OPINION OF ADVOCATE GENERAL LÉGER

delivered on 17 October 1995 *

1. Must the Community-law provisions on the free movement of persons and freedom of establishment be interpreted as precluding a Member State from requiring an independent worker taking up residence in its territory to exchange a driving licence issued by another Member State for a driving licence issued by the host Member State within one year, on pain of incurring penalties of up to one year's imprisonment — or six months where the offence is attributable to carelessness — by reason of the offence of driving without a licence?

This, in substance, is the question to which the Court has been requested to reply by the Amtsgericht (Local Court) Tiergarten, Berlin, in a reference for a preliminary ruling on the interpretation of Articles 6, 8a and 52 of the EC Treaty.

2. This question has arisen in the course of criminal proceedings brought by the Public Prosecutor at the Landgericht (Regional Court) Berlin against Mr Chryssanthakopoulos and his wife, Mrs Skanavi.

3. Both Mr Chryssanthakopoulos and Mrs Skanavi are Greek nationals. They have been resident in Berlin since 15 October 1992. Mr Chryssanthakopoulos is the managing director of a furniture company and his wife is an employee of that company. On 28 October 1993, Mrs Skanavi was stopped by the police while driving a motor vehicle belonging to the company and was able to produce only a driving licence issued by the Greek authorities and an international driving licence.

4. Pursuant to Paragraph 21 of the Straßenverkehrsgesetz (Law on Road Traffic, hereinafter the 'StVG'),

— Mrs Skanavi was charged with the offence of driving without a licence, punishable by up to one year's imprisonment — six months if the offence was committed through carelessness — or by a fine;

— Mr Chryssanthakopoulos, as the managing director of the company which owns the vehicle, was charged with having knowingly allowed his wife, who did not hold a German driving licence, to drive

* Original language: French.

that vehicle, an offence which attracts the same penalties.

5. Before the Amtsgericht Tiergarten, Berlin, the Public Prosecutor has asked that the defendants be fined DM 3 000.

6. According to the national court making the reference, failure to comply with the obligation laid down in Paragraph 4 of the Verordnung über internationalen Kraftfahrzeugverkehr (Regulation on international vehicle traffic) [1] is punishable by imprisonment, as provided for under Paragraph 21 of the StVG.

7. During the hearing, however, the Commission's representative drew the Court's attention to a judgment delivered on 15 December 1992 by the Landgericht Memmingen, [2] which, in a similar case, found the defendant, a foreigner driving with a foreign licence after expiry of the twelve-month period, not guilty in respect of a charge brought under Paragraph 21 of the StVG. That court expressed the view that the Public Prosecutor had been wrong to bring proceedings on the basis of that provision in such a case. That observation cannot, however, have any bearing on the Court's task in the present reference — *although it may assist the national court in resolving the dispute before it* — in so far as the national court alone has jurisdiction to determine whether the criminal proceedings brought against the accused by the Public Prosecutor at the Landgericht Berlin are well founded.

8. The German court proceeds from the premiss that authorization to drive a motor vehicle is an essential condition for the exercise of a trade or profession, in particular an activity as a self-employed person. By imposing an obligation to exchange licences under the conditions set out in the national provisions in question, the German legislature has, it believes, breached Articles 6, 8a and 52 of the EC Treaty.

9. *According to the national court*, the obligation to exchange driving licences discriminates against nationals of other Member States who have decided to establish themselves in Germany.

Even if the exchange of licences is not made subject to any particular condition and amounts to a mere formality, the fact that failure to do so is treated as constituting driving without a licence and is punishable by imprisonment means that the Community national in question runs the risk of acquiring a criminal record. Such a consequence will adversely affect the exercise of

1 — Under this provision, every person, whether a Community or German national, who has obtained a driving licence in another Member State, is required, in the event of taking up permanent residence in Germany — *that is to say, in the event of a minimum continuous period of residence of 185 days* — to exchange that driving licence for a German driving licence.

2 — Published in the periodical *Deutsches Autorecht*, No 10, 1994, p. 412, No 162.

his trade or profession and on that ground constitutes a barrier to freedom of establishment.

Furthermore, even though the obligation to exchange licences may be justified on objective grounds (for instance, the need to check the authenticity of the licence in question), it none the less constitutes an obstacle to the free movement of persons which must, according to the case-law of the Court, comply with the principle of proportionality. The criminal penalties provided for under the German legislation are, the national court believes, excessive in relation to the gravity of the offence committed.

