In Joined Cases 286/82 and 26/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale di Genova [District Court, Genoa] for a preliminary ruling in the proceedings pending before that court between

GRAZIANA LUISI

and

MINISTERO DEL TESORO [Ministry of the Treasury] (Case 286/82),

and between

GIUSEPPE CARBONE

and

MINISTERO DEL TESORO (Case 26/83),

on the interpretation of Articles 67, 68 and 106 of the EEC Treaty in order to enable the court making the reference to give its decision as to the compatibility with those articles of certain provisions of Italian legislation relating to transfers of foreign currency,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, U. Everling and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

# JUDGMENT

## Facts and Issues

The orders for reference, the course of the procedure and the observations submitted pursuant to 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 facts of the main proceedings may be summarized as follows:

*(a) Case 286/82*

In reports drawn up on 28 August 1979 and 12 December 1980, the Ufficio Italiano dei Cambi [Italian Exchange Office] placed on record the fact that Graziana Luisi, the plaintiff in the main proceedings, an Italian national residing in Italy, had used abroad means of payment to an exchange value of LIT 24 906 393 in 1975 and LIT 8 464 440 in 1976. It appears from those reports that during 1975 and 1976 Mrs Luisi sought and obtained sums from various Italian banks in a number of foreign currencies, in particular United States dollars, Swiss francs, German marks and French francs.

Under the Italian legislation then applicable, the export of foreign currency was authorized up to an exchange value of LIT 500 000 per year. The Ministero del Tesoro imposed on Mrs Luisi for infringements of that legislation two separate fines equal to the difference between the amount of currency exported and the maximum permitted limit.

Mrs Luisi contested the legality of the orders imposing those fines before the Genoa court and stated that she had exported the currency in question in particular for the purpose of various periods spent as a tourist in the Federal Republic of Germany and France. At that time, she had also undergone medical treatment of various kinds in Germany. According to the plaintiff in the main proceedings, the Italian provisions limiting the exportation of means of payment in foreign currency for the purposes of tourism are incompatible with the provisions of Community law relating to the movement of capital and current payments.

*(b) Case 26/83*

In a report prepared on 6 September 1979 the Ufficio Italiano dei Cambi placed on record the fact that in 1975 Giuseppe Carbone, the plaintiff in the main proceedings, an Italian national residing in Italy, had used means of payment abroad to an exchange value of LIT 13 801 310. It appears from that report that during November 1975 Mr Carbone purchased from about 20 Italian banks American dollars, Swiss francs and German marks together amounting to the above-mentioned sum. Since he had exceeded the maximum exchange value

of LIT 500 000 per year at that time permitted by Italian law, a fine of LIT 13 301 310 was imposed on Mr Carbone by order of the Minister of the Treasury of 28 November 1981, being equal to the amount of currency exported in excess of the permitted maximum.

Mr Carbone brought an action before the Tribunale di Genova against that order of the Minister of the Treasury. He stated that he had used the foreign currency for a period of three months spent as a tourist in the Federal Republic of Germany and claimed that the Italian provisions limiting the means of payment in foreign currency for the purposes of tourism were incompatible with Community law and in particular with Articles 3 (c), 5, 67, 68, 71 and 106 of the EEC Treaty.

The contested Italian legislation

2. The relevant Italian rules are contained in Decree Law No 476 of 6 June 1956 introducing new provisions regarding exchange regulations and creating a free market in foreign State and bank notes (Gazzetta Ufficiale della Repubblica Italiana No 137 of 6. 6. 1956) and various implementing decrees.

By virtue of the last paragraph of the first article of that decree law, foreign State and bank notes which are legal tender and credit instruments used as a means of payment between residents and non-residents are regarded as foreign currencies.

Article 8 of the decree law provides that residents are obliged to surrender to the Ufficio Italiano dei Cambi any foreign currency which they hold.

The Bank of Italy and the credit undertakings approved as agencies thereof may issue foreign currency to residents going abroad for the purposes of tourism, business, education or medical treatment, subject to compliance with the provisions laid down by the Ministro per il Commercio col Estero [Minister for Foreign Trade] (Article 10 (a) of Decree Law No 476).

Article 4 (a) of the Ministerial Decree of 6 June 1956 (Gazzetta Ufficiale della Repubblica Italiana No 138 of 7. 6. 1956) provides that:

"The export of foreign State and bank notes by residents for the purposes of tourism, business, education and medical treatment is permitted up to the amount fixed by the Minister for Foreign Trade."

That amount was initially fixed by Article 12 of the Ministerial Decree of 26 October 1967 (Gazzetta Ufficiale della Repubblica Italiana No 280 of 10. 11. 1967), which prescribed a limit of LIT 1 000 000 per trip for travel for the purposes of tourism, business, education and medical treatment. The Ministerial Decree of 21 March 1974 (Gazzetta Ufficiale della Repubblica Italiana No 77 of 22. 3. 1974) subsequently authorized residents to export, for the above-mentioned purposes, foreign State and bank notes and credit instruments denominated in foreign currency up to a maximum exchange value of LIT 500 000 (Article 13 (a)).

The sole article of the Ministerial Decree of 2 May 1974 (Gazzetta Ufficiale della Repubblica Italiana No 114 of 3. 5.

1974), amending the Ministerial Decree of 21 March 1974, provides as follows:

"(a) The exportation by residents for the purposes of tourism, business, education and medical treatment of foreign State and bank notes and credit instruments denominated in foreign currency is permitted up to a maximum exchange value of LIT 500 000 *per annum.*"

The Ministerial Decree of 22 December 1975 (Gazzetta Ufficiale della Repubblica Italiana No 343 of 31. 12. 1975) contains an identical provision in Article 13 authorizing the issue of foreign currency to travellers going abroad for the above-mentioned purposes, up to a maximum exchange value of LIT 500 000 *per annum.*

By virtue of Article 13 of Decree Law No 476, special authorizations for the issue of foreign currency of an amount exceeding the exchange value of LIT 500 000 may be applied for from the Minister for Foreign Trade. The latter may delegate his powers for that purpose to the Ufficio Italiano dei Cambi. Paragraph 3 of Circular No A/300 of 3 May 1974 issued by the Ufficio Italiano dei Cambi authorized the issue of foreign currency of an amount exceeding LIT 500 000 only for travel for the purpose of business, education or medical treatment, and subject to prior examination of the supporting documents by the Ufficio Italiano dei Cambi in each individual case.

At the material time, the export of foreign currency in excess of the limit laid down in the general authorization or in any special authorization obtained by a resident attracted a penalty under administrative law consisting in the payment of a sum of up to five times the value of the currency involved in the infringement (Article 15 of Decree Law No 476). Penalties under criminal law were subsequently introduced by Decree Law No 31 of 4 March 1976 (Gazzetta Ufficiale della Repubblica Italiana No 60 of 5. 3. 1976).

