OPINION OF ADVOCATE GENERAL COSMAS
delivered on 16 March 1999 *

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I — Introdution

1. In the present case the Court is requested under Article 177 of the EC Treaty to rule on questions submitted by the Arrondissementsrechtbank (District Court) te Rotterdam (Netherlands) with regard to the interpretation of Articles 7a and 8a of that Treaty. That court seeks to ascertain whether these fundamental provisions of primary Community law should be interpreted and applied as meaning that they prohibit national legislation requiring a person, even one who is a citizen of the European Union, to present a passport when crossing internal Community frontiers and imposing criminal penalties if that provision is infringed. This case is of particular interest in that it offers the Court an opportunity to interpret the content and effects in law of Articles 7a and 8a of the EC Treaty on the basis of a systematic approach and, by extension, to make a current and global examination of the question of the freedom of movement for persons as it presents itself after the successive revisions of primary Community law.

II — The facts and the questions submitted for a preliminary ruling

2. The facts in the main proceedings are simple. In criminal proceedings in the Netherlands, Mr Wijsenbeek, a Netherlands national, is accused of having refused, upon arrival at Rotterdam airport [1] on 17 December 1993 on a scheduled flight from Strasbourg, to present his passport to the national office responsible for border controls in accordance with the national legislation in this regard. It should be noted that the accused did not refuse to give his name, place and date of birth and address and that he presented a Belgian driving licence to confirm these facts; he did not, however, present an identity card or passport that would have established his nationality, as required by national legislation.

3. Mr Wijsenbeek acknowledges the facts on which the prosecution is based. How-

1 — It is not irrelevant to note that this airport is used as a matter of principle exclusively for flights to and from other Member States of the Community.

ever, he denies that he has committed an offence. He maintains that in his particular circumstances the carrying out of a check, as required by Article 25 of the Netherlands Aliens Order, when a frontier is crossed is contrary to Articles 7a and 8a of the EC Treaty. He relies in particular on the abovementioned provisions of Community law and his status as a citizen of the European Union and maintains that these provisions give him the right to move freely and to cross the internal frontiers of the Community without being obliged to present an identity card or passport and without being required to provide proof of nationality.

4. By judgment of 8 May 1995 the court of first instance (the Kantonrechter) (Cantonal Court) ordered Mr Wijsenbeek to pay a fine of NLG 65 or to serve one day's imprisonment for infringement of Article 25 of the Aliens Order. Mr Wijsenbeek appealed against that decision to the Arrondissementsrechtbank te Rotterdam. That court, considering that the conduct of the accused cannot attract criminal penalties if Articles 7a and 8a of the EC Treaty prohibited compulsory passport checks at the internal frontiers of the Community, decided by order of 30 October 1997 to stay proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Are the second paragraph of Article 7a of the EC Treaty, which provides that the internal market is to comprise an area without internal frontiers in which the free movement of persons is ensured, and Article 8a of the EC Treaty, which confers on all citizens of the Union the right to move and reside freely within the territory of the Member States, to be interpreted as precluding national legislation of a Member State imposing an obligation, accompanied by criminal penalties for failure to comply, on persons (whether or not citizens of the European Union) to present a passport on entry into a Member State whenever that person enters the Member State through the national airport coming from another Member State?

2. Does any other provision of Community law preclude such an obligation?'

III — Law applicable

A — *The national provisions*

5. The Vreemdelingenbesluit (Netherlands Aliens Order) [2] provides that:

'Netherlands nationals who leave or enter the Netherlands must, on request, present

2 — Order of 19 September 1966, Stb. 387.

and hand over to an official charged with border inspections the travel and identity papers in their possession and establish if necessary by any other means their Netherlands nationality.

This order is made pursuant to Article 3, paragraph 1, introductory subparagraph and subparagraph (b), of the Aliens Law and any infringement is punishable in accordance with Article 44, first paragraph, of that Law.'

6. Under Article 44 of the Vreemdelingenwet (Aliens Law), [3] any infringement of the Aliens Order is punishable by a criminal penalty entailing a prison sentence of a maximum of six months or a second-category fine. Article 23(3) of the Wetboek van Strafrecht (Netherlands Penal Code) provides that a second-category fine is not to exceed NLG 5 000.

B — *The Community provisions*

(a) The provisions of the EC Treaty

7. Article 3 of the EC Treaty provides:

'For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

...

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital,

(d) measures concerning the entry and movement of persons in the internal market as provided for in Article 100c,

...'.

8. Article 7a of the EC Treaty provides:

'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 7b, 7c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

3 — Law of 13 January 1965, Stb. 40.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

9. Article 8a of the EC Treaty provides:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.'

(b) Declarations in the context of the Single Act

10. When the Final Act to the Single European Act was signed on 17 and 28 February 1986, the Conference of the Representatives of the Governments of the Member States adopted a number of declarations annexed to the Final Act. Two of these declarations are likely to be relevant to the present case.

11. The declaration on Article 8a [4] is worded as follows:

'The Conference wishes by means of the provisions in Article 8a to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market.

Setting the date of 31 December 1992 does not create an automatic legal effect.'

12. The general declaration on Articles 13 to 19 of the Single European Act is worded as follows:

'Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terror-

4 — In reality, this is the future Article 7a of the EC Treaty.

ism, crime, the traffic in drugs and illicit trading in works of art and antiques.'

13. The Conference also 'noted' a number of declarations annexed to the Final Act, including the political declaration by the Governments of the Member States on the free movement of persons, which stated:

'In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.'

(c) Secondary legislation

14. Article 3(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 [5] and 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 [6] provides:

'Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport.'

15. These directives related to workers and the members of their families and to persons exercising their right freely to provide services. The range of persons covered was widened by Council Directive 90/364/EEC of 28 June 1990 on the right of residence, [7] 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 [8] and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. [9] All of these directives refer directly to Article 3 of Directive 68/360, in other words to the obligation for Member States to allow persons falling within the scope of the said directives to enter their territory simply on production of an identity card or passport.

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

6 — OJ 1973 L 172, p. 14.
7 — OJ 1990 L 180, p. 26.
8 — OJ 1990 L 180, p. 28.
9 — OJ 1993 L 317, p. 59.

IV — The admissibility of the questions submitted

16. In its observations, the Irish Government raises the question of admissibility. It maintains first that, under Article 92 of the Rules of Procedure of the Court, the Court clearly lacks jurisdiction to reply to the questions submitted. According to the Irish Government, the referring court was unable to establish precisely the facts on which the questions it submitted to the Court were based. More particularly, the Irish Government submits that it is impossible to determine with certainty whether, when he crossed the Netherlands border, Mr Wijsenbeek was coming from another Member State of the Community or from a third country. Secondly, the Irish Government contends that it was impossible to apply Community law, given Mr Wijsenbeek's refusal to reveal his nationality. Finally, the Irish Government states that, since the main proceedings relate to the application of a Netherlands provision to a Netherlands national in the Netherlands, they are purely internal and hence devoid of interest at the Community level. In particular, according to the Irish Government, the question of the return of nationals of a Member State to their own country falls within the exclusive jurisdiction of the national legislature.

17. I do not think this view should be adopted. First, the facts adduced by the national court are sufficient to enable this Court to give a helpful reply to the questions submitted. Although neither the documents in the case nor the order for reference demonstrates clearly that Mr Wijsenbeek was coming from Strasbourg, as he himself states and which no-one contests, that does not in any way nullify the value of the reply to the questions asked. On the contrary, a reply to those questions should be provided and it should be considered an established fact that Mr Wijsenbeek was coming from France when he tried to cross the border without presenting a passport.

18. Next, the assertion of the Irish Government that in the present case the non-application of Community law was the fault of Mr Wijsenbeek himself does not preclude the need to reply to the questions submitted. Without examining the content and scope of the Community rules applicable to the case, it is not possible to examine the question whether their application is rendered impossible by the attitude of the accused.

19. Lastly, as the Commission rightly observes, the issue in the main proceedings does not fall outside the scope of Community law. Upon his return to the Netherlands Mr Wijsenbeek exercised the right to move freely within the Community and as a result could invoke the relevant provisions of Community law. The fact that Mr Wijsenbeek has Netherlands nationality and was returning to the Netherlands is not sufficient to give the main proceedings a purely national character.

20. It is appropriate to refer to the *Singh* [10] judgment on this point: the Court had to consider to what extent the spouse of a Community national who returned to establish himself in his country of origin could claim the right of residence deriving from the principle of freedom of movement for persons. In that judgment, the Court ruled that a national of a Member State who has gone to another Member State, as envisaged by Article 48 of the EC Treaty, and who returns to establish himself or herself in the Member State of which he or she is a national comes within the scope of Community law. Such a person has the status of a Community citizen and enjoys the rights of movement and establishment under Articles 48 and 52 of the EC Treaty. Those rights cannot be fully effective if their exercise is impeded in the country of origin of the national concerned.

21. The Court had taken a similar view in the *Kraus* judgment, [11] when it held that Community law, and especially Articles 48 and 52 of the Treaty, applied in a case involving a German national who had objected to German legislation requiring prior authorisation for the use, on German territory, of a postgraduate academic title he had obtained in another Member State. [12]

22. In the present case it is sufficient to note that Mr Wijsenbeek used his right to move freely in the territory of the Community and that on that basis when he returned to the Netherlands he came within the protection afforded by Community law. He was therefore entitled to rely on the Community provisions which, he believed, prohibited, in his case, the carrying out of a border control upon his arrival at Rotterdam airport. On this basis, the questions submitted for a preliminary ruling are perfectly admissible.

V — The reply to the questions submitted

23. The particular interest which this case has attracted is reflected in the number of parties submitting observations to the Court. Apart from Mr Wijsenbeek, the Netherlands Government and the Commission, the United Kingdom, Irish, Finnish and Spanish Governments have participated in the proceedings. The key question on which the Court is called upon to rule is whether recent developments in primary Community law have led to a prohibition on national passport controls at the internal frontiers of the Community. Up to now, the practice of carrying out border checks has been considered to be entirely consistent with Community law, at least subject to certain conditions. Among the parties presenting observations, Mr Wijsenbeek is the only one to maintain that certain forms of border control are no longer compatible

10 — Judgment in Case C-370/90 *The Queen* v *Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265.

11 — Judgment in Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663.

12 — See also the judgments in Cases 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399 and C-61/89 *Bouchoucha* [1990] ECR I-3551.

with the fundamental provisions of the EC Treaty. He relies in this regard on Articles 3(c), 6 and 7a of the EC Treaty, as amended by the Treaty of Maastricht. Taking account also of the observations made by the national court, however, I consider that this Court should confine itself to interpreting Articles 7a and 8a of the EC Treaty and to examining the scope and consequences of the introduction of these provisions into Community law. [13]

24. In the analysis that follows, I shall therefore focus on the scope and legal effects of Articles 7a (subsection B) and 8a (subsection C) of the Treaty in order to determine whether a border control of the type to which Mr Wijsenbeek was subjected and which is described in the factual part of the order for reference is compatible with Community law. As a preliminary matter, however, I consider it essential to complement my examination with a general theoretical synopsis of the principle of the free movement of persons, analysing the changes generated by the current development of this principle in the Community legal order, primarily via the interpretation and application of Article 48 et seq. of the Treaty (subsection A).