10. However, since it is unsure as to how the provisions of Community law should be interpreted, the national court has submitted the following question to the Court for a preliminary ruling:

'Are Articles 6, 8a and 52 of the EC Treaty to be interpreted as being incompatible with a provision of national law which requires a national driving licence issued by an EC Member State to be exchanged for a German driving licence within one year of the holder's taking up normal residence in the Federal Republic of Germany, failure to do which will mean that driving a motor vehicle constitutes the offence of driving without a licence, punishable by up to one year's imprisonment or a fine?'

11. A similar question of interpretation in a preliminary reference concerning a practically identical case was referred to the Court by order of 13 February 1978 of the Amtsgericht Reutlingen in *Choquet*. [3] However, the Court's interpretation in that case cannot be directly applied to the present proceedings in so far as the Community-law framework was amended by the entry into force of First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence. [4]

12. The reply to the question which has been submitted to the Court makes it necessary, first, to examine whether the obligation to exchange is compatible with the freedom of establishment and, second, to determine whether the penalties which may be imposed are contrary to the Treaty rules, in particular those on freedom of establishment and freedom of movement. I shall examine those two aspects in turn.

I — The compatibility of the obligation to exchange with Articles 6, 8a and 52 of the EC Treaty

13. Although the facts underlying the dispute in the main proceedings date from 28 October 1993, that is to say, four days prior to the entry into force of the Treaty on

3 — Judgment in Case 16/78 *Choquet* [1978] ECR 2293.

4 — OJ 1980 L 375, p. 1.

European Union, the Amtsgericht Tiergarten, Berlin, has cited Articles 6, 8a and 52 of the EC Treaty as possibly precluding the contested national provisions.

14. My view is that the question submitted must be considered in the light of Articles 7 and 52 of the EEC Treaty. Although the Court pointed out in *Bordessa and Others* [5] that:

'... it is for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court ...',

the national court must none the less specify why the interpretation of legal rules which are not applicable to the facts before it will be useful in resolving the dispute facing it. [6]

15. In the present case, the national court has not provided this information in its order for reference.

16. In any event, the reply which I propose that the Court should make to the question submitted by the national court in this case would have been the same had the Treaty on European Union been applicable.

17. The first paragraph of Article 6 of the EC Treaty sets out the general principle of non-discrimination on grounds of nationality in terms identical to those of the first paragraph of Article 7 of the EEC Treaty:

'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.'

18. In terms identical to those of Article 52 of the EEC Treaty, Article 52 of the EC Treaty provides as follows:

'Within the framework of the provisions set out below, 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. Such progressive abolition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

5 — Judgment in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10.

6 — Ibid., paragraph 9.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

19. Finally, Article 8a(1) of the EC Treaty guarantees for every citizen of the Union the right to move and reside freely within the territory of the Member States:

'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.'

20. This is the first time that the Court has been requested to interpret Article 8a of the EC Treaty. However, I do not believe that this provision would have been applicable in this case, for the same reasons as those which the Court has set out in its case-law on the independent application of the general principles contained in the Treaty. [7]

21. Article 8a relates to the right, for every citizen of the Union, to move and reside freely within the territory of the Member States. The right of residence, however, necessarily follows from the specific right of free establishment given effect by Article 52 of the Treaty. Consequently, any rule that is incompatible with Article 52 is necessarily also incompatible with Article 8a.

22. In my opinion, Article 7 of the EEC Treaty is not applicable. In its judgment in Case C-246/89 *Commission* v *United Kingdom*, the Court ruled that the principle of non-discrimination on grounds of nationality contained in Article 7 of the EEC Treaty applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific rules against discrimination:

'... the Court has consistently held (see, for example, judgment in Case 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461, paragraph 13) that Article 7 applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination.' [8]

7 — See *infra*, points 22 and 23 of this Opinion.

8 — Judgment in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 17.

23. In that same judgment, the Court ruled that such was the case with regard to Article 52 of the EEC Treaty:

'... the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented by Article 52 of the Treaty in the specific domain governed by that article and ..., consequently, any rules incompatible with the latter provision are also incompatible with Article 7 of the Treaty.' [9]

24. My view is that Community law does not, in principle, preclude the obligation to exchange driving licences under the conditions laid down in the German legislation. This view is based essentially on two grounds: Directive 80/1263 and the Court's case-law.

