OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 12 October 1989 *

Mr President,
Members of the Court,

1. Lothar Messner, a national of the Federal Republic of Germany, with a fixed address in Germany, resided in Italy in order to work as a consultant on behalf of an Italian subsidiary of a German undertaking for which he works.

2. The documents forwarded by the national court show that he arrived in Italy on 27 April 1987 and that on 8 May 1987 he reported the theft of his car to police headquarters at Volterra. By a report of 4 June 1987, the police informed the local magistrate (Pretore) that he had not made the prescribed declaration of residence within three days of entering Italy.

3. In those proceedings, the Pretore has referred the following question to the Court:

'May Article 3(c) in conjunction with Article 56(1) of the EEC Treaty be interpreted as meaning that it is lawful for Italy to impose on nationals of another Member State of the Community an obligation to make a formal declaration of residence within three days of entering Italian territory, failing which they are liable to a criminal penalty, in view of the fact that a feudal obligation of that kind whose nature and purpose are manifestly oppressive and which is clearly inspired by xenophobia, cannot be justified on any specific ground of public policy, public security or public health?'

4. Let me point out straight away that the question concerns exclusively the obligation to make a declaration imposed directly on nationals of other Member States and not the obligations imposed by Italian legislation on hoteliers, hospitals, private persons, and so on, in relation to the residence of foreigners.

5. Proceedings were brought against Lothar Messner under Article 142 of the consolidated laws on public security, approved by Royal Decree No 773 of 18 June 1931, which provides that:

'Foreigners are required to report, *within three days of entering State territory*, to the public security authority of the place where they are, in order to make themselves known and to make a declaration of residence. The same requirement applies to foreigners when they transfer their residence from one commune in Italy to another. Foreigners making only a short stay, who reside on Italian territory for recreational purposes for not more than two months shall be required to make only the first declaration of entry'.

* Original language: French.

6. Article 17 of the Consolidation Act lays down the relevant penalties:

'Infringements of the provisions of this consolidation act for which no penalty is provided or for which the Penal Code does not make provision shall be punishable by a term of imprisonment of up to three months or a fine of up to LIT 80 000'.

In the meantime, the maximum fine has been increased to LIT 400 000.

7. The obligation for nationals of other Member States to report their presence to the police was later dispensed with,[1] except for employed persons and persons providing or receiving services who enter Italy with the intention of staying there for only three months or less. Those who take up residence in Italy with the intention of carrying on an activity there for more than three months are required to apply for a 'residence card for a citizen of a Member State of the European Communities'. Thus, the competent authorities are thereby notified of the presence of such persons within national territory.

8. Let us first consider whether the legislation at issue is in principle compatible with Community law.

A — Principle

9. Lothar Messner resided in Italy either as an employed person or as a supplier of services. For our purposes here, the provisions of Community law applicable to both cases are based on identical principles.

10. First of all, Article 8 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (Official Journal, English Special Edition, 1968 (II), p. 485) provides that:

'1. Member States shall, without issuing a residence permit, recognize the right of residence in the territory of . . . a worker

a) pursuing an activity as an employed person, where the activity is not expected to last more than three months . . .

2. In all the cases referred to in paragraph 1, *the competent authorities of the host Member State may require the worker to report his presence in the territory.*'

11. Moreover, Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal L 172, 28.6.1973, p. 14) provides that

'the right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

1 — See Articles 1, 2 and 3 of the Decree of the President of the Republic No 1656 of 30 December 1965, GURI No 55, 3. 3 1966, as amended by Law No 127 of 4 April 1977, GURI No 105, 19. 4 1977.

Where such a period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. *The Member State may, however, require the person concerned to report his presence in the territory*'.

12. Since the position in Community law is thus perfectly clear, it is not surprising that in its judgment of 7 July 1976 in Case 118/75 *Watson and Belmann* [1976] ECR 1185, the Court stated that:

'(i) Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory;

(ii) under the terms of Article 8(2) of Directive No 68/360/EEC and Article 4(2) of Directive No 73/148/EEC, the competent authorities in the Member States may require nationals of the other Member States to report their presence to the authorities of the State concerned;

(iii) such an obligation could not in itself be regarded as an infringement of the rules concerning freedom of movement for persons' (paragraphs 17 and 18).