13 — It is not necessary, in my opinion, to approach the issue from the point of view of Article 3(c) of the EC Treaty as well. Under that provision, the activities of the Community entail the creation of an internal market and the abolition of obstacles to the free movement of goods. This general intention is embodied and expressed in specific obligations incumbent upon the Community institutions, especially pursuant to Articles 7a and 48 et seq. of the EC Treaty. (With regard to the relationship between Article 3(c) and Articles 48 and 52 of the Treaty, see in particular the judgments in Cases 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16, and 222/86 *Unectef* v *Heylens and Others* [1987] ECR 4097, paragraph 8.)
Since specific provisions of primary Community law exist, it is neither necessary nor appropriate to examine Article 3(c) of the EC Treaty separately. Unlike the Spanish Government, I prefer in any case not expressly to characterise that provision as purely 'in the nature of a programme'. Such an assessment, which the Court made with regard to Article 2 of the Treaty in its judgments in Cases 126/86 *Giménez Zaera* v *Institut Nacional de la Seguridad Social y Tesorería General de la Seguridad Social* [1987] ECR 3697 and C-339/89 *Alsthom Atlantique* v *Compagnie de Construction Mécanique Sulzer* [1991] ECR I-107, is often wrongly interpreted as meaning that the provisions contained in the first part of the Treaty have no legal effect and do not have the binding force attached to a fully-fledged rule of law. I do not believe that such a view is entirely correct: the principles set out in Articles 2 and 3 of the Treaty are of fundamental importance for purposes of interpretation and make it possible to attribute a conceptual value to the other rules of Community law. However, they are not endowed with direct effect. An individual cannot base any right whatsoever on them alone, any more than he can invoke them (directly) in support of his legal situation.
In short, Article 3(c) of the Treaty establishes the framework of Community activities from which other provisions of the Treaty specifically derive — as far as we are concerned in the present case, Article 7a of the Treaty. If the activities of the Community with regard to the abolition of obstacles to the free movement of persons creates rights for individuals, those rights will be based on a more specific provision, and not directly on Article 3(c) of the Treaty. That is why an independent examination of this provision does not directly affect the reply to be given to the questions submitted.

A — *The progressive strengthening of the freedom of movement for persons on the basis of Article 48 et seq. of the Treaty*

(a) The direct effect of the Treaty articles relating to freedom of movement for persons

25. The cornerstone of the affirmation of freedom of movement for persons is undoubtedly the case-law established by the Court during the 1970s on the direct effect of Articles 48, 52 and 59 of the Treaty. This case-law is also of special importance in the context of the present case. First, all things considered, the position which Articles 48, 52 and 59 occupied in the Community — then termed the Economic Community — was similar to

that currently occupied by Article 8a of the EC Treaty in a Community that has been detached from its purely financial basis.[14] Secondly, some of the obstacles which the Community judicature had to overcome at that time in order to acknowledge the direct effect of the provisions in question of the EC Treaty display similarities with the obstacles arising currently with regard to the recognition of the direct effect of Articles 7a and 8a of the EC Treaty.

26. The question of direct effect arose first with regard to the Treaty provisions creating the freedom of establishment for persons. Article 52, in particular, provides that '... restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period ...'. Article 54 also provides that before the end of the first stage the Community institutions (and more specifically the Council) are required to adopt a number of measures towards the realisation of freedom of establishment. Interpreting these provisions in the *Reyners* judgment,[15] the Court adopted the following reasoning: 'in laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures'.[16] And 'the fact that this progression has not been adhered to leaves the obligation itself intact beyond the end of the period provided for its fulfilment',[17] an obligation which produces its effects directly upon the expiry of the period set for its fulfilment.[18] It was therefore not possible to invoke against the direct application of Article 52 the fact that the Council had failed to adopt all or some of the measures provided for by Articles 54 and 57 of the Treaty.[19] This led the Court to rule that 'since the end of the transitional period Article 52 of the EEC Treaty is a directly applicable provision, despite the absence, in a particular sphere, of the directives prescribed by Articles 54(2) and 57(1) of the Treaty'.

27. In the same way, with regard to the provisions of Article 48 of the EEC Treaty, in the *Van Duyn* judgment[20] the Court held that 'these provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power'[21] and therefore ruled that 'Article 48 of the EEC Treaty has a direct effect in the legal orders of the Member States

14 — See paragraph 78 et seq. below.

15 — Judgment in Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631.

16 — The *Reyners* judgment, cited in footnote 15 above, paragraph 26.

17 — The *Reyners* judgment, cited in footnote 15 above, paragraph 27.

18 — The wording in the *Kraus* judgment, cited in footnote 11 above, is even clearer: 'In stating that freedom of movement for workers and freedom of establishment are to be secured by the end of the transitional period, Articles 48 and 52 lay down a precise obligation of result. The performance of that obligation was to be facilitated by but not to be made dependent upon the implementation of Community measures. The fact that such measures have not yet been adopted does not authorise a Member State to deny to a person subject to Community law the practical benefit of the freedoms guaranteed by the Treaty' (paragraph 30).

19 — The Court acknowledged, of course, that the directives provided for by Articles 54 and 57 '... have however not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment'. In expressing this point of view, the Court did not intend to limit the direct effect of Article 52 of the Treaty, but was letting it be known clearly that the recognition of such a direct effect did not nullify the obligation for the Council to adopt the directives in question.

20 — Judgment in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

21 — The *Van Duyn* judgment, cited in footnote 20 above, paragraph 6.

and confers on individuals rights which the national courts must protect'. [22] The Court also held that, when Member States invoked limitations justified by the Treaty on the rights implied by the principle of freedom of movement for workers, the application of such limitations is, however, subject to judicial control, 'so that a Member State's right to invoke the limitations does not prevent the provisions of Article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect'. [23]

28. In any case, at least in its initial form, this case-law appears disinclined to attribute a direct effect to certain Treaty provisions establishing freedom of movement for persons except in order to combat discrimination based on nationality. In other words, the Treaty provisions in question appear to be no more than applications of the general prohibition on discrimination based on nationality and have no other scope, either positive or negative. [24] In later judgments, however, the Court went further than this initial restrictive attitude and clearly recognised that Articles 48, 52 and 59 prohibited not only discrimination but also 'obstacles' to freedom of movement. The course of current case-law of the Court with regard to Articles 48 and 52 of the Treaty is encapsulated particularly clearly and thoroughly in the *Kraus* [25] and *Gebhard* [26] judgments. The result of these judgments is that those provisions of the Treaty preclude any national measure which 'is liable to *hamper or to render less attractive* the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty'. [27] By way of exception, national measures displaying such characteristics must fulfil four conditions: 'they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'. [28]

22 — The operative part of the *Van Duyn* judgment, cited in footnote 20 above.

23 — The *Van Duyn* judgment, cited in footnote 20 above, paragraph 7.

24 — The link between the direct effect and the concept of equal treatment is already included in the *Reyners* judgment, cited in footnote 15 above; it emerges more clearly, however, from the judgments in Cases 33/74 *Van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299 and 36/74 *Walrave and Koch* v *Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405. In the *Van Binsbergen* judgment, the Court ruled that 'the first paragraph of Article 59 and the third paragraph of Article 60 have direct effect and may therefore be relied on before national courts, *at least in so far as they seek to abolish any discrimination* against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided'. In the operative part of the *Walrave and Koch* judgment, the Court ruled that 'as from the end of the transitional period the first paragraph of Article 59, in any event *in so far as it refers to the abolition of any discrimination based on nationality*, creates individual rights which national courts must protect'.

25 — Cited in footnote 11 above.

26 — Judgment in Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See also the judgment in Case C-106/91 *Ramrath* v *Ministre de la Justice and l'Institut des Réviseurs d'Entreprises* [1992] ECR I-3351, paragraphs 29 and 30. With particular regard to the material scope of Article 59 of the Treaty, see the judgment in Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 12.

27 — Paragraph 32 in the *Kraus* judgment, cited in footnote 11 above, and paragraph 37 in the *Gebhard* judgment, cited in footnote 26 above.

28 — Paragraph 37 in the *Gebhard* judgment, cited in footnote 26 above.

29. To summarise, the above analysis has enabled me to identify the main lines of the interpretation of the content and binding force of the provisions of the Treaty which, until the fundamental changes made between 1986 and today, were the cornerstone of the establishment of freedom of movement for persons on the territory of the Community. It is essentially thanks to the case-law of the Court that Articles 48, 52 and 59 of the Treaty have been acknowledged to contain primary rules with direct effects. It follows from the application of those provisions that a national measure, even one which makes no distinction on grounds of nationality, which impedes or even discourages, actually or potentially, the holders of the right inherent in freedom of movement for persons from exercising that right constitutes an infringement of Community law unless it is justified in accordance first with the provisions of the Treaty and secondly with the criteria established by the case-law of the Court.

(b) The beneficiaries of the right to freedom of movement for persons under Article 48 et seq. of the Treaty

30. It is necessary, in this context, to emphasise the significance and importance of the extension of the scope *ratione personae* of freedom of movement for persons: this extension is the fruit of the joint efforts of the Community legislature and the Community judicature. Under Article 48 et seq. of the Treaty, the only beneficiaries of the right to freedom of movement are the nationals of Member States,[29] within the specific framework of the pursuit of an activity of economic interest. The Community legislature has nevertheless considered it appropriate to extend the scope of freedom of movement, which thus also covers certain members of the family of the worker exercising the rights conferred on him by Article 48 et seq. of the Treaty, irrespective of their nationality.[30] A number of examples from the case-law of the Court are of even greater interest. Initially, the Court acknowledged that recipients of services, such as tourists, came within the regulatory framework of Article 59 et seq. of the Treaty.[31] Subsequently, by interpreting Articles 7 and 128 of the Treaty more

29 — With particular regard to Article 48 of the Treaty, which does not explicitly limit freedom of movement to workers who are nationals of a Member State, the fact that this right is conditional on being a national of a Member State was recognised formally in the judgment in Case 238/83 *Caisse d'Allocations Familiales de la Région Parisienne* v *Meade* [1984] ECR 2631, paragraph 7.

30 — See Directive 68/360, cited in footnote 5 above, and Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, Series I, 1968 (II), p. 475).

31 — See the judgments in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377 and in Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

broadly, the Court recognised the right of a further category of persons, students, to freedom of movement. [32] [33] The Council, for its part, widened the material scope of freedom of movement by giving the right of residence first to employees and self-employed persons who have ceased their occupational activity [34] and then to certain persons not pursuing an economic activity and who do not enjoy this right under other provisions of Community law, [35] and finally to students. [36]

(c) Access to the territory of Member States as an element in the right to freedom of movement

31. It should be noted that Directives 90/364, 90/365 and 93/96 do not have their legal basis in Article 48 et seq. of the Treaty. The first two [37] were adopted pursuant to Article 235 and the third pursuant to the second paragraph of Article 7 (now the second paragraph of Article 6 of the EC Treaty). [38] This remark is not without interest, as it shows the limits *ratione personae* of Article 48 et seq. of the Treaty and the need to add a provision of more general scope which could serve as the legal basis for fully implementing the principle of freedom of movement for persons. This need has now been addressed, as I shall examine below, [39] by Article 8a of the EC Treaty.

32. I shall now proceed to examine one element of freedom of movement for persons as enshrined in Article 48 et seq. of the Treaty; this element lies at the heart of the questions submitted in the present case. It consists of the possibility for persons enjoying the right to freedom of movement to enter the territory of a Member State. This issue is not dealt with in detail in the acts establishing the Community but is nevertheless the subject of secondary legislation. As a general rule, the right of entry 'shall be exercised simply on production of a valid identity card or passport'. [40] I have already mentioned that the directives specifying the

32 — See in particular the judgments in Cases 293/83 *Gravier* v *City of Liège* [1985] ECR 593, 24/86 *Blaizot* v *University of Liège and Others* [1988] ECR 379 and C-357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027.

