

JUDGMENT OF THE COURT

23 February 1995 *

In Joined Cases C-358/93 and C-416/93,

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

Aldo Bordessa (Case C-358/93)

and against

Vicente Marí Mellado,

Concepción Barbero Maestre (Case C-416/93),

on the interpretation of Articles 30 and 59 of the EEC Treaty, and Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5),

* Language of the case: Spanish.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler and P. J. G. Kapteyn (Rapporteur), (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida and J. L. Murray, Judges,

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

after considering the written observations submitted:

in Case C-358/93 on behalf of:

- the Ministerio Fiscal, by Florentino Orti Ponte, Fiscal de la Audiencia Nacional,
- Aldo Bordessa, by Francisco Velasco Muñoz Cuellar, Procurador de los Tribunales, and José Colls Alsius, of the Barcelona Bar,
- the Spanish Government, by A. Navarro González, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,
- the Netherlands Government, by J. G. Lammers, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Portuguese Government, by Luis Fernandes, Director in the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, and Jorge Santos, Legal Adviser with the Bank of Portugal, acting as Agents,

- the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, and Derrick Wyatt QC, acting as Agents,
 - the Commission of the European Communities, by Thomas Cusack, Legal Adviser, and Blanca Rodríguez Galindo, of the Legal Service, acting as Agents,
- and, in Case C-416/93 on behalf of:
- the Ministerio Fiscal, by Florentino Orti Ponte, Fiscal de la Audiencia Nacional,
 - the Spanish Government, by A. Navarro González, Director-General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, acting as Agents,
 - the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Nicolas Eybalin, Foreign Affairs Secretary in the same Ministry, acting as Agents,
 - the Portuguese Government, by Luis Fernandes, Director in the Legal Service of the Directorate-General for the European Communities in the Ministry of Foreign Affairs, and Jorge Santos, Legal Adviser with the Bank of Portugal, acting as Agents,
 - the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent,
 - the Commission of the European Communities, by Blanca Rodríguez Galindo and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Ministerio Fiscal, Aldo Bordessa (Case C-358/93), Vicente Marí Mellado and Concepción Barbero Maestre (Case C-416/93), represented by D. Alvarez Pastor, of the Madrid Bar, the Spanish Government, the Belgian Government, represented by P. Duray, Assistant Adviser in the Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, and J.-V. Louis, Head of the Legal Service at the Banque Nationale de Belgique, acting as Agents, the Portuguese Government, the United Kingdom, and the Commission, at the hearing on 4 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 17 November 1994,

gives the following

Judgment

1 By order of 19 June 1993, received at the Court on 16 July 1993 and registered under number C-358/93, and by order of 20 September 1993, received at the Court on 7 October 1993 and registered under number C-416/93, the Audiencia Nacional (National High Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 30 and 59 of the EEC Treaty, and Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5, hereinafter 'the Directive').

2 Those questions were raised in two sets of criminal proceedings. On 10 November 1992 Aldo Bordessa (Case C-358/93), an Italian national residing in Italy, arrived

at the customs post of La Junquera, Gerona (Spain) travelling towards France. When his car was inspected, banknotes worth approximately PTA 50 million were discovered in it, concealed in different places. Since Mr Bordessa did not possess the authorization required under Spanish law for the export of such a sum, he was arrested and the money confiscated. On 19 November 1992, Marí Mellado and Barbero Maestre (Case C-416/93), a married couple of Spanish nationality residing in Spain, crossed the frontier at the same customs post. In the course of an inspection carried out inside France, the French authorities subsequently discovered banknotes worth a total of PTA 38 million in their car. Since no application had been made to the Spanish authorities for authorization to export that amount, criminal proceedings were initiated before the Spanish courts.

