I am thinking particularly of the provisions of Articles 70 (2) and 73 and also of those in Chapter 2, "Balance of payment" of Title II, "Economic policy" of Part three (Article 104 to 109).

In other words the public policy mentioned in Article 36 does not refer to *monetary* public policy. On the other hand I would like to refrain from giving this concept of public policy a *moral* tinge and assimilating it to the concept of "public morality" to which the national court does not seen to have referred. Assuming that putting surplus income into safe securities, such as monetary gold, cannot be justified by bad management of the money market by the States themselves, and even if the concept of "public policy" has a certain moral tinge, I think that the concern to prevent hoarding or speculation falls within the scope of *monetary* public policy, which is dealt with in the specific provisions to which I have just drawn attention, in particular in Article 104, which provides that "Each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices". Hoarding is closely connected with currency stability, inflation and devaluation (Henri Guitton, La Monnaie, 1970, p. 276) and "monetary" gold forms part of the balance of payments (C. Maestripieri, Cours sur "La libre circulation des capitaux dans la CEE", 1973-1975, p. 18).

As the judge of the court of first instance acknowledges recourse to public policy within the meaning of Article 36 it cannot therefore *"prima facie"* justify the restrictions imposed on the importation of Krugerrands.

(2) The problem, as far as Article 36 is concerned, of the exportation of silver coins of the kind at issue is more difficult. In so far as these coins have been "withdrawn from circulation" — and half-crowns have been since the end of 1969 — it may be asked whether the concern to retain the bulk of the small change which is legal tender in the United Kingdom may justify the restrictions on their exportation. It may

also be asked whether another consideration — which the national court moreover has not specifically mentioned — does not have to be taken into account under Article 36, namely "the protection of national treasures possessing artistic, historic or archaeological value".

In this line of argument half-crowns fall within the concept of "national assets" and it would be legitimate for the capital appreciation derived from melting down the quantities exported to ensure for the benefit of the "public purse" rather than for the benefit of private individuals. But apart from the fact that these silver coins, originally the property of the Crown, have as it were fallen into the "public sector", the wording of Article 36 requires national treasures to have an artistic, historic or archaeological value. Now I doubt whether these coins satisfy those criteria even if, as the United Kingdom Government asserts, no licence has been granted to private individuals under Section 10 of the Coinage Act 1971 to profit by the destruction of these coins *within* the United Kingdom.

Finally, assuming that the silver coins in question are in fact goods, their exportation does not seem to me to be likely to destroy confidence in United Kingdom currency; this exportation is the consequence of the loss of confidence in this currency (bad money drives out good, according to Gresham's law) rather than the cause of this loss of confidence and grounds of public policy within the meaning of Article 36 cannot be effectually invoked under this head.

IV — Nevertheless these considerations do not dispose of the problem. Although some gold and silver coins are in certain respects goods which can in some, if not all of the Member States, perfectly legally be the subject-matter of banking transactions, subject to payment of any VAT which may be chargeable, they are *goods* of a very special kind which, as I am going to explain, could and can be assimilated "to capital" by reason of the circumstances and conditions of and methods used in the transactions of which they are the subject-matter.

I would now like to dispose straightaway of an objection which is bound to be raised against me. The point has often been made that, although all money is perforce goods, at least to begin with, all goods have in certain respects from an economic standpoint the characteristics of capital. This is so, for example, in the case of diamonds, paintings by great masters, stamps, silver tableware or even sugar.

(1) But in this category of goods having a value as "capital" there are some goods which have these characteristics in a very high degree and which owing to their small compass and the ease with which they can be bought and sold and their durable nature are eminently suited, I would say, to use neutral words, for putting away or investing. This immediately brings to mind precious metals, or "monetary" gold and silver, which offer high value in a small compass and have incomparable physical properties (resistance to deterioration, homogeneity, divisibility). Furthermore, in the good old days of "bimetallism" or of the "gold standard", gold or silver coinage combined both the characteristics of goods and of a monetary symbol. The value of the goods matched perfectly the value of the monetary symbol since the convertibility into "hard cash" of paper money at any time was guaranteed. Such an approach furthermore was adopted in the early nineteenth century (the metallist theory of John Stuart Mill). According to this realistic conception of money as goods, money was only considered to have a value because it was "just like any other goods". But nowadays such a conception has been universally abandoned: goods which have become a currency are no longer like any other goods and the advocates of the theory of nominalism have had no difficulty in proving this.

Until we go back to those happy days of the gold standard, coins made from this metal still exist and continue to be minted; gold (and to a lesser extent silver) in the form of bars, ingots or coins is one of the few forms of capital which almost invariably keeps or even increases its value.