33 — The judgment in Case C-292/89 *Antonissen* [1991] ECR I-745 is also of interest. This relates to the right of entry and residence of a person seeking to pursue an economic activity. The Court considered that in the absence of a Community provision prescribing a period during which Community nationals seeking employment in a Member State may stay there, the period of six months laid down in the national legislation of the United Kingdom was not in principle contrary to Community law. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State (paragraph 21).

34 — Directive 90/365, cited in footnote 8 above.

35 — Directive 90/364, cited in footnote 7 above.

36 — Directive 93/96, cited in footnote 9 above.

37 — The preamble of Directives 90/364 and 90/365 mentions Article 3(c) of the EEC Treaty, the current Article 7a (numbered 8a before the Treaty of Maastricht), as well as Articles 48 and 52; these provisions did not, however, form the legal basis of the directives in question.

38 — See also Council Directive 75/34/EEC of 17 December 1974, which is also based on Article 235, concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10).

39 — See paragraph 78 et seq. below.

40 — Article 2(1) of Directives 68/360 (cited in footnote 5 above) and 73/148 (cited in footnote 6 above).

manner in which the principle of freedom of movement is to be applied to certain categories of person generally refer to Article 3(1) of Directive 68/360, which provides that Member States are to allow holders of the right of freedom of movement to enter their territory 'simply on production' of a valid identity card or passport.

33. Under Community law, border controls of this type are the only permissible general condition which can be imposed by the national authorities or by domestic legislation on persons entering the territory of a Member State. The Court has ruled against the application of formalities in addition to passport checks in so far as such formalities lead to additional restrictions on access to the territory and, by extension, to the exercise of freedom of movement. [41]

34. Moreover, all other formalities imposed by a Member State with regard to establishment, residence and, more generally, movement on its territory, although they are liable, first, to constitute discrimination on grounds of nationality and, second, to 'hamper' or 'render less attractive' the exercise of the Community freedoms in question, are subject to strict judicial control based on the abovementioned principles of case-law, which the Community judicature has derived directly from the provisions of Article 48 et seq. of the Treaty. [42]

35. I conclude from this, in accordance with the hitherto accepted interpretation of

41 — Two judgments of the Court can be mentioned by way of example. In the first the Court considered that Community law prohibited national legislation which, when a person enjoying the protection of Article 48 et seq. of the Treaty entered the territory, required an endorsement to be stamped on the passport giving leave to enter the territory of the said State (judgement in Case 157/79 *Pieck* [1980] ECR 2171). In the second the Court held that national legislation which, in the context of border controls, requires citizens of Member States exercising the Community right to freedom of movement to state the purpose and duration of their journey and the financial means at their disposal for it before they are permitted to enter the territory was not compatible with Article 48 et seq. of the Treaty (Case C-68/89 *Commission* v *Netherlands* [1991] ECR I-2637).

42 — Hence, although Member States have the power to adopt measures aimed at enabling the national authorities to have an exact knowledge of population movements affecting their territory and at imposing on nationals of other Member States an obligation to report their presence to the authorities of the State concerned, Community law nevertheless requires, first, that the period fixed for the discharge of the said obligations be reasonable and, secondly, that the penalties attaching to a failure to discharge them should not be disproportionate to the gravity of the offence (see the judgments in *Watson and Belmann*, cited in footnote 13 above, and Case C-265/88 *Messner* [1989] ECR 4209).
It is also worth mentioning a judgment in which the Court held that a Member State, in that instance Belgium, could impose on Community nationals residing on its territory the requirement to be in possession of their residence permit, since an identical obligation is imposed on the nationals of that State with regard to their identity card (judgment in Case 321/87 *Commission* v *Belgium* [1989] ECR 997). The same judgment mentions that the national authorities may check compliance with the obligation in question. However, this obligation cannot affect the right to enter Belgium, the exercise of which is conditional neither on compliance with the said obligation nor on the carrying out of the disputed checks; independently of this, the execution of the checks in question, in particular if it is found that they are carried out 'in a systematic, arbitrary or unnecessarily restrictive manner' (paragraph 15 of the judgment in Case 321/87), constitutes a barrier to the free movement of persons within the Community which is contrary to Community law.
Finally, it should be noted in any event that the right of entry and establishment is acquired irrespective of the issue of a residence permit and that the grant of such a permit is therefore not to be regarded as a measure giving rise to the disputed rights (see the judgment in Case 48/75 *Royer* [1976] ECR 497, paragraph 31). Those rights derive directly from Community law (see also the judgments in Cases 8/77 *Sagulo and Others* [1977] ECR 1495, paragraph 4, and C-363/89 *Roux* v *Belgian State* [1991] ECR I-273, paragraph 17).

Article 48 et seq. of the Treaty, that it follows from these articles that the ability to enter the territory of Member States and to cross the borders, subject solely to the presentation of a passport or identity card, is inherent in the right to freedom of movement. In itself, the formality of presentation admittedly constitutes a restriction on the unimpeded movement of persons, in its absolute form: this formality is considered justified in the light of Article 48 et seq. of the Treaty, naturally in so far as it is essential in order to certify the identity of the national of a Member State, from which derives the possibility of moving freely. In other words, the protection guaranteed by the provisions of primary Community law here in question is not so extensive that it is equivalent to an absolute freedom to cross borders, transcending all border controls. This last observation sums up the position adopted hitherto by the Community legislature, which also appears to be that accepted by the Court. I shall now examine whether the legislation and case-law which I have just mentioned remain relevant, and to what extent, following the fundamental changes in primary Community law brought about by the insertion of Articles 7a and 8a into the text of the EC Treaty by the Single European Act and the Treaty of Maastricht.

B — *The scope and binding nature of Article 7a of the EC Treaty*

36. Under Article 7a, which was introduced into primary Community law by Article 13 of the Single European Act, the Community 'shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992'. The second paragraph of that article defines the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'. For the purposes of the reply to be given to the national court, particular importance must be attached first to ascertaining the precise scope of the provisions in question and secondly to establishing the extent to which they have direct effect.

(a) The scope of Article 7a of the EC Treaty

37. In their observations, the Spanish and Netherlands Governments have maintained that the disputed provisions are purely in the nature of a programme. Similarly, the Irish Government and the United Kingdom Government consider that the first paragraph of Article 7a of the Treaty imposes no concrete obligation on the Community institutions and that it merely sets out a political objective. They also contend that although the second paragraph of Article 7a defines the internal market as an area without internal frontiers, it does not impose an obligation to establish that market. It simply means, in their submission, that once the internal market has been created, if it is, it must be a framework in which internal restrictions do not exist.

38. I believe that such a reductionist view does not correspond to the true scope of the specific provisions of Article 7a of the Treaty. That article has binding effect. It creates for the Community the obligation to establish the internal market by progressive stages, in other words to create an 'area without internal frontiers'. This obligation ineluctably leads to a more specific duty to create the conditions which will permit the complete abolition of frontier controls. The elimination of internal frontiers, for which the Community's constitutional legislature has expressly provided, cannot be achieved without the permanent abolition of frontier controls within the 'internal market', so that the free movement of persons is fully guaranteed.

39. Nor do I consider it possible to accept the argument of the United Kingdom Government that, as far as the crossing of borders is concerned, Article 7a cannot in itself create a regime of greater freedom than that currently in force under Article 48 et seq. of the Treaty. [43]

40. In fact, as I shall analyse below, [44] the creation of an area without internal frontiers in accordance with Article 7a presupposes that the freedom to cross borders is enjoyed by all persons moving within the internal market, even if they are not nationals of a Member State. [45] Nevertheless, the above comparison between the scope of Article 48 et seq. of the Treaty and that of Article 7a and the conclusion drawn from it, namely that the holders of rights based on Article 48 et seq. of the Treaty are in an inferior position in relation to the persons referred to in Article 7a, is based on false interpretative reasoning. They set out from a static and ossified conception of the provisions in question which underestimates the dynamism of the Community and the possibility for evolution in the interpretation of the provisions of the Treaty, first in the light of their application and secondly as a result of the introduction of new fundamental provisions by way of revision of the rules of primary law.

41. Article 7a is certainly not devoid of binding force, as the Governments of some Member States appear indirectly to maintain, nor does it simply reiterate the requirements imposed by earlier Community legislation. [46] Article 7a creates an obligation to establish a regime of absolute

43 — It is maintained that, as Article 48 et seq. of the Treaty and the secondary legislation based on these articles provides for a system of movement free of all controls within the Community, such a system cannot be based on Article 7a of the EC Treaty: in such a case, it is argued, persons benefiting from the provisions of Article 48 et seq., that is to say nationals of Member States who are pursuing, have pursued or hope to pursue an economic activity, would be in an inferior position in relation to persons able to rely on Article 7a, in other words natural persons, whether or not nationals of a Member State.

44 — See paragraph 59 below.

45 — See in particular Article 73j of the Treaty of Amsterdam (see paragraph 68 et seq. below).

46 — It is this meaning which some of the participants in the proceedings before the Court appear to bestow on the last phrase of the first paragraph of Article 7a, which places an obligation on the Community to adopt measures with the aim of progressively establishing the internal market 'without prejudice to the other provisions of this Treaty'. Setting out from this premiss, these participants contend that the measures which may be adopted under Article 7a may not exceed, *ratione materiae* and *ratione personae*, the scope of the more specific provisions of primary and secondary Community legislation relating to freedom of movement for persons.

freedom to cross internal borders, which makes it possible to eliminate systematic border checks for all; that does not, however, mean that Article 48 et seq. of the Treaty confers only lesser rights on persons within their field of application in that until now the implementation of these rights presupposed the prior formality of presenting a passport or identity card when crossing borders. Quite simply, as far as the crossing of the internal borders of the Community is concerned, Article 48 et seq. of the Treaty must now be interpreted primarily in the light of the specific obligations placed upon the Community institutions by Article 7a.

42. In any case, the fact that the article in question places a requirement on the Community institutions does not automatically mean that it creates rights for individuals. More especially, the introduction of a Community obligation to create an area without internal frontiers does not mean that persons moving within the internal market can presume to cross frontiers without controls or directly invoke the provisions of Article 7a to that end. By the same token, the nationals of Member States cannot simply invoke the Community's specific obligation to adopt measures with the aim of progressively establishing the internal market in order automatically to derive therefrom the right to enter Member States of which they are not nationals in order to exercise the rights provided for by Article 48 et seq. of the Treaty without having to 'present' a passport or identity card. In order to arrive at the recognition of such a right — exclusively on the basis of Article 7a or of the combined provisions of Articles 7a and 48 — Article 7a of the Treaty must have the necessary legal characteristics, in accordance with the case-law of the Court, for direct legal effects to be created.

