OPINION OF ADVOCATE GENERAL JACOBS
delivered on 22 January 1998 *

1. In these proceedings the Commission seeks a declaration under Article 169 of the Treaty that the Federal Republic of Germany has failed to fulfil its obligations under Articles 48, 52 and 59 of the Treaty, Article 4(1) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1] and Article 4(1) of 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. [2]

2. Directive 68/360 provides, in so far as is relevant:

'*Article 1*

Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.

...

Article 4

1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

...'

* Original language: English.

1 — OJ, English Special Edition 1968 (II), p 485.

2 — OJ 1973 L 172, p. 14.

3. Directive 73/148 provides, in so far as is relevant:

'*Article 1*

1. The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

...

Article 4

1. Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the European Communities" shall be issued. This document shall be valid for not less than five years from the date of issue and shall be automatically renewable.

Breaks in residence not exceeding six consecutive months and absence on military service shall not affect the validity of a residence permit.

A valid residence permit may not be withdrawn from a national referred to in Article 1(1)(a) solely on the grounds that he is no longer in employment because he is temporarily incapable of work as a result of illness or accident.

Any national of a Member State who is not specified in the first subparagraph but who is authorised under the laws of another Member State to pursue an activity within its territory shall be granted a right of abode for a period not less than that of the authorisation granted for the pursuit of the activity in question.

However, any national referred to in subparagraph 1 and to whom the provisions of the preceding subparagraph apply as a result

of a change of employment shall retain his residence permit until the date on which it expires.

...'

4. The Commission notes that German law treats nationals of other Member States differently from German nationals in the sanctions imposed for infringement of the requirement to be in possession of a valid identity document. First, in the case of a foreigner negligence [Fahrlässigkeit] suffices to constitute an infringement [3] whereas in the case of a German national intent [Vorsatz] or recklessness [Leichtfertigkeit] is necessary. [4] Secondly, in the case of a foreigner the fine laid down for infringement is subject to a maximum of DM 5 000 [5] whereas in the case of a German national the fine imposed is as a general rule subject to a maximum of DM 1 000. [6]

5. In July 1990 the Commission sent the Government of the Federal Republic of Germany a letter setting out its view that the above provisions were compatible neither with the obligation of equal treatment and Articles 48, 52 and 59 of the Treaty nor with Directives 68/360 and 73/148 and giving Germany the opportunity to submit its observations on the alleged infringements.

6. The German Government replied in January and March 1991. It recognised that there was discrimination between German nationals and nationals of other Member States and indicated that it was ready to carry out the necessary amendments when it implemented the directives on the right of residence of non-workers, [7] required by 30 June 1992 at the latest. In February 1992, the Government informed the Commission that it would submit a draft law to that effect to the Commission in late February or early March before sending the draft law to the legislatures. It presumed that the law would be adopted during that year. The Government has also indicated that the Federal Ministry of the Interior wrote in March 1991 and January 1994 inviting the ministers and senators for internal affairs in the different Länder to ensure that infringements by nationals of other Member States of the obligation to be in possession of a valid identity document were punished only if the act had been committed recklessly.

3 — Paragraph 12a(2) of the Gesetz über die Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (law on entry and residence of European Community nationals) of 22 July 1969 as most recently amended by the EWR-Ausführungsgesetz (law on the implementation of the European Economic Area) of 27 April 1993.

4 — Paragraph 5(1)(1) of the Gesetz über Personalausweise (law on identity cards) of 19 December 1950 as most recently amended by the Gesetz sur Änderung des Gesetzes über Personalausweise und des Paßgesetzes (law amending the law on identity cards and the law on passports) of 30 July 1996.

5 — Paragraph 12a(3) of the 1969 law cited in note 3.

6 — Paragraph 5(2) of the 1950 law cited in note 4 in conjunction with Paragraph 17(1) and (4) of the Gesetz über Ordnungswidrigkeiten (law on administrative offences) of 24 May 1968 as most recently amended by the Verbrechensbekämpfungsgesetz (law on the fight against crime) of 28 October 1994.

7 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, p. 26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28 and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, OJ 1990 L 180, p. 30.

7. Since the amendment to the law had still not been effected by the middle of 1995, the Commission in July of that year issued a reasoned opinion in accordance with Article 169 of the Treaty and invited the Federal Republic to take the necessary measures to comply with that opinion within two months of its notification.

8. As at January 1997, the Commission had not been informed of any formal amendment of the provisions in question and it accordingly brought proceedings under Article 169.

9. The Commission accepts that, according to the case-law of the Court of Justice, [8] Community law does not prohibit Member States from imposing penalties on persons falling within its ambit who have failed to obtain one of the identity documents mentioned in Directive 68/360 or Directive 73/148. Those sanctions must, however, be appropriate and not disproportionate to the nature of the infringement. In particular, they should not be so severe as to become an obstacle to the freedom of entry and residence provided for in the Treaty. The Commission claims that the German rules do not observe the principles of proportionality and of equal treatment or satisfy the requirement not to hinder the free movement of persons. It notes finally that the guidelines given by the Federal Ministry of the Interior to the ministers and senators for internal affairs in the Länder are not sufficient, particularly since the Ministry refers solely to the degree of fault required and not to the different scale of fines.

10. In its defence, the German Government notes that it has conceded from the outset that the principle of equality has not been observed. It regrets that the impugned provisions of the 1969 law [9] have still not been amended and confirms that an amendment relating to the fines will be adopted as soon as possible, and at the latest as part of the forthcoming reform of the 1969 law. [10]

11. The Commission in its reply considers that it is appropriate to maintain its application, given that its original letter in this case dates back to 1990 and that the necessary amendment was announced in early 1992. The German Government submitted no rejoinder.

12. Since Germany does not dispute the substance of the Commission's claim, merely stating in its defence that the necessary measures are under way, the Commission's application is well founded. The Court has

8 — Case 118/75 *Watson and Belmann* [1976] ECR 1185; Case 8/77 *Sagulo, Brenca and Bakhouche* [1977] ECR 1495; Case 157/79 *Regina* v *Pieck* [1980] ECR 2171 and Case C-265/88 *Criminal proceedings against Messner* [1989] ECR 4209.

9 — Cited in note 3.

10 — Cited in note 3.

consistently held that a Member State may not plead provisions, practices or circumstances in its internal legal order to justify a failure to comply with its obligations under a Community directive. [11] Moreover, the fact that Germany is currently attempting to rectify its non-compliance does not afford it a defence. An action based on Article 169 of the Treaty requires only an objective finding of a failure to fulfil obligations and not proof of any inertia or opposition on the part of the Member State concerned. [12]

Conclusion

13. Accordingly I am of the opinion that the Court should:

(1) declare that, by failing to adopt within the prescribed period the provisions necessary to implement:

— Article 4(1) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families;

— Article 4(1) of 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,

the Federal Republic of Germany has failed to fulfil its obligations under the Treaty;

(2) order the Federal Republic of Germany to pay the costs of these proceedings.

11 — Case 58/81 *Commission* v *Luxembourg* [1982] ECR 2175, paragraph 4 of the judgment.

12 — Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8 of the judgment.