In Case 203/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale [District Court], Bolzano, for a preliminary ruling in the criminal proceedings pending before that court against

GUERRINO CASATI

on the interpretation, *inter alia*, of Articles 67, 69, 71, 73 and 106 of that Treaty and of various principles of Community law in order to enable the national court to adjudicate on the compatibility of certain provisions of Italian exchange control legislation with those articles and principles,

THE COURT,

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling and A. Chloros, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. The accused in the main proceedings, Mr Casati, an Italian national residing in the Federal Republic of Germany, was arraigned before the

Tribunale, Bolzano, on a charge of having attempted to export from Italy, without the authorization prescribed by Italian exchange control legislation, the sums of LIT 650 000 and DM 24 000 which were found in his possession at the frontier between Italy and Austria. Mr Casati sought to justify himself by explaining before the national court that he had intended to purchase during his holidays in Italy certain equipment "intended for his business in Germany". To that end, he had imported the sum of DM 30 000 without declaring it. Since the factory at which he wished to buy the equipment was closed, he was obliged to take most of the money back with him.

2. Article 13 of Decreto Ministeriale [Ministerial Decree] of 7 August 1978 (Gazzetto Ufficiale No 220 of 8 August 1978) provides that the exportation by non-residents, *inter alia*, of foreign bank notes is permitted up to the amount previously imported or legally acquired in Italy, which must be proved in accordance with the procedures laid down by the Minister for Foreign Trade.

Those procedures were laid down in particular by Circular No A/300 of 3 May 1974 of the Ufficio Italiano dei Cambi [Italian Foreign Exchange Department], Article 11 of which provides that non-residents may export the amounts which they declared on "Form V 2" on entry into Italy.

3. The exportation, without prior authorization, of currency, shares or bonds, letters of credit or other means of payment is punishable by administrative penalties if the value involved is less than LIT 500 000, by a fine of between one-half and one-third of the value of the effects exported if their value is between LIT 500 000 and LIT 5 000 000 and, if the value is in excess of that amount, by a term of imprisonment of one to six years and a fine of between two and four times the value involved (Article 1 of Decreto Legge [Decree-Law] No 31 of 4 March 1976, Gazzetta Ufficiale No 60 of 5 March 1976 enacted, with amendments, as Law No 159 of 30 April and successively amended, most recently by Article 2 of Law No 863 of 23 December 1976, Gazzetta Ufficiale No 348 of 31 December 1976). Before 1976, such infringements were classified as administrative infringements and not as offences and were punsihable only by administrative penalties consisting of a fine of up to five times the value of the effects exported (Article 15 of Decreto Legge No 476 of 6 June 1956, Gazzetta Ufficiale No 137 of 6 June 1956 which refers back to the Decree of the Minister for Finance referred to in Regio Decreto Legge [Royal Decree-Law] No 1928 of 5 December 1938, Gazzetta Ufficiale No 297 of 29 December 1938, enacted as Law No 739 of 2 June 1939).

4. Article 67 (1) of the EEC Treaty lays down:

"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 all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested."

According to Article 69 of the EEC Treaty:

"The Council shall, on a proposal from the Commission, which for this purpose shall consult the Monetary Committee provided for in Article 105, issue the

necessary directives for the progressive implementation of the provisions of Article 67, acting uanimously during the first two stages and by a qualified majority thereafter."

The first paragraph of Article 71 of the EEC Treaty contains a standstill provisions worded as follows:

"Member States shall endeavour to avoid introducing within the Community an 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."

The Council has adopted two directives to give effect to Article 67 of the EEC Treaty. The first was adopted on 11 May 1960 (Official Journal, English Special Edition 1959-1962, p. 49) and the second, which adds to and amends the first, on 18 December 1962 (Official Journal, English Special Edition 1963-1964, p. 5).

The two directives contain, in Annex I, a complete list of the capital movements covered by Article 67. There is a detailed description of those movements in Annex II. Annex I divides capital movements into four categories, referred to as Lists A, B, C and D.

According to Article 1 of the first directive, the Member States are to grant all foreign exchange authorizations required for the performance of the transactions set out in List A, for example, in respect of direct investments, investments in real estate and personal capital movements such as inheritances etc.

Article 2 of the directive provides that the Member States are to grant general permission for the transactions referred to in List B, namely operations in securities dealt in on a stock exchange.

Foreign exchange authorizations required for the performance of the transactions referred to in List C, that is to say, for example, operations in securities not dealt in on a stock exchange, the issue and placing of securities on the capital markets of other Member States and medium-and long-term loans and credits, are to be granted, according to Article 3 of the directive, only where such free movement of capital is not capable of forming an obstacle to the achievement of the economic policy objectives of a Member State. Only Belgium, Luxembourg and the Federal Republic of Germany have introduced this liberalization.

Finally, in the case of the transaction referred to in List D, namely highly mobile capital movements such as, for example, the placing of funds on current accounts and deposit accounts with credit institutions abroad, investments in Treasury bills and the importation and exportation of sums of money, Article 7 of the directive merely requires the Member States to inform the Commission of any amendment of the provisions governing such movements.

The relevant safeguard clauses in the Treaty are contained in Article 73 (movements of capital leading to disturbances in the functioning of the capital market), Article 108 (difficulties or serious threat of difficulties as regards the balance of payments) and Article 109 (sudden crisis in the balance of payments). Several Member States have resorted to those clauses.

Under the Council Directive of 21 March 1972 on regulating international capital flows and neutralizing their undesirable effects on domestic liquidity (72/156/EEC, Official Journal, English Special Edition, 1972 (I), p. 296), the Member States may, in addition, take the steps necessary for effective regulation of international capital flows and for the

neutralization of the undesirable effects produced by those flows on domestic liquidity.