(b) The direct effect of Article 7a

43. In its observations, the Irish Government notes that the attribution of a direct effect to the provision at issue would bring into question the existing fabric of regulations on the exercise of freedom of movement for persons. The attribution of such an effect would, it maintains, render inapplicable important aspects of the Community legislation described above defining the particular procedures for giving effect to requirements established by Article 48 et seq. of the Treaty. More seriously, in the submission of the Irish Government, it would contradict the rule that the ability of a person exercising the rights described in Article 48 et seq. of the Treaty to enter the territory of a Member State presupposes the presentation of a passport or identity card. The Irish Government contends that the mere introduction of a general obligation to create an area without internal frontiers is not sufficient of itself to render pointless the existing and hitherto valid arrangements for applying the princi-

ple of freedom of movement. In my opinion, the first part of this remark is entirely correct. If Article 7a truly has direct effect, it precludes the principle on which all the directives on the free movement of persons are based, which link entry to the territory of a Member State to the presentation of an identity card or passport. However, this profound modification, which should not be minimised, is not of itself a sufficient argument to refuse to attribute a direct effect to Article 7a.

44. Moreover, the Irish Government's contention, based on the premiss that attributing a direct effect to Article 7a would render superfluous the introduction of Article 8a in the context of the revision carried out by means of the Treaty of Maastricht, must be rejected. [47] I consider that that premiss must be rejected, because it underestimates the special importance of Article 8a in the economy of the EC Treaty. As I shall demonstrate at a later stage in this Opinion, [48] the particularity of this article is that it refers directly to a category of persons whose particular status (that of citizen of the Union) it recognises and to which it guarantees a fundamental constitutional right of substantial scope. Whereas Article 7a relates to the creation of an *area* without frontiers, Article 8a focuses on the *citizen of the Union*; in other words, the latter provision envisages the freedom of movement for persons in its subjective dimension. These two provisions are therefore not conceptually identical and it cannot be claimed that the attribution of a direct effect to the former deprives the latter of all meaning.

45. It is in accordance with the criteria laid down in established case-law of the Court [49] that I shall examine whether the provisions of Article 7a have direct effect. On the basis of that case-law, in order to produce a direct effect a provision must first impose a precise and well-defined obligation, secondly it must be unconditional and finally its implementation must not depend on further measures to be adopted by the Community institutions or the Member States, in the sense that it must not accord them discretionary powers for the purposes of its application. Among the parties submitting observations, Mr Wijsenbeek alone contends that Article 7a meets these conditions. By contrast, the Member States which have submitted observations as well as the Commission consider that the article at issue cannot have direct effect. I shall examine below the arguments raised for and against Article 7a having direct effect, in each case from the angle of the criteria of case-law I have mentioned.

47 — This reasoning is based on the idea that, since it affects every individual moving within the internal market, the scope of Article 7a is wider than that of Article 8a, which merely recognises the right of citizens of the Union to move and reside freely. Hence, if Article 7a enables all beneficiaries of that right to disregard all obstacles such as border controls, what purpose is served by the adoption of Article 8a?

48 — See paragraph 81 et seq. below.

49 — See in particular the Opinion of Advocate General Mayras in the *Van Duyn* case, cited in footnote 20 above, and the judgments in Cases 148/78 *Ratti* [1979] ECR 1629 and 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53.

(i) The comparison between Article 7a and Article 48 et seq. of the Treaty

46. In its observations, the United Kingdom Government maintains, with regard to the comparison between Articles 7a and 48 of the Treaty, that the latter article imposes a far stricter obligation on the Community institutions than the former. Hence, Article 48(1) provides that freedom of movement for workers '*shall be secured*' within the Community by the end of the transitional period at the latest. The idea of 'securing' an outcome leaves no latitude for the institutions required to achieve it. On the other hand, again according to the United Kingdom Government, Article 7a appears to call for the progressive attainment of an objective, or even of a general obligation: it does not require them to be 'secured' within a set period. It is for this reason, according to the United Kingdom Government, that the two articles in question cannot have the same binding nature.

47. For my part, I consider that the comparative analysis I have just described, although of interest,[50] is not sufficient reason for refusing to acknowledge that Article 7a has direct effect. Indeed, it can be retorted that because of its wording the article in question more resembles Article 52 than Article 48(1) of the Treaty. As mentioned above, the Court has not hesitated to recognise the direct effect of Article 52 even though this article provides for the progressive abolition of restrictions on the freedom of establishment in the course of the transitional period.[51] One could therefore cite the *Reyners* judgment,[52] in which the Court recognised that 'in laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 thus imposes an obligation to attain a precise result', and maintain in the present case that the deadline of 31 December 1992, the date expressly stipulated in Article 7a as the expiry of the fixed period, is equivalent to implementation of the specific obligation to establish the internal market and thus confers a direct effect on the said article. I do not believe, however, that such comparative analyses of themselves provide an answer to the question under examination. It is preferable to focus on Article 7a alone and to determine the extent to which this article meets the criteria established by case-law for determining whether a provision has direct effect.

(ii) The declarations regarding Article 7a, annexed to the Final Act of the Single European Act

48. The Commission as well as the Irish, Netherlands and United Kingdom Governments refer to the declarations annexed to the Final Act of the Single European Act in order to contest the precise and unconditional nature of Article 7a of the Treaty. More particularly, the Declaration on Article 8a of the EEC Treaty (now Article 7a of

50 — See footnote 59 below.

51 — See paragraph 26 above.

52 — See footnote 15 above.

the EC Treaty) expressly states that 'setting the date of 31 December 1992 does not create an automatic legal effect'. Similarly, it is possible to infer *a contrario* from the wording of the first paragraph of that Declaration, according to which, by means of the article at issue, the Conference wishes to 'express' a 'firm political will', that the disputed provisions of the Single European Act are devoid of binding force. Furthermore, the General Declaration on Articles 13 to 19 of the Single European Act (which articles include Article 7a of the EC Treaty) formally states that these provisions do not affect the right of Member States to take the necessary measures for purposes such as controlling immigration from third countries or to combat terrorism, crime and illicit trafficking.

49. Arguments against attributing a direct effect to Article 7a of the Treaty can certainly be derived from those declarations. First, interpreted in the light of those declarations, the passing of the date of 31 December 1992 does not automatically create an obligation for the Community to have completed the establishment of an area without internal frontiers. Secondly, whatever Article 7a states, the Community does not appear able to shoulder the burden of creating the internal market. The Member States continue to hold important regulatory powers closely associated with this task, such as controlling immigration from third countries or the campaign against international crime. As it is not accompanied by the transfer of the relevant competence from the Member States to the Community, Article 7a cannot be interpreted as meaning that it imposes a specific obligation on the latter to abolish internal frontiers, but rather as establishing a general objective, without however endowing the Community institutions with the necessary powers to attain it.

50. However, as a prior condition for adopting such a restrictive interpretation it would have to be acknowledged that the abovementioned declarations had binding force or even were of value for interpreting the meaning of the provisions of the said article. The Netherlands and United Kingdom Governments refer to Article 31(2) of the 1969 Vienna Convention on the Law of Treaties, [53] according to which declarations on the interpretation of an article of an international treaty made at the time of the conclusion of the treaty and expressing the will of all the parties constitute an 'agreement' forming part of the context of the signed international treaty which must be taken into account when interpreting provisions of that treaty. The Governments mentioned above and the Commission thus maintain that the declarations in point, annexed to the Single European Act, have these characteristics and on this ground are factors in the interpretation of Article 7a of the Treaty.

51. I do not concur with this point of view. I would first like to refer to the *Antonissen* judgment, [54] in which the Court ruled on the legal significance of a declaration

53 — The 1969 Vienna Convention is of legal interest for Community law in that it contains the existing customary rules of public international law on the interpretation of international agreements.

54 — Cited in footnote 33 above.

recorded in the minutes of the Council at the time of the adoption of Regulation No 1612/68 [55] and Directive 68/360. [56] The Court held that such a declaration could not be used for the purpose of interpreting a provision of secondary legislation where, as in that case, 'no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance.' [57] The same remark applies to the declarations at issue in the present case as far as Article 7a of the Treaty is concerned: not only does the content of the declarations not correspond to the text of the disputed article, it runs directly counter to it, at least in the case of the first of the declarations.

52. The Commission admittedly points to the differences between the case we are examining and the facts at the origin of the *Antonissen* judgment. In this instance, the problem raised relates not to declarations annexed to a provision of secondary legislation but to declarations annexed to an act of primary law and public international law, that is to say the Single European Act, and emanating from the Conference of the Representatives of the Governments of the Member States, a body constituting the very power that originates the provision at issue.

53. I do not believe that this difference alone constitutes grounds for rejecting the solution I have advocated above. Although public international law in principle accords declarations an appropriate value for interpreting the meaning to be attached to a provision of an international treaty, I do not believe that this solution can be transposed without modification into Community law. Let me explain: the provision of the Single European Act to which the declarations in question referred was subsequently inserted into the EEC Treaty and now takes the form of Article 7a of the EC Treaty, at issue in the present instance. It is therefore an integral part of primary Community law and must be interpreted in a way that respects both the individual nature and dynamics of the Community legal order. The articles of the Treaty are not purely and simply equivalent to provisions of public international law: they form the basis of a legal order *sui generis* on which the Member States of the Community have conferred sovereign rights. The rules of public international law contained in the text of an international agreement, by contrast, do not have the characteristics of primacy and direct effect inherent in Community law; in accordance with the dominant doctrine of dualism, their application depends ultimately on the will of the contracting states. It is therefore logical that texts adopted in the context of an international treaty, such as the declarations cited above, are also of more particular interest for the purposes of interpreting that treaty since they express the will of the contracting parties.

54. Moreover, I consider that once provisions of primary Community law have been inserted into the text of the Treaty and

55 — See footnote 30 above.

56 — Cited in footnote 5 above.

57 — Paragraph 18 of the *Antonissen* judgment, cited in footnote 33 above.

made applicable in the Community legal order, they acquire autonomous value in relation to the will of their authors, just as the provisions of a constitutional act acquire autonomous value in relation to the will of the constituent legislature which enacted them. The will of the author of a provision of Community law is but one of the parameters in the interpretation of that provision, and far from the most important one; the value of this interpretative criterion is significantly less than that which the will expressed by the States has in public international law when they draw up a normative international text.

55. Article 7a of the EC Treaty must be interpreted by examining first its literal wording and its position and objective in the overall economy of the rules of primary Community law. As regards more specifically the declarations annexed to the Single European Act, it cannot be accepted that they are sufficient to deprive Article 7a of direct effect if that effect stems from a literal and systematic reading of the article in question.

56. I would like more especially to make the following observations. First, the declaration stating that setting the date of 31 December 1992 does not create a legal effect cannot be based on Article 7a. Hence, it should be considered only in so far as a literal and systematic interpretation of Article 7a of the Treaty leads us to conclude that the date in question does not create direct legal effects, and then merely in the alternative as a factor supporting that conclusion.[58] Similarly, to the extent that it underestimates the binding force of a rule of primary Community law, the declaration stating that Article 7a merely expresses a political objective is worthless for the purposes of interpretation if that underestimation is not based directly on arguments drawn from the text of the Treaty itself. Finally, the maintenance of the Member States' powers in certain fields affecting the free movement of persons follows, in one way or another, from the text of the Treaty itself, in which case this declaration is superfluous. At all events, the question as to the extent to which the maintenance of these national powers removes Article 7a from the category of provisions having direct effect is an issue which needs to be examined in the context of the interpretation of the article itself and the reply to be given does not automatically stem from the declarations in this regard annexed to the Final Act of the Single European Act.

