Article 9 of Directive No 64/221, the essential requirement is that it should be clearly established that the authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive.

6. Although Article 9 (2) of Directive No 64/221 does not prevent the person concerned from making a direct application to the competent authority it does not require such an application and it allows the Member State a choice in that respect, provided that the person concerned is entitled to make such an application if he so requests.

7. The conditions on which the person concerned must be entitled to put forward to the competent authority his arguments in defence and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation must not be less favourable to him than the conditions applicable to proceedings before other national authorities of the same type.

In Joined Cases 115 and 116/81

REFERENCES to the Court under Article 177 of the EEC Treaty by the President of the Tribunal de Première Instance [Court of First Instance], sitting at Liège in interlocutory proceedings, for a preliminary ruling in the actions pending before him between, on the one hand,

REZGUIA ADOUI

and

1. BELGIAN STATE, in the person of the Minister of Justice, and
2. CITY OF LIÈGE, in the person of the Bourgmestre,

and, on the other,

DOMINIQUE CORNUAILLE

and

BELGIAN STATE, in the person of the Minister of Justice,

on the interpretation of Articles 7, 48 (3), 56 (1) and 66 of the Treaty and of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on ground of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117), and in particular of Articles 3, 6, 8 and 9 thereof

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco and A. Touffait, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling and A. Chloros, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The orders making the references, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. On 3 June 1980 Miss Adoui, a French national, submitted an application to the competent authorities of the City of Liège for a permit to reside in Belgium. That permit was refused to her by a decision of the Minister of Justice, which was notified on 15 October 1980 and contained an order to leave the country within 15 days on the grounds that her personal conduct made her residence undesirable for reasons of public policy and that she worked in a bar which was suspect from the point of view of morals and in which waitresses displayed themselves in the window and were able to be alone with their clients, such conduct being contrary to the Police Order of 25 March 1957 of the City of Liège. It is not stated in the documents before the Court whether the order to leave the country contained a prohibition of returning to it.

Miss Adoui complied with that order on 28 October but returned to Belgium one month later and notified the municipal administration of her return. An order to leave the country within four days was served on her on 27 November 1980. By a registered letter of 1 December 1980 she applied to the Commission Consultative des Etrangers [Consultative Committee for Aliens, hereinafter referred to as "the Consultative Committee" or "the

Committee"] for an opinion, but that action was considered to be out of time by the Ministry of Justice, which consequently refused to submit the case to the Consultative Committee and, on 3 December 1980 and 15 January 1981, reiterated its order that she should leave the country. Miss Adoui refused to comply with those orders and, considering that she was the victim of unlawful acts, summoned the Belgian State and the City of Liège before the court with jurisdiction to grant interlocutory relief.

2. Miss Cornuaille, a French national, has resided in Belgium since 2 June 1978. Her application for residence dated 13 June 1978 remained unansweed. However, her certificate of registration was extended on several occasions. The Office des Etrangers [Aliens Office] received information from the police describing her as a waitress of questionable moral character who "in scant dress displays herself to clients" and requested the opinion from the Consultative Committee required as a preliminary to an expulsion order. It seems that although Miss Cornuaille does not hold a residence permit, the Aliens Office treated her as if she held a residence permit. In the statement drawn up on 25 April 1979 for the Committee the Aliens Office refers to the policy at present applied with regard to persons concerned with prostitution in support of its view that, having regard to her personal conduct, Miss Cornuaille's presence in Belgium is detrimental to the requirements of public policy.

Miss Cornuaille protested and requested disclosure of the file. Following several refusals she obtained such disclosure by means of an action for interlocutory relief which she brought against the Minister of Justice. The consideration of the case was adjourned several times by the Consultative Committee. Finally Miss Cornuaille was summoned to appear before the Committee at its sitting on 11 September 1980. However, she requested an adjournment on the ground that she had lodged a complaint with the Procureur du Roi [Public Prosecutor], Liège, against the authors of the information sent to the Aliens Office alleging false written statements, defamation, injurious statements and calumnies. Without the attendance of Miss Cornuaille herself or her adviser, the Committee issued an opinion on 11 September 1980 recommending her expulsion without having taken account of the matters which had been the subject of the complaint to the criminal authorities. Considering that the Belgian State had been guilty of unlawful acts, Miss Cornuaille summoned it before the court with jurisdiction to grant interlocutory relief.

3. The Belgian Law of 28 March 1952 provides that "no alien may take up residence in the Kingdom without having obtained for that purpose the permission of the Minister of Justice." The main characteristic of a residence permit as distinct from a certificate of registration is the fact that a holder of the former may be expelled from the country only for a limited number of legal reasons and often only after an opinion from the Consultative Committee.

The measures of public policy which may be taken under them depend on whether

or not the alien holds a residence permit. In the first case, the deportation measure consists in expulsion by Royal Decree after the necessary opinion from the Commission. In the second case, the Minister of Justice has an arsenal of measures at his disposal (prohibition or refusal of entry, order to leave the country and deportation).

Article 3 bis of the Law (amendment of 1969) provides that the refusal of a residence permit to an alien who is a national of a Member State of the EEC as well as any decision expelling such an alien from the territory before the issue of a permit are subject, at the request of the person concerned, to examination by the Consultative Committee. The alien concerned may apply for the opinon of the Committee by registered letter to the Minister of Justice within a period of eight days from the date on which he received notice of the refusal to issue a residence permit or of the expulsion measure prior to the issue of a permit.

The Law of 28 March 1952 was amended by that of 15 December 1980. The amendments do not, however, affect the case of the plaintiffs in the main proceedings.

The Consultative Committee is composed of a magistrate, an advocate and an official from the Ministry of Foreign Affairs (Article 10 bis). The members of the Committee are appointed for three years by the King. The procedure and workings of the Committee are governed by the Royal Decree of 22 December 1969. Matters must be brought before the Committee in accordance with the above-mentioned procedure. The application must set out the reasons on which it is based. The Minister makes his observations in a statement addressed to the Chairman of the Committee, of which a copy is sent to the alien. The latter is summoned to appear before the Committee at the request of the Public Security Administration through the intermediary of the municipal administration of his place of residence or of the director of the establishment at which he is detained. He may be assisted or represented by an adviser. If, without a reason considered to be valid by the Committee, the alien or his adviser fails to appear, he loses the right to be heard by it. The Committee's opinion is notified to the Minister of Justice, to the Community national and to his adviser within eight days. The Committee's secretarial duties are performed by an official from the Ministry of Justice.

4. During the interlocutory proceedings, Miss Adoui claimed that since her personal conduct had never infringed the requirements of public policy, the refusal of the residence permit was arbitrary and that the procedure followed by the Ministry of Justice since 22 November 1980 was unlawful. She concluded from this that the defendants in the main proceedings should be ordered to issue a residence permit to her for a period of five years and be forbidden to adopt any measure whatsoever in an attempt to induce her to leave the country, at the very least for as long as no decision had been taken on the second application for a residence permit which she claimed to have made.

5. During the interlocutory proceedings, Miss Cornuaille claimed that there had been an infringement to her right to defend herself in the only proceedings which had to take place before the implementation of an administrative measure deporting her from the territory

In view of the need to take urgent action by virtue of the fact that an immediately enforceable expulsion order was likely to be adopted with respect to her, she asked that her right to obtain a residence permit should be recognized and that the expulsion proceedings should not be proceeded with until the result of the criminal investigation was known or, at the very least, before proceedings genuinely observing the principle of *audi alteram partem* had taken place before the Consultative Committee.

6. By order of 8 May 1981 the President of the Tribunal de Première Instance, sitting at Liège in interlocutory proceedings, after excluding the City of Liège from the proceedings in Case 115/81 on the ground that its rôle was limited to that of a mere enforcement agency of the State in matters of administration relating to aliens, decided to stay the proceedings in both cases and to refer to the Court under Article 177 of the Treaty the following questions for a preliminary ruling:

"A — The concept of public policy

(1) Would the Court kindly give a definition of the concept of public policy such as may be relied upon by virtue of Articles 48 and 56 of the Treaty? (Case 115/81)

Would the Court kindly give a definition of the concept of public policy as that concept is to be understood for the purposes of Articles 48 and 56 of the Treaty? (Case 116/81)

(2) On numerous occasions the Court has stated that the concept of public policy could fall within the discretion of the Member States subject to the limitations of Community law. Would the Court specify those limitations?

(3) How, in the Court's view, can the doctrine expounded in its judgment in Case 41/74 *Van Duyn* [1974] ECR 1337 be reconciled with the principle of non-discrimination contained in Article 7 of the Treaty and, moreover, embodied in Articles 48 et seq. of the Treaty? Subject to what precise conditions and limitations may discrimination exist in the legislation and practice of a Member State between its own nationals and the nationals of other Member States where the free movement of persons guaranteed by the Treaty is concerned? (Case 115/81)

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(4) Is it conceivable that 'personal conduct constituting a genuine and sufficiently serious threat affecting one of the fundamental interests of society' (Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999) may not be criminally punishable in the

Member State wishing to so define that conduct in order to expel a national of another Member State? (Case 115/81)

Is it conceivable that 'personal conduct constituting a genuine and sufficiently serious threat affecting one of the fundamental interests of society' (Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999) may not be criminally punishable in the Member State wishing to so define that conduct in order to expel a national of another Member State?

(5) Is it conceivable that one of the fundamental interests of society is involved if that interest is not at the very least embodied as such beforehand in a law, a regulation or a practice having the same effect of the State relying upon it, even if such conduct is not criminally punishable? (Case 115/81)

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(6) Since a measure expelling a person from the territory of a State often has repercussions which are sometimes much more serious than a criminal penalty, is it not necessary to apply by analogy Article 7 of the European Convention for the Protection of Human Rights and to take the view that the conduct punished must have constituted a criminal offence laid down by law at the time when it was committed? Alternatively, what other solution would the Court suggest in order to avoid an arbitrary decision on the matter by national administrations? (Case 115/81)

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(7) In employing the expression 'sufficiently serious threat' the Court, by using the adverb 'sufficiently', introduces the idea of proportionality. Does the Court mean that it is necessary to measure, on the one hand, the seriousness of the perturbation which is threatening the requirements of public policy and, on the other hand, the seriousness, which varies from case to case, of the expulsion order?

(8) May not the expulsion become so serious in certain cases that it may no longer be contemplated owing to the fact that it constitutes inhuman treatment: father or mother of a large family, spouse or parent of a national of the expelling State, a minor, a person who for reasons of age or health does not have a sufficient chance of

becoming readjusted to life in another country, a person who was born and has lived for a considerable period in the territory of the expelling State etc.? (Case 115/81)

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(9) To what extent are Member States entitled to take account of the private morality of the persons concerned as the ground for a refusal or withdrawal of residence permits if that morality is not of such a nature as to give rise in the host State to perturbations which are specifically and objectively ascertainable in public?

Does not the adjective 'public' exclude any consideration of the private life, morality and convictions of the individuals concerned, if those matters should not normally find expression in external conduct capable of giving rise to perturbations which are specifically and objectively ascertainable in public?