5. By order of 6 Octobre 1980, the Tribunale, Bolzano, referred the following questions to the Court of Justice for a preliminary ruling:

(1) After the end of the transitional period must the restrictions on the movement of capital referred to in Article 67 of the EEC Treaty be deemed to be abolished regardless of the provisions of Article 69 thereof?

(2) Does the fact that the Italian Government omitted the consultative procedure laid down in Article 73 of the Treaty in relation to Decreto Legge No 31 of 4 March 1976, which was enacted as Law No 159 of 30 April 1976, constitute an infringement of that Treaty?

(3) Does any principle or provision of the Treaty guarantee non-residents the right to re-export currency previously imported and not used, even if it has been converted into Italian lire?

(4) If so, may any failure to comply with the formalities prescribed by the currency legislation of the State from which the sums are subsequently re-exported in the above-mentioned circumstances be punished by penalties including the confiscation of the currency, a fine of up to five times the amount of that currency and deprivation of personal liberty for a period of up to five years (subject to heavier penalties where a number of persons are involved)?

(5) If the preceding question is answered in the affirmative, may any failure to comply with the above-mentioned formalities carry penalties on the same scale as those imposed for the unlawful exportation of currency?

(6) After the end of the transitional period is it possible to consider as being compatible with the "standstill" requirements set out in Articles 71 and 106 (3) domestic legislation which increases penalties prescribed by other, previous legislation as, for example, when infringements which were previously punishable by administrative penalties are made punishable by imprisonment and fines, thereby rendering them criminal offences?

(7) Does the principle in accordance with which dissimilar situations may not be treated in the same way (which is encompassed by the prohibition of discrimination referred to *inter alia* in Article 7 of the Treaty) permit the same penalties imposed by a Member State in respect of the unlawful exportation of currency or of failure to comply with the formalities in relation to currency to be applied without distinction both to residents of that State and to non-residents?

(8) After the end of the transitional period is it possible to consider compatible with Articles 67, 71 and 106 (3) of the Treaty domestic provisions which prescribe specified formalities in connection with the exercise of the right, which is however recognized, to re-export previously imported capital, requiring the fulfilment of such formalities as sole proof of prior importation, thereby creating in substance a penalty under criminal law in respect of non-fulfilment thereof?

6. The order making the reference to the Court was received at the Court Registry on 16 October 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by:

— G. Casati, represented by H. Rungger, of the Bolzano Bar, and by

G. M. Ubertazzi and F. Capelli, of the Milan Bar;

— The French Government, represented by Th. Le Roy, of the Secretariat-General of the Inter-Departmental Committee for Questions of European Economic Co-operation, acting as Agent;

— The Government of the Federal Republic of Germany, represented by M. Seidel, adviser to the Federal Ministry for Economic Affairs, acting as Agent;

— The Italian Government represented by A. Squillante, Head of the Department for Diplomatic Legal Affairs, Treaties and Legislative Matters, acting as Agent, assisted by M. Conti, State Advocate;

— The Government of the United Kingdom, represented by R. D. Munrow, Treasury Solicitor, acting as Agent;

— The Danish Government, represented by its Legal Adviser, L. Mikaelsen of the Ministry for Foreign Affairs, acting as Agent;

— The Irish Government, represented by L. Dockery, Chief State Solicitor, acting as Agent;

— The Commission, represented by its Legal Adviser, A. Abate, acting as Agent.

7. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court requested the parties to the proceedings to answer certain questions in writing before the sitting.

II — Written observations submitted before the Court

First question (direct applicability of Article 67 of the EEC Treaty)

The *Danish, Irish, French, Italian and United Kingdom Governments* contend that Article 67 of the EEC Treaty is not directly applicable. That article requires the Member States to abolish all restrictions on movements of capital only "to the extent necessary to ensure the proper functioning of the Common Market". The imprecise nature of that reservation precludes the application of the Court's case-law on direct applicability inasmuch as that case-law relates only to the provisions of the Treaty which contain a precise obligation as to the result to be achieved.

Since the assessment of the degree of liberalization "necessary to ensure the proper functioning of the Common Market" is political in nature, and in view of the fact that the adaptation of the system governing capital movements to such degree of liberalization constitutes an instrument of continuous intervention, the necessary assessment cannot be carried out by the national courts but solely by the Council, by the adoption of directives pursuant to Article 69 of the EEC Treaty. The provisions of the Treaty relating to capital movements and to the balance of payments reflect a carefully balanced system of powers divided between the Commission, the Council and the Member States.

That interpretation is also supported by the wording of the so-called "standstill" provision set out in the first paragraph of Article 71 of the EEC Treaty according to which "the Member States *shall endeavour* to avoid introducing within

the Community any new exchange restrictions ... and *shall endeavour* not to make existing rules more restrictive". That provision contrasts with the other standstill provisions of the Treaty which constitute prohibitions of a precise nature.

The adoption of rules to govern capital movements is moreover closely linked to other measures of economic policy, such as those relating to monetary and investment policy, which are within the scope of the Member State's powers. To enable those other measures to operate properly, it is essential that the Member States should be able to restrict certain capital movements.

The close relationship between the adoption of rules to govern capital movements and the adoption of rules to govern the balance of payments is also evidenced by the second paragraph of Article 71 which lays down that 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 their balance of payments, so permits".

The Danish Government recalls that the terms of Articles 52 and 59 of the EEC Treaty, as analysed in the case-law of the Court, define the procedures for giving effect to the obligation to liberalize capital movements during the transitional period. On the other hand, the limits referred to in Article 67 define the extent to which liberalization must be introduced.

The Danish Government also observes that in Articles 52 to 66 of the EEC Treaty, the Council is normally called upon to adopt only directives relating to a particular sector. As regards capital movements on the other hand, the directives adopted pursuant to Article 69 of the EEC Treaty apply to all movements of capital. The Council has therefore expressed its views exhaustively on the scope of the liberalization measures which it was necessary to take.