58 — Advocate General Jacobs appears to have adopted the same reasoning with regard to Article 7a of the EC Treaty (at that time Article 8a of the EEC Treaty) in his Opinion in Case C-297/92 *Istituto Nazionale della Previdenza Sociale* v *Baglieri* [1993] ECR I-5211 regarding the binding nature of the deadline of 31 December 1992. Having concluded that the passing of the set date had no binding legal effects, especially as regards the free movement of persons, owing to the need to adopt further measures, he nevertheless observed: 'Such a conclusion would moreover be consistent with the Declaration on Article 8a of the Treaty annexed to the Final Act adopting the Single European Act, which states that setting the date of 31 December 1992 "does not create an automatic legal effect". *While the status and effect of the declaration have yet to be clarified, it is clear that, to the extent that it can be taken into account in interpreting Article 8a*, it is incompatible with the view that setting that date had the effect of transforming the scope of the social security regulations' (paragraph 12 of the Opinion). The Court did not adopt a position on the question, abstaining from any mention of the declaration at issue.

(iii) The unconditional nature of the obligation for the Community to create an area without internal frontiers and the possibility of abolishing frontier controls within the Community without adopting flanking measures

57. The Member States which have submitted observations and the Commission maintain that Article 7a of the Treaty does not give rise to an unconditional obligation which can be implemented without the adoption of flanking measures and hence without the Community or the Member States exercising discretion. More especially, the Irish Government contends that the article at issue places a positive obligation on the Community which, precisely by reason of its positive nature, cannot be implemented in a rule having direct effect. The United Kingdom Government, for its part, contends that there is an essential difference between the free movement of goods and freedom of movement for persons: whereas the first of these freedoms is closely linked to the existence of a customs union, a similar union does not exist at the level of persons for the purposes of the second; the said Governments, together with the Netherlands Government and the Commission, also maintain that the creation of an area without internal frontiers necessarily presupposes the adoption of important flanking measures and that in the absence of such measures the obligation on the Community cannot materialise. These measures relate, for example, to the crossing of the internal frontiers of the Community, the granting of political asylum and cooperation among national and Community authorities with a view to the exchange of information on freedom of movement for persons. In any case, according to these interveners, the need to adopt flanking measures of itself precludes Article 7a of the Treaty from having direct effect.

58. I think these arguments put the finger on the fundamental imperfections in the provisions of Article 7a of the Treaty that prevent a direct effect from being attributed to that article. First, the remark on the positive nature of the obligation to create an area without internal frontiers is relevant. The establishment of a regime of complete freedom of movement for persons and the abolition of frontier controls do not merely entail eliminating existing restrictions on freedom of movement. They presuppose the adoption of positive measures, and more specifically the establishment of a *framework system*, the smooth operation of which is ultimately decisive for the abolition of controls at the internal frontiers. [59] Among the components of this system we will find, for example, the creation of common arrangements for controls at the internal frontiers of the Com-

59 — In addition to the remarks I have made with regard to the comparison between Articles 7a and 48 et seq. of the Treaty (see paragraph 46 et seq. above), I will show that it is this which constitutes the essential difference between, on the one hand, the principle of the freedom of movement for persons, at least as defined in Article 48 et seq. of the Treaty, and on the other movement within an area without internal frontiers, provided for by Article 7a of the same Treaty. The freedom of movement provided for in Article 48 et seq. imposed on the Community and the Member States an essentially negative obligation, implying the prohibition of unjustified obstacles to the movement of persons. This obligation does not amount to an obligation to adopt positive measures so that the remaining obstacles to the free movement of persons across the internal frontiers of the Community — the presentation of a passport or identity card — cease to be tolerated or justified. It is this far more radical and different obligation which is established by Article 7a of the EC Treaty. The abovementioned provisions of primary Community law cannot share the same fate and it is not possible to confer direct effect on Article 7a alone and solely because direct effect has been attributed to certain of the articles of the Treaty from Article 48 onwards.

munity, the formulation of a common policy on issues such as asylum, the issue of visas or the exchange of information on the freedom of movement for persons.

59. The scope *ratione personae* of Article 7a also militates against attributing direct effects to the provisions it contains. I have already pointed out that the creation of an internal market was closely linked to the right for all natural persons moving freely within this market to cross the internal frontiers without there being systematic border controls. The category of persons enjoying this right necessarily includes natural persons who are not nationals of a Member State. If one wished to distinguish between citizens of the Union and persons without that status and to deny the latter the rights deriving from Article 7a — if there be any — it would not be possible to abolish frontier controls completely within the Community, as such checks would be necessary to ascertain whether a person crossing the frontier were a citizen of the Union (in which case he should not be checked!) or were not. Hence, as the elimination of systematic frontier controls within the Community relates to (or is even of concern to) all natural persons within a Member State, it goes without saying that the obligation for the Community to abolish every obstacle to the crossing of internal frontiers can be implemented only when the creation of a common system for checking persons crossing the Community's external frontiers has been completed. The creation of such a system is therefore necessary, first in order to prevent abuse of the right to cross internal frontiers, secondly for the sake of the smooth functioning of the internal market, and finally in order to respect the sovereign right of the Member States to control their internal affairs.

60. The legislature which established the Community also perceived the need to adopt essential measures regarding the convergence of national provisions on the crossing of the internal frontiers of the Community. For that reason, at the time of the revision carried out in the context of the Treaty of Maastricht, it introduced Article 100c, which empowers the Community institutions to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States and, secondly, to adopt measures relating to a uniform format for visas. However, doubts have arisen whether this regulatory task can be accomplished entirely at the Community level: first, Articles 7a and 100c do not confer on the Community institutions the body of powers needed to create the appropriate common mechanism for checks at the external borders, which are supposed to permit the abolition of checks at the internal frontiers; secondly, a number of issues related to those dealt with in Articles 7a and 100c come within the competence of the Mem-

ber States within the framework of intergovernmental cooperation in the fields of justice and home affairs, which was instituted by the Treaty on European Union.

61. I note in particular that Article K.1 of the latter Treaty, in the version now in force, describes as 'matters of common interest' on which Member States 'shall inform and consult one another within the Council with a view to coordinating their action' asylum policy, rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon, and conditions of entry, movement and residence by nationals of third countries on the territory of Member States. Moreover, it is significant that the Court does not have jurisdiction over acts adopted in the context of the cooperation established by Article K of the Treaty on European Union. Although this question remains hypothetical, one may ask how the Court could one day conclude that 'the time is approaching' for the full implementation of the obligation to eliminate the internal frontiers of the Community if it is not in a position to assess whether European unification has reached the stage which logically precedes the abolition of controls at the internal borders, in other words to rule on matters such as cooperation regarding controls at the external borders, asylum policy, the issuing of visas, etc.

62. From this point of view, the Spanish Government is right to point out that Article 7a lacks regulatory content and that while placing a precise obligation on the Community institutions it does not grant them the necessary powers to perform it. The comparison made by the United Kingdom Government between the free movement of persons and the free movement of goods is also well founded. Although, ultimately, goods enjoy greater freedom than natural persons — to the extent that they are not subject to a corresponding requirement to 'present an identity card or passport' and are not subject to systematic border controls — this difference of treatment is explained on the following grounds: goods have benefited from the customs union, especially the establishment of the common customs tariff, whereas a comparable development has not taken place so far in the regime applicable to persons crossing the external borders of the Community (and regrettably this concern has not been one of those to which the Community has given priority).

(iv) The changes that would result from implementation of the Treaty of Amsterdam

63. I think reference should also be made to the latest developments regarding the probable revision of primary Community law, particularly in the field of freedom of movement for persons and the elimination of obstacles to that freedom at the borders. First of all, I shall point out the importance

of the changes brought about by the Treaty of Amsterdam by comparison with the strange status quo enshrined in the Treaty of Maastricht.

64. Before going into detail, I feel I must express my comprehension for the objections which may be aroused by the analysis on which I am about to embark. An examination of the provisions of the Treaty of Amsterdam for the purposes of the interpretation to be given to Article 7a of the EC Treaty, especially from the point of view of the questions submitted by the national court, proves to be of no practical use from a strictly legal point of view and, in the field of methodology, entails acrobatics incompatible with the principles of positive law. The relevant facts in the case in the main proceedings occurred well before the signing of the Treaty of Amsterdam, which in any event, at the time of writing this Opinion, has not yet come into effect.

65. It is not my intention, however, to make futurology one of the parameters for the interpretation of a rule of law. I simply believe it advisable that the Court should not ignore the prospects of development in the Community legal order. In the area of the free movement of persons, the ongoing process of European unification has already led to the preparation of concrete proposals for regulations which very probably will be incorporated into the EC Treaty, thereby undeniably altering the meaning and scope of certain provisions of primary Community law.

66. I think it is useful to mention in particular the content of a fairly large number of provisions of the Treaty of Amsterdam aimed at further facilitating freedom of movement of persons. The provisions in question are contained in Title IIIa, [60] entitled 'Visas, asylum, immigration and other policies related to free movement of persons', which, according to the Treaty of Amsterdam, will be added to the text of the EC Treaty, provided that that revision takes place. The provisions within this title considerably expand the powers of the Community in certain matters affecting the free movement of persons; they also change the legal nature of measures taken at European level in these areas. As I have already said, in the wake of the Treaty of Maastricht the problems of visas, asylum, immigration or the crossing of the internal or external borders of the Community were likely to fall solely within the ambit of intergovernmental cooperation and could not be the subject of autonomous Community action, except for minimal powers granted to the Community under Article 100c of the Treaty. The Treaty of Amsterdam repeals Article 100c, which had never led to the adoption of provisions of secondary Community law.

67. In addition, most of the powers which Article K of the Treaty on European Union made subject to intergovernmental cooperation are now to be transferred to the Community. In other words, the subject-matter of what it has become customary to

60 — My references to the provisions added to primary Community law by the Treaty of Amsterdam are based on the initial numbering, and hence do not accord with the consolidated version of the treaties.

call the 'third pillar' is shrinking and as a consequence strengthening the 'first pillar' of the Union, namely the Community. More especially, the new Article 73i, which will be inserted into the EC Treaty at the time of the revision carried out by the Treaty of Amsterdam, if it takes place, now speaks of an 'area of freedom, security and justice'. With a view to its progressive establishment, it is provided that the Council is to adopt, 'within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 7a, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration...'.

68. This obligation is clarified in Article 73j, which will also be inserted into the EC Treaty. This article provides that the Council, acting in accordance with a particular procedure, is, again within a period of five years after the entry into force of the Treaty of Amsterdam, to adopt a series of measures, among which the following in particular attract our interest: first, measures aimed at abolishing border controls within the Community, secondly measures on the crossing of the external borders of the Member States, which are to establish standards and procedures to be followed by Member States in carrying out checks on persons at the external borders and rules on visas (list of third countries whose nationals must be in possession of visas and those whose nationals are exempt, uniform format for visas), and finally measures setting out the conditions under which nationals of third countries are to have the freedom to travel within the territory of the Member States during a period of no more than three months. [61]

69. I draw the following conclusions from the abovementioned provisions of the Treaty of Amsterdam.

70. First, the entry into force of the Treaty of Amsterdam, if it occurs, will lead, under the new Article 73i et seq., to the Community being vested with a number of powers [62] directly linked to the implementation of the general obligation under Article 7a of the EC Treaty on the progressive establishment of the internal market. Article 73i et seq. will in reality clarify and deal with on the regulatory plane the most important of the factors of the freedom of

61 — It should be noted that Article 73p, which was added to the EC Treaty during the revision carried out under the Treaty of Amsterdam, formally recognises the jurisdiction of the Court to review the legality of measures adopted under Article 73p et seq. Despite the limitations that have been maintained, this development represents progress by comparison with the way in which the version of Article K of the Treaty on European Union in force under the Treaty of Maastricht had excluded the Court almost completely. If the provisions of the Treaty of Amsterdam are adopted, I believe it probable that one day the Community judicature will be able to ascertain whether the 'flanking measures' are in place which will allow the expectations raised by Article 7a with regard to the establishment of an internal market and an area without internal frontiers to become reality.