The exchange control legislation was further amended by a Ministerial Decree of 12 March 1981 (Supplement to Gazzetta Ufficiale della Repubblica Italiana No 82 of 24. 3. 1981). That decree raised the limit under the general authorization for travel for the purpose of tourism and business to the exchange value of LIT 1 000 000 *per annum;* the possibility of special authorizations for a higher amount was confined to business travel. In implementation of that decree, as amended by the Ministerial Decree of 14 July 1982 (Supplement to Gazzetta Ufficiale della Repubblica Italiana No 207 of 29. 7. 1982), Circular No 1/11 of the Ufficio Italiano dei Cambi of 9 May 1983 (Gazzetta Ufficiale della Repubblica Italiana No 137 of 20. 5. 1983) then laid down that the maximum annual allowance for residents wishing to go abroad for the purpose of tourism was to be the exchange value of LIT 1 600 000, of which LIT 100 000 might be in the form of foreign State and bank notes and the remainder in the form of various other means of payment. For residents going abroad for the purposes of business, medical treatment of education, the same circular authorized the issue of foreign currency within the limits of the actual and proven needs of the persons concerned, which were to be verified by the approved banks.

The Community provisions

3. In the proceedings before the national court the plaintiffs relied on the one hand upon Articles 67 and 68 of the Treaty relating to the movement of capital and, on the other, upon Article 106 of the Treaty concerning payments relating to the movement of goods, services and capital, and also transfers of capital and earnings.

Article 106 (3) provides as follows:

"Member States undertake not to introduce between themselves any new restrictions on transfers connected with the invisible transactions listed in Annex III to this Treaty.

The progressive abolition of existing restrictions shall be effected in accordance with the provisions of Articles 63 to 65, in so far as such abolition is not governed by the provisions contained in paragraphs (1) and (2) or by the Chapter relating to the free movement of capital."

The following appear among the invisible transactions listed in Annex III to the Treaty:

Business travel;
Tourism;
Travel for private reasons (education);
Travel for private reasons (health);
Travel for private reasons (family).

The Council has adopted two directives for the implementation of Article 67 of the Treaty. The first is dated 11 May 1960 (Official Journal, English Special Edition 1959-1962, p. 49) and the second, which supplements and amends the first, is dated 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 of the Treaty. Annex I divides capital movements into four categories which are set out in Lists A, B, C and D. Article 7 of the first Directive imposes upon Member States the obligation to notify the Commission of any amendment of the provisions governing the transactions appearing in List D which includes, *inter alia,* the physical import and export of financial assets.

The Council has also adopted two directives in implementation of Article 106 of the Treaty. The first is Directive 63/340 of 31 May 1963, which is based on Articles 63 and 106 (2) and is intended to ensure the abolition of all prohibitions on or obstacles to payments for services where the only restrictions on the exchange of services are those governing such payments (Official Journal, English Special Edition 1963-1964, p. 31). Article 3 of that Directive provides as follows:

"This directive shall apply to the services specified in Articles 59 and 60 of the Treaty.

It shall not, however, apply to services in connection with transport or to foreign exchange allowances for tourists."

The second directive is No 63/474 of 30 July 1963, which is based on Articles 63 and 106 (3) and liberalizes transfers in respect of invisible transactions not connected with the movement of goods, services, capital or persons (Official Journal, English Special Edition 1963-1964, p. 45). The invisible transactions listed in the annex to that directive do not include expenses incurred in connection with travel for the purposes of tourism, business, education or medical treatment.

*Procedure*

4. As is apparent from the order making the reference in Case 286/82, the Tribunale di Genoa considers that, in view of the judgment of the Court of 11 November 1981 in Case 203/80 *Casati* [1981] ECR 2595, the Community provisions relating to the movement of capital do not entail compulsory abolition of restrictions imposed by Member States regarding the physical export of foreign currency. It considers however that the transactions carried out in this case fall under the headings of tourism, business, education or health which are among the invisible transactions referred to in the first subparagraph of Article 106 (3) of the Treaty and appear in the list in Annex III to the Treaty. Consequently, the national court wishes to know whether Community nationals have the benefit of the rights which Member States are obliged to respect pursuant to the "standstill" provisions contained in the first subparagraph of Article 106 (3). Since in the judgment cited above the Court of Justice did not give a ruling on the interpretation of that provision in relation to Article 67 et seq. of the Treaty relating to the movement of capital, the national court, by order of 12 July 1982, decided pursuant to Article 177 of the Treaty to stay the proceedings and to submit the following question to the Court for a preliminary ruling:

"In the case of exportation by residents travelling abroad for the purpose of tourism, business, education or medical treatment of foreign State and bank notes and credit instruments in foreign currency, do persons subject to Community law have the benefit of rights which Member States are obliged to respect by virtue of the 'standstill' provisions contained in the first subparagraph of Article 106 (3) of the EEC Treaty, regard being had to the fact that the transaction in question is one of the invisible transactions listed in Annex III to the said Treaty?

Or, by virtue of the reference made in the second subparagraph of Article 106 (3) of the Treaty, do the above-mentioned circumstances, which, from an objective point of view, constitute a transfer of currency in cash, fall within the definition of the movements of capital which, pursuant to the provisions of Articles 67 and 68 of the Treaty and the related directives adopted by the Council on 11 May 1960 and 18 December 1962, are not subject to compulsory liberalization, with the result that control measures and penalties imposed by a Member State, in this case administrative penalties, are lawful?"

5. In the statement of grounds in the order making the reference in Case 26/83, the Tribunale di Genova points out that pursuant to Article 106 (1) of the Treaty, the liberalization of the provision of services under Article 59 of the Treaty ought to entail the abolition of any control relating to payments connected with those services. In this case, the foreign currency (German marks) is said to have been used for tourist purposes within the territory of a Member State of the Community and in particular for services provided in the hotel sector or in closely related sectors. Considering that it was therefore necessary to interpret the concept of movement of services within the meaning of Article 106 (1), and in particular to determine whether transfers of currency relating to the provision of various services should be described as "current payments" or as "movement of capital",

the national court, by order of 22 November 1982, decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

"In the case of exportation, by resident travellers going abroad for the purpose of tourism, of foreign bank notes, or credit instruments in foreign currency, do Community nationals benefit from rights which the Member States are bound to respect by virtue of the directly applicable provision contained in Article 106 (1) of the EEC Treaty, on the assumption that tourism is to be regarded as falling within the scope of the movement of services and that transfers of currency to cover tourist expenses are to be treated as current payments which must therefore be deemed to be liberalized in the same way as the services with which they are connected;

or, if the transaction in question falls within the category of invisible transactions listed in Annex III to the EEC Treaty and, by virtue of the reference made by the second subparagraph of Article 106 (3), the transaction constitutes a transfer of cash, does it fall within the category of movements of capital which, under the provisions of Articles 67 and 68 of the Treaty and of the relevant directives adopted by the Council on 11 May 1960 and 18 December 1962, need not necessarily be liberalized, with the result that in that sphere Member States may impose controls and penalties of an administrative nature?"

The orders making the references were received at the Court Registry on 27 October 1982 (Case 286/82) and 21 February 1983 (Case 26/83).

6. By order of 8 June 1983 the Court joined the two cases for the purposes of the oral procedure and judgment.

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

In Case 286/82 by Graziana Luisi, the plaintiff in the main proceedings, represented by Giuseppe Conte and Gualtiero Timossi, of the Genoa Bar, and by the Government of the French Republic, represented for that purpose by Jean-Paul Costes, who is attached to the Prime Minister's Secretariat-General, acting as Agent,

In Case 26/83 by Giuseppe Carbone, the plaintiff in the main proceedings, represented by Giuseppe Conte and Gualtiero Timossi, of the Genoa Bar, and by the Government of the Kingdom of the Netherlands, represented by E.F. Jacobs deputizing for the Secretary-General in the Ministry of Foreign Affairs, acting as Agent,

And in both cases by the Government of the Federal Republic of Germany, represented by Martin Seidel, acting as Agent, by the Government of the Kingdom of Belgium, represented by W. Collins (in Case 286/82) and by E. de Beer de Laer (in Case 26/83), acting as Agents, by the Government of the Italian Republic, represented by the Avvocato dello Stato, Marcello Conti, acting as Agent, and by the Commission of the European Communities, represented by

Guido Berardis, a member of its Legal Department, acting as Agent.

