OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 18 April 2002 [1]

1. The Commission has brought an action against the Grand Duchy of Luxembourg under Article 226 EC. It seeks a declaration by the Court of Justice that the Member State has failed to fulfil its obligations under Article 7(2) of Regulation No 1612/68 on freedom of movement for workers within the Community [2] and Article 43 EC.

The Member State is alleged to have infringed the provision by maintaining, in its national legislation, a requirement of a prior period of residence on its territory for the granting of a guaranteed minimum income.

I — Facts

2. Early in 1998 it was brought to the Commission's attention, by way of an individual complaint, that the Luxembourg law made entitlement to a guaranteed minimum income subject to the condition that the applicant had resided in the country for at least 10 years during the previous 20.

The Commission contacted the Luxembourg authorities, pointing out that that condition might be incompatible with Community law. It received the reply that a draft law intended to remove the condition was being prepared.

3. However, by letter dated 19 July 1999, the Commission was informed that the Luxembourg Conseil d'État had issued an unfavourable opinion and therefore the law passed on 29 April 1999 [3] had maintained the residence requirement, although its duration was reduced to five years during the previous twenty.

1 — Original language: Spanish.

2 — Regulation (EEC) of the Council of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 475).

3 — Published in the *Mémorial* (Official Journal of the Grand Duchy) on 1 June 1999. That amendment came into force on 1 March 2000, nine months after its publication.

II — The Community provisions

4. Under Article 7 of Regulation No 1612/68:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...'

5. Article 43 EC, for its part, provides:

'... Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

III — The contested Luxembourg legislation

6. The legislation which is regarded as incompatible with Community law is Article 2(1) and (2) of the Law of 26 July 1986 establishing entitlement to a guaranteed minimum income. Under those provisions, the benefit is granted to any person who, with the mandatory authority, has his domicile and actual residence in the Grand Duchy, is over 25 years of age, earns less than the established minimum, is prepared to exhaust the possibilities offered by national or foreign legislation to improve his situation, and has resided in Luxembourg for at least five years during the previous twenty. Only stateless persons and political refugees are exempt from the residence requirement.

IV — The administrative procedure

7. In spite of the fact that the duration of the period of residence required to qualify for the benefit had been reduced, the Commission considered that the legislation was still incompatible with the fundamental principle of non-discrimination by reason of nationality enshrined in Article 7(2) of Regulation No 1612/68, for employed workers, and in Article 43 EC, for self-employed workers. On 6 August 1999, it therefore sent a letter of formal notice to the authorities of the Grand Duchy inviting them to submit observations within two months.

8. On 26 January 2000, having received no reply and remaining unconvinced by the explanations which accompanied notification of the amended legislation, the Commission sent the Luxembourg Government a reasoned opinion under Article 226(1) EC urging it to amend the Law again.

On 31 May 2000, the government notified the Commission of its decision to make a new legislative change, in order to comply with the guidelines laid down in the reasoned opinion, and repeated that intention in its letter of 15 June 2000.

9. On 24 July 2000, the Commission's staff requested specific details of the planned schedule, and at the same time asked the national authorities to grant the benefit immediately to the nationals of other Member States to whom it had been refused because they did not fulfil the residence requirement.

In its letter of 26 October 2000, the government provided some details of the future legislative provision, stating that it intended to submit it to the vote in the parliamentary session 2000–01. It added that, in the absence of applicable legislation, it was impossible to accede to the request in respect of the aforementioned nationals.

V — The contentious proceedings

10. On 26 July 2001, since it had received no news relating to the legislative amendment which had been announced, the Commission lodged an application before the Court seeking a declaration that the Member State had failed to fulfil its obligations.

11. The applicant alleges that the legislation currently in force in Luxembourg

constitutes a manifest infringement of the principle of equality of treatment, which prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result. [4] According to the case-law of the Court, the requirement that a person shall have been resident for a certain period is covert discrimination by reason of nationality, because such a requirement is more easily met by Luxembourg nationals than by nationals of other Member States. [5] The fact that the requirement is imposed on Luxembourg nationals in the same way does not alter that assessment.