62 — I do not wish, by reason of my observations, to participate in the debate whether the said Community powers are appropriate or sufficient in view of the creation of a framework of complete freedom of movement for persons or whether obstacles exist, particularly because of the maintenance of parallel powers of the Member States in the fields of asylum and immigration. Some of these matters continue to come within the realm of intergovernmental cooperation in accordance with Article K.1 et seq. of the Treaty on European Union (in the version amended by the Treaty of Amsterdam). I shall merely note that, by transferring a regulatory matter from the third pillar to the first, the Treaty of Amsterdam as a matter of principle lays the basis for the implementation of the general requirements of Article 7a of the Treaty, which in any case have not been achieved at the current stage of European unification.

movement of persons to which Article 7a refers. In other words, the Treaty of Amsterdam provisions in question are the indispensable complement to the system intended to be created by Article 7a, with which we are dealing in the present case. [63]

71. This point of view is reinforced by the fact that both Article 73i and Article 73j refer directly to Article 7a of the EC Treaty. From this I therefore draw the following *a contrario* conclusion: before the forthcoming institutional amendment — by which I mean the entry into force of the most recent revision of the Treaties — and in the absence of the Community powers and procedures decided at Amsterdam, the complete implementation of the requirements of Article 7a of the EC Treaty, directly and by virtue solely of the automatic application of that article, remains impossible; the logical consequence is that it is impossible to attribute a direct effect to the Treaty provision in question, at least as far as the elimination of controls at the internal frontiers of the internal market is concerned. [64]

72. Finally, and this is also very important, the obligation imposed by Article 73i et seq. to adopt measures to permit the progressive establishment of an 'area of freedom, security and justice' does not have immediate effect: it is to be implemented 'within a period of five years after the entry into force of the Treaty of Amsterdam'. Hence, if the specific requirements on the adoption of measures with a view to ensuring 'the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders', [65] requirements which stem from Article 73i et seq., are accompanied by the granting to the competent Community institution of an implementation period of five years (which, of course, has not yet begun), I do not see how the deadline of 31 December 1992 set by Article 7a of the EC Treaty for the establishment of the internal market could be interpreted as already prohibiting systematic border controls at the internal borders of the Community. I have already stated that it would be possible to say, in reply to this reasoning, that it is based on a hypothetical institutional amendment. As long as Article 73i et seq. is not among the provisions of the Treaty in force, there can be no question, in positive law, of indirectly 'reviving' the deadlines for the adoption of the Community measures needed for the abolition of controls at the internal borders of the internal market. Nevertheless, I think it would be particularly unfortunate to attribute direct effects as from the deadline of 31 December 1992 to Article 7a of the EC Treaty, in its current version, until the incorporation of the Treaty of Amsterdam into the body of applicable rules of primary Community law. It is very probable that it will cease to have such effects once the

63 — In other words, the 'area without internal frontiers' which the legislature of the Single European Act intends to create by means of Article 7a (at that time Article 8a) presupposes, as a condition *sine qua non* of its existence, the establishment of an 'area of freedom, security and justice', the creation of which is mentioned only in the Treaty of Amsterdam.

64 — Furthermore, the provisions of Articles 73i and 73j, which the Treaty of Amsterdam intends to add to the Treaty, show the close link between the elimination of controls at the internal borders of the Community and the adoption of measures on the crossing of the external borders of the Member States and the conditions under which nationals of third countries may travel within the Community. It is therefore not immaterial that paragraph (a) of Article 73i refers to 'flanking measures' directly related to the establishment of an area without internal borders, as provided for in Article 7a of the Treaty. In other words, the legislature establishing the Community recognises directly — albeit belatedly, given the expectations raised by the insertion of Article 7a into the text of the Treaty — that the full and immediate application of this article is possible only if it goes hand in hand, unfailingly, with the adoption of flanking measures, at least as regards the elimination of border controls at the internal borders of the Community.

65 — Paragraph 1 of Article 73j of the EC Treaty, as added by the Treaty of Amsterdam.

imminent revision of the Treaty has been completed.

73. In summary, in view of the examination of the overall development of primary Community law and the dynamics of the revision of the fundamental provisions which should shortly take place, I consider it advisable, for reasons of legal logic, methodology and good policy in terms of judicial decision-making, to hold that Article 7a does not have direct effect, especially as regards the complete elimination of the internal frontiers of the Community.

(v) The *Baglieri* judgment

74. In fact, the Court reached the same conclusion in its *Baglieri* judgment, [66] which I have already mentioned. In that case the Court had been asked whether Article 8a of the EEC Treaty (now Article 7a of the EC Treaty) could be interpreted as meaning that, in the absence of measures of secondary Community law requiring the Member States to admit persons who have been subject to compulsory insurance in another Member State to voluntary affiliation to their social security schemes, an obligation to that effect arises.

75. Advocate General Jacobs states: 'It is plain however from the wording of Article 8a that that article is not in itself intended to have the effect of harmonising provisions of the Member States relating to the free movement of persons. Even when the date 31 December 1992 specified in Article 8a has passed, it cannot be regarded as having such an effect.' [67]

76. In that same case the Court held that that article 'cannot be interpreted as meaning that, in the absence of measures adopted by the Council by 31 December 1992 requiring the Member States to admit persons who have been subject to compulsory insurance in another Member State to voluntary affiliation to their social security schemes, an obligation to that effect arises automatically by reason of the expiry of that deadline.

Indeed, as the Advocate General points out in section 14 of his Opinion, such an obligation presupposes the harmonisation of the social security legislation of the Member States and no such harmonisation has been carried out as Community law stands at present.' [68]

77. I believe that the same reasoning should be followed in the present case, except that the matters for which common Community or national measures must be adopted relate to the harmonisation of national

66 — Cited in footnote 58 above.

67 — Paragraph 11 of his Opinion.

68 — Paragraphs 16 and 17 of the *Baglieri* judgment, cited in footnote 58 above.

laws on the crossing of the Community's external frontiers, immigration policy, the granting of visas, asylum policy and the exchange of information on these matters. In conclusion, Article 7a cannot be interpreted as meaning that it automatically requires the abolition of border controls within the Community after 31 December 1992.

C — *The scope and binding nature of Article 8a of the Treaty*

78. Article 8a, which was introduced by the Treaty of Maastricht, is to be found in the second part of the EC Treaty dealing with citizenship of the Union. The article gives every citizen of the Union the right to move and reside freely within the territory of the Member States.

(a) The place of Article 8a within the regulatory system of the Treaty

79. It is contended that Article 8a of the Treaty does not in itself have autonomous regulatory scope and that it is no more than a general declaration of no legal value which recapitulates in a non-binding manner the contents of other specific provisions of primary and secondary Community law regarding the free movement of persons. According to this point of view, there can be no question of this article producing direct effects.

80. I cannot concur with this point of view, for a number of reasons. First, it underestimates the constitutive task of the Community's constitutional legislature, presenting it as being devoid of substance. Secondly, it disregards the Community's evolutive dynamics at a time when those dynamics are obvious at all stages in the evolution of the written rules and case-law on the free movement of persons. Lastly, my objection is based primarily on the very wording and spirit of the article in question, from which I believe it is possible to deduce arguments in favour of the original, binding and fundamental nature of the provisions it contains.

81. It is no accident that the authors of this article resorted for the first time to a *constitutional* vocabulary, using terms such as 'right' and 'citizen of the Union', which, clearly, were not to be found in the text of the Treaty before the revision effected by the Treaty of Maastricht. Until this revision, the Community legislature had systematically avoided explicitly mentioning rights accorded to natural or legal persons,

even in cases in which the granting of such rights was obvious. [69]

82. More generally, before the revision brought about by the Treaty of Maastricht, the text of the Treaties establishing the Communities gave the impression that persons were not considered to possess rights, in other words as autonomous holders of rights and obligations, except indirectly; it is only by repercussion that they benefit from the favourable consequences of the direct application of a rule of Community law and, more generally, of the implementation of the economic objectives of the Community legal order. The central objective of the Community rule lay in principle in the development of the Community itself and in the promotion of its fundamental aspirations, even where persons were directly affected by the regulatory scope of the said rule, as in the case of Article 48 et seq. of the Treaty.

83. The insertion into the Treaty of provisions such as Article 8a on citizenship of the Union and the ensuing rights will remedy this shortcoming of Community law. The article in question is inspired by the same *anthropocentric philosophy* as the other provisions of the body of rules of which it forms part. One class of persons, the citizens of the Union, become holders of a specific right — in the present case the right to move and reside freely within the territory of the Member States — irrespective of whether the enjoyment of this right is accompanied by the promotion of other Community aspirations or objectives.

84. This is where one of the most essential differences between Article 8a and Article 48 et seq. is to be found. The latter articles have established a *functional* possibility for nationals of the Member States, which they are granted so that they exercise it with a view to the creation of a common market, the objective of which can only be to permit persons to pursue their economic activities in optimum conditions. Article 8a, by contrast, establishes for nationals of the Member States (now designated citizens of the Union) a possibility of a *substantive nature*, namely a right, in the true meaning of the word, which exists with a view to the autonomous pursuit of a goal, to the benefit of the holder of that right and not to the benefit of the Community and the attainment of its objectives.

85. It follows that the new regime of freedom of movement introduced by Article 8a differs from the previous regime not only by reason of the extent of the category of persons benefiting from this freedom. In other words, Article 8a does not simply enshrine in constitutional terms the *acquis communautaire* as it existed when it was inserted into the Treaty and complement it by broadening the category of persons

69 — A significant example of this is to be found in Article 119 of the Treaty, which requires Member States to 'ensure' the application of the principle that men and women should receive equal pay for equal work, but without formally stating the obvious, namely the right of any worker, regardless of sex, to equality of treatment as regards pay.

entitled to freedom of movement to include other classes of person not pursuing economic activities. Article 8a also enshrines a *right of a different kind, a true right of movement, stemming from the status as a citizen of the Union*, which is not subsidiary in relation to European unification, whether economic or not.

86. Hence, as freedom of movement constitutes a goal in itself and is inherent in the fact of being a citizen of the Union, and is not merely a parameter of the common market, it does not merely have a different regulatory scope: it also, and primarily, differs in terms of the *nature* of the rights it bestows on individuals and the *breadth* of the guarantee that Community and national principles must accord it. This finding may ineluctably lead to a revised, updated reading of the position under legislation and case-law that has become established under the classic understanding of the content and scope of the principle of freedom of movement or even to a questioning of received solutions, such as the obligation to present a passport or identity card when crossing the internal frontiers of the Community.

87. However, before examining this particular question, which is at the centre of the questions submitted by the national court, in the light of Article 8a of the EC Treaty, I believe it is necessary to explain in some detail the direct effect which this article produces in the Community legal order.

(b) The direct effect of Article 8a of the Treaty

88. First the wording of the provisions at issue militates in favour of attributing direct effects to them. I would point first to the particular choice of constitutional phraseology unique to the second paragraph of Article 8a, which empowers the Council to adopt provisions with a view to 'facilitating' the exercise of the rights to move and reside freely. It follows that those rights have already been created: they exist and are applied directly by virtue of the first paragraph of Article 8a; the actions of the Council are of an auxiliary nature and not a constituent element of the exercise of those rights.