13. Of course, it is understandable that the Pretore di Volterra considers the provisions at issue as incompatible with the growing feeling of the citizens of the Member States that they belong to a true community of peoples and are no longer foreigners, in the full sense of the word, in any of the other 11 countries.

14. On the other hand, the desire of the governments of the Member States to achieve, as soon as possible, the complete abolition of controls on persons at frontiers will probably mean that some formalities will be retained within countries in order to trace offenders of all kinds and to enable national authorities to identify the persons who are temporarily carrying on economic activities in the national territory.

15. However, with regard to a measure such as the one at issue, the Court is not required merely to take formal note of it. As it pointed out in paragraph 18 of the judgment in *Watson and Belmann*, an infringement of the rules concerning freedom of movement for persons

'might result from the legal formalities in question if the control procedures to which they refer were such as to restrict the freedom of movement required by the Treaty or to limit the right conferred by the Treaty on nationals of the Member States to enter and reside in the territory of any other Member State for the purposes intended by Community law'.

16. Consideration must therefore also be given to the question whether freedom of

movement is restricted by a time-limit which is too short for making the declaration of arrival and a penalty which is too severe in the case of an infringement of the rule.

19. In only one of them, Germany, are the rules more restrictive than in Italy. In Germany, the declaration of arrival must be made 'immediately' ('unverzüglich'). (That rule too only applies for periods of residence of more than one month and less than three months for the purpose of gainful employment.)

B — The time-limit

17. In *Watson and Belmann*, the Court stated that

'as regards the period within which the arrival of foreign nationals must be reported, the provisions of the Treaty are only infringed *if the period fixed is unreasonable*' (paragraph 19).

18. However, it is certainly not easy to establish what constitutes a reasonable time-limit. According to the Italian Government,

'the time-limit of three days for reporting to the public security authority is not unreasonable: it seems to accommodate fairly the requirements of a foreigner who has entered the national territory and the aims of receiving information [about the movements of foreigners within the national territory] and of protection [of public order] which the rule seeks to meet'. [2]

It may be useful to look at the situation in the other Member States by way of comparison.

20. In all the Member States, the rules are more liberal. No declaration of arrival is required in Ireland or France. In the United Kingdom the rules in force at the present time require a declaration of arrival to be made within seven days, but the competent authorities do not apply the rules to nationals of the other Member States. In Denmark, a self-employed person or employed person who takes up residence for less than three months need only make a declaration to the tax authorities. However, no time-limit is prescribed for that declaration. In the other Member States, a declaration of arrival must be made within eight days (Belgium, Greece, Luxembourg, the Netherlands), 10 days (Portugal) or 15 days (Spain).

21. In order to assess whether or not the three-day period allowed by Italy is reasonable, account must also be taken of the fact that the period starts to run once the frontier has been crossed. However, it may easily take a traveller coming from northern Europe at least two days to reach a place in the southern part of the Italian peninsula.

22. He then needs time to inquire about the various administrative formalities which his

2 — Observations of the Italian Republic, pp. 4 and 5.

residence entails and to establish which authority he must report to in order to make the declaration of residence. In fact, depending on the size of the locality, he must report either to the 'sindaco', or to the 'commissariato di polizia', or to the 'questura'. [3]

23. Finally, in my opinion, the purpose of the obligation to make that declaration of arrival must also be taken into consideration.

24. Inasmuch as the obligation is intended to reveal the presence of foreign offenders at a certain place in the national territory, it is obviously in the interests of public order and public security that their presence should come to the attention to the authorities as soon as possible. However, there can be no doubt that those who have something to hide take good care not to make a declaration of arrival. Therefore, as far as they are concerned, the time-limit of three days will remain a dead letter.

25. However, the provision is also intended, more generally, to enable 'the national authorities to have an exact knowledge of population movements affecting their territory' (see paragraph 17 of the judgment in *Watson and Belmann*). In my view, since those concerned will remain in the country for up to three months, the public interest is not seriously harmed if they do not make the declaration until eight or even 10 days after their arrival.