Upon 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, it called upon the parties to the preparatory proceedings to express their views at the hearing as to how "business travel" referred to in Annex III to the Treaty should be defined.

## II — Written observations submitted to the Court

As regards the physical export of currency for the purposes of tourism considered in the light of the Treaty, the observations lodged in these proceedings reveal three general views, namely: in the first place, the view that the operations in question are capital movements falling within Article 67 of the Treaty; secondly, the view that they are invisible transactions within the meaning of Article 106 (3) of the Treaty; and, thirdly, the view that they are payments connected with services as provided for in Article 106 (1).

*Preliminary comments*

The *Italian Government* expresses doubts in the first place as to whether the plaintiffs in the main proceedings actually used all the currency to which these two cases refer for the purposes of tourism in Community countries. It points out that the plaintiffs did not furnish specific evidence in that regard in the main proceedings. The large sums withdrawn within relatively short periods in each of the actions before the national court by far exceed the requirements of a tourist, even for a prolonged stay abroad. Moreover, a part of the funds was in currencies of non-member countries. In that regard, the Italian Government points out that under Italian exchange legislation the mere possession of foreign currency by a resident and the failure to surrender it to the Ufficio Italiano dei Cambi within the prescribed time limits constitute an unlawful act. Although it is not for the Court of Justice to verify the facts of the main proceedings, it is nevertheless relevant to confirm to the national court that the Community provisions relating to capital movement and to payments and transfers connected with invisible transactions do not relate to mere possession of foreign currency by residents of a Member State and likewise do not extend to the export of foreign currency by residents travelling to non-member countries.

The Italian Government's observations are based on the view that the subject-matter of the dispute is limited to the issue and exportation of foreign currency not intended for specific purposes but simply necessary for travellers going abroad in order to satisfy such needs of a general nature as may arise during the trip.

*Observations supporting the applicability of Article 67*

The *French and Italian Governments* consider that the exportation of currency for tourist purposes constitutes a movement of capital falling within

Article 67. In support of their view they state that exportation of that kind is nothing more than a way of providing a person with means of payment in a given country. When a traveller crosses the frontier, the ultimate use of such means of payment is still undecided. In fact, at the export stage, the means of payment in question are not earmarked for a specific payment in consideration of a particular service; currency is merely being transferred from one Member State to another. All the conditions necessary for the transaction in question to be classified as movement of capital, as provided for in Article 67, are therefore satisfied. Moreover, the physical export of financial assets appears in List D in Annex 1 to the Directive of 11 May 1960, the first Council directive for the implementation of Article 67 of the Treaty. The transactions appearing in that list are classified as capital movements for which no obligation as to liberalization has been imposed on the Member States.

The Italian Government adds that that view is confirmed by the fact that private travel for tourist purposes does not appear among the invisible transactions listed in the annex to Council Directive 63/474 liberalizing transfers in respect of invisible transactions not connected with current payments or capital movements. Apparently, the Council considered that transfers connected with tourist trips fall within the category of capital movements, at least in so far as they do not constitute payment for the provision of specified services.

The Italian Government considers that by virtue of the judgment of 11 November 1981 in Case 203/80) *Casati* [1981] ECR 2592, the first paragraph of Article 71 does not impose upon the Member States any "standstill" obligation which may be relied upon by individuals with regard to restrictions on the export of currency by travellers. Similarly, Article 67 (1) does not entail the automatic abolition of all such restrictions upon the expiry of the transitional period. In fact, liberalization of that kind should be carried into effect by means of the procedure provided for in Article 69.

In those circumstances, the applicability of the provisions of Article 106 (3) to exports of currency for tourist purposes is irrelevant, even though tourism appears among the invisible transactions referred to in Annex III of the Treaty.

In that connection, the Italian Government maintains that Article 106 (3) is of a purely subsidiary character in so far as it applies to the invisible transactions listed in Annex III to the Treaty only in cases where they are not governed by other provisions of the Treaty. As may indeed be seen from the second subparagraph of paragraph (3) transfers connected with certain invisible transactions referred to in Annex III in fact constitute current payments falling under Article 106 (1) und (2) or capital movements as provided for in Article 67 of the Treaty. The reference to Articles 63 and 65 with regard to progressive abolition of the restrictions on transfers connected with invisible transactions is meaningless except with regard to transfers which are classifiable neither as current payments nor as capital movements. That situation is explained by the fact that the list in Annex III to the Treaty reproduces in full Annex B to the Code for the Liberalization of Invisible Transactions of the Organization for European Cooperation and

Development, which was not drafted in such a manner as to take account of the conceptual system embodied in the EEC Treaty, particularly as regards definition of the concept of services in Articles 59 and 60 of the Treaty.

The Italian Government points out in that regard that, according to the usual classification of international payments, a distinction is made between, on the one hand, capital movements and, on the other, current payments. Current payments consist in the transfer of currency for which immediate consideration is given, namely the transfer of goods or the provision of services. In the first case there is a current payment connected with a commercial transaction and in the second a current payment connected with an invisible transaction, both cases falling in principle within the scope of Article 106 (1) and (2) of the Treaty. However, certain transactions listed in Annex III to the Treaty, such as banking charges, representation expenses and charges for documentation do not fall within the concept of services as provided for in Articles 59 and 60 of the Treaty. In fact, the term "services ... normally provided for remuneration" necessarily presupposes the existence of a specific relationship between the provider of a given service and a person established in another Member State to whom the service is rendered, whereas the operations referred to above are more concerned with general expenses not connected with a specific relationship. Transfers connected with such operations, a complete list of which is given in the annex to the above-mentioned Directive 63/474, fall precisely within the residual field of application of Article 106 (3).

In so far as they are capital movements, exports of currency by travellers for the purposes of tourism do not therefore fall within the residual category of transfers connected with the invisible transactions listed in Annex III, referred to by Article 106 (3). If, in consequence, the abolition of existing restrictions provided for in the second subparagraph of that paragraph does not apply with regard to such exports, the same conclusion must therefore be drawn with regard to the "standstill" clause in the first subparagraph thereof. In fact, the "standstill" clause and the rule requiring progressive abolition of existing restrictions constitute an indivisible whole, so that the limitation of the field of application to residual transfers, even if expressed merely in the context of the second subparagraph, can refer only to paragraph (3) in its entirety.