89. It is also useful to refer to the conclusions acknowledged by the body of European constitutional literature. In the legal order, the right of the citizen to move freely is linked to the fundamental right to personal freedom, which is at the apex of individual rights. The rights in this category have this characteristic in common: they produce their legal effects directly, by reason of being enshrined in a constitutional act, and their exercise does not necessarily depend on the adoption of particular measures by the legislature or the administration. Their direct application is the result of their negative nature: their compulsory scope includes the obligation, for government, not to take measures or actions likely to affect the personal domain of individuals. Restrictions may, of course, be imposed on the exercise of these rights, but they must be justified and not harm the very essence of the personal right.

90. These conclusions must, I believe, apply equally to the right to move and reside freely as affirmed by Article 8a for the citizens of the Union. This article appears to have been conceived in order to establish, in the Community legal order, a purely individual right in a form corresponding to that of the right to move freely, which is enshrined at the constitutional level in the internal legal order of the Member States. On that basis, the article in question produces direct effects in that it obliges the Community authorities as well as the national authorities to respect the right of European citizens to move freely and requires them to avoid establishing obstacles which could harm the very essence of this right. The above considerations are particularly important when it comes to interpreting the passage in Article 8a which provides that the right to move and reside freely is to be recognised 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. Can this reservation on its own call into question the direct effect attributed to Article 8a? I think not. This phrase does not alter the direct nature of the bestowed right, in that it does not eliminate the precise and unconditional form of the provisions to be interpreted. As the Commission rightly points out, the Court has not hesitated to reach the same conclusion when, in the past, it has had to interpret provisions of the Treaty whose application was subject to general reservations. [70] Moreover, it is a feature of any right recognised by a legal order that it cannot be exercised without any control whatsoever and to the detriment of other rights or legal interests and that it is subject to limitations and restrictions essential to the proper functioning of the legal system of which it is part.

91. However, the introduction of the abovementioned reservation into the first paragraph of Article 8a could in another way limit the compulsory scope of the right to move and reside which this provision confers. It is maintained in particular [71] that the form which the authors of the Treaty gave to this article, in that it provides that this right does not exist absolutely but subject to the 'conditions' laid down in primary and secondary Community law, has the following significance: although it does not strip the provision of its direct effect, it nevertheless limits the production of such effects to the framework previously created by existing rules of Community law on the freedom of movement of persons. In other words, the direct effect of Article 8a cannot exceed the limitations placed on the exercise of the free movement of persons, as recognised under Article 48 et seq. of the Treaty and in accordance with the relevant provisions of secondary law. In the present case, accepting this point of view would mean recognising the right of all citizens of the Union to move and reside freely within the Community, but on condition that they presented a passport or identity card to the extent that this is patently provided for by the rules of secondary law.

70 — The example of Article 48 is more interesting, in that this article enshrines the freedom of movement of workers, 'subject to limitations justified on grounds of public policy, public security or public health'. With regard to the direct effect of Article 48, see paragraph 27 et seq. above.

71 — See the written observations of the Commission, paragraph 27 et seq.

92. I concede that this reasoning has some basis in the provisions of Article 8a in question. It must be rejected, however, as it does not correspond to the spirit of those provisions and the observations I have made on the special position and fundamental importance of Article 8a in the economy of the rules of the EC Treaty, in the context of a Community that is general and not purely economic in nature.

93. If the rights established by Article 8a were no more than a reiteration of those previously recognised in the Community legal order regarding the free movement of persons, the addition of this article to the text of the Treaty, and moreover in such a strategic position, would not be justified. I have already mentioned that, thanks to case-law and secondary legislation, the classes of persons enjoying freedom of movement had already been extended before the Treaty of Maastricht to comprise all the nationals of Member States and the members of their families, whether or not they pursue an economic activity, 'provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'. [72]

72 — Article 1(1) of Directive 90/364, cited above.

94. If we were to follow the particularly reductionist view of Article 8a set out above and to make the application of the rights which that article confers totally dependent on the manner and the classical terms of application of freedom of movement as they were before the revision brought about by the Treaty of Maastricht, Article 8a would lose a large part of its effectiveness. Its only legal effect would be a rather modest extension of an advantageous situation dating back to the time of the European Economic Community to Community nationals who do not have sickness insurance and sufficient resources.

95. Article 8a was not adopted solely to cater for marginal situations such as this. I have shown above that its basic function was to accord a fundamental right to the citizens of the Union, the nature, intensity and scope of which differ from the beneficial effects produced by compliance with the classical Community principle of freedom of movement of persons under Article 48 et seq. of the Treaty or rules established in this respect by provisions of secondary law. Article 8a takes Community law *beyond* the concept of the principle of freedom of movement generally accepted hitherto. It is for this reason that it is not always possible to transpose the 'acquis communautaire' regarding this principle into the field of application of Article 8a of the Treaty.

96. Hence, the fact that the crossing of the external borders depended until now on the

presentation of a passport or identity card, in the sense that in Community law the presentation of such a document was a legitimate 'condition' for the exercise of freedom of movement, does not mean that that 'condition' automatically governs and in every case affects the exercise of the right to move and reside freely which is enshrined in Article 8a. For it to be possible to transpose this 'condition' into the context of the application of Article 8a, it would be essential that it did not constitute an unjustified limitation on the specific right conferred by this article and that it did not affect the very essence of this right. In my view, this is the only possible interpretation of the first paragraph of Article 8a — and especially of the reservation it formulates by referring to the 'limitations and conditions' existing before it entered into force — which respects the 'effectiveness' of this article and demonstrates its specific significance in the economy of the rules of the Treaty.

(c) Article 8a of the Treaty and border controls within the Community

97. We can deduce from the foregoing that Article 8a of the EC Treaty introduced into Community law a fundamental individual right having direct effect, which consists in the possibility for citizens of the Union to move and reside freely within the Community. It is conceivable to impose restrictions or conditions on the exercise of that right only if the measures in question are justified and do not affect the very essence of that right. It is from this standpoint that one should assess the lawfulness first of the limitations and conditions already existing in Community law on the exercise of freedom of movement of persons — as we know it at present — and secondly of the limitations that will be established in future by the Community legislature. I would point out that, as the Commission rightly remarks in its observations, since it is a question of assessing the compatibility of a limitation or condition with Article 8a, it is necessary to consider that the safeguarding of freedom of movement and residence is the rule, which must be interpreted in the broad sense, whereas the limitations placed on it are exceptions, to be interpreted and applied strictly.

98. On the question of the crossing of the internal frontiers of the Community, the specific difference which, in my opinion, distinguishes Article 8a from Community law on freedom of movement of persons as applied up to now is the following: in the past the conduct of systematic border controls and the obligation to show a passport or identity card were a commonly accepted constraint when crossing borders, without anyone asking whether this formality was justified in all cases, but such a view *cannot be taken for granted* when it comes to applying Article 8a of the Treaty. The lawfulness of the border control arrangements presupposes either that the right to move freely enshrined in Article 8a is not impeded by the conduct of these controls and by the general obligation to present a travel document when crossing

the internal borders of the Community, or that the obstacle at issue is, in all cases, automatically justified and does not affect the very essence of the said right.

99. I believe that the conditions I have just described do not exist as far as Article 8a is concerned. First, the setting of limitations on the crossing of the internal frontiers clearly constitutes an obstacle to freedom of movement enshrined in that article. Furthermore, and this observation is equally important, the right deriving from Article 8a is, by reason of this obstacle, more seriously affected than was the legal situation of nationals of the Member States when travelling before the introduction of the article in question.

100. As far as the application of Article 48 et seq. of the Treaty is concerned, I wish to point out that the ultimate objective of granting freedom of movement to nationals of the Member States was to enable them to come to another Member State in that this benefited the common market. [73] The objective of the common market (either through the provision of labour or services, or through the consumption of goods and services) is not seriously threatened by the single general obligation on persons moving from one country to another to present a passport or identity card. That is why, although this obligation constitutes an obstacle to freedom of movement, it has never been considered contrary to Article 48 et seq. of the EC Treaty.

101. By contrast, imposing exactly the same obstacle to the exercise of the right enshrined in Article 8a affects this right much more strongly. The freedom to cross borders is *in itself* an important constituent of the citizen's right to move freely, and not simply a means of achieving the common market. [74] The obstacle at issue may affect the holder of the right himself, in other words the citizen of the Union, in that it prevents him from benefiting from all the probable and favourable effects which flow from this right. [75] Moveover, recognition of the possibility of moving (in principle) unchecked within the geographic area corresponding to a legal order is inherent in the status of citizen covered by that legal order. From this point of view, the situation of a citizen of the Union is identical to that of a citizen of a Member State. Just as it is permissible to express doubts as to the constitutional legality of dividing the national territory into zones, citizens' access to which is subject to general and systematic controls and the presentation of an identity document in all circumstances, so too is it permissible to ask similar questions from the point of view of con-

73 — Even the mere fact that a person not pursuing an occupational activity but receiving income resides in a Member State other than the one of which he is a national is of economic interest from the point of view of Community law in that such a person is bound to consume goods and benefit from services. From this point of view, granting freedom of movement to almost any person, whether he pursues an activity or not, has an economic impact of relevance to the common market.

74 — See my foregoing analysis of the difference between the functional right and the substantive right to freedom of movement.

75 — It would not be possible to sustain this argument with regard to Article 48 et seq. of the Treaty. The existing obstacles to crossing frontiers unchecked did not affect the substance of the 'rights' deriving from freedom of movement.

temporary Community law with regard to the maintenance of this kind of general limitation on the application of Article 8a.

102. It follows that, at least on the level of principles, the organisation of systematic controls valid for all citizens of the Union crossing the internal borders of the Community and the imposition of a general obligation to present a passport or identity card constitute obstacles which affect the substance of the right enshrined in Article 8a of the EC Treaty and which are not *automatically* lawful or justified.

103. This does not mean, however, that it is inconceivable to impose constraints of this kind. The direct effect of Article 8a cannot imply that every citizen of the Union can cross the borders *in all circumstances* without presenting a passport or identity card. The *general* abolition of border controls within the Community does not stem from Article 8a, because, as we have seen, it is not imposed directly by Article 7a, [76] which deals with the disputed question as a whole.

104. Article 8a merely lays down a specific obligation, requiring the public authorities to abstain from measures or actions which constitute unreasonable obstacles to the exercise of the right enshrined in this article unless those obstacles meet certain criteria which make it possible to consider them compatible with Community law. These criteria are, in my opinion, the same as those formulated by the case-law on Article 48 et seq. of the Treaty. [77] However, it is not obvious that the application of these criteria in the context of Article 8a leads to results identical to those obtained when it was only a question of applying Article 48 et seq. of the Treaty. As I have explained above, I believe that the scope of Article 8a and that of Article 48 et seq. of the Treaty are not identical. Hence, an obstacle to freedom of movement deemed lawful from the point of view of Community law under Article 48 et seq. of the Treaty can be considered contrary to that same Community law because it affects the right deriving from Article 8a.