Gold and especially "monetary gold" is used as an insurance against devaluation. This monetary gold even attracts some "agio" compared with gold bars because of the minting involved although primarily because of the great ease with which it can be handled.

Consequently, even though transactions in gold or silver coins which are legal tender take the form of "commercial" transactions, they may be regarded as a form of investment or, if you prefer, of putting assets away. In these circumstances it is not surprising that public authorities are interested in this gold and silver.

(2) The Krugerrand occupies a very special place among the gold coins officially quoted and currently dealt in.

Although the "Kruger" is officially quoted in rands it is not strictly speaking legal tender since the coin does not bear any indication of its nominal value, apart from mentioning in two languages "one ounce of fine gold"; it would be more exact to say that it is a metal. However it is certainly not sought after so energetically for the bearded effigy "Uncle Paul" on its obverse or the "springbok" on its reverse side but simply because it weights 33.93 grammes, contains 31.10 grammes, that is 22 carats or one troy ounce having a gold content of 916 666 parts per 1 000. There are two other reasons for its popularity: at the beginning of 1976 its premium over its value in gold was only 4 %, the reason being that it is still minted on a large scale. At the same time the margin between the selling and the purchase price over the counter at the banks is the lowest of all the gold coins (4.14%).

In practice its price fluctuations are the same as the price differences of the gold ingot and this is the characteristic of all coins which are put away or invested: they do not circulate because they are a "monetary symbol" but because of their intrinsic value. The krugerrand is "a slice of an ingot".

During the first four months of 1978 some 2.5 million of them have been sold compared with 800 000 during the same period of the preceding year. According to an advertisement in the "Wall Street Journal" the Germans and the Swiss buy nearly 45 000 Krugerrands each week. This "rush" undoubtedly reflects the renewal of interest shown in the yellow metal, the growth of the budget deficit increased by the efforts made to revive the economy giving rise to fears that the rate of depreciation of some currencies (especially at that time the pound sterling) could not be arrested.

The reason why I have laid some stress on these characteristics which the specialist publications set out is not to induce Your Lordships to buy some Krugerrands but to show that the national court clearly cannot fail to take account of them in order to decide the case before it in view of the date of the transactions giving rise to the criminal proceedings and the particular circumstances in which they have been carried out. We must not forget that the imports covered altogether more than 100 kilogrammes of gold.

(3) I find confirmation of the special nature of gold in the domestic provisions of the Member State in which the coins in this case have been "put into free circulation". In the German Law on Foreign Trade "Außenwirtschaftsgesetz" of 28 April 1961, gold has a special position (Section VI) after Trade in Goods (Section III), Provision of Services (Section IV) and Capital Movements (Section V).

According to Article 24 of this law transactions in gold between residents and non-residents as well as the exportation and importation of gold may be restricted for the purpose of preventing a reduction in the purchasing power of the mark or maintaining the equilibrium of the balance of payments, without prejudice to the restrictions provided for in Articles 8 to 13 relating to trade in *goods.*

Similarly Article 1 of the Belgian Law of 11 September 1962 relating to the importation, exportation and transit of *goods* provides: "For the purpose of this law:

(a) *goods* shall mean: everything regarded as such for the application of *customs* legislation *with the exception of minted gold* or gold ingots, both coin and paper money which are legal tender in Belgium or abroad, *and also all securities whatsoever,* whether Belgian or foreign, public or private whether they be in the form of share certificates or bearer securities . . ."

Article XX of GATT provides:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(I) . . . (c) relating to the importation or exportation of gold or silver;"

Similarly Article 12 of the Convention establishing the European Free Trade Association (EFTA) lays down:

"Provided that such measures are not used as a means of arbitrary or unjustifiable discrimination between Member States or a disguised restriction on trade between Member States nothing in Articles 10 and 11 shall prevent the adoption or enforcement by any Member State of measures,

. . .

(f) relating to gold or silver."

(4) It is now advisable to find out whether this ambivalent nature of monetary gold — both goods and a "security" — universally recognized by economists is or is not part of Community law.

(a) As far as the Treaty itself is concerned Article 67 (1) states that *"During the transitional period and to the extent necessary to ensure the proper functioning of the Common Market,* Member States shall *progressively* abolish between themselves" restrictions on movement of capital.

The following articles lay down the time-limits to be complied with and the measures to be adopted by the Member States and the Community to implement this general principle.