The Italian Government goes on to submit that transfers of foreign currency connected with tourist travel likewise cannot be regarded as payments connected with the provision of services within the meaning of Article 106 (1) and (2). It refers to the opinion of Mr Advocate General Trabucchi in Case 118/75 *Watson* [1976] ECR 1201 in support of its view that the essential component of "services" within the meaning of Articles 59 and 60 of the Treaty lies in the existence of a specific relationship, which is clearly defined, at least as regards its essential elements such as the persons involved and the nature and duration of the service. That component, namely the appropriation of the exported currency to a specific service, is lacking in the case of the tourist, who is merely a potential user of services and other unspecified facilities. The transfer of currency by a tourist does not constitute a payment within the meaning of Article 106 but merely a means of ensuring that he has funds

available to him in the country of destination. As the ultimate use of such funds remains to be determined they may be used for widely differing purposes and in connection with sectors wholly unrelated to the field of services. In such circumstances, the conclusion is inescapable that a transfer of that kind for which the consideration is not identified is classifiable as a movement of capital within the meaning of Article 67 *et seq.* of the Treaty.

Thus, the case of a tourist of the kind with which these proceedings are concerned is clearly different from that of a national of a Member State going to see a particular doctor in another Member State in order to receive medical treatment or indeed that of a student who registers for a specific course of study in another Member State. In both the latter cases services are indeed provided within the meaning of Articles 59 and 60 of the Treaty. The payments connected with such specific services should be liberalized, provided that the correct procedures are followed, in particular banking procedures, so that the outflow of currency can be tied with certainty and in a verifiable manner to the transaction in question.

In that respect, the Italian Government states that even if transfers of currency for tourist purposes were to be regarded as liberalized payments within the meaning of Article 106 (1), it would still be undeniable that the Member States are entitled to "verify the nature and genuineness of transfers of funds and of payments and to take all necessary measures in order to prevent contravention of their laws and regulations, in particular as regards the issue of foreign currency to tourists" (cf. General Programme for the Abolition of Restrictions on Freedom to Provide Services, Title III, last paragraph; confirmed by Article 2 of Directive 63/340, Article 2 (1) of Directive 63/374 and Article 5 of the Directive of 11 May 1960). Consequently, even a system whereby every export of currency is subjected to specific controls would in principle be allowed under Community law. *A fortiori,* the same applies to the introduction, on the pattern of the Italian legislation, of a general and automatic authorization for the export of currency on the occasion of a trip abroad, up to a specified amount. Determination of the amount of such an allowance, reflecting the normal requirements of an average tourist, is a matter which can be left only to the discretion of the national legislature. Likewise, the obligation to apply for a specific authorization to exceed the allowance and the imposition of appropriate penalties are not contrary to Community law.

The Italian Government emphasizes in that regard that such a system in no way affects the right of residents to go abroad for tourist purposes. It merely

lays down precautionary control measures intended to tackle the difficult problem of making a specific distinction between exports of currency for genuine tourist needs and exports connected with speculative transactions of a wholly different nature.

In view of the discretionary powers enjoyed by the Member States in that respect, the Italian Government also considers that private citizens are not entitled to rely on individual rights based on Article 106 (1). It adds that if Article 106 (3) did apply to transfers of currency for the purposes of tourism, the second subparagraph of that paragraph is not in any case directly applicable, since that provision does not specify any precise timing for the progressive abolition of existing restriction. Moreover, to date no Council directive has provided for such abolition with regard to tourism. The "standstill" clause in the first subparagraph of paragraph (3) is not relevant to this case since no new restriction has been introduced nor have any existing restrictions been made more severe by comparison with the Italian legislation in force on 1 January 1958.

The *French Government* considers that tourism falls within the scope of the services provided for in the Treaty. By virtue of Article 106 (1) and (2), the restrictions on payments connected with the tourist trade should therefore have been abolished at the end of the transitional period. However, since exports of State and bank notes constitute capital movements within the meaning of Article 67 of the Treaty, each Member State, in the exercise of the freedom it retains to impose restrictions on capital movements, has perceived an economic and practical need to establish a reasonable threshold for the permissibility of the free movement of notes for tourist purposes. Movements of notes are thus seen as authorized capital movements which are nevertheless subject to a specific limit, below which they are deemed to be earmarked for tourist payments.

The French Government points out in that regard that the Code for the Liberalization of Invisible Transactions of the Organization for European Cooperation and Development provides that resident travellers are authorized to purchase and export bank notes of the Member States which they visit up to the amount of 700 special drawing rights per trip per person. In the Community, similar systems of allowances are provided for by means of tax and customs rules. Just like national allowances in respect of capital, those systems reflect on the one hand a concern to facilitate trade and, on the other, the need for controls intended to prevent certain kinds of fraud. The Member States have abundant information available to serve as a basis for determination of the amount of the allowance, such as the prices charged by tour operators for stays abroad. It is also possible for them to accord different treatment to travellers according to the purpose of their trip (business, health or leisure) or to grant special facilities on the basis of supporting documents. Moreover, an amount, which rises commensurately with the price of the trip, is normally paid without the use of notes, namely by means of bank transfers from the country of origin or by payments to travel agencies in the country of residence.

In the view of the French Government, since the end of the transitional period, Article 106 (3) adds nothing to the provisions of paragraph (1) of that article, except in so far as it extends the obligation as to liberalization so as to include payments connected with transactions which do not fall within the scope of the free movement of goods, services and capital.

It considers, in conclusion, that the Member States are free to regulate physical exports of bank notes and therefore to recognize that such exports may, within a specified limit, be intended for the payment of tourist expenses. Of course, they retain the right to change that limit and to take measures to ensure that such facilities are not used as a vehicle for capital movements.

*Observations supporting the applicability of Article 106 (3)*

In the view of the *German and Belgian Governments,* the restrictions imposed by a Member State on the export of currency by a resident going abroad for the purposes of tourism, business, education and medical treatment are not restrictions on capital movements, but fall within the field of application of Article 106 (3) of the Treaty. Those activities in fact appear in the list of invisible transactions in Annex III to the Treaty, even though the "standstill" obligation laid down in the first subparagraph thereof applies to exports of means of payment relating thereto.

Both governments share the opinion of the Italian Government to the effect that, by virtue of the second subparagraph thereof, Article 106 (3) is merely residual in character as regards payments connected with transactions falling within the four fundamental freedoms of the common market.

In that respect, the *German Government* states that the "standstill" clause in the first subparagraph of paragraph (3) is not intended to depart from the principle that the payments referred to in Article 106 (1) are of a subordinate nature. By virtue of the latter provision, the freedom in respect of payments must be interpreted as representing part of one of the four principal freedoms. It is therefore guaranteed only to the extent to which those principal freedoms are achieved. Consequently, the "standstill" clause in the first subparagraph of paragraph (3) can only relate to transfers connected with invisible transactions unrelated to the movement of goods, services, capital and persons (cf. Annex I to Directive 63/474). As a result, in the case of payments connected with invisible transactions falling within any of the four principal freedoms, the "standstill" clause gives way to other provisions of the Treaty. Therefore, a restriction on payments connected with an invisible transaction, which at the same time is a movement of capital, must be considered solely in the light of Article 67 *et seq.* of the Treaty.

The export of currency by a resident going abroad for the purposes of tourism, business, education or medical treatment constitutes an economic fact which may be associated in part with the free movement of goods (business trips) and in part with the free provision of services (tourism, educational trips or medical treatment). By reason of the complete liberalization achieved in these fields since the expiry of the transitional period, the question whether the restrictions are "existing" or "new" will not affect any assessment of the compatibility of any restrictions with the Treaty. Only in so far as the exportation in question is used otherwise than for the declared purposes may it be regarded as a capital movement which must be assessed according to the provisions of Article 67.