First, the Court's case-law

25. In its judgment in *Choquet*, cited above — that is to say, even before the entry into force of Directive 80/1263 — the Court ruled that:

'... it is not in principle incompatible with Community law for one Member State to require a national of another Member State, who is permanently established in its territory, to obtain a domestic driving licence for the purpose of driving motor vehicles, even if he is in possession of a driving licence issued by the authorities in his State of origin'. [10]

26. In order to arrive at this finding, the Court acknowledged that the Member States had full competence to determine the conditions under which a foreign driving licence could be recognized or exchanged for a domestic driving licence *in so far as*, within their national territory, the rules concerning the safety of highway traffic fell primarily within the scope of the responsibilities devolving upon the Member States. [11]

27. Consequently, the Court sanctioned the measures taken by national authorities which are designed to enable them to ensure that every driver resident within the territory of the Member State in question holds a driving licence that satisfies the requirements imposed on that State's own nationals, [12] *on*

9 — Ibid., paragraph 18.

10 — Point 9.

11 — Ibid., point 6.

12 — Ibid., point 7.

condition that those measures can reasonably be regarded as proportionate to the requirements of road safety. The obligation to exchange licences must therefore be regarded as such a measure.

29. In my view, there is no ambiguity whatever in the wording of the second sentence of the first subparagraph of Article 8(1) of Directive 80/1263. It sets out *expressly* the obligation to exchange a national driving licence or a Community model licence within a year of taking up normal residence.

Second, Directive 80/1263

30. Examination of all of the provisions and general purpose of Directive 80/1263, as well as that of its rationale, reveals that this obligation is consistent with Community law.

28. The first subparagraph of Article 8(1) of Directive 80/1263 provides as follows:

31. Directive 80/1263 represents substantive progress *vis-à-vis* the previous situation in so far as no common rules on the issue and mutual recognition of driving licences had hitherto been adopted.

'The Member States shall provide that, if the holder of a valid national driving licence or valid Community model licence issued by a Member State takes up normal residence in another Member State his licence shall remain valid there for up to a maximum of a year following the taking up of residence. At the request of the holder within that period, and against surrender of his licence, the State in which he has taken up normal residence shall issue him with a driving licence (Community model) for the corresponding category or categories without subjecting him to the conditions laid down in Article 6. However, that Member State may refuse to exchange the licence if its national regulations, including medical standards, preclude the issue of the licence.'

32. The objective pursued by the Community legislature in 1980 was twofold:

— *first*, it was necessary to guarantee freedom of movement for Community nationals settling in a Member State other

than that which had issued the original driving licence; [13]

— *second*, it was necessary not to deprive Member States of their natural competence regarding road safety on their own public road systems. [14]

33. This was the reason why, during the first phase of this harmonization, while establishing a Community model for national driving licences [15] and laying down the principle of Member States' mutual recognition of national driving licences and the automatic exchange of licences by holders transferring their place of residence or place of employment from one Member State to another, [16] the Community legislature allowed Member States to retain *a measure of competence* in respect of the rules governing driving licences. [17]

34. The reconciliation of these two — apparently contradictory — objectives was achieved by endeavouring to improve road traffic safety within the Community. [18] Thus, any national legislature exercising the possibility of derogating from the Community rules in relation to the issue, validity or exchange of driving licences must be able to justify such action on the ground that it is pursuing this single objective — *improved road traffic safety on the public highway*. If it cannot do so, those national measures may be regarded as indirectly affecting the exercise of the rights of free movement and freedom of establishment guaranteed by Article 52 of the EC Treaty and consequently as being incompatible with the Treaty.

35. *Likewise, with more particular regard to the question of exchanging driving licences*, even though the second sentence of the first subparagraph of Article 8(1) of Directive 80/1263 is couched in general terms, I take the view that the potential situations in which a Member State would be entitled to refuse to exchange licences are limited. [19] This follows not only from an analysis of Article 8 as a whole but also, as I have already demonstrated, from the general scheme and purpose of Directive 80/1263.

13 — First, second, third and fourth recitals in the preamble to Directive 80/1263.

14 — Ibid., sixth recital in the preamble.

15 — Ibid., Article 1.

16 — Ibid., first and second recitals in the preamble.

17 — Particularly with regard to the issue (Article 6(2)) or validity (Articles 7 and 9) of driving licences.

18 — First recital in the preamble to Directive 80/1263.

19 — These potential situations are those in which (a) driving licences have been issued to those under 18 years of age (Article 5(2)); (b) the medical standards applied by the Member State in which the holder of the driving licence takes up residence are more stringent (Article 6(1)(a)); (c) the driving licence was obtained while the holder was resident in the Member State in which he requests the exchange (Article 8(1), *a contrario*); (d) penalties may have been imposed on the holder of the licence prohibiting him from driving a vehicle (Article 8(1)).
It should be noted that the representative of the Federal Republic of Germany mentioned during the hearing that, with regard to exchanging driving licences, the German national legislation does not provide for derogations other than those mentioned above.