(10) If a Member State which is anxious to remove from its territory prostitutes from a given country because they could promote criminal activities does so systematically, declaring that their business of prostitution endangers the requirements of public policy and not taking the trouble to consider whether the persons concerned may or may not be suspected of contact with the underworld, is that State not adopting a measure of a general preventive nature prohibited by the doctrine enunciated in the judgment in Case 67/74 *Bonsignore* [1975] ECR 297 and does it indeed base its measure on the personal conduct of the person concerned? (Case 115/81)

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(11) May a Member State suddenly take the view that the personal conduct of persons carrying on a particular trade constitute a genuine and sufficiently serious threat affecting one of the fundamental interests of society, even though the carrying on of the trade is not prohibited in its territory, the trade is carried on

without hindrance by several thousands of people, foreign nationals have for years been allowed to enter the trade, income from the trade is lawfully taxable, far from prohibiting the trade the State concerned has adopted laws for the protection of those carrying on the trade from certain forms of exploitation and, furthermore, certain foreign nationals may still carry on the trade? (Case 115/81)

Could a Member State suddenly take the view that the personal conduct of persons carrying on a particular trade constitute a genuine and sufficiently serious threat affecting one of the fundamental interests of society, even though the exercise of the trade was not prohibited in its territory but, on the contrary, was carried on without hindrance by several thousands of people, foreign nationals had for years been allowed to enter the trade, income from the trade was lawfully taxable, those carrying on the trade were protected by legislation from certain forms of exploitation, or certain foreign nationals still carried on the trade? (Case 116/81)

(12) In using in Case 67/74 *Bonsignore* the expressions 'presence (which) could no longer be tolerated' and 'necessary solution', does the Advocate General correctly convey the degree of seriousness required in order to justify expulsion from the territory of a Member State?

(13) Under what circumstances can a person who has had a residence permit refused or withdrawn because his personal conduct presented a danger to the requirements of public policy of the host State subsequently regain entry into the territory of the State concerned and apply for a new residence permit? Is it possible to adopt a definitive decision expelling a national of a Member State from the territory?

(14) Article 6 of Directive No 64/221/EEC provides that European nationals must be informed of the grounds of public policy, public security, or public health upon which the decision taken in their case is based. Must that statement be made in the mother tongue of the person concerned? Must the statement, save where the interests of the security of the State are involved, be complete, detailed and candid? May a State use a general statement of grounds in standard form repeated in a large number of cases? (Case 115/81)

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B — Procedural safeguards

(1) In its judgment of 5 March 1980 in Case 98/79 *Pecastaing* [1980] ECR 691 the Court stated that the object of the provisions of Article 9 of Directive No 64/221 was to ensure minimum procedural safeguards for persons affected by a measure withdrawing or refusing residence permits. Can the Court indicate, define and enumerate the procedural safeguards which Member States must provide for an alien seeking the legal remedy referred to by Article 9 of the directive?

(2) The directive states that the 'authority shall not be the same'. Does that imply that it must be possible for the action to be brought before an impartial authority which is totally independent of the authority taking the decision? Is there sufficient independence where the members forming the different authority are designated by the authority which takes the decision. Would it not be desirable that Member States place the responsibility of considering the legal remedies provided for by Articles 8 and 9 of the directive within the jurisdiction of the courts?

(3) In his opinion delivered before the Court in the *Pecastaing* case, the Advocate General took the view that the real independence of the different authority could be guaranteed only in the total absence of any dependent relationship vis-à-vis the authority required to take the decision. Does the Court, like the Advocate General, consider that an official of the administration who is entrusted with taking the decision may not be a member of that authority? May an official of the administration which takes the decision be responsible for the secretarial duties of that authority? If any hierarchical relationship between the members of the different authority and the authority taking the decision is prohibited, then in countries where the issue falls within the ambit of the Ministry of Justice should there not be a ban on allowing magistrates of the Public Prosecutor's office to sit as members of the authority? May a government official belonging to another administration sit as a member of the authority? Must members of the authority be appointed for a short or a long, or in any event definite period? Is it proper that the authority taking the decision should be the one which pays the members of the different authority?

(4) Must not the national of a Member State who is subject to a measure be able to bring the matter before the different authority himself? Is it proper that the authority taking the decision should be the only authority able to bring the matter before the different authority, summon the alien to a hearing of

the authority and therefore control the speed with which the proceedings progress?

(5) The decisions of the different authority must state the reasons on which they are based. Does that not imply that the alien has the right to receive a copy thereof bearing the signatures of the members of the authority and stating their identities and capacities? (Case 115/81)

The decisions of the different authority must state the reasons on which they are based. Does that not imply that the alien has the right to receive a copy thereof bearing the signatures of the members of the authority and stating their identities and capacities? (Case 116/81)

(6) Save in properly justified cases of urgency, must the alien and his adviser, when prevented for a valid and important reason from attending a hearing of the different authority, be entitled to obtain postponement of the consideration of the case to another hearing?

(7) Must the decision of the different authority deal in detail and to a sufficient extent with the submissions of law and fact put forward by the alien? Should he have the right to lodge a written statement of his submissions and a file?

(8) Is the authority taking the decision obliged to submit to the different authority a file relating to the case proving that the decision withdrawing or refusing a residence permit referred for consideration by the separate authority is based on genuine, accurate and serious facts? Must the proof of the facts on which the authority bases the decision which it takes be absolute and uncontestable? May an alien contesting the sufficiency of the proof rely on being given the benefit of the doubt? May anonymous information and police reports which do not state their sources be used by the authority taking the decision? (Case 115/81)

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(9) Whilst under Article 3 of Directive No 64/221 previous criminal convictions are not in themselves to constitute grounds for a measure refusing or withdrawing a residence permit, may it not be said that

where the facts alleged against the alien constitute criminal offences the authority taking the decision is bound to establish those facts by the existence of a criminal conviction?

(10) Can personal conduct contrary to the requirements of public policy be inferred from a report on morality?

(11) Are the alien and his adviser entitled to demand disclosure of the file submitted by the authority taking the decision to the different authority? If reasons of State security permit the authority taking the decision not to disclose certain documents to the alien or his adviser may that authority nevertheless rely on information contained in a document which it refuses to submit to the different authority?

(12) Does not the requirement of an adequate defence imply that the alien or his adviser may demand to receive the original of the file submitted or a copy thereof, possibly in return for the payment of a not too prohibitive sum? By requiring the alien's adviser to travel to the capital of the Member State, particularly where the territory of the Member State covers a large area, in order to examine the file placed at his disposal, does that not indeed entail disproportionate costs for the alien to such an extent as to compromise his rights of defence?

(13) How long before the hearing must the alien or his adviser obtain disclosure of the file? Does the period of one month not constitute a proper period in order to allow the alien to prepare his defence, make up his file by assembling his documents and possibly draw up a written statement?

(14) Could the authority taking the decision, on the pretext of reasons of State security, include in its file a document not disclosed to the alien or his adviser in order not to divulge the identity of a police informer? Must not a document which the alien alleges to be false be excluded from the proceedings?

(15) Is it not essential that the alien or his adviser should be advised of the dates of the hearing sufficiently in advance thereof in order to allow adequate preparation for the hearing, such as for example one month's notice?"

7. The order of the President of the Tribunal de Première Instance, Liège, were received at the Court Registry on 12 May 1981.

8. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiffs in the main proceedings, represented by J. Levaux and L. Misson of the Liège Bar, by the Belgian State, in the person of the Minister of Justice, represented in Case

115/81 by J.-P. Soumagne of the Liège Bar, and in Case 116/81 by E. E. Jeunehomme of the Liège Bar, by the Government of the French Republic, represented by G. Geoffroy, Member of the General Secretariat of the Interdepartmental Committee for Questions of European Economic Co-operation in the Prime Minister's Office, acting as Agent, by the Government of the Italian Republic, represented by A. Squillante, Head of the Department for Diplomatic Legal Affairs, Treaties and Legislative Matters, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato, by the Government of the Kingdom of the Netherlands, represented by F. Italianer, Secretary General of the Ministry of Foreign Affairs, acting as Agent, by the United Kingdom, represented by R. N. Ricks, of the Treasury Solicitor's Department, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, J. Amphoux, acting as Agent, assisted by F. Herbert of the Brussels Bar.

9. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

A — Observations submitted by the plaintiffs in the main proceedings

Questions A (1) and (2). The plaintiffs in the main proceedings take the view that the concept of "public policy" may be defined by reference to its purpose; it permits the State and the municipalities to derogate from the observance of the rights of individuals when, if they did not do so, the existence or essence of the community governed by the rule of law would be threatened.

With reference to the, case-law of the Court it is possible to state as follows the limits which have been placed on the Member States' discretion to remove the rights of residence or establishment guaranteed by the Treaty by relying upon public policy: the public policy of the Member State concerned must itself be threatened; the threat must relate to the future, since public policy may not be used to punish past conduct; it must arise from the personal conduct of the person concerned; public policy may not be relied upon to serve economic ends without jeopardizing the very objective of the Treaty; the threat to public policy must be genuine and sufficiently serious, that is to say it must affect "one of the fundamental interests of society" (cf. judgment in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999); the concept of public policy must be interpreted strictly and restrictively; it must be applied in a non-discriminatory manner; it may be the subject of a discretion retained by the Member States and exercised under the control of the institutions of the Community; it may be applied only on condition that a series of procedural rules and requirements are observed; it is necessary that the conduct of the person concerned should constitute a threat to public policy as laid down in the laws of the Member States;

in order that public policy may be relied upon, it is necessary that the conduct in question should be criminally punishable; finally, public policy may not serve to limit the exercise of public freedoms on the territory of the host country.

Questions A (3), (4), (5), and (6). It is clear from the judgment in the *Bouchereau* case cited above that the conduct complained of, which constitutes a genuine and sufficiently serious threat affecting one of the fundamental interests of society must be criminally punishable. Indeed, the State would be relying on the interest pleaded in a discriminatory manner if that interest were not incorporated in its legislation. The requirement of prior incorporation in a criminal law is, moreover, the only manner in which arbitrary actions by Member States prohibited by the Court in its case-law be avoided. In order to ensure that migrants seeking entry feel that there is certainty in the law and that they may have confidence in the right of residence and establishment conferred upon them by the Treaty, it must be stated that their rights may be challenged only if they commit particularly serious acts and they must be assured that they may be charged with no conduct other than that which is punishable by a law existing prior to such conduct. By permitting expulsions for conduct which is not criminally punishable the door would be left open for expulsions for concealed reasons. Indeed, expulsion would often constitute a much more serious penalty for the persons concerned and their families than a criminal penalty. The result would be that the public policy exception contained in Articles 48 and 56 of the Treaty would in fact have to be regarded as introducing rules of criminal law into the Community legal order.

The expression "equivalent attitude of the State" contained in Question (5) refers to the attitude of the United Kingdom in Case 41/74 *Van Duyn* [1974] ECR 1337: its legislation did not permit the punishment of the promoters of the sect complained of but an amendment to the law had already been planned which would allow the fundamental interests of the State to be relied upon. The situation is quite different when no-one has ever called into question the conduct concerned.

