OPINION OF ADVOCATE GENERAL JACOBS
delivered on 20 May 1992 *

Mr President,
Members of the Court,

1. In this case, the European Parliament seeks the annulment of Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30). The Parliament is supported by the Commission, while the Council is supported by the Netherlands and the United Kingdom.

2. The Parliament, while not challenging the substance of the directive, claims that it is invalid on three grounds. First, it challenges the legal basis. The directive was adopted under Article 235 of the EEC Treaty, which states:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

3. It is well established that the use of Article 235 as the legal basis for a measure 'is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question': see e. g. Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 13. The Parliament argues that the contested directive could have been adopted under the second paragraph of Article 7 of the Treaty, possibly in conjunction with Article 128 of the Treaty, and that the Council's recourse to Article 235 therefore renders it invalid.

4. Article 7 of the Treaty provides as follows:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and in cooperation with the European Parliament, adopt, by a qualified majority, rules designed to prohibit such discrimination.'

5. The second paragraph of that article has to date never been used in isolation as the legal basis for a Community act, although it has occasionally been used in combination with other provisions: see e. g. Regulation No 2001/83 concerning social security, OJ 1983 L 230, p. 6; Regulation No 101/76 laying down a common structural policy for the fishing industry, OJ 1976 L 20, p. 19. The cooperation procedure, to which that

* Original language: English.

paragraph refers, is set out in Article 149(2) of the Treaty and, where it applies, its effect is to give the Parliament greater influence over the content of proposed legislation than simple consultation such as that required by Article 235. It may therefore affect the substance of the measure in question.

6. Article 128 of the Treaty provides as follows:

'The Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market.'

7. Secondly, the Parliament challenges the adequacy of the last recital of the preamble to the directive, which states: '... the Treaty does not provide, for the action concerned, powers other than those of Article 235'. The Parliament maintains that the Council should have explained why in its view the directive could not have been adopted under the second paragraph of Article 7.

8. Thirdly, the Parliament takes the view that the Council had a duty to explain in the preamble to the directive why certain amendments proposed by the Parliament had not been accepted.

9. The Parliament explained at the hearing that it considers the first of these grounds to be its principal claim, the second ground being intended to be subsidiary to the first ground and the third subsidiary to the second.

Directive 90/366

10. Directive 90/366 was adopted against the background of a body of case-law establishing that 'unequal treatment based on nationality must be regarded as discrimination prohibited by Article 7 of the EEC Treaty if it falls within the scope of that Treaty and ... that conditions for access to vocational training fall within the scope of that Treaty': see Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 15, citing Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593. The Court pointed out in the latter case that the implementation of a common vocational training policy was envisaged by Article 128 of the Treaty. That policy, the Court said, constituted 'an indispensable element of the activities of the Community, whose objectives include *inter alia* the free movement of persons, the mobility of labour and the improvement of the living standards of workers' (paragraph 23 of the judgment). In Case 24/86 *Blaizot* v *University of Liège and others* [1988] ECR 379, at paragraph 15 of the judgment, the Court said that, for these purposes, 'any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and level of training of the pupils or students, and even if the training programme includes an element of general education'.

11. The purpose of Directive 90/366 is accordingly to enable nationals of the Member States to pursue vocational training courses in other Member States. To this end, Article 1 provides as follows:

'Member States shall, in order to facilitate access to vocational training, grant the right of residence to any student who is a national of a Member State and who does not enjoy this right under other provisions of Community law, and to the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognized educational establishment for the principal purpose of following a vocational training course there and that they are covered by sickness insurance in respect of all risks in the host Member State.'

12. By virtue of Article 2(1) of the directive, the right of residence is restricted to the duration of the course of studies in question. It subsists for as long as the person concerned fulfils the conditions laid down in Article 1: see Article 4. The directive does not, however, give rise to any right to the payment of maintenance grants by the host State: see Article 3. The Court has said that this is a matter falling outside the scope of the principle of access on a non-discriminatory basis to vocational training courses: see *Brown* v *Secretary of State for Scotland*, already cited.

13. Article 2(1) of the directive further provides that the right of residence conferred by the directive is to be evidenced by a document known as a 'Residence permit for a national of a Member State of the EEC'. The validity of such a permit may be limited to the duration of the course or to one year where the course lasts longer than that. A permit of the latter type must be renewable annually. Where a member of the student's family does not hold the nationality of a Member State, he must be issued with a residence document of the same validity as that issued to the student on whom he depends. When issuing the residence document, the host State may require only that the applicant produce a valid identity card or passport and proof that he meets the conditions laid down in Article 1 of the directive.