26. For all those reasons, in my view, the period of three days imposed by Italy cannot be regarded as 'reasonable', as stipulated in the judgment in *Watson and Belmann.*

C — The penalties

27. With regard to the penalties which national authorities may legitimately impose in such cases, we find valuable criteria for assessment in the judgments in *Watson and Belmann* and *Pieck.* [4]

28. In paragraphs 20 and 21 of the judgment in *Watson and Belmann,* the Court stated that:

'among the penalties attaching to a failure to comply with the prescribed declaration and registration formalities, *deportation, in relation to persons protected by Community law, is certainly incompatible* with the provisions of the Treaty since, as the Court has already confirmed in other cases, such a measure negates the very right conferred and guaranteed by the Treaty;

as regards other penalties, such as fines and detentions, whilst the national authorities are entitled to impose penalties in respect of a failure to comply with the terms of provisions requiring foreign nationals to notify their presence *which are comparable to those attaching to infringements of provisions of equal importance by nationals,* they are not justified in imposing a penalty so disproportionate to the gravity of the

3 — B. Nascimbene: *Lo Straniero nel diritto italiano,* Milan, Giuffré editore, 1988, pp. 22 and 23.

4 — Judgment of 3 July 1980 in Case 157/79 *Regina* v *Stanislaus Pieck* [1980] ECR 2171.

infringement that it becomes an obstacle to the free movement of persons'.

29. In the judgment in *Pieck*, the Court made clear its view on the penalty of imprisonment. In paragraph 20 of the judgment it stated:

'The failure on the part of a national of a Member State of the Community, to whom the rules and freedom of movement for workers apply, to obtain the special residence permit prescribed in Article 4 of Directive 68/360/EEC may not be punished by a recommendation for deportation or by measures which go as far as imprisonment.'

30. In that case the infringement was not the same inasmuch as the offender had failed to obtain a residence permit. Obviously, when a foreigner fails to make a declaration of arrival, as Lothar Messner did, he commits a less serious offence. Therefore, imprisonment should *a fortiori* be ruled out in such cases.

31. With regard to the amount of the fine, the following observations may be made: the fines imposed by the other Member States to punish a failure to make a declaration vary from BFR 60 to 1 500 in Belgium, from LFR 250 to 2 500 in Luxembourg, and not more than HFL 5 000 in the Netherlands and DM 5 000 in Germany.

32. By way of comparison, the Commission points out in its written observations that Article 11(2) of Italian Law No 1228 of 24 September 1954,[5] imposes a fine of only up to LIT 10 000 for failure to discharge an equivalent obligation, namely the obligation imposed both on Italian nationals and foreign nationals to apply for registration in the commune in which they take up residence after a period of residence abroad. That fine has since been raised to LIT 50 000.

33. In my view, that provision is a good benchmark for the application of the principle of 'penalties which are comparable to those attaching to infringements of provisions of equal importance by nationals' laid down by the Court in its judgment in *Watson and Belmann*. As the infringement consisting in not making a declaration of arrival is certainly not more serious than the infringement which consists in not registering with the commune when taking up a permanent residence, I am of the opinion that a national court should not impose a higher fine for failure to make a declaration of arrival than it would impose for failure to register with the commune.

34. Moreover, a fine which may be as much as LIT 50 000 (approximately BFR 1 500) could scarcely be regarded as

'a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons' (paragraph 21 of the judgment in *Watson and Belmann*).

5 — GURI No 8, 12.1.1955.

35. In conclusion, I propose that the Court should reply to the question referred to the Pretore di Volterra in the following way:

'Community law does not in principle preclude a rule of national law which requires nationals of other Member States to make a declaration of residence.

However, the period fixed for the discharge of that obligation must be reasonable, which is not the case with a period of three days which starts from entry into the territory.

The fine imposed for failure to discharge the obligation must be comparable in kind and amount to the fine applicable to an infringement of the same gravity committed by a national of the Member State in question.'