Questions A (7) and (8). In this instance it is necessary to introduce an idea of double proportionality. It is not sufficient to consider in itself the perturbation to public policy but account must also be taken of the personal circumstances of the Community national: the consequences of refusing or withdrawing residence or establishment permits would be dramatic for an entire community which immigrated into Belgium several generations ago, mainly of Italian nationality, and would amount to cruel or inhuman treatment within the meaning of Article 3 of the European Convention on Human Rights, of Article 5 of the Universal Declaration on Human Rights and of Article 7 of the International Agreement on Civil and Political Rights of the United Nations Organization.

Question A (9). It is both the problem of the substantive nature of public policy and the problem of the respect for private life, freedom of conviction and freedom of expression which are at issue here. A State may not consider itself to be threatened by an attitude of an individual which is not of such a nature as to give rise specifically and objectively to perturbations ascertainable in public. If it is of such a nature, however, it is the threat of perturbations which are taken into consideration and not the individuals' convictions themselves. Far more than a right to work is conferred upon the migrant worker by the Treaty and by secondary law: a right to live in the host country like other workers of that country and to enjoy the same rights as those workers.

Questions A (10) and (11). The plaintiffs in the main proceedings wish to point out that they deny engaging in prostitution, that no charge has, moreover, ever been brought against them, that they wished to perform work other than that of waitresses and that the file on the case proves that they have sought other employment. Moreover, their being on view in the window presents such a small danger to public policy that many municipalities in Belgium do not prohibit such conduct. Where there is such a prohibition, offences are punished merely by minor penalties (peines de police). In any event, prostitution is not prohibited in Belgium; only incitement to debauchery, often in the form of soliciting in public, is prohibited. The Belgian authorities make no secret of the fact that they are systematically expelling all French waitresses, perhaps because they may be "the logistic support" for the French underworld. Where residence or establishment permits are refused or withdrawn for reasons relating to the campaign against crime, it is necessary that in each particular case a precise examination should be undertaken and that an unfavourable decision should be made only where it is established that the person concerned is actually connected with criminal activities.

Question A (12). The fundamental nature of the principle of the free movement of persons within the Community means that there is an obligation on the Member States, when the personal conduct of a Community citizen may be considered to be capable of threatening national public policy, to use in preference in order to protect themselves all means other than the refusal or withdrawal of the residence or establishment permit; those measures may only be applied as a last resort and when there is a genuine necessity to do so (cf. judgments in Case 36/75 *Rutili* [1975] ECR 1219 and in the *Bouchereau* case cited above).

Question A (13). In Belgium use is made in the case of Community citizens of documents entitled "Order to leave the country", sometimes signed by an official from the Aliens Office and sometimes merely by police officers or officials of the municipality. The Belgian Law of 28 March 1952 on the supervision of aliens provides that only the Minister may expel from the territory of the Kingdom an alien who has lawfully entered that territory and that there may be no delegation of that power. The Belgian authorities generally justify their actions by claiming that it is preferable to issue an order to leave the country rather than

a ministerial expulsion order, since the latter has the effect of permanently denying the alien to whom it is addressed admission to the territory. That justification is not tenable because in practice when an alien has been the subject of an order to leave the country, the Belgian authorities consider that he is no longer authorized to return to Belgium on the same conditions. That is what happens in particular when a Community national has allowed the very short period of eight days which he has to bring an action against a decision refusing him a residence permit before the Consultative Committee to expire.

As the Court has stated *inter alia* in the *Bouchereau* case cited above and in Case 131/79 *Santillo* [1980] ECR 1585, the threat to public policy must be a present threat. The means that any Community citizen is entitled to a residence or establishment permit in any Member State if there can be no fear that his conduct is a present threat to public policy, even if that person has previously been imprisoned, convicted, expelled etc. It is also illegal to treat a Community citizen to whom a first residence permit is refused as a person who has entered Belgium illegally even if he carries valid national identity documents.

Question A (14). It is obvious that in order to inform the persons concerned of the grounds for the decision, it must be ensured that a language is used which is understood by them. The Court may recall in that regard the terms used in its judgment in the *Rutili* case cited above.

Question B (1). The Court should state that the procedural safeguards must be the same as those granted to nationals where the restriction of their freedom of movement is concerned. It may be emphasized that if a Community citizen does not receive the means to claim and enforce his rights against a host State, the very subject-matter of his right is reduced to a mere cipher.

Question B (2). The plaintiffs in the main proceedings consider that it is necessary to go beyond the provisions of Articles 8 and 9 of Directive No 64/221, which in their view are insufficient for the purpose of ensuring that the aims of the Treaty are achieved in his matter. If the Community legal order is based on the rights of residence and establishment, then it stands to reason that in the Member States rights of such importance must be protected by the courts, whose primary function is to guarantee the fundamental rights of the individual. In Belgium, apart from detention by the administrative authorities which is possible in cases of necessity for a very short period, only a court may take a decision affecting citizens' freedom of movement. It would therefore be discriminatory to allow the right of residence and establishment of

Community citizens to fall within the discretion reserved to the executive power. Would it, moreover, be possible to speak of genuine independence and genuine authority if the authorities called upon to take the decision and to deal with the matter on appeal did not come under different powers?

Question B (3). In Belgium the three members who sit on the Consultative Committee, which purports to be the authority required by Articles 8 and 9 of Directive No 64/221, are appointed by the Ministry of Justice, the authority which takes the decision withdrawing or refusing the establishment or residence permit. The secretarial duties of the Committee are performed by an official from the Ministry of Justice, and in some cases by the very person who dealt with the case of the person making the application. In certain cases only the alien who made the application may appoint the third member of the Committee, but from a list drawn up by the Ministry of Justice. The Committee is often presided over by a magistrate from the Public Prosecutor's Office, even though under the Belgian judicial system there is a hierarchical relationship between him and the Minister of Justice. The alien never receives the actual decision of the Committee but only a summary drawn up by the official from the Ministry of Justice who acts as the secretary of the Committee. The alien is not informed of the names and capacities of persons sitting on the Committee and they do not appear in the text of the summary sent to him by the Committee's secretariat. There is only one Consultative Committee for the entire Kingdom and it sits at the offices of the Ministry of Justice which are allocated to the Police des Etrangers [Aliens Police]. Practitioners in this field complain that almost systematically the opinions of the Commission favour the arguments of the Aliens Police.

Question B (4). In Belgium the Ministry of Justice, the authority which takes the decision, assumes the rôle of sole judge of the admissibility of actions: the alien has no right to be heard directly by the Consultative Committee. This practice means that when a residence permit is refused, all the identity documents which the alien obtained when he lodged his application, and in particular the provisional residence permit, are immediately withdrawn and he remains in possession only of an order to leave the country expiring on a given date. That order is renewed from month to month until his case is submitted to the Committee. In the case of waitresses, before renewing the order to leave the country for the length of the procedure, the Ministry of Justice requires that they cease work; this has a suspensory effect. Without an identity document it becomes impossible for the alien to find new employment, except in particular environments such as those of bars. The clear intention of the Ministry of Justice in prolonging the procedure before the Committee is to discourage the alien.

Question B (5). The answer should be in the affirmative.

Question B (6). An affirmative reply should be given so long as the reason relied upon is valid and important, a matter which may be decided upon by the different authority on condition that

the authority concerned is not subject to that which takes the decision.

Question B (7). Article 9 of Directive No 64/221 refers to "such rights of defence and of assistance or representation as the domestic law of that country provides for". In all proceedings in Belgium each party has the right to submit written statements and documents and to compel the courts to reply specifically to the submissions of law and fact which it makes. The same should be true of the proceedings in question, since the judicial function of the authority called upon to give its opinion is evident.

Question B (8). The case of the plaintiff in Case 116/81 sufficiently illustrates the importance of the question asked. It is surprising to see that without any proof the person concerned is accused of having contracted venereal disease even though it is now established that the allegation was wholly incorrect. Clearly, the Belgian State considered that it did not have to adduce evidence of the fact and was content to rely upon it. Police inquiries are frequently cursory in this matter and the proceedings and the decision do not differ according to whether the police inquiry produces a large or small amount of information concerning the personal conduct of the person concerned, whose capacity as a French waitress alone is sufficient to justify expulsion.

Question B (9). It is sufficient to recall the general rule of the presumption of innocence (Article 6 of the European Convention for the Protection of Human Rights, Article 11 of the Universal Declaration on Human Rights and Article 14 of the Agreement of the United Nations Organization on Civil and Political rights).

Question B (10). The plaintiffs in the main proceedings refer to what has been said concerning Question A (9). The morality of the person concerned does not constitute the ground of public policy required by Articles 48 and 56, if there is no possibility of perturbations specifically and objectively ascertainable in public.

Questions B (11), (12), (13) and (14). The plaintiffs in the main proceedings request the Court to state in an extremely detailed manner the procedural rules to be observed. If they feel compelled to do so, it is because the files submitted prove sufficiently that the natural tendency of the Belgian administration is to try to limit the procedural safeguards which an alien may claim. Despite the intervention of leading members of the Brussels and Liège bars and the Opinions of Advocates General Capotorti and Warner in Case 98/79 *Pecastaing* [1980] ECR 691 and in the *Santillo* case cited above, the production of files in the proceedings before the Consultative Committee continues to be refused. Quite apart from the financial predicament in which the alien is normally placed following the refusal of a first residence permit, the mere fact that he is obliged to travel to the capital of the host country in order to submit his defence may itself entail difficulties of such a nature as to jeopardize his right of defence.

Question B (15). It seems clear that an affirmative answer is required.

B — Observations submitted by the Belgian State

Questions A (1), (2) and (3). A definition which is too precise would be likely to fix the concept of public policy, whereas it seems more important that it should be able to evolve in order that it may adapt itself to the progress of each society. *A fortiori,* it would seem impossible to lay down the limits of the particular requirements of public policy which meet the specific circumstances of each of the Member States. There is no contradiction between the doctrine enunciated in the judgment in the *Van Duyn* case cited above and the principle of non-discrimination. The observations of the Belgian State on the first two questions are in keeping with the doctrine enunciated in that judgment, which defines a principle and lays down the limits of its application. It should be added that the subject-matter of the concept of public policy does not necessarily take the specific form of a legal provision in the national legal orders (Case 115/81).

Questions A (4), (5) and (6). These questions raise an interesting point of jurisprudence but are of no relevance to this case. The Belgian Law of 21 August 1948, repealing the national rules on prostitution, provides that supplementary provisions may be adopted by the municipal councils if their purpose is to ensure morality and the public peace. By the Police Order of 24 October 1977 adopted by the municipal council of the City of Liege the act of displaying oneself in a window is punishable by a "peine de police" (penalty for minor offence); such conduct is criminally punishable and justifies expulsion from the territory (Case 115/81). In Case 116/81 the Belgian State merely states, with regard to Question A (5), that the concept of public policy may vary from one country to another and from one period to another (cf. *Van Duyn* judgment cited above) and that it is not necessarily specifically defined in any legal provision.

Question A (7). Where public policy is concerned, it is clear that no account should be taken of the difficulties caused by expulsion from Belgian territory, which vary from person to person. Whatever view is taken concerning the scope of public policy, it is nevertheless clear that within the same society it must be applied to the same category of persons without discrimination (Case 115/81).

Question A (8). This question is merely of academic interest in this case. It does not directly concern the plaintiff in the main proceedings, a young person in good health who lives "by her charms" and does not need to concern herself with the consequences of expulsion from the territory of large families, elderly persons and minors (Case 115/81).