The Commission states that there is no doubt that the benefit in issue constitutes a social advantage, as the Court held in its judgment in *Hoeckx*, [6] and it must therefore be granted on the same terms to all workers who are nationals of Member States.

Article 43 EC, for its part, confers on nationals of one Member State who wish to pursue activities as self-employed persons in another Member State the benefit of the same treatment as the host State's own nationals and also prohibits any discrimination based on nationality which hinders the taking up or pursuit of such activities. [7]

The Commission also invokes, in support of its action, the judgment of the Court in *Commission* v *Belgium*, [8] in which, in respect of a similar piece of legislation and a benefit similar in content, it held that to maintain the requirement of a period of residence on Belgian territory which workers from other Member States had to fulfil in order to qualify for the grant of the allowance of the minimum means of subsistence (minimex) was contrary to the principle of equality of treatment.

12. In the reply to the claim, submitted on 10 October 2001, Luxembourg states that on 22 March 2000 it passed the law intended to amend the contested national legislation. It invites the Court to dismiss the action or to stay the proceedings until the Commission withdraws its application.

13. The Commission waived its right to submit a rejoinder, and also stated that

4 — Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11, and Case C-175/88 *Biehl* [1990] ECR I-1779, paragraph 13.

5 — Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 32; Case C-279/89 *Commission* v *United Kingdom* [1992] ECR I-5785, paragraph 42; and Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 10.

6 — Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 22.

7 — Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 27.

8 — Case C-326/90 *Commission* v *Belgium* [1992] ECR I-5517.

there was no reason to stay the proceedings.

14. As neither of the parties has submitted a request stating the reasons why it wished to present oral observations, the Court has decided, in accordance with Article 44a of the Rules of Procedure, to give a decision on the case without holding a hearing.

VI — Examination of the action

A — *The request for a declaration of failure to fulfil obligations*

15. It is clear from the case-law of the Court cited by the applicant that the requirement that a worker must reside in one Member State constitutes covert discrimination by reason of nationality against the nationals of the other Member States, and that a benefit such as the one in question must be regarded as a social advantage which must be granted to the nationals of the other Member States on the same terms as to the nationals of the Member State concerned.

16. In its reply to the claim, Luxembourg states that it leaves to one side the matter of whether the five-year residence requirement is discriminatory, without putting forward any argument in that respect, and declares that it is prepared to amend the legislation which contains it. Even if the defendant State does request the Court to dismiss the action because it encloses the draft law — the promulgation of which does not appear in the records either — I consider that its attitude is tantamount to a submission.

17. Furthermore, it is well known that the object of an action under Article 226 EC is established by the Commission's reasoned opinion, and even when the default has been remedied after the time-limit prescribed by paragraph 2 of the same article, pursuit of the action still has an object. That object may consist in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default. [9]

18. The suggestion that the proceedings should be stayed is also irrelevant, since the circumstances specified in Article 82a(1)(b) of the Rules of Procedure as justifying such a decision are not present. In any event, up to April 2002, the Commission has given

9 — Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 11, and Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6.

no indication that it wishes to withdraw its action.

19. Since it has been established, without a shadow of a doubt, that Luxembourg has not fulfilled its obligation to adjust its national law to the provisions of Article 7(2) of Regulation No 1612/68 and Article 43 EC, within the time-limit prescribed in the reasoned opinion, the Commission's request for a declaration of failure to fulfil obligations must be granted and Luxembourg must be ordered to pay the costs.

B — *The request that the Court specify the consequences of the declaration of failure to comply with obligations*

20. In paragraph 20 of the claim, the Commission seeks, as well as a declaration that the Luxembourg State has failed to comply with its obligations, a statement of its consequences, in order that Community law may be fully effective for the nationals of other Member States affected in the past by the proscribed legislation.

In a letter dated 24 July 2000, sent by the Director-General for Employment and Social Affairs, the Commission asked the Luxembourg authorities for information about the measures adopted in order to regularise, immediately, the position of Community nationals who had applied to receive the disputed benefit. In support of that request it stated that the principle of non-discrimination by reason of nationality and the precedence of Community law were directly applicable throughout the territory of the Union. In the letter sent to the Commission by Luxembourg's Permanent Representative on 26 October 2000, it was stated that such action was impossible because there was no legal provision for the granting of the benefit to Community nationals without the requirement of a prior period of residence in the Grand Duchy.