The *French Government* adds that Article VIII of the Articles of Agreement of the International Monetary Fund restricts the capital movements which may be liberalized to current transactions. More positively, Article VI, Section 3, of those Articles of Agreement authorizes the members to exercise control over capital movements. Section 1 of that article even permits the International Monetary Fund to bar one of its members from access to its loans where they are intended to "meet a large or sustained outflow of capital" if the member fails to exercise appropriate controls.

The *Commission* recalls that the co-ordination of national economic policies provided for by Articles 6, 104, 105 and 145 of the EEC Treaty has not yet been achieved. In view of existing links between capital movements and the aforesaid policies, the Commission does not consider that Article 67 satisfies the requirements for direct applicability. In the circumstances it takes the view that even after the end of the transitional period, the Member States are free to maintain restrictions on the movements of capital included in List D and some of those in List C, both annexed to the First Council Directive adopted pursuant to Article 69 of the EEC Treaty, without being obliged to resort to the safeguard clauses.

The *Government of the Federal Republic of Germany* emphasizes, to begin with, that its observations on the scope of Article 67 of the EEC Treaty concern only exchange restrictions although the question raised by the national court also

relates to other restrictions on movements of capital.

The Federal Government is of the opinion that the effect of Article 67 of the Treaty is to prohibit, as from the end of the transitional period, subject to certain exceptions, exchange restrictions affecting capital movements and that individuals may rely on that prohibition. The exceptions include short-term investments and credits, current and deposit accounts and personal capital movements which, for reasons relating to the monetary policy of the Member States, and in view of the stage which integration has so far reached, cannot be liberalized. It is possible to identify those exceptions with precision which is why the Council included them in List D annexed to the directives adopted by it pursuant to Article 69 of the EEC Treaty.

The Court has established that the prohibitions laid down by the Treaty automatically came into force on the expiry of the transitional period with the result that individuals may rely upon them without its being necessary to adopt any directives.

The free movement of capital is subject to the same rules as the other fundamental freedoms embodied in the Treaty since Article 3 of the latter places the abolition of obstacles to the free movement of capital on the same footing as the introduction of the other freedoms.

By providing for the abolition of restrictions on movements of capital only "to the extent necessary to ensure the proper functioning of the Common Market", Article 67 of the EEC Treaty does not introduce a condition for such abolition but simply limits its scope.

Likewise, the standstill provision contained in Article 71 of the EEC Treaty is directly applicable even though that article is drafted in terms which are less clear than, for example, the other standstill provisions in the EEC Treaty. Article 71 is designed to achieve the same political objective of integration as those provisions, namely that of preventing the Member States from introducing new restrictions. It would make no sense if that right were still vested in the Member States when the Treaty requires them to abolish any restrictions in force during the transitional period. Furthermore, although as regards for example the free movement of persons no provision precludes the introduction during the transitional period of fresh restrictions on entry into national territory, the Court has none the less held that Article 48 of the EEC Treaty has direct effect.

Any substantive peculiarities which may exist in the field of capital movements, compared with other matters governed by the EEC Treaty, may be taken into account to the extent required by virtue of the safeguard clauses, in particular, those contained in Articles 73 and 108 (3) of the EEC Treaty which were to remain in force after the expiry of the transitional period.

In that connection, the Federal Government also refers to Article 103 of the EEC Treaty and emphasizes that it is on the basis of that article that the Council adopted Directive No 72/156/EEC of 21 March 1972 on regulating international capital flows. It does not dispute that the directive has remained in force even after the expiry of the transitional period, and observes that by adopting such legislation the Council has given the Member States an opportunity to take action in relation to certain capital movements in the event of monetary crises.

Mr *Casati* submits, after analysing the case-law of the Court on the direct applicability of Articles 52 and 59 of the

EEC Treaty, that Article 67 of the EEC Treaty is directly applicable.

The only difference between the wording of Article 67 and that of Articles 52 and 59 is that Article 67 provides for the abolition of restrictions on movements of capital only "to the extent necessary to ensure the proper functioning of the Common Market".

It is clear from Article 67, interpreted in conjunction with Article 69 of the EEC Treaty, that the only way to determine precisely the extent to which the abolition of restrictions is considered "necessary to ensure the proper functioning of the Common Market" is by the adoption of Community directives. In the directives which it had adopted in that connexion, the Council has made its opinion quite clear as to which capital movements are to be liberalized and which restrictions are to be abolished to ensure "the proper functioning of the Common Market".

Article 67 of the EEC Treaty must therefore be classified, as from the end of the transitional period, as a directly applicable rule capable of conferring subjective rights on individuals. Thus, from that moment, Article 67 combined with the directives referred to in Article 69 has become a directly applicable rule. That is precisely what the Court stated in its judgment of 17 December 1970 in Case 33/70 SACE [1970] ECR 1213 on the provisions of Article 13 (2) of the EEC Treaty which should have been supplemented by directives.

In relation to the facts of the case, the national court must therefore determine whether the operation carried out by Mr Casati is subject to a restriction prohibited since the end of the transitional period. Thus, if the Italian State is no longer empowered, as from that date, to impose on non-resident nationals certain restrictions on the importation and re-exportation of the same sum of money, equally it is not entitled, after the end of that period by authorizing only the use of Form V2 to introduce a restriction limiting evidence of such importation. In the latter case, the restriction is more than a mere formality inasmuch as it affects the subjective right of non-residents to import and re-export the same sum of money.

Against that interpretation of Article 67, it is impossible to contend that Article 71 does not contain a strict standstill provision on the introduction of new restrictions since Article 71 refers to restrictions in existence on the date of the entry into force of the Treaty and it may not be interpreted in such a way as to reduce the scope of the provisions of Article 67 and of the general principles of the Treaty which took effect at the end of the transitional period.