Regard is of course had to the private or family interests, or both, of aliens in respect of whom an expulsion measure is envisaged. It is indeed true that an expulsion measure is only adopted in exceptional cases regarding certain categories of aliens, such as for example those referred to in the question. It seems nevertheless hardly conceivable to prohibit a Member State in general terms from adopting expulsion measures, in any circumstances, with regard to aliens

belonging to those categories. Article 21 of the Law of 15 December 1980 provides that certain categories of aliens may not be expelled unless they have seriously jeopardized public policy or national security (Case 116/81).

Question A (9). In this case the perturbations which were specifically and objectively ascertainable did exist since the plaintiff in the main proceedings was on view in a window on a public thoroughfare in contravention of the above-mentioned municipal order providing for a criminal penalty (Case 115/81).

An expulsion measure may be envisaged only where the morality of the person concerned is reflected in his behaviour, which presupposes that certain specifically and objectively verifiable acts have taken place. It is not therefore necessary that such perturbations have already taken place, if the potential risk of perturbation exists, in particular as a result of the personal conduct of the individuals concerned (Case 116/81).

Question A (10). The plaintiff in the main proceedings was not expelled from the territory because she had connections with the "international underworld", but because she worked in a bar which was suspect from the point of view of morals. With regard to the fundamental problem raised by this question, which goes beyond the issues raised by this case, it must be observed that personal conduct taking the form of prostitution in certain circumstances promotes criminal activities, in particular by the money which it raises for those who exploit prostitution (Case 115/81).

It is not necessary for a prostitute to be involved with the "underworld" before an expulsion measure may be envisaged with respect to her on grounds of public policy. It goes without saying that the activity of a prostitute intrinsically jeopardizes public policy if she carries on that activity in a provocative manner, for example if she displays herself at the window of a bar in an indecent manner or if she solicits clients in the street in the vicinity of the bar (Case 116/81).

Question A (11). A State may not be criticized for expelling aliens who commit offences of soliciting and displaying themselves in windows in disregard of that State's concept of public policy and sound morals. The different treatment of nationals and aliens in this matter is inevitable, since a State can clearly not expel its own citizens. It cannot be maintained that the Treaty prohibits the expulsion of delinquent aliens on the ground that nationals commit the same offences without being expelled from their own country (Case 115/81).

It is possible to relate this question to Question A (3) and the wording of it might seem rather equivocal were it not for the — fortunate — fact that it embodies the concept of "personal conduct" to which the Court has attached paricular importance in its judgments (Case 116/81).

Question A (12). The Belgian State refers to its observations on Questions A (7), (8) and (9) (Case 115/81).

Question A (13). If a person has been refused a residence permit for reasons relating to his personal conduct, it is clear that that refusal continues for the same length of time as the personal conduct which justified that measure (Case 115/81).

Question A (14). Since the plaintiff in the main proceedings is a French national all decisions were notified to her in her mother tongue. Moreover, the decision which was notified to her was not in a standard and stereotyped form but referred specifically to her conduct (Case 115/81).

This question might be worded more precisely if it were to be asked in what language the notification of the decision and the grounds thereof should be made to a European national: in the language spoken or chosen by the addressee or in one of the national languages of the State adopting the decision, at the option of the person concerned? For the rest, it is clear that the grounds for the decision adopted must bear a relation to the personal conduct of the person concerned (Case 116/81).

Question B (1). The procedural safeguards are laid down by Article 9 of Directive No 64/221 and may be outlined as follows:

"Different authority".

The person concerned must be able to assert his rights of defence:

He must enjoy such rights of assistance or representation as the domestic law of the country provides for:

He is to be entitled to submit his defence in person, except where this would be contrary to the interests of national security.

The procedure provided for by the new provisions offers safeguards which are virtually identical to those in proceedings before the courts (independence of members, respect for the rights of defence, disclosure of documents, hearing of witnesses, recourse to an interpreter). In view of the fact that the procedural safeguards were increased even though they were already satisfactory, the procedure laid down in implementation of Article 9 of the directive thus comprises all the desired safeguards.

Question B (2). With regard to the composition of the Consultative Committee the court making the reference took the view that its composition guaranteed its judicial independence, since the members making up the different authority are appointed not by the authority which takes the decision but by the King.

Question B (3). In accordance with the provisions of the Law of 28 March 1952, the secretarial duties of the Consultative Committee were not performed by an official of the administration responsible for taking the decision but indeed by an independent official. Articles 33 and 34 of the Law of 15 December 1980 provide that the chairmanship is held by two present, former or honorary magistrates. With regard to the appointment of the members of the "different authority", Article 33 of the Law provides that the members of the Committee are appointed for a period of three years and that their appointment may be renewed. The allowances granted to the members

of the Committee are determined by the King and are fixed in accordance with the Royal Decree of 24 December 1964 laying down the allowances for subsistence expenses of members of the staff of the ministries and with the Royal Decree of 18 January 1965 laying down general rules on travel expenses.

Question B (4). The authority which takes the decision brings the matter before the "different authority" in cases where the Law of 15 December 1980 requires the preliminary opinion of the Consultative Committee. That opinion may be requested only by the Minister of Justice. However, an alien may appeal to the Minister in the cases laid down in Article 44. Consequently, it should be pointed out that the fact that the Committee is entrusted with the task of giving opinions to the Minister of Justice constitutes a safeguard for the alien, whose case is thus examined by an independent body. The authority which takes the decision does not summon the alien: the summonses are sent on the initiative of the Chairman through the intermediary of the secretary of the Committee, who, as has already been stated, is an independent official.

Question B (5). Article 62 of the Law of 15 December 1980 contains the general rule requiring that any administrative decision must state the reasons on which it is based and be notified. That means therefore that there is control by the Conseil d'État [State Council] of the reasons stated in the opinions of the Committee. As soon as that Law came into force, the plaintiff in the main proceedings received a copy of the opinion given by the Committee.

Question B (6). As is the rule before any court, the Committee considers the application for an adjournment and decides whether or not to accept it depending on the ground relied upon. Any court or tribunal other than an administrative one may consider that an application for an adjournment which follows other applications is excessive and consequently reject it (Case 115/81).

As is the rule before any court, the Committee considers the application for an adjournment and decides whether or not to accept it depending on the ground relied upon. For example Counsel for the plaintiff in the main proceedings has asked for and obtained an adjournment on several occasions, the grounds relied upon being either holidays or other cases set down for hearing before other courts. Any administrative court or tribunal other than an administrative one may consider that an application for an adjournment which follows other applications is excessive and may consequently reject it. This is what occurred before the Committee, which refused to grant the adjournment requested at the sitting of 11 September 1980, after having granted adjournments on 13 September 1979, 29 May 1980 and 21 August 1980 (Case 116/81).

Question B (7). The decision of the "different authority" must deal in detail and to a sufficient extent with the submissions of law and fact put forward by the alien (requirement of a statement of reasons contained in Article 62 of the Law). Moreover, lawyers are entitled to lodge statements, which moreover confirms long-established practice.

Question B (8). With regard to the file on the case, the authority which takes the decision is required to submit "the file relating to the case" to the Chairman of the Consultative Committee at least eight working days before the hearing. The rapporteur of the Justice Committee of the Senate has emphasized that Articles 34 and 36 of the Law mean that the security administration is obliged to submit a complete file, including documents which it considers to be confidential. If that administration

wishes that certain documents should not be disclosed to the members of the Consultative Committee and to the parties, it asks the President to remove those documents from the file; consequently they cannot play any rôle in the decision of the Commission. It is emphasized that the assessors can have no knowledge of the documents thus removed. In view of the fact that the Conseil d'État exercises control over the reasons relied upon in the opinion, the Minister cannot rely on documents which are not produced in order to justify his decision and the administration would not run the risk of being unable to provide support for his proposal.

Questions B (9) and (10). According to the doctrine enunciated in the *Bouchereau* case cited above an expulsion order entails "a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction". It is of little relevance whether the acts constituting criminal offences are punished by criminal conviction. The personal conduct of the person concerned must have threatened the requirements of public policy.

Question B (11). The Belgian State refers to its reply to Question B (8).

Question B (12). Where a lawyer is entitled to examine the file, he may also obtain copies thereof at his own cost.

Question B (13) and (15). Article 36 of the new Law provides that the members of the Consultative Committee, the alien and his lawyer may examine the file as from the third working day before the date of the hearing. A period of one month is laid down for sending the summons to the person concerned. To that summons is joined a detailed statement giving the reasons and disclosing the contents of the file. Moreover, the defence has a limited period of three days in which to check itself, if necessary, the information contained in the statement on the basis of the file. If the defence considers that there are grounds to contest the conformity of the information contained in the statement with the contents of the file, it may in any event request an extension of time which it will be able to justify. Since the lawyer is able to organize the defence of his client one month before his appearance before the Committee, the period of three days is sufficient in order to study the file.

Question B (14). The Belgian State recalls that the documents removed from the file can play no rôle in the decision of the Consultative Committee. Confidence must be placed in a committee whose composition provides all the safeguards of objectivity in order to ensure a fair result in regard to a document which the alien alleges to be false. To decide as a general principle that a document alleged by the person concerned to be false must necessarily be removed from the proceedings amounts to an acknowledgement of the right to contest the genuineness of all the documents on the file submitted to the Committee, and thus to have them removed and to empty

the file of its content. The representative of the administration may also allege that a document submitted by the alien is false; such an allegation clearly does not mean that the document should automatically be excluded from the proceedings.

C — Observations submitted by the French Government

Questions A (1) and (2). The French Government takes the view that for obvious reasons the national authorities of each Member State must be able to determine the content of the concept of public policy, subject only to the rules laid down by the Court in its judgment in all the cases referred to it on this matter. The Court seems to have inferred from the power expressly conferred by Article 56 of the Treaty a general power in favour of the Member States to determine the requirements of public policy. However, in order to preserve the principles of equality and non-discrimination, which are among the foundations of the Treaty, the Court has placed an important limit on that principle by conferring upon the Community institutions a supervisory power, which may be assimilated to *ex posto facto* supervision exercised case by case on consideration of the particular facts. Consequently, under the general scheme laid down by Article 48 of the Treaty, the Member States are empowered to determine the requirements of public policy, subject to the supervision exercised by the Community institutions.

Questions A (3), (10) and (11). The division of powers effected by the Court is intended to reconcile the Community principle of non-discrimination laid down by Article 7 of the Treaty with national requirements of public policy. Article 48, by laying down a provision requiring treatment as a national, adopts the principle of non-discrimination but also allows the Member States to maintain in their legislation and practices exceptions applicable to Community citizens. In the *Van Duyn* case cited above the Court considered that a Member State could prevent the exercise of certain activities by a national of another State even though no similar restriction was imposed on its own citizens. Conversely, in Case 67/74 *Bonsignore* [1975] ECR 297 the Court took the view, in accordance with Article 3 of Directive No 64/221, that only "personal conduct" could justify the expulsion of a Community citizen and that such a measure could not be based on reasons of a "general preventive nature". It seems therefore that there is a tendancy towards making a distinction, to which the French Government subscribes, between differential treatment based on personal conduct (a derogation acceptable on grounds of public policy) and discrimination based on reasons of a general preventive nature (which cannot be accepted without infringing the principle of free movement).