- 3 Under Article 4(1) of Royal Decree 1816 of 20 December 1991 on economic transactions with other countries, the export of such items as coins, banknotes and bank cheques payable to the bearer, made out in pesetas or in foreign currencies, is subject to a prior declaration when the amount is in excess of PTA 1 million per person and per journey and subject to prior administrative authorization when the amount is in excess of PTA 5 million per person and per journey.
- 4 That decree was amended by Royal Decree 42 of 15 January 1993 which, according to the national court, constitutes no more than a technical improvement.
- 5 The national court considers that it is necessary to determine the validity and effect of that provision in the light of Community law before making a finding on a

criminal offence under Law No 40 of 10 December 1979 on the regulations governing exchange control, as amended by Organic Law No 10 of 16 August 1983. Accordingly it stayed proceedings and submitted the following questions to the Court for a preliminary ruling:

- '(1) Does Article 30 of the EEC Treaty preclude rules of a Member State which require a person leaving national territory bearing coins, banknotes or bearer cheques to make a prior declaration if the amount is in excess of PTA 1 million and to obtain prior administrative authorization if the amount exceeds PTA 5 million, where non-compliance with those requirements entails criminal penalties which may include detention?

- (2) Does Article 59 of the EEC Treaty preclude rules such as those described in Question 1?

- (3) Are rules such as those described in the previous questions compatible with Articles 1 and 4 of Directive 88/361/EEC?

- (4) If Question 3 is answered in the negative, do the rules in Article 1 in conjunction with Article 4 of Directive 88/361/EEC meet the necessary conditions in order for them to be relied on as against the Spanish State before national courts and to render inapplicable national rules which conflict with them?'

By order of the President of 13 June 1994 the two cases were joined, in accordance with Article 43 of the Rules of Procedure, for the purposes of the oral procedure and the final judgment.

- 7 It should first be observed that Article 1(1) of the Directive requires Member States to abolish restrictions on movements of capital taking place between persons resident in Member States. However, as indeed the national court pointed out, the Kingdom of Spain was authorized under Article 6(2) of the Directive temporarily to continue to apply restrictions to the capital movements listed in Annex IV, subject to the conditions and time-limits laid down therein. Among the transactions mentioned in Annex IV, List IV specifies *inter alia* the physical import and export of financial assets — means of payment, the liberalization of which the Kingdom of Spain was permitted to defer until 31 December 1992.
- 8 Since the facts which gave rise to the two cases occurred before that date, the French and Portuguese Governments have expressed doubts regarding the applicability of the Directive to those facts.
- 9 It is clear nevertheless from the order for reference that the national court considered it necessary to seek a ruling from the Court of Justice on the interpretation of Articles 1 and 4 of the Directive on the ground that, if appropriate, it would apply the principle recognized in its domestic law of the retroactive effect of the more favourable criminal provision. It would therefore refrain from applying domestic law in so far as it conflicted with Community law. That was moreover confirmed at the hearing by the parties to the main proceedings.
- 10 Consequently it is necessary to answer the questions submitted since it is for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see the judgment in Case C-30/93 *AC-ATEL Electronics Vertriebs GmbH v Hauptzollamt München-Mitte* [1994] ECR I-2305).

Questions 1 and 2

- 11 By its first two questions, the national court wishes to know whether Articles 30 and 59 of the Treaty preclude rules which, as in the present case, make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or administrative authorization and make that requirement subject to criminal penalties.
- 12 As regards Article 30 of the Treaty in particular, it should first be pointed out that, according to settled case-law, under the system of the Treaty means of payment are not to be regarded as goods falling within the purview of Articles 30 to 37 of the Treaty (see Case 7/78 *Regina v Thompson and Others* [1978] ECR 2247, paragraph 25).
- 13 It is also clear from the system of the Treaty that the physical transfer of assets falls not under Articles 30 and 59 but under Article 67 and the directive implementing that provision.
- 14 Even if it were established that such a transfer constituted a payment connected with trade in goods or services, the transaction would be governed not by Articles 30 and 59 but by Article 106 of the Treaty.
- 15 Consequently it should be stated in reply to the first two questions that rules which make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or administrative authorization and which make that requirement subject to criminal penalties do not fall within the scope of Articles 30 and 59 of the Treaty.

Question 3

- 16 By its third question, the national court is essentially asking whether Articles 1 and 4 of the Directive preclude national legislation from making the export of coins, banknotes or bearer cheques conditional on a prior declaration or authorization.
- 17 It should first be noted that the Directive brought about the full liberalization of capital movements, for which purpose Article 1 required Member States to abolish restrictions on movements of capital taking place between persons resident in Member States.
- 18 Under the first paragraph of Article 4 of the Directive, Member States may ‘take all requisite measures to prevent infringements of their laws and regulations, *inter alia* in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information’.
- 19 The effectiveness of tax controls and the fight against illegal activities, such as tax evasion, money laundering, drug trafficking and terrorism, have been invoked as aims justifying the rules at issue.
- 20 It must therefore be examined whether Member States, in pursuing those aims, are taking measures which fall under the first paragraph of Article 4 of the Directive and consequently concern interests which those States are entitled to protect.