That does not mean that the Member States are obliged to tolerate situations which jeopardize their balance of payments. To deal with situations of that kind, the Treaty permits recourse to the safeguard clauses referred to in Articles 73, 108 and 109.

Second question (failure to follow the consultation procedure provided for by Article 73 of the EEC Treaty)

The *French and Italian Governments* are of the opinion that the obligation relating to consultation, contained in

Article 73 of the EEC Treaty, is inoperative in the present case since it applies only to restrictions on liberalized capital movements.

Furthermore, the *French Government*, whose opinion is shared by the *Commission*, recalls that Article 73 of the EEC Treaty applies only to "protective measures" against "movements of capital" [which] lead to disturbances in the functioning of the capital market in any Member State" and not therefore to an increase of the penalties.

The *Government of the Federal Republic of Germany* observes that individuals may not rely upon the obligation relating to consultation since it was not laid down for their benefit.

It adds that a breach of that obligation does not in itself invalidate the measures adopted by the Member States but that the validity of such measures presupposes solely that the substantive requirements of Article 73 of the EEC Treaty have been met. According to paragraph (2) of that article, the Commission may amend or abolish only *ex nunc* the measures adopted by a Member State. That provision therefore assumes that the measures adopted by a Member State are valid even where they have been notified to the Commission only after their entry into force.

The *Government of the United Kingdom* questions the applicability of Article 73 in the present case.

Third question (existence of a principle guaranteeing the right of non-residents to re-export currency previously imported

The *French and United Kingdom Governments* consider that, *prima facie*, the importation and the exportation of means of payment are covered by the heading "physical import and export of financial assets" in List D of the Council directives on movements of capital. Those directives do not impose on the Member States any express obligations to liberalize the capital movements included in List D.

According to the *Italian Government*, there is no Community rule or principle dealing with the physical exportation of means of payment not intended for specific purposes.

The *Government of the Federal Republic of Germany* takes the view that the transportation of currency from one country to another is permissible to the extent to which it is regarded as a movement of capital liberalized under Article 67 of the EEC Treaty.

That right is also guaranteed where an individual relies upon it in connection with other fundamental freedoms of Community law, in particular the right of persons to freedom of movement or to be provided with services.

In that regard, individuals cannot derive any additional right from Article 106 of the EEC Treaty, considered in conjunction with the list of invisible transactions in Annex III to the Treaty. Those payments have been liberalized only to the extent to which movements of capital are necessary. Article 106 (3), taken together with the above-mentioned list, admittedly also guarantees freedom of payments, without requiring compliance with any other formality, in connection with travel for private reasons. However, that gives rise to a right in favour of an individual to transport currency freely from one country to another only in so far as that currency is necessary for the needs of the journey. A different interpretation of Article 106 (3) would result in an evasion of the restrictions on short-term capital movements which are allowed under Article 67.

Fourth and fifth questions (proportionality of penalties)

The *French and Italian Governments* maintain that the question of the observance of the principles of Community law does not arise in the case of movements of capital which have not been liberalized. In countries which have retained exchange control mechanism, penalties are traditionally as heavy as those imposed in Italy.

The *French and United Kingdom Governments* also refer to Article 5 (1) of the First Council Directive on movements of capital which lays down that:

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

The United Kingdom Government understands this provision to safeguard the right of the Italian Government to require information from persons leaving Italy about any export of currency and to enforce this requirement by such measures as it thinks fit, even in the case of liberalized movements of capital.

The *Italian Government* adds that the unlawful act specified in Article 1 of Decreto Legge No 31 of 4 March 1976 consists in the exportation of currency without authorization. The fifth question is therefore devoid of any purpose. In connection with the fourth question, the Italian Government observes that Italian law does not punish failure to comply with mere formalities and that even in the case of non-residents only illegal exportation is punishable. Furthermore, the different cases specified by the aforesaid decreto legge are carefully graduated, precisely in order to ensure that the penalties, which are quite reasonable in relation to their objective characteristics, are proportionate. With regard to more serious cases, the discretionary powers retained by the court are sufficiently wide to enable it to take account of the circumstances of each individual case and to impose a penalty consonant with the seriousness of each criminal offence.

The *Irish Government* is of the opinion that the penalties imposed by a Member State for breach of its legislation (assuming the legislation itself to be compatible with the Treaty) are a matter for that Member State alone to decide, even in the case of liberalized capital movements. Only in extraordinary circumstances, which are not easy to envisage in practical terms, could the penalties be subject to review under the Treaty.

According to the *Danish Government*, it is not contrary to the Treaty for a Member State to increase the penalties provided in respect of illegal transfers of capital. As long as the Member States are entitled, under Community law, to prevent certain movements of capital, their power also extends in its opinion, to the imposition of penalties. That stems from the fact that the Member States are still empowered to determine the policy which they intend to pursue in the matter of criminal penalties, including the selection of the type of penalties which they wish to impose in the event of the infringement of rules of Community law. It also means that the Member States are empowered to increase the penalties if they see fit. Even to the extent to which capital movements have been liberalized, the Member States

may, under the Council directives on capital movements, impose an obligation to complete forms and other declarations enabling them to supervise the volume of capital movements and to monitor the lawfulness of transactions. Thus, in the event of legislation introducing such controls being infringed, the Member States are also entitled to impose suitable penalties.

The *Government of the Federal Republic of Germany* observes, in connection with the fourth question, that the free movement of capital is not guaranteed to the extent necessary to ensure the proper functioning of the Common Market if the Member States may punish formal infringements by imposing penalties which are disproportionate to the nature of the offence. The Court has applied that principle in a consistent line of decisions.