Questions A (4) and (5). In the Bouchereau case the Court seemed to take the view that the threat to public policy does not arise from the existence

of a criminal conviction but from the circumstances which are evidence of personal conduct. A threat is therefore constituted by personal conduct in certain circumstances, a criminal conviction merely being a possible consequence (a penalty) of that personal conduct. Conversely, the Court decided in the *Van Duyn* case that the absence of a legal prohibition could not prevent reliance upon public policy. Consequently, conduct which is not punished by the criminal law of the Member State where it occurs may still be a valid ground for an expulsion measure. French case-law, for its part, considers that the existence of offences is only one of the matters to be considered in examining the conduct of the individual concerned. That solution adopted for nationals of non-member countries, is of course applicable to nationals of the Member States. The French Government is therefore of the opinion that an affirmative answer should be given, particularly since as a general rule such conduct cannot entail expulsion of an alien from French territory.

Question A (6). A threat to public policy of such a nature as to entail and justify an expulsion order is based on the conduct of the individual. A criminally punishable offence merely establishes and penalizes the conduct but cannot affect its nature. An expulsion order based on a threat to public policy therefore requires a definition of the nature of the conduct. A measure expelling a person from the territory cannot be assimilated to a criminal penalty, since it is an administrative decision. For that reason it seems unnecessary that the acts which are the reason for the measure should constitute an offence laid down by law.

Questions A (7), (8), (9) and (12). Consequently, each Member State must define the conduct of Community nationals individually and in each particular case; they may take account of any extenuating circumstances which may benefit the alien whose expulsion is contemplated. In practice the French Government considers each case individually, the national authorities usually taking account of humanitarian considerations, and in particular any family ties which the alien threatened with expulsion may plead. In no case, however, can it be accepted that any particular type of circumstances may of themselves prevent the Member States from deciding to expel an alien whose personal conduct threatens public policy. With regard to the public nature of the perturbation, it is established that the Member States are entitled to take into consideration all the information at their disposal. It is clear that as a general rule the perturbations threatening public policy are "publicly" ascertainable. That does not alter the fact that in certain cases criminal conduct occurring in private life may in certain circumstances constitute a valid reason for an expulsion order. With regard to the definition of personal conduct ("presence [which] could no longer be tolerated") and the penalty ("necessary solution"), the Court

refused in the *Bonsignore* case to follow the Advocate General who sought a Community definition and thus confirmed its intention to leave this type of definition within the discretion of the Member States.

It is the established practice of the French Government to draw a distinction between the refusal of residence and expulsion. A refusal of residence is never final, since the alien may always return if he fulfils the conditions. In the case of expulsion on the other hand, until the order is repealed the expulsion remains valid. However, an expulsion measure may at any moment be repealed if the threat to public policy has ceased. A refusal to regularize an alien's situation, if it is not accompanied by an expulsion order, may not be put forward as an objection to his return since his situation must be the subject of a new examination if he subsequently returns to France.

With regard to the implementation of the division of powers, it appears that the principle of each procedural safeguard is laid down by the directive but that the implementing provisions governing the details of those safeguards fall within the discretion of each Member State. The Court has already had the opportunity to give a ruling on this question in connection with Articles 53 and 62 of the Treaty (prohibition of new restrictions) and took the view that there was no conflict between those provisions and Article 189 of the Treaty: "The choice of form and methods can only operate in compliance with the stipulations and prohibitions in Community law" (Case 48/75 *Royer* [1976] ECR 497).

Question A (14). Article 6 of the directive lays down the obligation in principle to notify the grounds of the decision. The French Law on the notification of the reasons for administrative measures (Law No 79/587 of 11 July 1979) supplements that provision and ensures the respect of fundamental safeguards. With regard to the language used in the statement, this question is not relevant to the decision in these cases, which concern French-speaking administrative authorities communicating with French nationals.

Question B (1). The organization of the safeguard provided for by Article 9 of the directive is a matter falling within the discretion of the Member States and it is they who must ensure the respect thereof.

Questions B (2) and (3). It is clear from the judgment in the *Santillo* case that it falls within the discretion of each of the Member States to determine the nature of the "different authority" to which an appeal may be made by persons against whom an expulsion measure is contemplated and to decide whether or not that "different authority" must be part of the judicial system.

Question B (4). It is clear from Article 9 (2) of the directive that the Member States are obliged to grant the persons concerned a direct right of appeal to the "different authority".

Questions B (6) to (15). The implementation at national level of the Community principles adopted by the directive concerning procedural safeguards, and in particular the principle of

adversary proceedings and the rights of defence, is a matter for national legislation and the application thereof is a matter for the national courts. As an illustration, the French Government submits certain information on the detailed organizational rules in France for giving effect to the procedure provided for by Article 9 of the directive in relation to the questions raised by the court making the reference to the Court of Justice. If for a valid reason the alien or his adviser has been unable to appear before the committee responsible for hearing the case, he will be summoned to another sitting of the committee. An alien whose expulsion is contemplated is entitled, after securing disclosure of his file, to submit a statement, if he wishes to do so. An alien summoned before the committee may discuss and make any criticisms of the allegations against him. If the evidence proves to be insufficient, the committee may issue an unfavourable opinion. A mere report cannot be sufficient to justify a severe measure. Where there is no urgency, the person concerned may request the disclosure of his file. Except in urgent cases, he has a minimum period of 15 days in which to consult his file. If, as seems most unlikely, a document has been added to the file, the person concerned must be allowed to obtain knowledge of it if it is relied upon before the committee. A minimum period of 15 days is required between the date of the summons and the appearance before the committee.

The French Government emphasizes that it is only if the detailed organizational rules of the "different authority" provided for by Article 9 of the directive do not allow the alien to exercise his rights of defence and more generally encroach upon the indispensable independence of that authority that the national rules governing its work may, in appropriate cases, be held to be contrary to Community law by national courts. Such would be the case if an alien were unable to have the benefit of an examination of his case which was separate from that carried out by the administrative authority empowered to take any decision refusing to issue a residence permit or expelling him. Consequently, the mere presence, in the composition of the authority, of a member of the administration responsible for taking, if necessary, a decision ordering expulsion or that of an official belonging to another administration cannot of itself call into question the impartiality of that authority.

D — Observations submitted by the Italian Government

Question A (1). It seems impossible for the Court to define the concept of public policy (which "may vary from one country to another and from one period to another") without once more relying on the fact that the activity constitutes "a social danger" not necessarily connected with an offence of a criminal nature (*Van Duyn* case). This concept differs specifically from one country to another and changes as time passes.

Question A (2). On the other hand, the limitations may be common to the Member States, but they are "limitations", that is to say limits beyond which it is forbidden to go but which do

not define the concept. These limitations are based on observance of specific rules of Community law in the field in question and on the observance of the general principles of law which safeguard fundamental rights and regulate a democratic society; those principles are also part of Community law and require *inter alia* that such limitations should be reasonable and proportionate. It is clear that the limitations must be restrictively interpreted.

Question A (3). It is a fact that restrictions justified on grounds of public policy may create for an alien a situation different from that in which nationals find themselves. However, to admit that the absolute prohibition of denial of access to the territory which exists with regard to nationals applies also to a citizen of another Member State would be tantamount to abolishing the reservation expressly laid down in Article 48 (3) of the Treaty. The principle embodied in Article 7 of the Treaty must be understood and interpreted in conjunction with the rule and the exception to the rule provided for in Article 48.

Question A (4). It is appropriate to point out that public policy is relied upon as a basis for prevention (specific and not general prevention as the Court made clear in the *Bonsignore* judgment). Aggression (having regard to which the mere presence of a real and sufficiently serious threat enables the restrictive measure to be justified) need not necessarily be criminally punishable. In fact, criminal-law penalties do not necessarily relate to the most serious conduct but are the result of a choice of legislative policy, above all in cases where, by reason of the particular nature of the conduct, such penalties are regarded as the most effective deterrent and, to a lesser degree, a means of repression.

Question A (5). It is not always by seeking a specific rule which refers to and safeguards a fundamental interest of society and which lays down penalties for failure to uphold it, that it is possible to determine that interest, but by analysing the totality of the provisions existing in a particular country and the interpretation of them in a specific period having regard to the safeguard of public welfare.

Question A (6). Whilst Article 7 of the European Convention on Human Rights provides that no-one may be held guilty of a criminal offence on account of any act which did not constitute a criminal offence at the time when it was committed, restrictive measures regarding an alien do not constitute "convictions" but "preventive" measures, both in so far as they seek to prevent entry into the territory (and it could not be otherwise) and in so far as they seek to terminate residence. An expulsion order may be more serious in certain cases than a criminal conviction but that fact is without importance except in so far as the provision which enables the measure to be adopted must be interpreted restrictively and prudently, observing the principles guaranteeing the reasonable and proportionate nature of the measure adopted.

Question A (8). The circumstances referred to must be given serious consideration when the measure is adopted, also and in particular in so far as they relate to the dangerous character of the individual.

Question A (9). Since private morality is a matter exclusively for each individual and no State intervention of any kind whatsoever is permissible, the morality of each individual is without importance with regard to public policy except where it is characterized by outward behaviour which has the features of an unlawful act (or, with a view to prevention, by the danger which such behaviour represents) or at least of a social danger.

Question A (10). In principle, it does not seem possible, with regard to a person who, having the general benefit of the guarantee accorded by Community law, engages in prostitution, to exclude the taking of the view that the behaviour of the person in question constitutes a social danger, provided that that view is based on that person's personal conduct.

Question A (11). Prostitution may, from an abstract point of view, and depending on the views of each of the States at various times, be regarded, at least in certain of its manifestations, as a dangerous phenomenon for society which may constitute a genuine and sufficiently serious threat, affecting a fundamental interest of society, although from the socio-political point of view it may be regarded as inappropriate to adopt repressive measures on a general basis against that activity. Furthermore, from a concrete point of view, since prostitution is a widespread phenomenon tolerated in all the Member States, it is very difficult to regard the individual, and possibly discreet and reserved, exercise of that activity as a serious threat to public policy. Against the background of these considerations, it must be emphasized that the application of an unduly strict criterion may too easily lead to abuses, having regard to the extreme difficulty of appraising sexual morality.

Question A (12). The expressions used by Mr Advocate General Mayras in his opinion in the *Bonsignore* case — "presence [which] could no longer be tolerated" and "necessary solution" — certainly convey the degree of the seriousness of the threat to public policy but are nevertheless related to a national assessment of public policy.

Question A (13). The limitation which may be imposed by virtue of Article 48 (3) must be justified by grounds of (special) prevention and not of repression — as soon as the threat to public policy is reduced there ceases to be any reason for maintaining or extending a restrictive measure adversely affecting the free movement of persons, and the situation of the person in question may certainly be re-examined.

Question A (14). The reasons for restrictive measures must certainly be given, and must be real rather than apparent. On the other hand, it does not seem necessary to state the reasons in the mother tongue of the person concerned, in so far as that does not seem necessary to enable the individual concerned

personally to be "informed" of the measures adopted.