21. I have to say that I sympathise with the Commission's position, but I must acknowledge that its request cannot be granted for the reasons I shall now explain.

22. Firstly, in accordance with settled case-law, the letter of formal notice from the Commission to the Member State, and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the infringement procedure. Consequently, the

reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. [10]

Although the Commission is not obliged to indicate in the reasoned opinion the measures or steps to be taken to eliminate the infringement, it is obliged to indicate, at least, the complaints which it intends to make the subject of its application to the Court. The Commission must specifically indicate to the Member State concerned that it must adopt a certain measure if it intends to make the failure to adopt that measure the subject-matter of its infringement action. [11]

In the case I am considering, however, the Commission did not urge the Luxembourg Government — either in the letter of formal notice or in the reasoned opinion sent in January 2000 — to regularise immediately the position of nationals of other Member States to whom it had refused to grant the minimum guaranteed income allowance because they did not fulfil the residence requirement. According to the documents in the case, that request was not made until the following July, in a letter from the Director-General for Employment and Social Affairs, when the Luxembourg authorities had already replied to the opinion and the subject-matter of the future dispute had been delimited.

23. Secondly, the consequences of a declaration of failure to fulfil obligations is contained in Article 228 EC: the Member State is required to take the necessary measures to implement the judgment of the Court.

Those measures are not restricted to eliminating the effects of the national legislation for the future, but, as the judgment has effect *ex tunc*, also extend to removing the harmful consequences caused from the moment the incompatibility with the Community legislation arose. [12] It is well known that Member States are required to make good loss and damage caused to individuals as a result of breaches of Community law. The basis for that obligation is found in, amongst other provisions, Article 10 EC, under which Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequence of a breach of Community law.

According to the case-law, an interpretation given by the Court to a provision of

10 — Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55; Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 34; and Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 23.

11 — *Commission* v *Austria*, cited above, paragraph 39.

12 — Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559 et seq. especially 571, as regards the ECSC Treaty, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36, as regards the EC Treaty.

Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force. [13]

To that it must be added that the Member State has not requested the Court, as it could have done, to impose temporal limits on the effects of the judgment.

I consider that, at this stage, a Member State cannot be permitted to use the absence of national legislation as a reason for refusing equal treatment to the nationals of other Member States residing in its territory, particularly when the case-law of the Court has held benefits of a very similar nature to be a tax advantage within the meaning of Article 7(2) of Regulation No 1612/68 [15] and judgment has been given against several States for imposing a requirement of prior residence in its territory in order to qualify for them. [16] Otherwise, it would be very easy for them to evade their obligations under Community law merely by not legislating or by delaying for as long as possible making an adjustment to their national laws.

24. Finally, if, as I suggest, it is declared in these proceedings that the Member State has failed to fulfil its obligations, and if the Member State persists in its stubborn refusal to regularise the position of those who were adversely affected before the amended legislation came into force, the Commission has the opportunity of bringing a fresh action before the Court. Since early in 1998, when it received the individual complaint, until the new law becomes applicable, [14] several years will have passed during which that Member State has apparently continued to infringe Community law.

25. For the reasons I have given, I consider that the Commission's request that the Court specify the consequences of the declaration of failure to comply with obligations cannot be granted.

13 — Joined Cases C-367/93 and C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 42, and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 46.

14 — It must be borne in mind that the 1999 amendment, which reduced from ten to five years the period of residence needed to qualify for the benefit, did not come into force until nine months after it was published.

15 — Case 157/84 *Frascogna* [1985] ECR 1739; Case 122/84 *Scrivner* [1985] ECR 1027; *Hoeckx*, cited above; Case 256/86 *Frascogna* [1987] ECR 3431; and Case C-310/91 *Schmid* [1993] ECR I-3011.

16 — *Commission* v *Belgium*, cited above; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817; and Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307.

VII — Conclusion

26. In the light of the foregoing considerations, I propose that the Court should:

(1) declare that, by maintaining in its national law a requirement of a prior period of residence on its territory for the grant of the guaranteed minimum income allowance, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Article 43 EC;

(2) order the Member State to pay the costs of the proceedings.