The Federal Government observes, in connection with the fifth question, that it is generally indavisable to have recourse to the same penalties to punish breaches of both procedural and substantive provisions. In its opinion, however, it is conceivable that cases may arise in which the absence of a heavy penalty makes it impossible to enforce compliance with the formalities.

According to the *Commission*, the Member States must take into account the provisions of the second paragraph of Article 5 of the Treaty in exercising their powers in relation to capital movements which have not been liberalized. Where national law provides for administrative controls in respect of certain capital movements, the penalties introduced to ensure observance of the rules in the matter should be in keeping with the principle of proportionality as laid down in the case-law of the Court. That principle is applicable where a Member State omits to give .control measures the necessary publicity, for example by failing to publish them in its official gazette, or where it fails to recognize fully the right of a non-resident guilty of an omission to provide evidence.

The Commission goes on to say that there is a conflict between the above-mentioned principles and the excessively heavy penalties provided for by Articles 1 and 2 of Italian Laws Nos 159 and 863 of 1976. Form V 2 was introduced, according to the order referring the case to the Court for a preliminary ruling, by means of "administrative provisions", which in Italy are not given all the publicity they require. However, the Commission entertains certain doubts regarding freedom to provide evidence in view of the fact that in Italy, again according to the aforesaid order "evidence of lawful prior importation of currency is restricted by law to cases where there has been a failure to comply with administrative formalities". Finally, the Commission wonders whether, in the present case, the principle of the right of defence enshrined in Article 6 (3) (d) of the European Convention on Human Rights, has been observed.

Mr Casati emphasizes that the principle of proportionality has two meanings: one is concerned with the relationship between the means and the end, and the other is that the provisions concerning the treatment of different situations must be appraised on the basis of their proportional nature in relation to one another.

According to Mr Casati, the principle of proportionality must be observed by national law where, as in the present case, that law is capable of interfering with Community law in such a way as to exert an adverse influence on the achievement of the objectives and on the functioning of the Common Market.

Even criminal legislation, whilst it relates to a sphere into which Community law does not enter, is capable of exerting an influence on the objectives and the functioning of the Common Market and should comply with the principle of proportionality. That situation also arises in the present case in view of the fact that the penalties provided for by Italian exchange control legislation undoubtedly affect the behaviour of Community citizens and their economic choices.

Applying his first interpretation of the principle of proportionality to the present case, Mr Casati observes that the objectives of the contested measure adopted by Italy are to obtain certian information and to facilitate its retrieval both because such information concerns in general the balance of payments and, more particularly, because it makes it possible to ensure that an individual who entered Italian territory with a specific sum of money, does not leave the country with a greater sum. Those objectives are not contrary to Community law but the severity of the penalties should be proportionate to the objectives pursued.

Applying his second interpretation of the principle of proportionality, Mr Casati observes that a resident who leaves Italy, without authorization, in possession of a certain amount of money belonging to that State, is punishable in the same manner as a non-resident who leaves Italy with the sum previously imported by him without completing Form V 2. According to Mr Casati, the treatment reserved to the latter is not proportionate to that reserved to the former.

Mr Casati goes on to compare the exportation of capital to Member States with its exportation to non-member countries. He contends that, from the point of view of Community law, national legislation should reflect the fundamental difference between the two situations.

Sixth question (standstill provision in Articles 71 and 106 of the EEC Treaty)

The *French and Italian Governments* observe, referring back to their answers to the first question, that Article 71 of the EEC Traty does not preclude the introduction of new restrictions on capital movements even after the end of the transitional period since that article provides that "the Member States *shall endeavour* to avoid introducing ... any new exchange restrictions ...".

In their opinion, which is shared by the *Danish, German, Irish and United Kingdom Governments* and by the *Commission,* Articles 71 and 106 of the EEC Treaty call on the Member States not to strengthen existing exchange rules and restrictions, whereas the national court refers only to increasing the penalties prescribed by the Italian rules, the substance of which remains unchanged.

Mr Casati emphasizes that even though they may not be governed by express standstill provisions, any restrictions on the free movement of goods, services or capital, or any strengthening of existing measures are prohibited on the ground that they are incompatible with the objectives of the EEC Treaty and with the process of progressive integration set in motion by it. That opinion is also

supported by the second paragraph of Article 5 of the EEC Treaty. A standstill provision prohibits not only national measures which may be regarded as genuinely contrary to the rules on liberalization but also those which may prove to be simply incompatible with such rules. Community law, in so far as it relates to economic affairs, concerns above all the effects of national measures and their ability to hold up, even indirectly, the process of liberalization which the Treaty seeks to achieve. It follows that a standstill provision also applies to national rules operating in matters such as criminal law which are properly within the competence of the Member States.

Seventh question (principle of equality of treatment)

In the opinion of the *Government of the Federal Republic of Germany,* the principle of equality of treatment creates in favour of individuals a right to specific treatment according to whether or not they reside in a State in view of the fact that in addition to residence abroad other circumstances make special treatment necessary.

According to *Ireland, France and Italy,* the principle of equality of treatment is inapplicable in the present case. France and Italy observe in this regard that Italian exchange control legislation classifies persons according to their place of residence and not according to their nationality.

France adds that the principle in question is inapplicable in connection with the illegal exportation of means of payment because the position of a non-resident who wrongfully exports capital is no different from that of a resident who wrongfully exports capital. The crux of the matter is to ascertain not by whom but on whose behalf the capital is wrongfully exported since past experience shows that complicity between residents and non residents is not only the rule but one of the basic practices used by offenders to evade national rules in the matter. As regards the formalities, however, the position is different since only non-residents may export previously imported means of payment, with the result that only non-residents are called upon to complete the forms which enable the Italian authorities to take note of their importations.

Italy observes, moreover, that the substantive rules imposing specific obligations or responsibilities on residents and non-residents may be different but that where a breach occurs involving the exportation of currency which has not been authorized in accordance with the prescribed procedures, discrimination in relation to penalties cannot be justified.