Question B (1). A similar answer to that given in the *Pecastaing* case cited above, must be given with regard to Article 9 of the directive, since that provision indicates that the safeguards must be based either on the possibility of an appeal to a court of law, which must not be limited to a review of legal validity and which must have suspensory effect, or on the opinion of a competent authority in the host country before which the person concerned enjoys rights of defence (it may also be an administrative authority provided that it is different and independent from the one which adopted the measure, as the Court of Justice pointed out in the *Santillo* case). It does not seem possible to define in greater detail the "procedural safeguards" which the Member States must offer to a party who brings an appeal, since it is sufficient if the appeal is to a court of law, is not limited to a mere review of legal validity and has suspensory effect. The rules of procedure applicable to the appeal may only be the national rules of procedure, which differ from one State to another.

Question B (2). The Court has already partly answered this question in the *Santillo* judgment. The mere "designation" of the members does not imply that there is any supervision of them and does not detract from the independence of the member designated. On the other hand, Article 9 of the directive refers to an "appeal to a court of law" and it is only in the absence of such an appeal that the directive requires an "opinion" from an authority other than the one which adopted the contested measure.

Question B (3). It is natural that, as in Italy, the sittings of the Consultative Committee should be under the auspices of the administration (of the Ministry of the Interior) which, in general, concerns itself with problems of the kind in question and that certain of its members should, for reasons of specific competence, belong to the same administration. In a State whose constitution is founded on the rule of law, the formal act of making an appointment on the part of the Minister of the Interior certainly does not call in question the independence of the body.

Questions B (4) and (5). It is clear that the rules of procedure must be the national rules and that they must ensure that the opinion expressed is effective and genuine. It is also clear that the opinion, precisely because it is an opinion, must state the reasons on which it is based although it does not seem necessary that the "signatures of the members of the authority and . . . their identities and capacities" should be included.

Questions B (6), (7) and (8). It is for national law to regulate the procedure to be followed, which must simply provide the safeguards mentioned above. It is on those principles that the Italian provisions implementing the directive are based. Presidential Decree No 1656 of 1965 provides in particular that the person concerned must be informed of the grounds of public policy except where this is not advisable for reasons of State security. The decision to issue or withhold a residence permit must be

adopted within six months of submission of the application. The person concerned is authorized to remain on national territory provisionally until the adoption of the decision issuing or withholding a residence permit. The period allowed to nationals of a Member State to leave national territory may not be less than 15 days in the event of refusal to grant a residence permit, and not less than one month in the case of refusal to renew a permit or of an order expelling the person concerned from national territory, leaving aside cases of urgency. Likewise with the exception of cases of urgency, the decision whereby the authorities refuse to renew the residence permit or expel from national territory a person already authorized to reside there is adopted after an opinion is obtained from the committee reponsible for such matters, before which the person concerned may be assisted or represented by a person within his confidence. At the request of the person concerned, the committee is called upon to examine the decision refusing to grant a residence permit or expelling him from national territory even before the issue of a residence permit. In such a case, the person concerned may be allowed to put forward his defence personally.

Question B (9). The answer must be negative.

Question B (10). A person's morality may not be relied upon as grounds for the adoption of restrictive measures where there is no conduct or the risk (on a preventive basis) of specific personal conduct which might constitute a threat to public policy.

Question B (11). All the documents taken into consideration by the committee adopting the measure must be passed on to the authority which issues the opinion and the person concerned must be able to secure access to those documents.

Questions B (12) and (13). The procedure referred to in Article 9 of the directive is a matter to be regulated by national law in a manner allowing the person concerned to defend himself adequately, incurring expenses consonant with the principle of proportionality, and within reasonable limits.

Question B (14). At the very most it should be possible, for reasons of State security, to conceal from the person concerned the name of a police informant, whilst the importance of a document alleged to be false should be a matter governed by the legal provisions of each State until the competent court has given a decision as to its authenticity.

E — Observations submitted by the Netherlands Government

The Netherlands Government is of the opinion that the questions in Section A raise four closely inter-related problems which are matters of principle involving the free movement of persons within the Community.

The scope of the exception regarding public policy referred to in Articles 48 (3) and 56 (1)

It is not possible to give an all-embracing definition of the concept of public policy, since it involves variable interests which the State or public executive

bodies consider to be fundamental public interests which they must protect on their own initiative. The Court of Justice has subjected the power of discretion accorded to the Member States to restrictions, one of which, a considerable restriction of a systematic nature relating to the definition, is derived directly from Article 2 (2) of Directive No 64/221: it is not possible to rely on the exception of public policy to service economic ends. Another restriction arising from Community law is the principle of proportionality, various applications of which may be seen in, *inter alia*, the *Rutili*, *Sagulo* (Case 8/77 [1977] ECR 1495) and *Bouchereau* cases. A last restriction follows from the principle of non-discrimination, the only exception being that, with regard to nationals of other Member States, expulsion may be ordered or admission refused. This exception, which is logical in itself, is nevertheless subject to a number of precise rules which are strictly interpreted.

The general interest, falling within the concept of "public policy", in national law

The interests which the national authorities consider must be protected should be embodied in legislative provisions with which individuals are in a position to become acquainted, so that the courts can ascertain whether the exception of public policy is raised in connection with interests other than those which fall within its scope. It should not be concluded from this that the provisions of domestic law, which protect the interests of society, must always carry a criminal penalty, since fundamental public interests may also be protected by a penalty under administrative or private law. The legal definition of interests falling within the concept of public policy provides the first criterion for an assessment as to whether "conduct constitutes a genuine and sufficiently serious threat affecting a fundamental interest of society." It is also appropriate to have regard to the actual conduct repugnant to public policy. A punishable act, which is not serious in itself, may, by reason of the special circumstances in which it is committed (for example, in the case of repeated offences), constitute a danger to essential interests of society which cannot reasonably be tolerated. It would however not be correct to consider that only conduct which may lead to public disturbances offends against public policy. In private life also interests which the State regards as public interests may be seriously jeopardized. The criterion according to which the conduct in question must manifest itself "in public" seems therefore to be inadequate.

The consequences of the exception of public policy

Expulsion or refusal to allow entry must be regarded not as a penalty but as an administrative measure designed to protect public interests. In view of the fact that the provisions of Community law enable national authorities to adopt such a measure, those authorities are

responsible for deciding whether or not they will in fact take such measure. As regards the question whether in this case they should have regard to particular circumstances relating to the person in question, this is in principle a matter governed by national law. This is the lesson to be drawn from the *Royer* judgment. That power however ceases to exist once the reasons justifying it no longer apply; where the Community national in question no longer represents a direct and imminent danger to the fundamental interests of society, he should again be allowed to exercise his right of free movement. It hardly seems possible to define in general terms those cases in which national authorities are obliged to admit that, in a particular specific case, valid grounds no longer exist for the imposition of restrictions upon that right. The fact that an individual must be in a position to ascertain in an appropriate manner the reasons justifying a restrictive measure relating to him moreover constitutes a principle of good administration generally accepted in the Netherlands. This might imply in certain circumstances that the reasons should be communicated to him in his mother tongue unless he is fluent in the language of the place where he resides.

The principles of proportionality and non-discrimination

It is to be inferred from the *Bonsignore* judgment that the restrictions on the right of free movement must be applied having regard to the circumstances of each individual case. It is not permitted to terminate the right of residence or to withhold such right for reasons which although they certainly may be related to protection of public policy cannot be directly ascribed to the behaviour of the person in respect of whom the measure is adopted. The principle of non-discrimination is concerned not only with formal inequalities. Inequality of specific treatment also implies selective safeguarding of public policy based on nationality and therefore constitutes a case of prohibited discrimination.

F — Observations submitted by the United Kingdom

The concept of public policy. The United Kingdom also takes the view that it is neither necessary nor even possible to give a definition of public policy as such. The term may be interpreted only in the circumstances of each individual case. There is no question of excluding certain factors from its scope merely because they do not constitute criminal offences (cf. the *Van Duyn* and *Rutili* cases). The procedure under Article 177 and the judgments of the Court delivered to date, in conjunction with other safeguards provided for by Community law, offer a wholly satisfactory approach. That basis enables a careful balance to be made between the needs and aims of each Member State which seeks to protect its legitimate interests (and those of individuals) within its borders, on the one hand, and the needs of the Community and nationals of Member States within the Community, on the other.

Procedural safeguards. As to the general question about the nature of the safeguards to be provided by the Member States, the answer is to be found in the provisions of Directive No 64/221 and the decisions of the Court thereon. The detailed questions raised by the court making the reference appear to be directed towards establishing the broad proposition that the opinion referred to in Article 9 of the directive should be arrived at impartially. The courts of Member States are competent to assess the validity of the opinion given in a particular case, specific answers to those questions not being necessary. Moreover, since procedural fairness can only be judged in the light of the circumstances of each particular case as a whole and the nature of the competent authority and procedure to be followed before it will vary as between Member States, it would be inappropriate for the Court to lay down precise general procedural rules beyond those contained in the directive.

G — *Observations submitted by the Commission*

The concept of public policy and its limitations (Questions A (1) and (2)). The Community legislature has endeavoured not to give a common definition of public policy but to guide the conduct of the national authorities by laying down certain essentially negative criteria. The power not of defining in the abstract but rather of attributing a specific content to the concept of public policy by the application thereof was left to the Member States. This entails an important consequence with regard to the Court's intervention within the framework of preliminary proceedings: it may not be called upon to criticize a case of specific application of the concept where a public policy measure has been adopted by the authorities of a Member State. It is in fact the responsibility of the national courts to ascertain whether individual decisions conform to the provisions of Community law (cf. *Rutili* judgment).

Rather than attempting to give an exhaustive list of the limits of Community law to which public policy measures adopted by the national authorities are subject, the Commission prefers to describe the legal foundations on which such limits are based. They may be grouped in four categories. In the first place there are limits deriving from the very nature of the measures taken on grounds of public policy in the Community context, which must be interpreted strictly (cf. *Van Duyn* case). Then there are limits connected with observance of the fundamental principles of Community law and in particular the principle of non-discrimination. The Commission considers it appropriate to strike a balance between the application of the principle of non-discrimination, a pre-condition for which is of course the objective comparability of situations, and the power accorded to Member States to adopt public policy measures limiting the free movement of persons and applying therefore specifically to Community nationals. Measures taken in cases where Articles 48 (3) and 56 of the Treaty are applied are however subject to the second fundamental principle of the Community legal order, that of proportionality. It is appropriate not only to

ascertain whether the measure is really necessary in order to uphold public policy, which would be to interpret the exception strictly, but also to establish that the threat is sufficiently serious to justify the measure envisaged. In other words, the assessment relates not only to the justification of the measure itself *(Rutili* judgment) but a comparison is also made of the two interests involved, the protection of national public policy on the one hand and the free movement of persons on the other, having regard to the fundamental character of the principle of free movement, which the Court vigorously re-affirmed, in particular in the cases of *Royer,* cited above, 118/75 *(Watson* [1976] ECR 1185) and *Sagulo,* cited above. In more general terms, the Court stated in the *Bouchereau* judgment that reliance by a national authority on the concept of public policy presupposes in any event the existence, quite apart from the disturbance to the social order represented by any infringement of the law, of a genuine and sufficiently serious threat, affecting a fundamental interest of society. Finally, there is one last limitation under Community law on recourse to national public policy measures: the person concerned must enjoy the protection of adequate procedural safeguards enabling him to put forward his defence. This was stated in the *Royer* judgment and was embodied in the *Rutili, Bouchereau, Pecastaing* and *Santillo* judgments.