In so far as the amounts exported are within the prescribed limits, individuals may claim before the national court, by virtue of the provisions of the first subparagraph of Article 106 (3) in conjunction with Articles 30, 31 or 59 of the Treaty, that the introduction of restrictions on payments detracts from fulfilment of a Community obligation which the national courts are obliged to respect. However, no such possibility exists in respect of the excess amount, which constitutes a movement of capital. It is for the national court to consider to what extent the amount of currency exported is appropriate to the declared purposes.

The *Belgian Government* considers that payments for the purposes of tourism and travel for business, educational or health reasons are not connected with the movement of services but must be liberalized by virtue of Article 106 (3). It recognizes however that it is possible to consider such payments to be connected with invisible transactions falling within the scope of the movement of services which are liberalized by virtue of Article 106 (1). Both interpretations moreover lead to the same conclusion as regards the rights of individuals. In both cases it is no longer possible since the end of the transitional period to impose restrictions, even if they existed previously. In fact, in the event of paragraph (3) being applicable, the reference contained in the second subparagraph thereof to Articles 63 to 65 is meaningless after the end of the transitional period, at which time the second subparagraph became directly applicable.

The direct effect of Article 106 (3) prevents Member States from limiting the amounts of payments made for the purposes in question in this case. It does not however preclude the adoption of control measures intended, for example, to limit the physical exportation of notes and credit instruments to reasonable amounts in accordance with practice in the fields of tourism, changes of family residence and so forth. For larger amounts, it is possible to require payment to be made through banks. Such measures should not go further than is strictly necessary and the control procedures should not be designed to restrict the freedom which the Treaty seeks to ensure (cf. the judgment of 11. 11. 1981, cited above).

*Observations supporting the applicability of Article 106 (1)*

*Mrs Luisi*, the plaintiff in the main proceedings in Case 286/82, *Mr Carbone*, the plaintiff in the main proceedings in Case 26/83, the *Government of the Kingdom of the Netherlands* and the *Commission* take the view that, by virtue of Article 106 (1) of the Treaty, transfers of foreign currency made by residents of a Member State to another Member State intended to cover expenses incurred in respect of tourism must be regarded as liberalized in the same way as the services to which they relate. In Case 286/82, Mrs Luisi and the Commission adopt a similar position with regard to transfers of currency for the purpose of business, education and medical treatment.

All four observe that tourist travel is not classifiable within the category of capital movements but, conversely, relates to the free movement of services. In support of that view, they put forward the arguments set out below.

It is apparent in the first place from the General Programme for the abolition of restrictions on freedom to provide services (Journal Officiel 1962, p. 32) that at that time the Council already held the view that tourism was classifiable under the heading of provision of services. In fact, restrictions affecting tourism were included among the restrictions to be abolished. Moreover, Directive 64/221 of 25 February 1964 (Official Journal, English Special Edition 1963-1964, p. 117) and Directive 73/148 of 21 May 1973 (Official Journal, L 172, p. 14) refer expressly to nationals of a Member State who reside in or wish to go to another Member State as the recipients of services.

Subsequently, the above-mentioned parties, the Netherlands Government and the Commission point out that Directive 63/340 of 31 May 1963 on the abolition of all prohibitions on or obstacles to payments for services under Article 106 (2) (Official Journal, English Special Edition 1963-1964, p. 31) expressly provides that it does not apply to foreign exchange allowances for tourists. The word "however" in Article 3 which precedes the list of the only services to which the directive is not to apply shows without any doubt that the Community legislature included tourism in the categories of services defined by Articles 59 and 60 of the Treaty. Mr Carbone points out in that regard that "tourist and hotel services" are expressly included amongst the "services" listed in the Italian Ministerial Decree of 12 March 1981 (Gazetta Ufficiale No 82 of 24. 3. 1981, supplement, paragraph 52).

In the third place, a tourist who goes from one Member State to another for the purpose of holidays there is a recipient of services which are subject, as such, to the provisions of the Treaty relating to the free provision of services, in the same way as the provider of the said services. Different treatment must not be accorded to two cases which are wholly similar: the case where the provider of the service goes to the recipient thereof and the more frequent case where the recipient of the service goes to the provider of the service. The effect of any other view would be to exclude from the field of application of the Treaty an activity of considerable economic significance such as tourism.

In that connection, the *Government of the Netherlands* points out that tourism comprises at least two important elements which constitute services. In the first place, there are travel agencies, tour operators and the other intermediaries in that field, which have given tourism a considerable boost in the past decades. The provision of services of that kind would be seriously jeopardized if it were no longer possible or were possible only to a limited extent to make the payments or transfers from one Member State to another required for the travel facilities purchased from those intermediaries. Then, during their holidays, tourists have recourse above all to the service sector. Mention may be made in that respect of transport, hotels and restaurants,

camping sites and so on. In that connection, the type of services in question may be described as extending beyond frontiers, involving travel on the part of the recipient, that is to say the tourist. If it were considered that only the provider of services were covered by the Treaty, numerous people involved in trade would never be able to benefit from the advantages accruing from establishment of the common market.

*Mrs Luisi* adds that the restrictions on means of payment, in so far as they limit the mobility of tourists, are also incompatible with the second article of the Fourth Additional Protocol to the European Convention on Human Rights, which safeguards the right of persons to leave their country, even for a short time, and to move freely within the territory of another State. That right is protected by Community law.

Finally, *Mr Carbone, Mrs Luisi* and the *Commission* state that the physical export of currencies can only be regarded as a capital movement when it constitutes an end in itself and does not therefore serve as consideration or a means of payment for an underlying operation or activity. In the case of tourism, the means of payment employed by travellers going abroad are, on the contrary, used for current payments, connected with the provision of services of which travellers avail themselves in another Member State. *Mr Carbone* also observes that it cannot be said that tourism is not a service by reason of the fact that, in so far as it is offered to consumers as a whole, it is indeterminate. Moreover, the tourist is not always merely a potential consumer: before leaving his own country he may for example make a reservation at a hotel of his choice.

According to the *Netherlands Government,* an inherent feature of tourism is the fact that when a tourist crosses the frontier into his country of destination, no services have yet been provided. The tourist carries money to pay for the services which will actually be rendered to him in the near future. For that reason, it is not a mere transfer of money across a frontier but the export, for a specific purpose, of the money necessary for the services which will ensure that the tourist has facilities for his holidays.

Against that background, it is clear that the transfer of foreign currency to another Member State for the purposes of tourism is not governed by Article 67 et seq. of the Treaty or by the directives relating to capital movements, but rather by Article 106.

According to *Mrs Luisi* and the *Commission,* the provisions of Article 106 also apply to persons travelling to another Member State for the purpose of medical treatment or to follow specific courses, against payment. The Commission points out that business travel is a less easily classifiable type of activity by reason of its very varied nature. It considers that in general those involved are providers of services who either visit the recipients or provide services in a Member State other than that in which they are established (as for example an advocate who in another Member State defends the interests of a client who resides in his own country or a free-lance journalist who submits reports from abroad to a newspaper in his own country).

*Mrs Luisi, Mr Carbone,* the *Government of the Netherlands* and the *Commission* also express the view that payments relating to the provision of services must be liberalized as from the end of the transitional period. Comprising as it does transactions connected with the free movement of services, tourist travel has the benefit of such liberalization, by virtue of Article 106 (1) of the Treaty. Mrs Luisi and the Commission express the same view regarding travel for the purposes of business, education and medical treatment.