14. Article 2(2) provides that Articles 2, 3 and 9 of Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) are to apply *mutatis mutandis* to the beneficiaries of the contested directive. Moreover, 'The spouse and the dependent children of a national of a Member State entitled to the right of residence within the territory of a Member State shall be entitled to take up any employed or self-employed activity anywhere within the territory of that Member State, even if they are not nationals of a Member State.' Member States may not derogate from the provisions of the contested directive except on grounds of public policy, public security or public health. Where a Member State seeks to rely on any of these grounds, Articles 2 to

9 of Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-64, p. 117) are applicable. Member States are required to give effect to the contested directive by 30 June 1992.

15. The contested directive is one of a group of three measures adopted by the Council on the same day, each of which is designed to make further progress towards the abolition of the remaining obstacles to the free movement of persons within the Community. The other two measures are Directive 90/364 on the right of residence (OJ 1990 L 180, p. 26) and Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28). Directive 90/365 requires the Member States to 'grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families ..., provided that they are recipients of an invalidity or early retirement pension, or old-age benefits, or of a pension in respect of an industrial accident or disease of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State': Article 1(1). Directive 90/364 is a residual measure which requires the Member States to 'grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families ..., 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': Article 1(1). Like the contested directive, both Directive 90/364 and Directive 90/365 are based on Article 235 of the Treaty.

16. The three directives adopted on 28 June 1990 marked the culmination of a process stretching back to 31 July 1979, when the Commission submitted to the Council a proposal for a directive, based on Articles 56(2) and 235 of the Treaty, on a right of residence for nationals of Member States in the territory of another Member State (OJ 1979 C 207, p. 14). That proposal would have conferred a right of movement and residence on all nationals of the Member States who were not covered by existing provisions of Community law because they could not be regarded as exercising an occupational activity.

17. Although the Commission's proposal was greeted favourably by the Parliament on 17 April 1980 (see OJ 1980 C 117, p. 48), the Council was unable to reach agreement on the matter and the proposal was withdrawn by the Commission on 3 May 1989. It was replaced on 26 June of that year by three proposals which led ultimately to the directives adopted on 28 June 1990. In the course of the legislative procedure, the Council altered the legal basis of each of the three directives, the Commission having proposed the second paragraph of Article 7 for the contested directive, Article 100 for Directive 90/364 and Articles 49 and 54 for Directive 90/365.

18. When it received the Commission's proposal for a directive based on the second paragraph of Article 7 of the Treaty concerning the right of residence for students, the Council sought the Opinion of the Parliament in accordance with Article 149(2)(a) of the Treaty. In a resolution adopted on 13 December 1989 (OJ 1990 C 15, p. 82), the Parliament recorded its approval, subject to certain amendments, of the content of the proposed directive. It called on the Commission to amend its proposal in the light of the Parliament's amendments. The Commission accordingly submitted an amended proposal to the Council on 21 December 1989 (OJ 1990 C 26, p. 15). The Commission's amended proposal was again based on the second paragraph of Article 7 of the Treaty, recourse to which the Parliament had expressly approved in its resolution of 13 December 1989.

19. On 9 January 1990, the President of the Council wrote to the President of the Parliament informing him that the Council had reached agreement on all three proposed directives and had decided to consult the Parliament a second time. She drew the attention of the President of the Parliament to the fact that the Council had decided to modify the legal bases originally proposed by the Commission and to substitute in the case of each proposed directive Article 235 of the Treaty. None the less, the text of the proposals sent to the Parliament still referred to the legal bases proposed by the Commission. Indeed, the preamble to the proposal on the right of residence for students still purported to explain why the directive envisaged would contribute to the elimination of discrimination on the grounds of nationality. The Council seems, however, to have regarded this second consultation of the Parliament as falling within the framework of the procedure laid down in Article 235 and not, as far as that proposal was concerned, as a step in the cooperation procedure laid down in Article 149(2).

20. On 13 June 1990, the Parliament adopted a further resolution on the proposed directive on the right of residence for students (OJ 1990 C 175, p. 100), in which it stated that it had been consulted by the Council pursuant to Article 7 of the Treaty and in which it stressed that it considered the legal basis proposed by the Commission to be appropriate. It went on to approve, subject to the retention of Article 7 as the legal basis and to certain further amendments, the content of the proposed directive.