Scope of the principle of non-discrimination (Question A (3)). This principle does not operate where the situations or measures envisaged are not comparable. Moreover, it only applies subject to special provisions laid down in the Treaty and the regulations and directives issued for its implementation *(Sagulo* judgment).

Scope of the principle of proportionality (Questions A (7) and (8)). The examination to which a public policy measure is subject, as regards observance of this principle, relates in the first place to the extent to which the proposed measure encroaches upon the principle of free movement. The view was taken in the *Watson and Belmann* judgment that, among the penalties imposed for failure to observe the prescribed declaration and registration formalities, expulsion is certainly incompatible, in the case of persons protected by Community law, with the provisions of the Treaty, since such a measure constitutes the negation of the very right conferred and guaranteed by the Treaty. This does not of course mean that expulsion, which thus constitutes a particularly serious penalty, may not, in a specific case, according to the circumstances, also have considerable personal repercussions for the person concerned.

Interpretation of the concept of "sufficiently serious threat" (Question A (12)). Mr Advocate General Mayras, in his opinion in the *Bonsignore* case, merely expressed in other terms the requirement laid down by the Court that, on the one hand, the derogation is to be strictly interpreted and that therefore there must be a "genuine and sufficiently serious threat, affecting a fundamental interest of society" *(Bouchereau* judgment) and, on the other hand, the proposed measure must be necessary to safeguard the needs in question in a democratic society *(Rutili* judgment).

Must the personal conduct justifying the measure be the subject of a criminal penalty? (Questions A (4), (5) and (6)). The *Van Duyn, Watson and Belmann, Sagulo* and *Bouchereau* judgments clearly illustrate that there is no necessary connection between the classification of the threat to public policy posed by a Community national as a criminal offence and the requirement that that threat should be of a sufficiently serious nature. In the context of conduct which is not criminally punishable, and having regard to the discretion accorded to Member States in determining the content of the concept of public policy, the necessary control by the Community institutions is only possible if the Member State concerned has, in one way or another, indicated clearly and unequivocally its assessment of the harmful nature of the conduct or activity concerned and its intention to adopt measures with respect to foreign nationals. The Commission takes the view that in such a case, at least by analogy with Article 7 of the European Convention on Human Rights, there is a general requirement that conduct may not be the subject of repressive measures if such measures were previously unknown.

Interpretation of the "measure of a general preventive nature" (Question A (1)). The measures adopted in the circumstances described are not measures of a general preventive nature as referred to in the *Bonsignore* judgment. The fact that a measure is justified by an individual's belonging to a category or group whose activity is regarded as repugnant to public policy does not make it a general preventive measure since, in each individual case where it is applied, it is so applied exclusively because it is considered that the individual belonging to that group constitutes, by his presence or his activity, even in the past (cf. *Bouchereau* judgment), a genuine and sufficiently serious threat affecting a fundamental interest of society. There is a general preventive measure if additionally or exclusively the object of the restrictive measure was to achieve a deterrent effect with respect to the category of persons concerned. If however the measure is exclusively justified "either because public policy has been seriously affected by the offence committed or because it is to be feared that the person concerned will repeat the anti-social acts in question" (Opinion of Mr Advocate General Mayras in the *Bonsignore* case) it is not a measure of a general preventive nature.

Interpretation of the concept of personal conduct (Question A (11)). If the measure is based on the fact that persons engaged in the "profession" of prostitution constitute in certain countries a means of supporting criminal activities, the failure to ascertain whether such connections are or have been established in the specific case of the person concerned constitutes a breach of the requirement that personal conduct must be examined.

May private conduct be taken into account? (Question A (9)). It is not possible to formulate a general principle relevant to the assessment of a public policy measure under Community law,

relating to the "private" or "public" nature of certain conduct. If conduct forming part of a person's private life is regarded by a national authority as having repercussions outside that person's private life, the Member State concerned may, by application of the principles laid down by the Court, take the view that its intervention is required in order to uphold public policy. This is the case particularly in the field of morals: there are various types of conduct, of the sexual and other kinds, which are purely private, and which are viewed very differently as between one Member State and another and even, within a single Member State, from one period to another.

May an expulsion measure be definitive? (Question A (13)). A definitive decision expelling a person from the territory of a Member State undeniably constitutes an extremely serious measure, as the Community national sees a right which he acquires directly from the Treaty permanently nullified (*Watson and Belman* judgment). Every public policy measure adopted with respect to a Community national must be justified by a genuine and sufficiently serious threat affecting a fundamental interest of society (*Bouchereau* judgment). An assessment of this kind is necessarily dependent on a number of specific circumstances which, by definition, vary from one period to another (*Van Duyn* judgment). The past conduct of the person concerned may justify intervention by the authority provided that a genuine threat still exists (*Bouchereau* judgment). Therefore, a definitive expulsion order, regardless of the conduct which gave rise to it, is in breach of the principle of proportionality and disregards the principle of restrictive interpretation of the derogation provided for in Article 48 (3) of the Treaty. This does not on the other hand mean that a measure denying access to national territory may not be repeated in response to each fresh application, provided that the national authority can prove that each refusal falls within the limits of Community law described above.

Obligation to state the reasons for decisions (Question A (14)). The requirement that grounds must be stated, emphasized in the *Rutili* and *Royer* judgments, implies in particular that the State concerned must indicate "precise and complete" grounds for the decision so as to enable the person in question to make the appropriate preparations for his defence. Accordingly, a general statement of grounds not directly and precisely related to the behaviour to the Community national concerned does not satisfy this requirement. As regards the language used, the effectiveness of the safeguard provided by the requirement of a statement of grounds cannot be guaranteed with certainly unless the grounds are indicated in the national language of the persons concerned or, in the case of nationals of multilingual Member States, in the national language which they speak.

Minimum procedural safeguards (Question B (1)). Protection appears to be insufficient in three cases: where there is no appeal to a court of law against the decisions described in Article 8 of the

directive; where such appeals to courts of law are available but enable only the legal validity of the decision to be reviewed, to the exclusion of any examination of the substance; where such appeals, even where concerned with the substance of the case, have no suspensory effect (cf. Opinion of Mr Advocate General Capotorti in the *Pecastaing* case and the *Santillo* judgment).

Questions B (2) and (3). The requirement that a different authority be consulted fails totally to ensure observance of minimum procedural safeguards unless it seeks to ensure the independence of the members of that authority with respect to the authority in which the power of decision is vested. The Commission espouses the view taken by Mr Advocate General Capotorti according to which, if such independence is to be effective, it is essential "that the person or persons comprising the advisory body should have no links whatsoever with the authority required to take the decision" (*Pecastaing* case). It is appropriate to conclude, as did the Court in the *Santillo* judgment, that "The directive leaves a margin of discretion to Member States for defining the 'competent authority'. Any public authority independent of the administrative authority called upon to adopt one of the measures referred to by the directive, which is so constituted that the person concerned enjoys the right of representation and of defence before it, may be considered as such an authority". The Commission notes that, as far as it knows, the Consultative Committee never includes among the members of it involved in making the decision officials of the Ministry of Justice. The fact that an official of that ministry is responsible for the secretarial duties of the Committee is not liable to endanger its impartiality, since secretarial duties constitute merely an executive function and not a decision-making function. It is true that Article 10 of the Law of 28 March 1952 does not exclude the possibility of the inclusion on the Committee of a magistrate from the Public Prosecutor's Office. Such a situation might call in question the impartiality of the Committee, since the Public Prosecutor's Office may be called upon to intervene at a stage of proceedings prior to consultation of the Committee. The fact that the decision-making authority is the one who pays the members of the Committee does not however appear to call in question the impartiality of the latter since the same is true in the case of magistrates in civil and criminal courts. Finally, as regards proceeding before the Committee, the Director of Public Security or his representative takes part in the discussions but not in the decisions.

Questions on procedure before the Consultative Committee (Questions B (4), (5), (6), (7), (12), (13), (14) and (15)). Article 9 (1) of the directive provides that, in the event of compulsory intervention of the Consultative Committee, the person concerned must have an opportunity to put forward his defence and have himself assisted or represented on the terms, as to procedure, laid down by national legislation. This requirement is not mentioned in Article 9 (2) which deals with consultation, at the request of the person concerned, with the independent authority. The Commission is of the opinion that, if explicit reference is thus made to the national rules of procedure where comparatively more important interests (refusal to renew a residence permit or a decision deporting the holder of a residence permit) are involved, the

same rule should apply in the case where the Committee's participation relates to relatively less important matters (refusal to grant a first residence permit). Since a directive binds the Member State to which it is addressed with regard only to the result to be achieved, the Member State must therefore achieve the objective embodied in Article 9 (2), namely consultation at the request of the person concerned with the independent authority, but is permitted freely to lay down the rules of procedure for such consultation. This principle has been confirmed, in a wider context, by the judgments in Cases 33/76 (*Rewe* [1976] ECR 1989) and 45/76 (*Comet* [1976] ECR 2043), from which it appears that "in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law". These two judgments have however clarified matters in two important ways for the purposes of the present cases: the national procedural conditions may not be less favourable than those relating to similar actions of a domestic nature (cf. Opinion of Mr Advocate General Capotorti in the *Pecastaing* case) and the application of national rules of procedure must not make it impossible in practice to exercise rights which the national courts are under an obligation to safeguard. The Commission is therefore of the opinion that there is no need to answer the questions except in so far as the application of restrictive rules renders impossible in practice the consultation provided for in Article 9 (2) of the directive and the presentation of a defence. This applies particularly with regard to Question B (6), since the provision referred to may in certain cases be employed to limit a right conferred on the person concerned by a Community provision. The same applies with regard to Question B (7), with regard to which it is logical to admit that although Article 9 (2) enables the person concerned to present his defence, the unavoidable consequence is that his defence must be examined and countered by the independent authority consulted. Finally, the same applies with regard to Questions B (11), (12) and (13) regarding access to the file on the case. The Commission refers to the Opinion of Mr Advocate General Capotorti in the *Pecastaing* case. Access by the person concerned, directly or through his Counsel, to the complete file on the case as placed before the Committee is essential for the defence. The only factor which might limit access to the file is the possible existence of "reasons of State security", in which case the administration must prove the existence of such reasons to the independent authority. The procedure for consulting the file must reasonably allow the Community national to put forward his defence, with respect both to the time-limit for consultation and to any travelling expenses. The answer to Question B (15) is to be seen against the same background.

In Case 116/81 the Commission adds that for the Aliens Office to place the matter before the Committee at a time when the person concerned has not yet obtained his residence permit would fall

outside the scope of Article 9 (2) of the directive. The Commission considers however that the aim of that provision is to provide minimum safeguards for Community nationals and that Community law may not prevent a Member State from affording in fact a more extensive safeguard by approaching the Committee on its own initiative even with regard to measures envisaged against persons who do not yet hold a residence permit. Such a practice might, if it became widespread, encourage Community nationals not to comply with the time-limit laid down in the Royal Decree of 22 December 1969 and would therefore detract from their rights in so far as they would, at a later stage, be met with the argument that their action was out of time.