Mr Casati considers the problem raised by the seventh question from the point of view of the principle of proportionality. In his opinion, it is inadmissible for a non-resident to be subject to the same penalties as a resident on the grounds that a non-resident has an opportunity to appreciate the need to complete forms such as From V 2 only in exceptional cases and that a large proportion of the Italian provisions in question do not require the same publicity as laws since they constitute administrative measures.

Eighth question (exclusive evidence)

The *Danish, German, Irish, French, Italian and United Kingdom Governments* maintain that the requirement of formalities such as those referred to in this question is permitted under Article 5 (1) of the first Council directive on capital movements.

The *Italian Government* observes that no problem concerning exclusive evidence or a restriction of the right of defence arises in the present case since an offence is committed only where the exportation of currency is not authorized either by the administrative authority or by simple possession of the stamped declaration of importation or by a special document issued after the strict contols required have been carried out. In its opinion, evidence belatedly adduced in legal proceedings is obviously no substitute for the absence of administrative authorization.

Be that as it may, where there are no rules or principles of Community law on the exportation of currency not intended for specific purposes, the adoption of rules governing the circumstances and conditions in which the exportations of similar effects is authorized and of rules governing the procedures relating to authorization and the submission of admissible evidence must be left to the national authorities. It is a general principle that the rules on administrative controls and on administrative and judicial procedures, including the choice of methods and the detailed rules for their implementation, come within the scope of the Member States' powers even in the case of the recognition of rights arising under provisions of Community law.

Mr Casati takes the view that the Italian rules are incompatible with Article 6 of the European Convention on Human Rights which establishes, first, a presumption of innocence until guilt is proved and, secondly, the principle of the right to a fair hearing.

III — Oral procedure

The accused in the main proceedings, G. Casati, represented by his lawyers, H. Rungger, G. M. Ubertazzi and F. Capelli, the French Government, represented by its Agent, G. Guillaume, Director of Legal Affaires, the Government of the Federal Republic of Germany, represented by its Agent, M. Seidel, Adviser at the Federal Ministry for Economic Affairs, the Italian Government, represented by M. Conti, State Advocate, and the Commission, represented by its Legal Adviser, A. Abate, acting as Agent, presented oral argument at the sitting on 26 May 1981.

The Advocate General delivered his opinion at the sitting on 7 July 1981.

Decision

1 By order of 6 October 1980, received at the Court Registry on 16 October 1980, the Tribunale [District Court], Bolzano, referred to the Court for a preliminary ruling, pursuant to Article 177 of the EEC Treaty, several questions on the interpretation of Articles 67, 69, 71, 73 and 106 of the EEC Treaty and on the existence of various principles of Community law, to enable it to adjudicate on the compatibility of certain provisions of Italian exchange control legislation with those articles and principles.

2 The questions have been raised in connection with criminal proceedings brought against an Italian national, residing in the Federal Republic of Germany, who is charged with attempting to export from Italy, without the authorization prescribed by Italian exchange control legislation, *inter alia*, the sum of 24 000 DM, which was found in his possession on 16 July 1979 at the frontier between Italy and Austria. The accused in the main proceedings stated that he had previously imported that sum of money into Italy, without declaring it, with a view to purchasing equipment which he needed for his business in Germany and was obliged to re-export the currency because the factory at which he intended to buy the equipment was closed for the holidays.

3 Article 14 of the Italian Decreto Ministeriale [Ministerial Decree] of 7 August 1978 (Gazzetta Ufficiale No 220 of 8 August 1978) provides that foreign bank notes may be freely imported. Article 13 of the same decreto ministeriale provides that the exportation of foreign banknotes by a non-resident is permitted up to the amount previously imported or the amount lawfully acquired in Italy, which must be proved in accordance with the procedures laid down by the Minister for Foreign Trade. Those procedures were laid down in particular by Circular No A/300 of 3 May 1974 of the Ufficio Italiano dei Cambi [Italian Foreign Exchange Department], Article 11 of which provides that non-residents may export the amount of money which they declared on Form V 2 on entry into Italy.

4 According to Article 1 of Law No 159 of 30 April 1976, the unauthorized exportation of currency of a value exceeding Lit 500 000 is punishable by a term of imprisonment of one to six years and by a fine of between two and four times the value of the currency exported. Before 1976, those

infringements were no more than administrative infringements, not offences, and attracted only administrative penalties, consisting of fines of up to five times the value of the effects exported.

5 In its order making the reference to the Court, the national court referred to the case-law of the Corte Suprema di Cassazione [Supreme Court of Cassation], according to which a non-resident who fails to complete Form V 2 on entry into Italian territory and attempts to re-export the currency which he claims to have legally imported commits the offence specified in Article 1 of Law No 159 of 1976.

6 Having regard to those circumstances, the national court asks the Court of Justice to give a preliminary ruling on the following questions:

"(1) After the end of the transitional period must the restrictions on the movement of capital referred to in Article 67 of the EEC Treaty be deemed to be abolished regardless of the provisions of Article 68 thereof?

(2) Does the fact that the Italian Government omitted the consultative procedure laid down in Article 73 of the Treaty in relation to Decreto Legge No 31 of 4 March 1976, which was enacted as Law No 159 of 30 April 1976, constitute an infringement of that Treaty?

(3) Does any principle or provision of the Treaty guarantee nonresidents the right to re-export currency previously imported and not used, even if it has been converted into Italian lire?

(4) If so, may any failure to comply with the formalities prescribed by the currency legislation of the State from which the sums are subsequently re-exported in the above-mentioned circumstances be punished by penalties including confiscation of the currency, a fine of up to five times the amount of that currency and deprivation of personal liberty for a period of up to five years (subject to heavier penalties where a number of persons are involved)?