The capital here referred to comprises in addition to payments relating to trade in goods, services and capital itself, that category of factors of production made up of "sources of finance" or "financial resources" which are the subject-matter of intra-Community capital transactions or movements between banks and financial institutions by book entries (settlements between banks by entries) without being accompanied by any physical delivery of the monetary symbols or coin.

Although that does not emerge from the Treaty nevertheless the possibility cannot be ruled out that "capital" may be understood as comprising certain "securities" having an intrinsic financial value, that is to say not only *financial assets* which indicate the value of the *securities* recording the ownership of the capital, and the *actual* capital which serves to indicate the tangibility of

capital assets as production factors, but also *monetary* capital which represents the value of the capital assets expressed in terms of *money*.

(b) Although the Treaty itself does not provide any other particulars on what must be understood by "capital" we fortunately have a text whose validity is not challenged. This text is in the First Directive adopted on 11 May 1960 by the Council, added to and amended by a Second Directive of 18 December 1962 which are the only general measures adopted to date by the Council of Ministers to implement Article 67 of the Treaty apart from the Directive of 21 March 1972 on regulating international capital flows and neutralizing their undesirable effects on domestic liquidity.

Even though these texts are in essence concerned with putting in concrete form the principle laid down by Article 67 with regard to exchange restrictions with non-Member countries the definitions contained in them seem to me to apply also in the more general context of "capital". The Directive of 11 May 1960 only contains obligations imposed upon the Member States which could confer rights and impose obligations upon individuals as far as concerns the capital movements set out in List A, B and C of Annex I thereto.

The movements of capital set out in List D of Annex I are dealt with in Articles 4 to 7.

Article 4 provides:

"The Monetary Committee shall examine at least once a year the restrictions which are applied to the capital movements set out in the lists contained in Annex I to this Directive; it shall report to the Commission regarding restrictions which could be abolished".

Article 5 (1) states in particular:

"1. The provisions of this Directive shall not restrict the right of Member States to verify the *nature* and *genuiness* of transactions or transfers, or to take all requisite measures to *prevent infringements* of their laws and regulations."

Article 6 in effect merely repeats the provisions of Article 71 of the Treaty.

Finally Article 7 provides, *inter alia*, that "Member States shall make known (to the Commission) not later than ... after (its) entry into force ... any amendement of the provisions governing the capital movements set out in List D of Annex I ...".

This is what the United Kingdom did when it notified the Commission on 15 April 1975 of the restrictions on the importation of gold coins which entered into force on the following day and also, on 15 July 1974, of the restrictions on the exportation of silver coins which were imposed on that date. The Government of the United Kingdom advanced as the reason for the restrictions on the importation of gold coins its serious balance of payments problems. As far as concerns the restrictions on the exportation of silver coins the aim of this government was to prevent the melting down of these coins abroad for the purpose of extracting the pure metal, a restriction already in force within the United Kingdom, except in the case of the Royal Mint since such melting down could only do harm to the taxpayer.

As far as I am aware the Commission has not initiated any procedure against the United Kingdom on this ground for failure to fulfil an obligation under the Treaty.

The movements of capital set out in List D concern, *inter alia*, "Physical import and export of financial assets". This expression is set out in annex II which forms an integral part of the directive (Article 10) and covers as well as "securities" (not included under IV) "means of payments of all kinds" and "gold", which are suited for short term transactions of a particularly volatile nature.

Thus, even though the categories of capital falling within Article 67 (1) primarily cover tangible and intangible financial assets, the possibility cannot be ruled out, in the light of the directive, that this article also refers to "monetary" capital specified in List D.

In this field of terminology I would add that the English word *"assets"*, to which the French word *"valeurs"* in the nomenclature annexed to the directive corresponds, is rendered in French in other Community texts by the words *"capital" "capitaux"*. Let me quote the expressions "capitaux d'exploitation" (working assets), "revenus des capitaux mobiliers" (income from capital assets), "transfert de capital à l'intérieur et à l'extérieur" (transfer of assets at home and abroad), "formation de capital fixe" (fixed asset formation).

(c) Finally, having regard to the classification of the transactions at issue I would like to endeavour to state how "monetary" gold and silver are treated for the purpose of turnover tax.

Under the common system of a uniform basis of assessment of value added tax the supply of *goods* or services effected for consideration within the territory by a taxable person acting as such and the importation of *goods* and the obtaining within the territory of the supply of services shall be subject to this tax in the Member States (Article 2 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment.)

It must be remembered that this directive is in keeping with the aim of creating conditions for the free movement of goods, services and capital between Member States.

The Commission's proposal submitted to the Council on 29 June 1973 (Official Journal C 80 of 5 October 1973) provided that the Member States shall exempt, as well as certain activities of a general nature, "banking operations" and in particular dealings in currencies other than for collection, and in *gold to be used as coin* and credit transfers (Article 14 B (h)).