Questions of procedure relating to the burden of proof (Questions B (8), (9) and (10)). Although Article 9 (2) of the directive grants Community nationals the right of consultation with an independent authority, this is so that there may be a review not only of the legal validity but also of the appropriateness of the proposed measure before the decision is definitively adopted (*Pecastaing* judgment). The logical result is that the authority which adopts the decision must submit to the independent authority a file establishing, in full and incontestably, the nature of the alleged infringements, the need for the proposed measures and the fact that they are commensurate with the alleged threat (*Santillo* judgment). It may be seen from the *Royer* judgment that since a self-employed or employed Community national is entitled to enter and reside in a Member State, the burden of proof falls upon the authority. The Commission is of the opinion that determination of the extent to which previous criminal convictions may be relied on must be governed by national law. It may be seen from the *Bouchereau* judgment that the existence of a genuine threat to public policy may be constituted by criminally punishable conduct in the state of origin even in the absence of any criminal conviction. Finally, a "report on morality" drawn up by the local police of the district where the person concerned resides, giving details regarding his conduct, etc., on the basis of general information, is not alone sufficient reliably to establish the existence of a genuine and sufficiently grave threat affecting a fundamental interest of society.

III — Oral procedure

At the sitting on 13 January 1982 oral argument was presented by the following: L. E. Misson, of the Liège Bar, for the plaintiffs in the main proceedings; J.-P. Soumagne and E. E. Jeunehomme, of the Liège Bar, for the Belgian Government; Bernard Botte, acting as Agent, for the French Government; O. Fiumara, State Advocate, for the Italian Government; and Francis Herbert, of the Brussels Bar, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 16 February 1982.

Decision

1 By orders of 8 May 1981, received at the Court Registry on 12 May 1981, the President of the Tribunal de Première Instance [Court of First Instance], Liège, in interlocutory proceedings, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 7, 48 (3), 56 (1) and 66 of the Treaty and of Directive No 64/221/EEC of the Council, of 25 February 1964, on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117), and in particular Articles 3, 6, 8 and 9 thereof.

2 The questions were raised in actions brought against the Belgian State by the plaintiffs in the main proceedings, who are of French nationality, in connection with the refusal by the administrative authority to issue a permit enabling them to reside in Belgian territory, on the ground that their conduct was considered to be contrary to public policy by virtue of the fact that they were waitresses in a bar which was suspect from the point of view of morals.

3 The Belgian Law of 21 August 1948 terminating official regulation of prostitution prohibits soliciting, incitement to debauchery, exploitation of prostitution, the keeping of a disorderly house or brothel and living on immoral earnings. It provides that supplementary regulations may be adopted by municipal councils, provided that their purpose is to uphold public morality or to ensure the keeping of the public peace. The police regulation of the City of Liège of 25 March 1957 and subsequent orders provide that persons engaged in prostitution may not display themselves to passers-by, that the doors and windows of the premises where they pursue their activity are to be closed and covered so that it is impossible to see inside and that those persons may not stand in the street near such premises.

4 The questions submitted by the national court, the wording of which is practically identical in both cases, have been divided by the court making the reference into two groups, entitled "The concept of public policy" and "Procedural safeguards". In view of the fact that the questions in the two

cases are almost identical, it is appropriate to join the cases for the purpose of the judgment.

I — The concept of public policy

Questions 1 to 9, 11 and 12

5 Questions 1 to 9, 11 and 12 are essentially concerned with the question whether a Member State may, by virtue of the reservations contained in Articles 48 and 56 of the EEC Treaty, expel from its territory a national of another Member State or deny him access to that territory by reason of activities which, when attributable to the former State's own nationals, do not give rise to repressive measures.

6 Those questions are motivated by the fact that prostitution as such is not prohibited by Belgian legislation, although the Law does prohibit certain incidental activities, which are particularly harmful from the social point of view, such as the exploitation of prostitution by third parties and various forms of incitement to debauchery.

7 The reservations contained in Articles 48 and 56 of the EEC Treaty permit Member States to adopt, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto. Although that difference of treatment, which bears upon the nature of the measures available, must therefore be allowed, it must nevertheless be stressed that, in a Member State, the authority empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.

8 It should be noted in that regard that reliance by a national authority upon the concept of public policy presupposes, as the Court held in its judgment of 27 October 1977 in Case 30/77 *Bouchereau* [1977] ECR 1999, the existence of "a genuine and sufficiently serious threat affecting one of the fundamental

interests of society". Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or other genuine and effective measures intended to combat such conduct.

9 The answer to Questions 1 to 9, 11 and 12 should therfore be that a Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.

The tenth question

10 In the tenth question, the national court asks whether the action taken by a Member State which, "anxious to remove from its territory prostitutes from a given country because they could promote criminal activities, does so systematically, declaring that their business of prostitution endangers the requirements of public policy and not taking the trouble to consider whether the persons concerned may or may not be suspected of contact with the 'underworld' ", constitutes a measure of a general preventive nature within the meaning of Article 3 of Directive No 64/221.

11 It should be noted that Article 3 (1) of the directive provides that measures taken on grounds of public policy or of public security are to be based exclusively on the personal conduct of the individual concerned. In that regard it is sufficient to refer to the judgment of 26 February 1975 in Case 67/74 *Bonsignore* [1975] ECR 297, in which the Court held that "measures adopted on grounds of public policy and for the maintenance of public

security against the nationals of Member States of the Community cannot be justified on grounds extraneous to the individual case, as is shown in particular by the requirements set out in paragraph (1) that 'only' the 'personal conduct' of those affected by the measures is to be regarded as determinative".

The thirteenth question

12 As regards the possibility for a person against whom a decision has been taken ordering his expulsion from the territory of a Member State to be re-admitted to the territory of the State in question and apply there for a fresh residence permit, it must be stressed that any national of a Member State who wishes to seek employment in another Member State may re-apply for a residence permit. Such an application, when submitted after a reasonable period has elapsed, must be examined by the competent administrative authority in the host State, which must take into account, in particular, the arguments put forward by the person concerned purporting to establish that there has been a material change in the circumstances which justified the first decision ordering his expulsion. However, where such a decision has been validly adopted in his case in accordance with Community law and continues to be legally effective so as to exclude him from the territory of the State in question, Community law contains no provision conferring upon him a right of entry into that territory during the examination of his further application.

The fourteenth question

13 Article 6 of Directive No 64/221 provides that the person concerned is to be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based unless this is contrary to the interests of the security of the State. It is clear from the purpose of the directive that the notification of the grounds must be sufficiently detailed and precise to enable the person concerned to defend his interests. As regards the language to be used, it appears from the file on the case that the plaintiffs in the main proceedings are of French nationality and that the decisions affecting them were drawn up in French, so that the relevance of the question is not clear. It is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof.

II — Questions regarding procedural safeguards

14 These questions relate essentially to the composition of the "competent authority" referred to in Article 9 of Directive No 64/221, the qualifications and the term of office of its members, possible connections between those members and the authority remunerating them, the manner in which the matter is brought before the authority and the procedure before that authority.

15 The object of Article 9 (1) of the directive is to ensure a minimum procedural safeguard for persons against whom an expulsion measure has been adopted. Where any appeal to a court of law against administrative measures relates only to the legal validity of the decision, the intervention on the part of the competent authority must make it possible for an examination to be made of the facts and circumstances, including the discretionary factors on which the measure in question was based, before the decision is definitively adopted. The person concerned must be entitled to put forward to the competent authority his arguments in defence and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation. Paragraph (2) of the same article provides that persons against whom decisions have been adopted refusing the issue of a first residence permit or ordering expulsion before the issue of the permit may request that such decisions be considered by the competent authority.

16 The directive does not specify how the competent authority referred to in Article 9 is appointed. It does not require that authority to be a court or to be composed of members of the judiciary. Nor does it require the members of the competent authority to be appointed for a specific period. The essential requirement is that it should be clearly established that the authority is to perform its duties in absolute independence and is not to be directly or indirectly subject, in the exercise of its duties, to any control by the authority empowered to take the measures provided for in the directive. Provided that that requirement is satisfied, it is not contrary to the provisions of the directive, or to its pupose, for the remuneration of the members of the authority to be charged to the budget of the department of the administration of which the authority empowered to take the decision in question forms part or for an official belonging to that administration to serve as secretary to the competent authority.

17 As regards the manner in which the matter is brought before the competent authority in the circumstances referred to in Article 9 (2) of the directive, the latter contains no binding provision as regards the procedures in that respect. Although it does not prevent the person concerned from making a direct application to the authority, it does not require such an application and it allows the Member States a choice in that respect, provided that the matter is brought before the State authority once the person concerned has so requested.

18 As regards the form of the opinion of the competent authority, it is evident from the objectives of the system provided for by the directive that the opinion must be duly notified to the person concerned but the directive does not require the opinion to identify by name the members of the authority or indicate their professional status.

19 As regards the questions relating to procedure before the competent authority, including not only the rules of procedure but also the rules of evidence, it is sufficient to point out, as has been indicated above, that Article 9 (1) of Directive No 64/221 expressly provides that the person concerned must be entitled to put forward his arguments in defence before that authority and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation. Those conditions must not be less favourable to the person concerned than the conditions applicable to proceedings before other national authorities of the same type.

Costs

22 The costs incurred by the Belgian Government, the French Government, the Italian Government, the Netherlands Government, the United Kingdom and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the President of the Tribunal de Première Instance, Liège by orders of 8 May 1981, hereby rules:

1. A Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State's own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.

2. Circumstances not related to the specific case may not be relied upon in respect of citizens of the Community, as justification for measures intended to safeguard public policy and public security.

3. Any national of a Member State who wishes to seek employment in another Member State may, if a measure expelling him from the territory of that State has previously been adopted, reapply for a residence permit. Where such an application is lodged after a reasonable period has elapsed, it must be examined by the appropriate administrative authority in the host State, which must take into account, in particular, the arguments put forward by the person concerned in order to establish that there has been a material change in the circumstances justifying the first expulsion measure.

4. The notification of the grounds relied upon to justify an expulsion measure or a refusal to issue a residence permit must be sufficiently detailed and precise to enable the person concerned to defend his interests.

5. Community law does not require that the competent authority referred to in Article 9 of Directive No 64/221 be a court or be made up of members of the judiciary, or that its members be appointed for a specified period. It is not contrary to Community law for the remuneration of the members of the authority to be charged to the budget of the department of the administration of which the authority empowered to take the decision in question forms part, or for an official belonging to that administration to serve as secretary to the competent authority.

6. Although Directive No 64/221 does not prevent the person concerned from making a direct application to the competent authority it does not require such an application and it allows the Member States a choice in that respect, provided that the person concerned is entitled to make such an application if he so requests.

7. The opinion of the competent authority must be duly notified to the person concerned.

8. The person concerned must be entitled to put forward to the competent authority his arguments in defence and to be assisted or represented in such conditions as to procedure as are provided for by domestic legislation. Those conditions must not be less favourable to the person concerned than the conditions applicable to proceedings before other national authorities of the same type.

Mertens de Wilmars Bosco Touffait Pescatore Mackenzie Stuart

O'Keeffe Koopmans Everling Chloros

Delivered in open court in Luxembourg on 18 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President