The Commission points out that at the time of its accession Greece had to apply for an express derogation in order to maintain restrictions, subject to certain conditions and until 31 December 1985, on transfers connected with tourism. That derogation, which appears in Article 54 of the Act of Accession, is justified only if it is recognized that such transfers are actually liberalized in relations between the Member States.

Mr Carbone, Mrs Luisi, the Netherlands Government and the Commission therefore consider that an individual may rely upon Article 106 (1) in proceedings before a national court.

They consider that the first subparagraph of Article 106 (3) embodies an absolute obligation for Member States not to introduce, as between them, any new restrictions on transfers relating to travel for the purposes of tourism, business, education and medical treatment, which activities appear among the invisible transactions listed in Annex III to the EEC Treaty. Since that provision is clear in its scope and is mandatory no doubt can arise regarding its direct applicability. In that connection, Mrs Luisi and Mr Carbone allege that the restrictions introduced by the Italian Government in 1974 and 1975 with a view to limiting the amount of foreign currency used abroad each year represent a change by comparison with the previous situation. Before 1974 it was permissible to use the exchange value of the maximum authorized amount for each trip, regardless of the number of trips made by the resident during the course of a year. Under the Italian legislation now in force, an Italian national who has spent the whole permitted amount during a single tourist trip to a Member State is not allowed to return for a further stay, at least until the next year. Such a situation is manifestly incompatible with the first subparagraph of Article 106 (3). In its reply to the requests for a preliminary ruling, the Court should therefore rule that in the first place people subject to Community law are entitled to go to another Member State for tourist purposes whenever they wish without the exercise of that right being hindered by reason of an annual limit on expenditure.

The Commission also points out that the second part of the questions submitted derives from an imperfect understanding of the problem. The reference to the chapter relating to the movement of capital in the second subparagraph of Article 106 (3) in no way changes the fact that a transfer of currency for the purpose of tourism is classified as a current payment within the meaning of Article 106 nor does it entail the result that such a transfer is classified as a capital movement within the meaning of

Article 67, with all the consequences thereof with regard to liberalization. The concepts adopted in that respect by the Treaty are based on a clear distinction between capital movements (Article 67) and current payments (Article 106).

In the light of the foregoing considerations, Mr Carbone, Mrs Luisi and the Commission consider that the Member States are obliged to give authority for payments relating to tourism and travel for the purposes of business, education or medical treatment, pursuant to Article 106 (1) and to the reference contained in the second subparagraph of Article 106 (3). That does not mean that all control measures, although applied within a completely liberalized sector, are prohibited. Referring to the judgment of the Court in Case 203/80 *Casati,* cited above, Mrs Luisi and Mr Carbone state that those measures must not go further than is strictly necessary, nor must they be designed to restrict the freedom which the Treaty seeks to ensure. That situation arises however if, as in this case, the controls are carried out on a discretionary basis and if the national legislation limits the amount of payments connected with operations or activities which are liberalized under Community law.

Mr Carbone also draws the Court's attention to another factor. Even if it is admitted that the maintenance of exchange controls, particularly for tourist purposes, is in itself compatible with the freedom to provide services, Community law nevertheless imposes precise limits on the exercise of those controls. Those limits are reached where the effect of such controls is to render illusory the freedom to provide services safeguarded by the Treaty. Such a situation arises in particular where the controls in question allow the reintroduction of discretionary powers on the part of the administration which are capable of hindering the actual provision of services. It is a discretionary power of precisely that kind which characterizes the Italian legislation with which these proceedings are concerned.

Finally, the Commission points out that the use of bank notes by tourists is the most usual method of payment since it offers virtually total freedom of movement in the country visited. Therefore, Member States may not prevent their nationals from having at their disposal, for tourist travel, such quantities of bank notes as they may need. However, they retain the right to verify the nature and genuineness of transfers of currency. Such verifications may take different forms, but the measures adopted must not amount to a *de facto* prohibition of payments or lead to an arbitrary limitation of transactions. The Commission adds that it is only with regard to the protective measures provided for in Articles 108 and 109 of the Treaty that restrictions concerning both liberalized capital and current payments are permitted. However, the Italian Republic has never been authorized under those provisions to adopt or maintain the restrictive measures referred to in this case.

In conclusion, the Commission proposes that the questions submitted by the Tribunale di Genova be answered as follows:

"1. Transfers of currency in any form whatsoever by residents of one Member State to another Member State for the purpose of tourism, or

travel for the purpose of business, education or medical treatment are forms of payment relating to the provision of services governed by Article 59 of the Treaty. Such operations fall within the provisions of Article 106 of the Treaty and are not capital movements within the meaning of the first Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty.

2. The provisions of Article 106 confer upon individuals the right to transfer currency from the Member State in which they reside to another Member State for the purpose of tourism, and travel for the purposes of business, education and medical treatment. The Member States are under an obligation not to adopt any measure restricting the exercise of that right, unless it is duly authorized in accordance with Article 108 of the Treaty."

III — Oral procedure

At the sitting on 12 July 1983 oral argument was presented by the plaintiffs in both actions before the national court, represented by Giuseppe Conte of the Genoa Bar, the Government of the Italian Republic, represented by Marcello Conti, Avvocato dello Stato, the Government of the Federal Republic of Germany, represented by Martin Seidel, the Government of the French Republic, represented by Alexandre Carnelutti, and the Commission of the European Communities, represented by Guido Berardis.

The Advocate General delivered his opinion at the sitting on 15 November 1983.

## Decision

1 By orders of 12 July and 22 November 1982, which were received at the Court on 27 October 1982 and 21 February 1983 respectively, the Tribunale di Genova [District Court, Genoa] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 106 of the Treaty in order to enable it to decide whether the Italian legislation relating to transfers of foreign currency is compatible with that article.

2 The questions arose in proceedings instituted by two Italian residents against decisions of the Ministro del Tesoro [Minister for the Treasury] imposing fines upon them for purchasing various foreign currencies for use abroad in an amount whose exchange value in Italian lire exceeded the maximum

permitted by Italian law, which at that time was LIT 500 000 *per annum* for the export of foreign currency by residents for the purposes of tourism, business, education and medical treatment.

3 Before the national court the plaintiffs contested the validity of the provisions of Italian legislation on which the fines were based, on the ground that those provisions were incompatible with Community law. In Case 286/82 the plaintiff in the main proceedings, Mrs Luisi, stated that she had exported the currency in question for the purpose of various visits to France and the Federal Republic of Germany as a tourist and in order to receive medical treatment in the latter country. In Case 26/83 the plaintiff in the main proceedings, Mr Carbone, stated that the foreign currency purchased by him had been used for a stay of three months in the Federal Republic of Germany as a tourist. Both plaintiffs submitted that the restrictions on the export of means of payment in foreign currency for the purpose of tourism or medical treatment were contrary to the provisions of the EEC Treaty relating to current payments and the movement of capital.

4 In its first order, dated 12 July 1982 (Case 286/82), the Tribunale di Genova stated that the transactions for which Italian law imposed a ceiling on transfers of foreign currency, namely tourism and travel for the purposes of business, education and medical treatment, fell within the invisible transactions listed in Annex III to the Treaty. Payments made in connection with such transactions therefore fell within the first subparagraph of Article 106 (3) of the Treaty, which required Member States to refrain from introducing any new restrictions between themselves, notwithstanding which the contested Italian legislation was adopted in 1974. It appeared appropriate, however, to determine the exact scope of that provision in relation to those governing movements of capital, in particular as regards the extent to which the latter provisions apply to physical transfers of bank notes.