105. In transposing the abovementioned case-law [78] into the context of Article 8a, it should be acknowledged that any obsta-

76 — The Commission bases its reasoning largely on the argument that Article 8a cannot, by itself, have wider regulatory scope that that attributed jointly to Articles 7a and 8a. This point of view is correct in principle. If direct effects are not attributed to Article 7a, which imposes in Community law the obligation to create an area without internal frontiers, in other words the abolition of border controls, this obligation cannot acquire greater intensity indirectly as a result of the application of Article 8a. However, the Commission draws wrong conclusions from this correct remark, in that it considers that since the status quo predating Article 8a, in other words the imposition of a general obligation to present a passport or identity card, was not completely called into question by Article 7a, that status quo continues to apply without being in the least affected by the addition of Article 8a to the text of the Treaty.

77 — The application of the same criteria of case-law demonstrates the relationship which exists between Article 8a and Article 48 et seq. of the Treaty. As I have shown above, the first of these articles clearly constitutes an advance on the status quo created in the context of Article 48 et seq. of the Treaty. That is why the facts of Community law predating Article 8a cannot be transposed autonomously and automatically into the framework of this article. This does not mean that these facts cannot be used for interpreting Article 8a. Quite the contrary: these facts are of value for the conceptual understanding and application of Article 8a, in that the position which this article occupies in the economy of the EC Treaty corresponds to that occupied by Article 48 et seq. in the economy of the EEC Treaty.

78 — See paragraphs 28 and 29 above.

cle whatsoever which is liable 'to hamper or to render less attractive' the exercise of the rights guaranteed by this article complies with Community law if it meets the following conditions: it must first be non-discriminatory, secondly it must be justified by overriding reasons of public interest, it must then be appropriate for ensuring attainment of the objective it pursues and finally it must not go beyond what is necessary for that purpose. It is in the light of these criteria that the compatibility of controls at the internal frontiers of the Community and the imposition of a general obligation to present a passport or identity card with Community law must be examined.

106. From one point of view, the abovementioned general limitations on the crossing of borders meet the criteria listed above and are to be considered to comply with Article 8a of the Treaty and more generally with Community law. This reasoning is based mainly on the same reasons as those used previously to assert that Article 7a did not produce direct legal effects. The absence of arrangements for carrying out controls at the external borders of the Community, which would make it possible to check fully the persons entering the Community, justifies the conduct of controls at the internal frontiers for reasons of public interest, at both Community and national levels. More particularly, the imposition of a general obligation to present a passport or identity card not only does not create discrimination, but appears appropriate for ensuring the attainment of the public-interest objective which it pursues without entailing unreasonable constraints on the holders of the right to freedom of movement by taking forms disproportionate to the objective pursued.

107. I believe nevertheless that it would be preferable to adopt a slightly different stance. I do not doubt that the absence of an effective system of controls at the external frontiers justifies, in principle, the maintenance of controls at the internal frontiers, the most appropriate form of which consists in the obligation to present a passport or identity card. However, does this reasoning have absolute value? *In other words, are the imperfections and shortcomings of the Community legal order sufficient to justify the establishment of a general and universal obstacle, the necessary, appropriate and, in the strict sense, proportional nature of which cannot in any circumstances be validly challenged by persons with the right to freedom of movement? I do not think so.*

108. It is preferable, at the current stage of European unification and from the point of view of the systematic interpretation of Community law, to give the national court the possibility of examining on each occasion, within the framework of the ad hoc examination of the case before it, whether a limitation imposed on the crossing of the internal borders of the Community meets the abovementioned criteria of case-law, hence whether border controls, in the particular circumstances in which they are carried out, comply with Article 8a of the Treaty. The absence of effective Commu-

nity arrangements for controlling the crossing of the external borders, which would make it possible to abolish restrictions at the internal borders of the Community, does not necessarily mean that there are no similar non-Community mechanisms created within the framework of public international law or intergovernmental cooperation between the Member States, the application of which allows the restrictions in question to be reduced or abolished at particular geographic points.

109. The consideration made above is not purely hypothetical. I could cite the Schengen agreements as an example of such a non-Community mechanism for controls at the external frontiers. We know that the interpretation of these agreements does not come within the jurisdiction of the Court, and it is not my intention to undertake an interpretation of these agreements. However, the problem at issue comes within the jurisdiction of the national court. The question submitted therefore consists in ascertaining the extent to which the national court may use this 'acquis extracommunautaire' for the purposes of a more complete application of a fundamental Community rule such as Article 8a. In other words, it is advisable to examine globally, and without confining oneself to Community rules, the factual and legal framework in which a citizen of the Union undertakes to cross the borders of a Member State when coming from another Member State, in order then to decide (if appropriate) that, taking account of *particular* factors, of law and of fact, the imposition of systematic border controls on this citizen and an obligation to present a passport or identity card constitutes an unreasonable obstacle to the right to move freely, an obstacle which is not justified by 'overriding reasons of public interest' or which in any case represents, for the citizen concerned, a constraint which goes 'beyond what is necessary' to attain an objective affecting the public interest.

110. This solution appears to offer considerable advantages.

111. First, it highlights as much as is possible the scope of Article 8a of the Treaty, widening the rights of citizens of the Union despite the absence of Community arrangements for controls at the external borders. It would be unfortunate to make citizens bear the consequences of inaction by the Community institutions or of the negative attitude of the Member States with regard to the progress of European unification in the field of freedom of movement of persons.

112. Secondly, it succeeds in reducing (possibly) certain obstacles to the freedom of movement of citizens without compromising other priorities of European unification and without compromising the inalienable rights of the Member States with regard to

the control of the persons present in their territory,[79] rights which have long been recognised by the Court.[80]

113. Thirdly, it gives the national court responsibility for actively verifying compliance with the freedom of movement of persons, particularly as regards the crossing of the internal borders of the Community, by enabling it to derive from the general evolution of the law the elements useful for the optimum application of Community law.[81]

114. Lastly, and this is the most important point, this solution accords with the direction in which, in all probability, primary Community law will develop, as expressed in certain articles of the Treaty of Amsterdam and in the protocols annexed thereto. More especially, the protocol integrating the Schengen *acquis* into the framework of the European Union was signed precisely in order to incorporate into the Community legal order the results that had been achieved thanks to the Schengen agreements with regard to border controls, visas, political asylum and the exchange of personal information. Article 2(1) of that protocol provides that 'from the date of entry into force of the Treaty of Amsterdam, the Schengen *acquis*... shall immediately apply to the 13 Member States referred to in Article 1...'.[82] In other words, the Community's constitutional legislature does not confine itself to attributing to the Community institutions, in Article 73i et seq. of the Treaty of Amsterdam, powers aimed at progressively establishing an area of freedom, security and justice; it also ensures that the abovementioned convergence, both within Community law and outside it, is exploited in order to achieve optimum progress in European unification. I believe that the solution I have outlined above, with regard to the possibility for the national court to assess, *inter alia*, the practical consequences of the application of the Schengen agreements in its country before deciding whether a national limitation on the crossing of the internal frontiers of the Community complies with Article 8a or not, accords with the logic that inspired the Amsterdam conference when the protocol in question was signed.

115. I still have to examine the effects of the proposed solution on the existing rules

79 — I have explained earlier that the limitation or elimination of border controls between the Member States presupposed the creation of effective arrangements for controls at the other borders of the Member States, to which the Member States participating in the effort to eliminate internal borders will have contributed or consented. If they succeed in this, the Member States concerned do not risk being obliged to accept undesirable nationals from third countries and to give them asylum as a result of the elimination of the borders between them. Once controls at the external borders of the Member States are carried out in the manner agreed jointly and the movement and residence of nationals from third countries are organised in accordance with jointly accepted rules, there could be no question of a Member State being entered via intra-Community borders by persons which this Member State would not itself have admitted on the basis of rules which would be exactly the same.

80 — See the judgments in Cases 321/87 and C-265/88, cited in footnote 42 above, and the judgment in Case C-68/89, cited in footnote 41 above.

81 — This 'functional' view of non-Community rules serving as the raw material for the optimum promotion of the rule of Community law should come as no surprise. Since the Community rule and the non-Community rule have the same field of application, their joint interpretation and application flow from the need for a global view of the legal process and for the good administration of justice. It is in fact the same objective which the Court pursues when it calls upon the national court to interpret its national provisions 'in the light of' Community law. See the judgments in Cases C-334/92 *Wagner Miret* v *Fondo de Garantía Salarial* [1993] ECR I-6911 and C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135.

82 — The United Kingdom and Ireland are not involved; so far, these States have not agreed to comply with the rules of the Schengen agreements.

of primary Community law which allow the presentation of a passport or identity card to be a general condition for crossing borders in the context of the application of the principle of freedom of movement for persons. These rules continue to be of practical interest, as they determine the *maximum obstacle* which may be imposed on citizens of the Union when crossing the internal borders of the Community. However, these rules no longer mean that the imposition of an obligation to present a passport or identity card is always lawful or that it constitutes in every case a permissible limitation on the personal freedom of European citizens. On the other hand, this obligation must be justified, a requirement which, at the level of pure Community law, does not appear to be put in doubt by the absence of a system of controls at the external borders; however, it does not preclude the possibility that the effective operation of non-Community control arrangements of this kind — a matter which it is for the national court to assess — renders this obligation contrary to Article 8a of the Treaty.

116. This 'updated' reading of the current provisions of secondary Community law and this manner of transposing the regulatory scope of these provisions should not come as a surprise, even if they call the well-established status quo into question. They are the logical consequence of the development taking place within the Community legal order and of the progress made towards European unification as a result of the Treaty of Maastricht.

117. In any case, despite what I consider to be the important consequences of the incorporation of Article 8a into primary Community legislation, I do not believe that the case of Mr Wijsenbeek which is before the national court is an example of the crossing of the internal borders of the Community that should be permitted without any limitation whatsoever. As I have said, Article 8a prohibits the imposition of obstacles to the exercise of freedom of movement unless those obstacles meet certain criteria that are considered acceptable from the point of view of the Community. In my view, the application of the border control provided for in the Netherlands Aliens Order does not constitute an infringement of Article 8a of the Treaty, taking into account the law and facts mentioned in the order for reference, which are not disputed. More specifically, the accused attempted to cross the border, when coming from France, without submitting to control and without complying with the obligation provided for in Community law to present a passport or identity card. At the time of these events, the Treaty of Maastricht had been brought into force; however, as one notes still today, the Community arrangements for controls at the external borders, visas, the granting of asylum, etc., which would have made the limitations in question unjustifiable and disproportionate, have not been established. Furthermore, neither the order for reference nor the observations submitted by certain parties have brought to light other special factors which would allow me to conclude that the imposition of a border control was unjustifiable in the present case. [83] In any event, the examination of the latter question falls within the exclusive jurisdiction of the national court and my observations are purely indicative and hypothetical.

83 — At the time, the Schengen agreements, on which the accused relies, had not begun to produce their full effects.

VI — Conclusion

118. In the light of the above, I propose that the Court reply as follows to the questions submitted:

A citizen of a Member State returning to that Member State from another Member State enjoys the right to freedom of movement conferred by Article 8a of the EC Treaty.

(1) At the current stage of European unification, Articles 7a and 8a of the EC Treaty cannot be interpreted as requiring the automatic, complete and general lifting of systematic frontier controls where a citizen of a Member State crosses internal Community frontiers.

(2) Article 8a of the EC Treaty precludes any limitation liable to hamper or render less attractive the exercise of the right to freedom of movement laid down by that article. The obligation, on pain of criminal penalties, to show a passport or identity card when crossing internal Community frontiers constitutes a limitation of that kind save where such limitation applies without discrimination, is justified by overriding reasons of public policy, is appropriate for attaining the objective it pursues, and is no more coercive than is necessary in order to attain it.