The aim of this measure was to abolish zero rating (involving the retention of the right to deduct) in order to reduce the distortions of international competition. The reason for the measure is that banking transactions are not concerned with the goods; although the attendant transactions are in some respects of a commercial nature in respect of which commission is charged for services rendered, they are generally regarded as being in fact transactions which do not add any value to the actual operation, for example to the amount which is the subject of credit or a loan. Value added tax is a tax on consumption which only applies to products and services and transactions in gold to be used as coin and does not fall within this definition.

In the Commission's Amendments to the proposal, presented by the Commission to the Council on 12 August 1974, gold to be used as coin [monetary gold] was defined as "gold of a standard of at least 900/1 000, for authorized financial institutions".

Nevertheless, although the actual dealings in currencies other than for collection and in gold to be used as coin, as thus defined, were exempted in that there was no physical delivery of the "goods" in its normal commercial meaning, according to the last version of the text proposed by the Commission to the Council "this exemption shall not cover '*supplies of services*' relative to such transactions".

Article 13 of the text finally adopted by the Council on 17 May 1977 provides:

"B. Without prejudice to other Community provisions, Member States *shall exempt* (by 1 January 1978 at the latest) the following

under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing *any* possible evasion, avoidance or abuse ...

(d)

(4) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items; "collectors' items" shall be taken to mean *gold, silver* or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest".

Thus dealings in collectors' items, even over bank counters, are regarded as commercial transactions subject to VAT; on the other hand within the Member States dealings in "monetary" gold and silver coin are exempted. Furthermore for the purpose of stimulating capital transactions, the *negotiation* of banking transactions or of credit is itself exempted specifically from turnover tax.

It must indeed be noted that the text no longer mentions *gold* to be used as coin but currency used as legal tender thus having in view in particular gold or *silver* coins which are "*normally* used as legal tender".

The *importation* and *exportation* of gold by Central Banks which are undoubtedly "capital movements" giving this expression a wide meaning are exempted by virtue of Article 14 (1) (j) and 15 (11).

Therefore the question to be determined is what is meant by "currency used as legal tender" and "gold and silver coins ... which are not normally used as legal tender ....". This question is not only relevant for the purpose of avoiding distortions of international competition but also from the point of view of the Community's own resources, since, as Your Lordships are aware, a proportion of VAT has at present to be channelled into Community funds: compliance with the time-limit of 1 January 1978 automatically entails the allocation to the European Economic Community of a portion of VAT receipts as its own resources and is therefore a prerequisite of its financial independence. That is a matter for the Court of Auditors to consider. Moreover this directive could confer rights and impose obligations upon individuals.

The Commission's replies to your questions to it on this point seem to me to be very vague and incomplete if not indeed inaccurate. If I have correctly understood the explanations which have been given it would appear that only two Member States have to date complied with the provisions of the Sixth Directive.

In the Grand Duchy of Luxembourg, the Member State where the Court has its permanent residence, pursuant to Article 1 of the Grand-Ducal Regulation of 24 December 1977,

"Exemption from value added tax shall only apply:

...

(2) to deliveries and imports of gold coins which, when the transaction is effected, are legal tender in their country of origin;

(3) to deliveries and imports of gold coins other than those referred to at (2) above, in so far as such coins are *officially* quoted and do not consist of collectors' items of a numismatic nature ...".

I have satisfied myself that dealings in krugerrands are in fact exempted.

Moreover the Commission tells us that the Federal Republic of Germany has considered charging VAT on dealings in gold coins, which, although they are legal tender, that is to say are monetary gold, are traded mainly for their value as

a precious metal or for their numismatic value. This is aimed especially at certain coins used as legal tender in their country of origin such as krugerrands.

In the context of these proceedings it is not for Your Lordships to determine whether and by whom the Council Directive of 17 May 1977 has not been correctly applied.

For my own part I will merely confirm that at the present time krugerrands fall within the definition of monetary gold; that dealings in, which includes the negotiation of, these coins in the Member States where such negotiation is permitted are exempted from VAT on the ground that the coins in question are "legal *tender* in their country of origin" or coins "officially quoted"; furthermore that no action for failure to fulfil an obligation under the Treaty has been initiated by the Commission under this head; that the English silver coins are *legal tender* in their country of origin; that all those concerned have been involved, at least in part, in an operation to which the parties gave the semblance of a "bimetallic barter" — which did not even materialize since the AGOSI company still claims to be the owner of 1 550 Krugerrands — and that the silver coins are in any case *"means of payment of all kinds"* within the meaning of the 1960 Directive.