21. On 20 June 1990, one of the Commission's Vice-Presidents, Martin Bangemann, made it clear that the Commission did not accept the modification by the Council of the legal basis proposed by the Commission, which it considered to threaten the prerogatives of the Parliament. The Commission reserved the right to take legal action. Notwithstanding the views of the Parliament and the Commission, the Council, acting on the basis of Article 235 of the Treaty, adopted the contested directive on 28 June 1990. In a letter to the President of the Council dated 23 July 1990, Vice-President Bangemann repeated the Commission's view that the directive had not been adopted on the correct legal basis and that the Council's recourse to Article 235 jeopardized the Parliament's prerogatives.

22. I note that the view that the directive could be adopted under Article 7 of the Treaty was endorsed by the House of Lords Select Committee on the European

Communities in its report dated 6 February 1990 and entitled 'Free Movement of People and Right of Residence in the European Community' (Session 1989-90, 7th Report), at paragraphs 51 and 64.

Admissibility

23. The only express provision of the Treaty which allows an action for the annulment of acts of the Council to be brought before the Court is Article 173. As is well known, that article in its current form makes no mention of the European Parliament and the Court has held on two occasions that the Parliament does not have standing to institute proceedings under Article 173: see Case 302/87 *Parliament* v *Council* [1988] ECR 5615; Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041. In the latter case, however, the Court stated, at paragraph 26 of the judgment, that 'The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.'

24. In accordance with its duty to ensure the observance of the law in the interpretation and application of the Treaties and in order to maintain the institutional balance created by them, the Court held in that case that '... an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions': paragraph 27 of the judgment. The Court made it clear that the Parliament's prerogatives included 'participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty': paragraph 28.

25. In the present case, the Parliament's principal objection is that the Council substituted, for a legal basis requiring the cooperation procedure to be used, a legal basis which only required the Council to consult the Parliament. Since this change had an adverse effect on the Parliament's involvement in the legislative process leading to the adoption of the contested directive, it claims that its prerogatives have been infringed.

26. This claim is not allowed to escape unchallenged. The United Kingdom Government recalls that, in holding that the Parliament did not have standing to bring annulment proceedings under Article 173 of the Treaty, the Court stated in Case 302/87, at paragraph 27 of the judgment, that 'Article 155 confers ... on the Commission the responsibility for ensuring that the Parliament's prerogatives are respected and for bringing for that purpose such actions for annulment as might prove to be necessary.' The United Kingdom Government points out that, in Case C-70/88, the Parliament could not rely on the Commission to defend its prerogatives, since the two institutions did not agree on the point at issue.

According to the United Kingdom Government, it was only for that reason that the Court upheld the admissibility of the Parliament's action. In the present case, however, the Parliament and the Commission are in agreement, the latter having intervened in support of the former. The United Kingdom Government argues that responsibility for defending the Parliament's prerogatives therefore lies with the Commission and that the action is inadmissible. It even goes so far as to say that, if the Commission fails in a case such as this to comply with its duty to defend the Parliament's prerogatives, the Parliament is entitled to institute proceedings against it under Article 175 of the Treaty for failure to act.

27. I am unable to accept this argument. The Court's judgment in Case C-70/88 in my view represents an acknowledgement that the best person to defend the Parliament's prerogatives is the Parliament itself. It may be noted that, in paragraph 27 of its judgment, cited above, the Court expressed itself in general terms. That paragraph contains no hint that it was intended to be confined in the manner suggested by the United Kingdom Government.

28. The idea that, should the Commission fail to defend the Parliament's prerogatives, the latter might institute proceedings against the former under Article 175 is in my view indefensible in principle and unworkable in practice, as the present case demonstrates. The Commission has explained that, although it supports the position of the Parliament as a matter of law, it did not itself bring annulment proceedings because it considered it better, after such a long gestation period, to allow a measure as important as the directive to stand. Thus, although the Commission and the Parliament may be in agreement on the substance of the case, they are not in agreement on the desirability of bringing annulment proceedings. To ask the Commission to balance the public interest in allowing the directive to stand against the need to ensure that the Parliament's prerogatives are protected would in my view be unreasonable. It would in any event be extremely difficult, if not impossible, for the Parliament to establish, in the context of an action under Article 175, that a decision by the Commission to give priority to the former consideration was unlawful. Moreover, even if the Parliament were successful in proceedings against the Commission under Article 175, its victory would be a Pyrrhic one, for it would by then be too late for the Commission to commence proceedings for annulment against the author of the contested act. Where the Parliament's prerogatives are in issue, it is therefore far better for it to be given a direct right of action. That is in my view precisely what it enjoys as a result of the Court's ruling in Case C-70/88.