5 Seeking information on that point, the Tribunale submitted the following question to the Court for a preliminary ruling:

"In the case of exportation by residents travelling abroad for the purpose of tourism, business, education or medical treatment of foreign State and bank notes and credit instruments in foreign currency, do persons subject to Community law have the benefit of rights which Member States are obliged to respect by virtue of the 'standstill' provisions contained in the first subparagraph of Article 106 (3) of the EEC Treaty, regard being had to the fact that the transaction in question is one of the invisible transactions listed in Annex III to the said Treaty?

Or, by virtue of the reference made in the second subparagraph of Article 106 (3) of the Treaty, do the abovementioned circumstances, which, from an objective point of view, constitute a transfer of currency in cash, fall within the definition of the movements of capital which, pursuant to the provisions of Articles 67 and 68 of the Treaty and the related directives adopted by the Council on 11 May 1960 and 18 December 1962, are not subject to compulsory liberalization, with the result that control measures and penalties imposed by a Member State, in this case administrative penalties, are lawful?"

6 In its second order, dated 22 November 1982 (Case 26/83), the Tribunale considered only transfers of foreign currency for the purpose of tourism. It raised the question whether tourism, although constituting an invisible transaction within the meaning of Article 106 (3) of the Treaty, should not at the same time be regarded as falling within the scope of the movement of services and therefore be governed by the provisions of Article 106 (1) on the liberalization of payments connected with the provision of services.

7 The Tribunale therefore submitted a further question to the Court:

"In the case of exportation, by resident travellers going abroad for the purpose of tourism, of foreign bank notes, or credit instruments in foreign currency, do Community nationals benefit from rights which the Member States are bound to respect by virtue of the directly applicable provision contained in Article 106 (1) of the EEC Treaty, on the assumption that

tourism is to be regarded as falling within the scope of the movement of services and that transfers of currency to cover tourist expenses are to be treated as current payments which must therefore be deemed to be liberalized in the same way as the services with which they are connected;

or, if the transaction in question falls within the category of invisible transactions listed in Annex III to the EEC Treaty and, by virtue of the reference made by the second subparagraph of Article 106 (3), the transaction constitutes a transfer of cash, does it fall within the category of movements of capital which under the provisions of Articles 67 and 68 of the Treaty and of the relevant directives adopted by the Council on 11 May 1960 and 18 December 1962, need not necessarily be liberalized, with the result that in that sphere Member States may impose controls and penalties of an administrative nature?"

8 It is apparent from the wording of the questions submitted for a preliminary ruling and from the statement of reasons contained in the two orders for reference that the problems of interpretation of Community law arising in these cases are:

(a) whether tourism and travel for the purposes of business, education and medical treatment fall within the scope of services, or of invisible transactions within the meaning of Article 106 (3) of the Treaty, or of both those categories at once;

(b) whether the transfer of foreign currency for those four purposes must be regarded as a current payment or as a movement of capital, in particular when bank notes are transferred physically;

(c) what degree of liberalization of payments relating to those four purposes is provided for in Article 106 of the Treaty;

(d) what control measures regarding transfers of foreign currency Member States are entitled to take in relation to the payments so liberalized.

(a) "Services" and "invisible transactions"

9 According to Article 60 of the Treaty, services are deemed to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Within the context of Title III of Part Two of the Treaty ("Free movement of persons, services and capital"), the free movement of persons includes the movement of workers within the Community and freedom of establishment within the territory of the Member States.

10 By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.

11 For the implementation of those provisions, Title II of the General Programme for the Abolition of Restrictions on Freedom to Provide Services (Official Journal, English Special Edition, Second Series IX, p. 3), which was drawn up by the Council pursuant to Article 63 of the Treaty on 18 December 1961, envisages *inter alia* the repeal of provisions laid down by law, regulation or administrative action which in any Member State govern, for economic purposes, the entry, exit and residence of nationals of Member States, where such provisions are not justified on grounds of public policy, public security or public health and are liable to hinder the provision of services by such persons.

12 According to Article 1 thereof, Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English

Special Edition 1963-1964, p. 117) applies *inter alia* to any national of a Member State who travels to another Member State "as a recipient of services". Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p. 14) grants both the provider and the recipient of a service a right of residence co-terminous with the period during which the service is provided.

13 By basing the General Programme for the Abolition of Restrictions on the Freedom to provide Services partly on Article 106 of the Treaty, its authors showed that they were aware of the effect of the liberalization of services on the liberalization of payments. In fact, the first paragraph of that article provides that any payments connected with the movement of goods or services are to be liberalized to the extent to which the movement of goods and services has been liberalized between Member States.

14 Among the restrictions on the freedom to provide services which must be abolished, the General Programme mentions, in section C of Title III, impediments to payments for services, particularly where, according to section D of Title III and in conformity with Article 106 (2), the provision of such services is limited only by restrictions in respect of the payments therefor. By virtue of section B of Title V of the General Programme, those restrictions were to be abolished before the end of the first stage of the transitional period, subject to a proviso permitting limits on "foreign currency allowances for tourists" to be retained during that period. Those provisions were implementd by Council Directive 63/340/EEC of 31 May 1963 on the abolition of all prohibitions on or obstacles to payments for services where the only restrictions on exchange of services are those governing such payments (Official Journal, English Special Edition 1963-1964, p. 31). Article 3 of that directive also refers to foreign exchange allowances for tourists.

15 However, both the General Programme and the aforesaid directive reserve the right for Member States to verify the nature and genuineness of transfers of funds and of payments and to take all necessary measures in order to prevent contravention of their laws and regulations, "in particular as regards the issue of foreign currency to tourists".

16 It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.

17 Article 106 (3) provides for the progressive abolition of restrictions on transfers connected with the "invisible transactions" listed in Annex III to the Treaty. As the national court correctly stated, that list includes, *inter alia*, business travel, tourism, private travel for the purpose of education and private travel on health grounds.

18 However, since that paragraph is merely subordinate to paragraphs (1) and (2) of Article 106, as is apparent from the second subparagraph thereof, it cannot be applied to the four types of transaction in question.

(b) "Current payments" and "movements of capital"

19 The national court has pointed out that the physical transfer of bank notes is included in List D in the annexes to the two directives which the Council adopted pursuant to Article 69 of the Treaty in relation to the movement of capital (Official Journal, English Special Edition 1959-1962, p. 49, and 1963-1964, p. 5). List D enumerates the movements of capital for which the directives do not require the Member States to adopt any liberalizing measure. The question therefore arises whether the reference in that list to the physical transfer of bank notes implies that such a transfer itself constitutes a movement of capital.

20 The Treaty does not specify what is to be understood by the movement of capital. However, in the annexes to the two above-mentioned directives a list is given of the various movements of capital, together with a nomenclature. Although the physical transfer of financial assets, in particular bank notes, is included in that list, that does not mean that any such transfer must in all circumstances be regarded as a movement of capital.

21 The general scheme of the Treaty shows, and a comparison between Articles 67 and 106 confirms, that current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service. For that reason movements of capital may themselves give rise to current payments, as is implied by Articles 67 (2) and 106 (1).