- 21 The first paragraph of Article 4 of the Directive expressly refers to the requisite measures to prevent infringements of the laws and regulations of Member States, '*inter alia*' in the field of taxation and the prudential supervision of financial institutions. It follows that other measures are also permitted in so far as they are designed to prevent illegal activities of comparable seriousness, such as money laundering, drug trafficking or terrorism.
- 22 That interpretation is confirmed moreover by the insertion in the Treaty establishing the European Community of Article 73d, paragraph (1)(b) of which essentially reproduces the first paragraph of Article 4 of the Directive but also provides that Member States have the right to take measures which are justified on grounds of public policy or public security.
- 23 It is in the light of those considerations that it should be determined whether the requirement laid down by the authorities of a Member State of a prior declaration or authorization for the transfer of coins, banknotes or bearer cheques is to be regarded as a requisite measure within the meaning of the first paragraph of Article 4 of the Directive.
- 24 As the Advocate General pointed out at point 17 of his Opinion, authorization has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application.
- 25 A requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (see Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 34). It might have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive.

- 26 Pursuant to that provision, the application of the measures and procedures referred to in the first paragraph 'may not have the effect of impeding capital movements carried out in accordance with Community law'.
- 27 A prior declaration, on the other hand, may be one of the requisite measures which Member States are permitted to take since, unlike prior authorization, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations.
- 28 However, the Spanish Government defended the need for prior authorization, claiming that it was only by virtue of such a system that non-compliance could be classified as criminal and hence criminal penalties imposed. Failure to meet that requirement could also lead to confiscation of the capital sums involved in the crime.
- 29 That view must, however, be rejected.
- 30 The Spanish Government has failed to provide sufficient proof that it is impossible to attach criminal penalties to the failure to make a prior declaration.
- 31 Consequently, it should be stated in reply to the third question that Articles 1 and 4 of the Directive preclude the export of coins, banknotes or bearer cheques being

made conditional on prior authorization but do not by contrast preclude transactions of that nature being made conditional on a prior declaration.

Question 4

- 32 By its fourth question, the national court is asking whether the provisions of Article 1 in conjunction with Article 4 of the Directive have direct effect.
- 33 The requirement under Article 1 of the Directive for Member States to abolish all restrictions on movements of capital is precise and unconditional and does not require a specific implementing measure.
- 34 Application of the proviso in Article 4 of the Directive is amenable to review by the courts, and hence the fact that a Member State may avail itself of that possibility does not prevent Article 1 of the Directive, which enshrines the principle of the free movement of capital, from conferring rights on individuals which they may rely on before the courts and which the national courts must uphold.
- 35 Consequently, the reply to the national court's fourth question should be that Article 1 in conjunction with Article 4 of the Directive may be relied on before national courts and render inapplicable national rules which conflict with those provisions.

Costs

- ³⁶ The costs incurred by the Spanish, Belgian, French, Netherlands and Portuguese Governments, the United Kingdom, and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Juzgado Central de lo Penal de la Audiencia Nacional, by order of 19 June 1993 (Case C-358/93) and by order of 20 September 1993 (Case C-416/93), hereby rules:

1. Rules which make the export of coins, banknotes or bearer cheques conditional upon a prior declaration or an administrative authorization and make that requirement subject to criminal penalties do not fall within the scope of Articles 30 and 59 of the Treaty.
2. Articles 1 and 4 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty preclude the export of coins, banknotes or bearer cheques being made conditional on prior authorization

but do not by contrast preclude a transaction of that nature being made conditional on a prior declaration.

3. Article 1 in conjunction with Article 4 of Directive 88/361/EEC may be relied on before national courts and render inapplicable national rules which conflict with those provisions.

Rodríguez Iglesias

Schockweiler

Kapteyn

Mancini

Kakouris

Moitinho de Almeida

Murray

Delivered in open court in Luxembourg on 23 February 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President