29. The Council does not directly challenge the admissibility of the Parliament's application in the present case, but raises what it considers to be the risk that the Parliament's right of action might effectively be transformed from a remedy available in exceptional cases only to one that could in practice be exercised as a matter of course. The Council argues that the Parliament will always be able to claim that a measure adopted under an article of the Treaty providing for simple consultation should have been adopted under a provision requiring the cooperation procedure to be followed. In order to deal with such a claim, it will invariably be necessary to examine the substance of the case. If this danger is to be avoided, the Council maintains that the Parliament should be required to show a clear violation

of its essential prerogatives in order to establish admissibility.

30. As the Parliament points out in its reply, the Council does not suggest that these criteria are not met in the present case. In any event, the Council's argument is, as Advocate General Darmon pointed out in his Opinion delivered on 26 February 1992 in Case C-65/90 *Parliament* v *Council*, where a similar argument was advanced, incompatible with 'the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties', which was the basis of the Court's judgment in Case C-70/88. It may well be that it is implicit in the Court's ruling in that case that, in order to establish the correct legal basis of an act, the substance of an application may have to be examined, but this is not in my view equivalent to giving the Parliament an unlimited right to challenge acts adopted by the other institutions, such as that enjoyed by the Council and by the Commission. This may be illustrated by the ruling, delivered on 4 October 1991, on the substance of the Parliament's claim in Case C-70/88, where the Court summarily dismissed as inadmissible two of the Parliament's heads of claim on the basis that the Parliament had failed to show that they involved a violation of its prerogatives. I therefore have no doubt that the Parliament's application in this case is admissible.

The substance of the Parliament's claim

31. As I have explained, if the Parliament is correct in its view that the contested directive could have been adopted under the second paragraph of Article 7 of the Treaty, the Council was not entitled to have recourse to Article 235 of the Treaty and the directive will consequently be invalid. In order to deal with the principal head of the Parliament's claim, it is therefore necessary to examine the scope of Article 7.

32. At the time the pleadings in the present case were drafted, the Court had not yet had occasion to specify whether Article 7 conferred on students the right to enter and reside in a Member State other than their own for the purpose of pursuing a course of vocational training. On 26 February 1992, however, after the close of the written procedure, the Court gave judgment in Case C-357/89 *Raulin* v *Minister of Education and Science* [1992] ECR I-1027, in which that issue was resolved. In that case, the College van Beroep Studiefinanciering, a Netherlands tribunal of last resort having jurisdiction in disputes concerning certain types of educational grant, asked the Court for a preliminary ruling *inter alia* on the question whether Community law confers on a national of a Member State who has been admitted to a course of vocational training in another Member State the right to enter and reside in the latter State in order to follow the course concerned.

33. The Court ruled that the right to equal treatment in relation to the conditions of access to vocational training applied not only to requirements imposed by the educational establishment in question, such as registration fees, but also to any measure liable to hinder the exercise of that right. The Court pointed out that a student who had been admitted to a course might be unable to follow it if he did not have the right to reside in the State where the course was being held. It followed, said the Court, that the principle

of non-discrimination in relation to the conditions of access to vocational training which derived from Articles 7 and 128 of the Treaty meant that a national of a Member State who had been admitted to a course of vocational training in another Member State enjoyed the right to reside in the latter State for the duration of the course. The Court added that the right of entry and residence enjoyed by a student in these circumstances did not depend on the grant of a residence permit by the host State.

34. The Court went on to impose certain limits, however, on the rights enjoyed by students in these circumstances. Since a student's right of residence was simply the corollary of his right of access on a non-discriminatory basis to vocational training, the former right was restricted to what was necessary to enable the student to follow the course concerned. Member States were therefore entitled to limit the student's right of residence to the duration of the course in question and to require him to comply with certain requirements which were justified by the legitimate interests of the host State. In particular, that State was entitled to insist that the student have adequate resources to support himself and that he be covered by sickness insurance. These matters were not covered by the principle of access on a non-discriminatory basis to vocational training courses (see *Brown* v *Secretary of State for Scotland,* already cited).