36. By using the prescriptive form of the verb 'shall' in the second sentence of the first subparagraph of Article 8(1), the Community legislature has, in my opinion, demonstrated its desire to *lay down the principle that the change should be automatic*:

'... At the request of the holder ..., and against surrender of his licence, the State in which he has taken up normal residence *shall issue him* with a driving licence (Community model) for the corresponding category or categories without subjecting him to the conditions laid down in Article 6.' [20]

The third sentence of the first subparagraph of Article 8(1) must be understood as constituting an exception to the established rule.

37. An analysis of the general scheme and objectives of Directive 80/1263 confirms this position. As has already been seen, [21] in so far as the primary purpose of Directive 80/1263 is to ensure free movement for Community nationals establishing themselves in a Member State other than that which issued the driving licence, the necessary conclusion is that Member States can derogate from the automatic nature of licence exchange only if such derogations are justified by the desire to ensure improved road safety for road users. Any different interpretation of these Community-law provisions would deprive them of all effectiveness.

38. A new stage in this harmonization was achieved by Council Directive 91/439/EEC of 29 July 1991 on driving licences, [22] which substantively implements the principle of mutual recognition of driving licences issued by Member States [23] by removing the obligation to exchange licences. This Community measure will enter into force on 1 July 1996. [24]

39. I wish to conclude this examination by expressing my view that the principles of free movement and freedom of establishment must be understood as not precluding national legislation from requiring every resident holding a driving licence issued by another Member State to exchange that licence for a national driving licence within one year of taking up residence, *on condition, however, that the conditions imposed by those national rules* on the holder of a driving licence issued by another Member State are consistent in all respects with the objective of the Community-law provision in question. For that purpose, it is necessary that those national rules should be reasonably proportionate to the requirements of road safety.

20 — Emphasis added.

21 — See, in particular, points 30 to 34 of the present Opinion.

22 — OJ 1991 L 237, p. 1.

23 — Article 1(2).

24 — Article 13.

II — Are the penalties provided for under the contested national legislation contrary to Community law?

40. According to the national court, the penalty provided under the German legislation for failure to comply with the exchange procedure can be up to one year's imprisonment — or six months where the offence is attributable to carelessness — by reason of the offence of driving without a licence.

41. In so far as I have concluded that the obligation to exchange licences is not, in principle, contrary to Community law, it must be accepted that national authorities are entitled to make non-compliance with the exchange procedure subject to penalties. Pursuant, however, to the Court's judgment in *Kraus*, [25] the penalties imposed must not be disproportionate to the nature of the offence committed.

42. Thus, in the present case, if the national driving licence held by Mrs Skanavi was such as to render the exchange automatic in Germany, it would be manifestly disproportionate to the objective pursued by the German legislation if her carelessness were to have the result that penalties might be imposed on her which would be similar to those applicable to an offender driving without any authorization whatever, that is to say, without ever having passed the test required for the issue of a driving licence. During the hearing, the representative of the Federal Republic of Germany pointed out that the national court is not obliged to apply the maximum penalty provided for by the contested legislation and that it may impose more lenient penalties, such as simple fines.

43. As the Court pointed out in its judgment in *Kraus*, cited above, it is a matter for the national court to determine whether the penalties provided for by the legislation of the Member State in question are so severe as to constitute an obstacle to the fundamental freedoms guaranteed under the Treaty:

'... whilst the national authorities are entitled to prescribe penalties for non-compliance with the authorization procedure, the penalties imposed should not exceed what appears proportionate to the offence committed. It is for the national court to determine whether the penalties laid down for that purpose in the rules of the Member State concerned are not so severe as to impede the exercise of the fundamental freedoms guaranteed by the Treaty'. [26]

25 — Judgment in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 41.

26 — Ibid.

44. In conclusion, I propose that the Court reply as follows to the question submitted by the Amtsgericht Tiergarten, Berlin:

Article 52 of the EEC Treaty must be interpreted as not precluding a host Member State, in principle, from:

(1) requiring that a driving licence issued by another Member State be exchanged for a national driving licence within one year of the holder's taking up normal residence within the territory of the host Member State; such a requirement may, however, indirectly affect the exercise of the right of free movement and the right of free establishment guaranteed by Article 52 of the Treaty if it appears that the conditions which the national legislation imposes on the holder of a foreign licence are not reasonably proportionate to the requirements of road traffic safety;

(2) making non-compliance with the obligation to exchange licences subject to criminal penalties, on condition that those penalties are not disproportionate to the gravity of the offence; it is for the national court to determine whether the principle of proportionality has been complied with.