If I accept that Krugerrands are "legal tender", at least in their country of origin, the same reasoning must apply to silver coins of sixpence, one shilling and two shillings, which are at least *"de jure"* means of payment, even though it was not the nominal value of these coins that interested AGOSI, as well as half crowns which can still be changed at the Bank of England and which have been used, at least partially, *"de facto"* as means of payment.

On the other hand dealings in collectors' items of a numismatic nature are subject to VAT, their character as "goods" prevailing over their character as "capital", although the boundary between numismatics, jewellery and "assets put away" is at times loosely drawn.

V — It is advisable now to return to the implications of Articles 67 and 71. The latter provides that:

"Member States *shall endeavour* to avoid introducing within the Community any new exchange restrictions on the movement of capital and current payments connected with such movements, and shall endeavour not to make existing rules more restrictive" than they were when the Treaty entered into force, that is to say in the case of the United Kingdom, before 1 January 1973. According to the second paragraph of the said article the Member States "declare their *readiness* to go beyond the degree of liberalization of capital movements provided for in the preceding articles in so far as their economic situation, in particular the situation of the balance of payments, so permits". It is clear that neither of these two provisions creates rights for the benefit of individuals.

Article 67 makes the progressive abolition of restrictions on the movement of capital subject to one condition limited in time and one permanent condition. By admitting that the transitional period, applicable for the elimination of measures having an effect equivalent to quantitative restrictions on the importation and exportation of *goods*, also applies to the abolition of restrictions in connexion with the free movement of capital, that is to say that it be completed by 1 January 1975, the stipulation "to the extent necessary to ensure the proper functioning of the Common Market" continues to apply even after the expiry of this period. The same criterion of ensuring "the proper functioning of the Common Market" must also influence the Community's activities for example in the field of the approximation of the laws of Member States (Article 3 (h)).

Consequently, according to Article 67, if after the entry into force of the Act of Accession and after the expiry of the transitional period, for which it provides, any restrictions on the movement of capital remain in being, their retention only contravenes the Treaty if this *abolition* is *necessary* to ensure the proper functioning of the Common Market. I will refrain from defining my position on the question whether the *proper* functioning of the Common Market requires that "assets put away" and "investment", which were and are still effected and necessarily permitted by the law in force within the frontiers of each Member State, may be made possible at Community level and without any discrimination through the free movement of monetary gold in the remainder of the Community put into circulation in one Member State; I prefer to leave this point to be determined by Your Lordships.

The fact that, within some Member States, the coins in question may be freely dealt in and that all the Member States support hoarding and speculation by "reminting" gold coins amounts clearly to discrimination a little like the discrimination in the jugdment of 4 December 1974 in Case 41/74, *Yvonne van Duyn* v *Home Office* [1974] 2 ECR 1337, but, Article 67 specifically refrains from excluding the retention even after the expiry of the transitional period, of discriminatory treatment based on the nationality or residence of the parties, or on the place where the assets are put away, if the removal of such discrimination is not *necessary* to ensure the *proper* functioning of the Common Market.

Therefore there is no doubt that, although the krugerrands and silver coins in question are only the physical "substratum" of capital movements, the appellants can gain no advantage by invoking Article 67 and the expiry of the transitional period does not affect the continuing validity of the restriction flowing from the stipulation that the proper functioning of the Common Market must be ensured.

Finally it is for the national court to determine whether the financial movements which accompanied the circulation of the coins in question fall within the class of those which relate to actual trade in and movement of goods in the ordinary meaning of this expression, but it seems to me that, even if the United Kingdom Government has used an unorthodox but very effective instrument (the orders in implementation of the 1939 Act which govern the movement of *goods)* to regulate these monetary transactions, it is no less true that this objective could be lawfully attained in the context of Articles 67 and 104 of the Treaty.

In these circumstances it does not seem to me to be necessary to answer the last question referred to the Court and I submit that Your Lordships should declare that:

(1) Capital within the meaning of Community law must also be taken to mean gold and silver coins which are legal tender or "means of payment of all kinds";

(2) Even after the expiry of the transitional period referred to in Article 42 of the Act of Accession and notwithstanding Articles 73 and 106 of the Treaty the new Member States only have to abolish between themselves

and in their relations with the Community as originally constituted restrictions on trade in capital as thus defined belonging to persons resident in the Member States, as well as discriminatory treatment based on the nationality or the residence of the parties or the place where such capital is situate to the extent necessary to ensure the proper functioning of the Common Market.