(5) If the preceding question is answered in the affirmative, may any failure to comply with the above-mentioned formalities carry penalties on the same scale as those imposed for the unlawful exportation of currency?

(6) After the end of the transitional period is it possible to consider as being compatible with the "standstill" requirements set out in Articles 71 and 106 (3) domestic legislation which increases penalties prescribed by other, previous legislation, as, for example, when infringements which were previously punishable by administrative penalties are made punishable by imprisonment and fines, thereby rendering them criminal offences?

(7) Does the principle in accordance with which dissimilar situations may not be treated in the same way (which is encompassed by the prohibition of discrimination referred to *inter alia* in Article 7 of the Treaty) permit the same penalties imposed by a Member State in respect of the unlawful exportation of currency or of failure to comply with the formalities in relation to currency to be applied without distinction both to residents of that State and to non-residents?

(8) After the end of the transitional period is it possible to consider compatible with Articles 67, 71 and 106 (3) of the Treaty domestic provisions which prescribe specified formalities in connection with the exercise of the right, which is however recognized, to re-export previously imported capital, requiring the fulfilment of such formalities as sole proof of prior importation, thereby creating in substance a penalty under criminal law in respect of non-fulfilment therof?

7 Those questions may be divided into two groups. The first three questions and the sixth question concern in particular the interpretation of the provisions of the EEC Treaty on movements of capital and transfers of currency. The others concern the limits, if any, set by Community law to the provisions of criminal law and procedure adopted by the Member States in matters connected with Community law.

Interpretation of the provisions relating to movements of capital and transfers of currency

8 The first question concerns the effects of Article 67 and, more particularly, Article 67 (1), after the expiry of the transitional period. That article heads the chapter on capital which belongs to Title II, "Free movement of persons, services and capital", incorporated in Part Two of the EEC Treaty, entitled "Foundations of the Community". The general scheme of those provisions is

in keeping with the list, set out in Article 3 of the EEC Treaty, of the methods provided for the attainment of the Community's objectives. Those methods include, according to Article 3 (c) "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital". Thus the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the Community. Furthermore, freedom to move certain types of capital is, in practice, a pre-condition for the effective exercise of other freedoms guaranteed by the Treaty, in particular the right of establishment.

9 However, capital movements are also closely connected with the economic and monetary policy of the Member States. At present, it cannot be denied that complete freedom of movement of capital may undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby impairing the proper functionimg of the Common Market.

10 For those reasons, Article 67 (1) differs from the provisions on the free movement of goods, persons and services in the sense that there is an obligation to liberalize capital movements only "to the extent necessary to ensure the proper functioning of the Common Market". The scope of that restriction, which remained in force after the expiry of the transitional period, varies in time and depends on an assessment of the requirements of the Common Market and on an appraisal of both the advantages and risks which liberalization might entail for the latter, having regard to the stage it has reached and, in particular, to the level of integration attained in matters in respect of which capital movements are particularly significant.

11 Such an assessment is, first and foremost, a matter for the Council, in accordance with the procedure provided for by Article 69. The Council has adopted two directives under that article, the first on 11 May 1960 (Official Journal, English Special Edition 1959-1962, p.49) and the second, which adds to and amends the first, on 18 December 1962 (Official Journal, English Special Edition 1963-1964, p.5). All the movements of capital are divided into four lists (A, B, C & D) annexed to the directives. In the case of the movements covered by Lists A and B, unconditional liberalization is prescribed by the directives. However, in the case of the movements covered by List C, the directives authorize the Member States to maintain or to re-

impose the exchange restrictions in existence on the date of the entry into force of the first directive if the freedom of movement of capital is capable of forming an obstacle to the achievement of the economic policy objectives of the State concerned. Finally, in the case of the movements referred to in List D, the directives do not require the Member States to adopt any liberalizing measures. List D covers, *inter alia*, the physical importation and exportation of financial assets, including bank notes.

12 The conclusion must be drawn that the obligation contained in Article 67 (1) to abolish restrictions on movemets of capital cannot be defined, in relation to a specific category of such movements, in isolation from the Council's assessment under Article 69 of the need to liberalize that category in order to ensure the proper functioning of the Common Market. The Council has so far taken the view that it is unnecessary to liberalize the exportation of bank notes, the operation with which the accused in the main proceedings is charged, and there is no reason to suppose that, by adopting that position, it has overstepped the limits of its discretionary power.

13 The answer to the first question should therefore be that Article 67 (1) must be interpreted as meaning that restrictions on the exportation of bank notes may not be regarded as abolished as from the expiry of the transitional period, irrespective of the provisions of Article 69.

14 The second question put by the national court concerns the safeguard clause contained in Article 73. The purpose of that article is to enable a Member State to introduce, subject to certain conditions and in accordance with certain procedures, restrictions which that State would otherwise be obliged to refrain from imposing under the general rules governing movements of capital. It is inapplicable in the case of restrictions the introduction of which is already permitted under those rules.

15 In view of the answer to the first question, it is sufficient to state in reply to the second question that failure to have recourse to the procedures provided for by Article 73 in regard to restrictions imposed on capital movements which the Member State concerned is not obliged to liberalize under the rules of Community law does not constitute an infringement of the EEC Treaty.

16 In its third question, the national court asks essentially whether a principle of Community law or any provision of the Treaty guarantees the right of non-residents to re-export currency previously imported and not used.

17 To begin with it is necessary to observe that, as the replies given to the first two questions show, the extent to which capital movements are liberalized and exchange restrictions gradually abolished does not depend on a general principle but is governed by the provisions of Articles 67 and 69 of the EEC Treaty and by those of the aforesaid directives of 11 May 1960 and 18 December 1962 adopted to give effect to those articles. However, it is necessary to consider whether, in matters where, according to those provisions, there is so far no obligation to liberalize movements of capital — for example, transfers of currency — individuals may derive rights, which the Member States are bound to respect, either from the standstill provisions contained in Article 71 of the EEC Treaty or from Article 106 of the EEC Treaty, both of which are referred to by the national court, though in another context, in its sixth and eighth questions.