22 The physical transfer of bank notes may not therefore be classified as a movement of capital where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services.

23 Consequently, payments in connection with tourism or travel for the purposes of business, education or medical treatment cannot be classified as movements of capital, even where they are effected by means of the physical transfer of bank notes.

(c) The extent to which the payments referred to in Article 106 of the Treaty have been liberalized

24 As regards the movement of services, Article 106 (1) provides that payments relating thereto must be liberalized to the extent to which the movement of services itself has been liberalized between Member States in accordance with the Treaty. By virtue of Article 59 of the Treaty, restrictions on the freedom to provide services within the Community were to be abolished during the transitional period. As from the end of that period, any restrictions on payments relating to the provision of services must therefore be abolished.

25 Consequently, payments relating to tourism and travel for the purposes of business, education or medical treatment have been liberalized since the end of the transitional period.

26 This interpretation finds confirmation in Article 54 of the Act of Accession of 1979, by virtue of which the Hellenic Republic is authorized to maintain

restrictions on transfers relating to tourism, but only within certain limits and only until 31 December 1985. That article implies that without that derogation the transfers in question would have had to be liberalized immediately.

(d) Control measures in respect of transfers of foreign currency

27 The last aspect of the problem raised in these cases concerns the question whether, and if so to what extent, Member States have retained the power to subject liberalized transfers and payments to control measures applicable to the transfer of foreign currency.

28 In that respect, it should be noted in the first place that the liberalization of payments provided for in Article 106 compels Member States to authorize the payments referred to in that provision in the currency of the Member State in which the creditor or beneficiary resides. Payments made in the currency of a third country are not therefore covered by that provision.

29 It should also be noted that Article 2 of Directive 63/340, cited above, states that the liberalization measures provided for in the directive do not limit the right of Member States to "verify the nature and genuineness of payments". This proviso appears to be inspired by the fact that, at that time, payments relating to the movements of goods and services and movements of capital were not yet fully liberalized.

30 However, even though the transitional period has ended that liberalization has not yet been fully accomplished. The Council directives provided for in Article 69 of the Treaty with a view to attaining the free movement of capital have not yet in fact abolished all the restrictions in that area, whilst Article 67, which provides for that freedom, must, as the Court held in its judgment of 11 November 1981 (Case 203/80 *Casati* [1981] ECR 2595), be interpreted as meaning that even after the expiry of the transitional period restrictions on the export of foreign currency may not be regarded as having been abolished, irrespective of the terms of the directives adopted pursuant to Article 69.

31 In those circumstances, Member States have retained the power to impose controls on transfers of foreign currency in order to verify that transfers do not in fact constitute movements of capital, which have not been liberalized. That power is particularly important since it is bound up with the responsibility which Member States have in relation to monetary matters under Articles 104 and 107 of the Treaty, a responsibility which implies that appropriate measures may be adopted in order to prevent the flight of capital or other speculation of that kind against their currencies.

32 Articles 108 and 109 of the Treaty provide for the measures to be taken and the procedures to be followed where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments. However, those provisions, which are to remain operative even after the free movement of capital has been fully achieved relate only to periods of crisis.

33 In the absence of any crisis and until the free movement of capital has been fully achieved, it must therefore be acknowledged that Member States are empowered to verify that transfers of foreign currency purportedly intended for liberalized payments are not diverted from that purpose and used for unauthorized movements of capital. In that connection, Member States are entitled to verify the nature and genuineness of the transactions or transfers in question.

34 Controls introduced for that purpose must, however, be kept within the limits imposed by Community law, in particular those deriving from the freedom to provide services and to make payments relating thereto. Consequently, they may not have the effect of limiting payments and transfers in connection with the provision of services to a specific amount for each transaction or for a given period, since in that case they would interfere with the freedoms recognized by the Treaty. For the same reason, such controls may not be applied in such a manner as to render those freedoms illusory or to subject the exercise thereof to the discretion of the administrative authorities.

35 These findings do not preclude a Member State from fixing flat-rate limits below which no verification is carried out and from requiring proof, in the

case of expenditure exceeding those limits, that the amounts transferred have actually been used in connection with the provision of services, provided however that the flat-rate limits so determined are not such as to affect the normal pattern of the provision of services.

36 It is for the national court to determine in each individual case whether the controls on transfers of foreign currency which are at issue in proceedings before it are in conformity with the limits thus defined.

37 On the basis of all the foregoing considerations, it may be stated in reply to the questions submitted for a preliminary ruling that Article 106 of the Treaty must be interpreted as meaning that:

Transfers in connection with tourism or travel for the purposes of business, education or medical treatment constitute payments and not movements of capital, even where they are affected by means of the physical transfer of bank notes;

Any restrictions on such payments are abolished as from the end of the transitional period;

Member States retain the power to verify that transfers of foreign currency purportedly intended for liberalized payments are not in reality used for unauthorized movements of capital;

Controls introduced for that purpose may not have the effect of limiting payments and transfers in connection with the provision of services to a specific amount for each transaction or for a given period, or of rendering illusory the freedoms recognized by the Treaty or of subjecting the exercise thereof to the discretion of the administrative authorities;

Such controls may involve the fixing of flat-rate limits below which no verification is carried out, whereas in the case of expenditure exceeding those limits proof is required that the amounts transferred have actually been used in connection with the provision of services, provided however that the flat-rate limits so determined are not such as to affect the normal pattern of the provision of services.

## Costs

38 The costs incurred by the Belgian Government, the Government of the Federal Republic of Germany, the French Government, the Italian Government, the Netherlands Government and the Commission, which have submitted observations to the Court, 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 actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the questions submitted to it by the Tribunale di Genova by orders of 12 July and 22 November 1982, hereby rules:

**Article 106 of the Treaty must be interpreted as meaning that:**

**Transfers in connection with tourism or travel for the purposes of business, education or medical treatment constitute payments and not movements of capital, even where they are effected by means of the physical transfer of bank notes;**

**Any restrictions on such payments are abolished as from the end of the transitional period;**

**Member States retain the power to verify that transfers of foreign currency purportedly intended for liberalized payments are not in reality used for unauthorized movements of capital;**

**Controls introduced for that may not have the effect of limiting payments and transfers in connection with the provision of services to a specific amount for each transaction or for a given period, or of rendering illusory the freedoms recognized by the Treaty or of subjecting the exercise thereof to the discretion of the administrative authorities;**

**Such controls may involve the fixing of flat-rate limits below which no verification is carried out, whereas in the case of expenditure exceeding those limits proof is required that the amounts transferred have actually been used in connection with the provision of services, provided however that the flat-rate limits so determined are not such as to affect the normal pattern of the provision of services.**

Mertens de Wilmars Koopmans Bahlmann Galmot
Pescatore Mackenzie Stuart Bosco Everling Kakouris

Delivered in open court in Luxembourg on 31 January 1984.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

## OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 15 NOVEMBER 1983 [1]

*Mr President*
*Members of the Court,*

1. Two cases have been referred to the Court for a preliminary ruling relating to the exportation within the Community of foreign currency intended to pay for services in connection with tourism, health, education and business travel. In essence the issue to be decided is whether and how those matters are governed by Community law. The Court is therefore called upon to interpret the provisions of the EEC Treaty regarding liberalization of current payments for services which involve travel by the recipient of the service from the country in which he resides to the country in which the service is provided.

1 — Translated from the Italian.