JUDGMENT OF THE COURT (Fifth Chamber)
20 March 1997 *

In Case C-96/95,

Commission of the European Communities, represented by Pieter van Nuffel, of its Legal Service, and Horstpeter Kreppel, a national civil servant seconded thereto, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat at the same Ministry, acting as Agents, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, by not adopting within the prescribed period, or by not communicating to the Commission forthwith, the laws, regulations and administrative provisions necessary for transposing into national law Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28) and Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting as President of the Fifth Chamber (Rapporteur), C. Gulmann, D. A. O. Edward, J.-P. Puissochet and P. Jann, Judges,

Advocate General: A. La Pergola,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 24 March 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by not adopting within the prescribed period, or by not communicating to the Commission forthwith, the laws, regulations and administrative provisions necessary for transposing into national law Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28) and Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty.

Directives 90/365 and 90/364

2 Article 1 of Directive 90/365 provides that Member States are to grant the right of residence to all nationals of Member States who have pursued an activity in the Community as an employee or self-employed person and to members of their families, provided that they are recipients of an invalidity or early retirement pension, or old age benefits, or of a pension in respect of an industrial accident or disease, of an amount sufficient to avoid becoming a burden on the social security system of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.

3 Article 1 of Directive 90/364 provides that Member States are to grant the right of residence to nationals of Member States who do not enjoy that right under other provisions of Community law and to members of their families, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

4 Article 2 of both directives provides that the right of residence is to be evidenced by a residence permit.

5 Under Article 5 of both directives, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directives not later than 30 June 1992 and to inform the Commission thereof forthwith.

National legislation

6 Paragraph 2(2) of the Ausländergesetz of 9 July 1990 (Law on aliens, BGBl. I, p. 1354) states:

'This Law applies to non-German nationals who are entitled to freedom of movement by virtue of Community law, save where otherwise provided by Community law and the Law on EEC residence'.

7 Paragraphs 15 and 15a of the Aufenthaltsgesetz/EWG of 22 July 1969 (Law on EEC residence, BGBl. I, p. 927), in the version published in the Notice of 31 January 1980 (BGBl. I, p. 116, BGBl. III, p. 26-2), provide as follows:

'Paragraph 15: Implementation of the Law on aliens

Subject to provisions derogating from the present Law, the Law on aliens and the regulations adopted in implementation thereof are to be applied in accordance with the version in force at the material time.

Paragraph 15a: EC regulations and directives

(1) There is no derogation from Regulation (EEC) No 1251/70 of the Commission of the European Communities of 29 June 1970 on the right of workers to

remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970(II), p. 402); to that extent, Paragraph 1(1)(5), Paragraph 1(2), first sentence, Paragraph 2(2), Paragraph 6a and Paragraph 7(2), (3), (4) and (8) are merely declaratory.

(2) The Federal Minister for the Interior may, subject to the approval of the Bundesrat, adopt measures bringing this Law into conformity with any regulations which the European Communities may adopt in respect of the entry and residence of nationals of Member States.

(3) The Federal Minister for the Interior may, subject to the approval of the Bundesrat, adopt such measures regarding the entry and residence of persons other than those referred to in Paragraph 1(1) and (2) as are necessary for the implementation of directives issued by the Council of the European Community concerning:

1. the right of residence, in accordance with Council Directive 90/364/EEC of 28 June 1990 (OJ 1990 L 180, p. 26);

2. the right of residence of employees or self-employed persons who have ceased their occupational activity, in accordance with Council Directive 90/365/EEC of 28 June 1990 (OJ 1990 L 180, p. 28);

3. the right of residence for students in accordance with Council Directive 90/366/EEC of 28 June 1990 (OJ 1990 L 180, p. 30).'

8 Paragraph 15a(3) of the Aufenthaltsgesetz/EWG was incorporated by the EWR-Ausführungsgesetz of 27 April 1993 (Law implementing the Agreement on the European Economic Area, BGBl. I, p. 512, 528) and entered into force on 1 January 1994.