35. At the hearing, the United Kingdom Government accepted in the light of *Raulin* that the directive could have been adopted under the second paragraph of Article 7. The Council and the Dutch Government sought to establish, however, that the directive was not limited to the elimination of discrimination but that it sought to confer on students a genuine right to freedom of movement. It is in my view evident, however, that the directive does no more than give practical effect to the right of entry and residence which the Court has held derives from Article 7. Thus, according to Article 1, the purpose of the right of residence granted to students by the directive is 'to facilitate access to vocational training' and that right is restricted by Article 2(1) to the duration of the course in question. It will be observed that matters such as the payment of maintenance grants, which the Court held in *Brown,* already cited, were outside the scope of Article 7, are excluded from the ambit of the directive. Moreover, Member States are permitted to derogate from the directive on grounds of public policy, public security and public health where, as the Commission points out, inequalities of treatment may be objectively justified and therefore permissible under Article 7. In any event, the imposition of a limitation on the rights granted to students by the directive cannot have the effect of taking the rights themselves outside the scope of Article 7.

36. It is true that the right of residence conferred by the directive is not confined to the student but extends to his spouse and their dependent children, but as the eighth recital of the preamble to the directive itself states, 'the right of residence can only be genuinely exercised if it is granted to the spouse and their dependent children'. This approach is consistent with the decisions of the Court in different but related contexts to the effect that discrimination against the members of a

person's family may in some circumstances be tantamount to discrimination against the person himself: see e. g. Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085; Case 94/84 *ONEM* v *Deak* [1985] ECR 1873. Thus, the Council was not in my view required to have recourse to Article 235 in order to extend the right of residence to members of the student's family, nor did it need to do so in order to give them the right to work in the host State, for in my view that right must also be considered necessary to give full effect to the principle of non-discrimination laid down in Article 7. If members of the student's family were not entitled, regardless of their nationality, to work in the host State, a serious obstacle to the exercise of the right to freedom of movement conferred by the directive might thereby be created, for the student might then have to support both himself and his family while at the same time pursuing a course of study.

37. In my view, it therefore follows from the Court's ruling in *Raulin* that the right of entry and residence which the directive purports to confer on students who wish to pursue a course of vocational training in a Member State other than their own derives directly from the first paragraph of Article 7. As a result, the Council had the power to make arrangements for giving practical effect to that right under the second paragraph of Article 7 and there was no need for it to have recourse to Article 235. The directive must accordingly be declared void.

38. Since I regard this conclusion as inescapable in the light of the Court's ruling in *Raulin*, it is not strictly necessary for me to consider the other two heads of the Parliament's claim. I will, however, comment briefly on the second head because it is closely related to the first and the Parliament stated at the hearing that it attached great importance to it. The third head raises separate issues which I do not consider it appropriate to address.

39. The Parliament maintains that, even if the directive had been properly based on Article 235, it would none the less still be invalid because the Council did not explain why it could not have been based on another provision of the Treaty. It seems to me that this head of the Parliament's claim is both inadmissible and unfounded. Inadmissible, because if the Council's view of the need to have recourse to Article 235 had proved to be correct, its failure to explain why no other provisions of the Treaty gave it the necessary powers could not be said to have violated the Parliament's prerogatives. Unfounded, because a measure is liable to be annulled for defective reasoning where the defect suggests that all the relevant factors were not properly considered by the institution in question before the measure was adopted. That was not the case here, where the account of the legislative history set out above shows that the Council simply took the view that no provision other than Article 235 empowered it to adopt the directive. Moreover, it would in my view be unreasonable to require the Council, each time it wished to act under Article 235, to explain in detail why no other provision of the Treaty gave it the necessary powers, for it might be difficult in practice to define the limits of such a requirement.

40. Although strictly speaking the Court does not in my view need to address this head of the Parliament's claim, a ruling along these lines might, as the Council suggested at the hearing, avoid disputes in the future.

The effect of a declaration of invalidity

41. The Parliament and the Commission have suggested that, if the Court decides to quash the contested directive, it should limit the effects of its ruling because of the possibility that students may already have exercised their rights under national legislation adopted to give effect to the directive. That suggestion was supported at the hearing by the Netherlands and United Kingdom Governments.

42. The Treaty contains no provision expressly giving the Court the power to limit in this way the effects of a ruling declaring a directive void. Where a regulation is declared void in proceedings under Article 173 of the Treaty, however, Article 174 empowers the Court to state which, if any, of the effects of the regulation shall be considered definitive. Although Article 174 is confined to regulations, this does not in my view prevent the Court, in appropriate cases, from exercising a similar power in relation to directives which it has declared void.