18 According to the first paragraph of Article 71, the Member States must endeavour to avoid introducing within the Community any new exchange restrictions on the movement of capital and must endeavour not to make existing rules more restrictive.

19 By using the term "shall endeavour", the wording of that provision departs noticably from the more imperative forms of wording employed in other similar provisions concerning restrictions on the free movement of goods, persons and services. It is apparent from that wording that, in any event, the first paragraph of Article 71 does not impose on the Member States an unconditional obligation capable of being relied upon by individuals.

20 Capital movements account for only a part of the transactions involving transfers of currency. With good reason, therefore, the national court draws attention to Article 106 which is designed to ensure that the necessary transfers of currency may be made both for the liberalization of capital movements and for the free movement of goods, services and persons and which, moreover, does not contain the same restrictions as those expressly provided for by the provisions already considered.

21 More specifically, in its sixth question, the national court refers to the standstill obligation contained in the first sub-paragraph of Article 106 (3). According to that provision, the Member States undertake not to introduce between themselves any new restrictions on transfers connected with the so-called "invisible" transactions listed in Annex III to the Treaty.

22 In that regard, it is necessary to recall that the defendant in the main proceedings has stated that he intended to re-export a sum of money previously imported with a view to making purchases of a commercial nature, not an amount corresponding to a transaction actually listed in Annex III.

23 The answer to the questions relating to Article 106 (3) should therefore be that the latter provision is inapplicable to the re-exportation of a sum of money previously imported with a view to making purchases of a commercial nature if such purchases have not in fact been effected.

24 The order referring the matter to the Court contains no express reference to the first two paragraphs of Article 106. In view of the alleged purpose of the importation of the sum of money in question, those two paragraphs are significant in relation to the third question. According to those provisions, the Member States undertake to authorize on the expiry of the transitional period, any payments connected with, *inter alia*, the movement of goods. The first two paragraphs of Article 106 are thus designed to ensure the free movement of goods in practice by authorizing all the transfers of currency necessary to achieve that aim. However, those provisions do not require the Member States to authorize the importation and exportation of bank notes for the performance of commercial transactions, if such transfers are not necessary for the free movement of goods. In connection with commercial transactions, that method of transfer which, moreover, is not in conformity with standard practice, cannot be regarded as necessary to ensure such free movement.

25 In the light of the foregoing considerations, the answer to the third question should be that the right of non-residents to re-export bank notes which were previously imported with a view to performing commercial transactions but have not been used is not guaranteed by any principle of Community law or by any provisions of Community law relating to capital movements or by the

rules of Article 106 concerning payments connected with the movement of goods.

Possible limits set by Community law to national rules of criminal law and procedure

26 In its fourth, fifth and sixth questions, the national court asks in substance whether penalties of the kind provided for by Italian exchange control legislation are incompatible with the principles of proportionality and non-discrimination which form part of Community law. The eighth question raises the problem of the freedom to provide evidence in criminal proceedings.

27 In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.

28 Certain situations which are comparable to those considered in that case-law may arise, in connection with capital movements and transfers of currency, in relation to control measures maintained by the Member States for example under Article 5 of the First Directive for the implementation of Article 67 of the Treaty, but only in connection with transactions liberalized under Community law. The limits set by that case-law are designed to prevent the freedoms guaranteed by Community law from being eroded by the control measures which Community law permits the Member States to maintain. That is not the case in these proceedings. It is apparent from the replies to the other questions referred to the Court for a preliminary ruling that the transaction in question has not been liberalized either by the provisions of

the Treaty or by the directives adopted for their implementation. In such circumstances, the aforesaid case-law is inapplicable.

29 The reply to those questions should therefore be that with regard to capital movements and transfers of currency which the Member States are not obliged to liberalize under the rules of Community law, those rules do not restrict the Member States' power to adopt control measures and to enforce compliance therewith by means of criminal penalties.

Costs

30 The costs incurred by the French Government, the Government of the Federal Republic of Germany, the Italian Government, the United Kingdom Government, the Danish Government, the Irish Government and the Commission of the European Communities are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunale, Bolzano, by order of 6 October 1980, hereby rules:

1. **Article 67 (1) must be interpreted as meaning that restrictions on the exportation of bank notes may not be regarded as abolished as from the expiry of the transitional period, irrespective of the provisions of Article 69.**

2. **Failure to have recourse to the procedures provided for by Article 73 in regard to restrictions imposed on capital movements which the Member State concerned is not obliged to liberalize under the rules of Community law does not constitute an infringement of the EEC Treaty.**

3. **The first paragraph of Article 71 does not impose on the Member States an unconditional obligation capable of being relied upon by individuals.**

4. Article 106 (3) is inapplicable to the re-exportation of a sum of money previously imported with a view to making purchases of a commercial nature if such purchases have not in fact been effected.

5. The right of non-residents to re-export bank notes which were previously imported with a view to performing commercial transactions but have not been used is not guaranteed by any principle of Community law or by provisions of Community law relating to capital movements or by the rules of Article 106 concerning payments connected with the movement of goods.

6. With regard to capital movements and transfers of currency which the Member States are not obliged to liberalize under the rules of Community law, those rules do not restrict the Member States' power to adopt control measures and to enforce compliance therewith by means of criminal penalties.

Mertens de Wilmars Bosco Touffait Due Mackenzie Stuart

O'Keeffe Koopmans Everling Chloros

Delivered in open court in Luxembourg on 11 November 1981

A. Van Houtte
Registrar

J. Mertens de Wilmars
President