43. The Court's case-law establishes that Article 174 is based on the principle of legal certainty, which is a principle of general application. The Court has therefore applied Article 174 'by analogy' in the context of proceedings under Article 177 where it has been led to declare a regulation void: see e. g. Case 4/79 *Providence Agricole de la Champagne* v *ONIC* [1980] ECR 2823; Case 112/83 *Produits de Maïs* v *Administration des Douanes et Droits Indirects* [1985] ECR 719; Case 41/84 *Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1; Joined Cases C-38/90 and C-151/90 *R* v *Lomas and others* [1992] I-1781. A similar power has been exercised in relation to the Community budget following the annulment of the act of the President of the Parliament declaring the budget finally adopted: see Case 34/86 *Council* v *Parliament* [1986] ECR 2155; Case C-284/90 *Council* v *Parliament* [1992] I-2277. Moreover, the terms of Article 174 do not take account of the fact that a directive is like a regulation in that it may produce direct effect in the Member States. Even where a directive does not have this effect, national courts are bound to take it into account when interpreting relevant provisions of national law. This is so regardless of whether the deadline for giving effect to the directive has expired: see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15. Thus, to declare a directive void without preserving some or all of its effects might pose as serious a threat to legal certainty as a similar declaration in respect of a regulation or of the act of the President of the Parliament declaring the Community budget finally adopted: see paragraph 48 of the judgment in Case 34/86, already cited.

44. I therefore consider that Article 174 may be applied by analogy where an act other

than a regulation is declared void by the Court, both in a direct action under Article 173 and in proceedings under Article 177. Although the present action was not instituted under Article 173, it must clearly be treated for these purposes as if it had been brought under that provision. As the Court explained at paragraph 27 of its judgment in Case C-70/88, already cited, an action for annulment brought by the Parliament to safeguard its prerogatives is subject to the rules laid down in the Treaties relating to actions for annulment brought by the other institutions.

45. In the present case, it would in my view be going too far to state that the directive should be considered definitive, as this would defeat the purpose of declaring it void, which is to protect the Parliament's prerogatives. None the less, in view of the fact that the substance of the directive enjoys the unanimous support of the Council, the Commission and the Parliament, I consider that it would be desirable in the interests of legal certainty for it to be preserved until it is replaced by the Council with a new directive adopted on the correct legal basis.

46. Admittedly, the directive itself does not in itself confer on students rights which go further than those they enjoy under Article 7 of the Treaty, which has direct effect in the Member States. None the less, the directive helpfully spells out those rights, the scope of which might otherwise be disputed. Moreover, as the Commission points out in its observations, the directive serves a useful purpose in setting out the practical arrangements for the exercise of the rights in question. Indeed, the seventh recital of the preamble to the directive acknowledges that 'it is necessary for the Member States to adopt administrative measures to facilitate residence without discrimination'. This is to some extent the explanation for the considerable body of legislation which has been adopted to give practical effect to the right to freedom of movement for workers conferred by Article 48 of the Treaty, which also has direct effect. Moreover, the directive helps to ensure that each Member State treats students from other Member States in the same way.

47. In addition, it emerged at the hearing that, although none of the Member States seemed likely to have implemented the directive in advance of the deadline of 30 June 1992, some Member States were ready to do so by that date. Were the Court to quash the directive thereafter but decline to preserve its effects, the status of any national measures which had been adopted to give effect to it might be uncertain.

48. It is true that, when the adoption of a new directive is considered, the cooperation procedure will apply and that this may lead to differences of substance between that directive and Directive 90/366. However, in view of the widespread measure of agreement there seems to be with the content of the latter directive and the fact that that directive does no more than give effect to the rights flowing from Article 7 of the Treaty, the scope of which cannot be altered by the

Community institutions, it is reasonable to expect any such differences to be minimal.

49. I therefore consider that the effects of the directive should be maintained until it has been replaced by a new directive adopted on the correct legal basis. At the same time, I should make it clear that the Council will be under an obligation to act within a reasonable time to comply with the judgment of the Court declaring the directive void.

Conclusion

50. I am accordingly of the opinion that the Court should:

(1) declare Council Directive 90/366 of 28 June 1990 on the right of residence for students void;

(2) declare that the effects of the directive shall be maintained until it has been replaced by a measure adopted on the correct legal basis;

(3) order the Council to pay the costs, with the exception of those of the Commission, the Netherlands and the United Kingdom, who must pay their own costs.