The pre-litigation procedure

9 Since the Commission did not receive any notification, or other information, concerning measures for the implementation of Directives 90/364 and 90/365 in Germany, it called on the German Government by letter of formal notice of 14 October 1992 to submit its observations, in accordance with Article 169 of the EC Treaty, within two months.

10 In a communication dated 17 December 1992, which was forwarded to the Commission by letter of 5 January 1993, the German Government first of all explained that the Federal Minister for the Interior had informed the Interior Ministers of the *Länder* by circular of 30 June 1992 that, by virtue of the Ausländergesetz, residence permits as prescribed for Community nationals had to be granted to persons in the categories covered by the two directives, which accordingly formed an integral part of the legislation in force. The German Government added that it also intended formally to incorporate the two directives into the Aufenthaltsgesetz/EWG through the adoption of a new Paragraph 15a(3), conferring powers to adopt implementing measures.

11 By letter of 5 May 1993, the German Government forwarded to the Commission a communication dated 31 March 1993 concerning the transposition into national law of Directives 90/364 and 90/365, and of Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30). In that communication, the German Government maintained that the general clause in Paragraph 2(2) of the Ausländergesetz ensured that Directives 90/364 and 90/365 would be applicable on German territory. It repeated its intention of incorporating both directives into the Aufenthaltsgesetz/EWG.

12 Lastly, by letter of 2 June 1993, the German Government sent the Commission a communication, dated 20 May 1993, concerning Directive 90/366. The letter of 5 May 1993, mentioned above, was also annexed to the letter of 2 June, which was in reply to a letter from the Commission dated 23 April 1993 on the subject of Directive 90/366.

13 On 22 September 1993 the Commission delivered a reasoned opinion to the Federal Republic of Germany, calling on it to adopt the measures needed to comply therewith within two months. According to the Commission, it was clear from the German Government's communications of 17 December 1992 and 20 May 1993 that the German authorities were in the process of drafting the measures necessary for the incorporation of the two directives in the Aufenthaltsgesetz/EWG; this meant that such measures had still not been adopted or, in any event, had not yet been notified to the Commission.

14 On 24 November 1993 the German Government replied to the reasoned opinion. Annexed to that reply was the communication of 31 March 1993 and a communication of 23 November 1993 concerning the transposition of directives 90/364 and 90/365 into national law.

15 In its communication of 23 November 1993, the German Government argued that, in its communication of 31 March 1993, it had already challenged the Commission's view that the Federal Republic of Germany had not adopted the measures necessary to comply with Directives 90/364 and 90/365; moreover, the Commission had failed to address those arguments in its reasoned opinion. Referring to the communication of 31 March 1993, the German Government stressed that the primacy of Community law over domestic legislation regarding aliens had been embodied in the general clause incorporated in Paragraph 2(2) of the Ausländergesetz.

16 Lastly, the German Government stated that, although the directives do not need to be transposed as such, it intended, in the interests of legal certainty, to incorporate them expressly in the Aufenthaltsgesetz/EWG. Furthermore, the necessary enabling powers — already approved by the national legislature at the time of adopting the Law implementing the Agreement on the European Economic Area — would take effect at the same time as that Agreement.

Admissibility

17 The German Government contends that the action is inadmissible on the ground that its subject-matter is different from that of the pre-litigation procedure. It maintains that the Commission states in its application that the embodiment of the principle of the primacy of Community law in Paragraph 15 of the Aufenthaltsgesetz/EWG in conjunction with Paragraph 2(2) of the Ausländergesetz is not sufficient to transpose Directives 90/364 and 90/365 into national law; in its reasoned opinion, on the other hand, the Commission merely stated that the measures referred to in the letters of 5 January 1993 and 2 June 1993 had still not been adopted or, in any event, had not yet been notified. Accordingly, at that stage in the procedure, the Commission made no comment on the communication of 31 March 1993, from which it was clear that the effect of Paragraph 2(2) of the Ausländergesetz was to transpose Directives 90/364 and 90/365 into German law within the period prescribed.

18 Thus, in the German Government's view, the Commission disregarded the rule that, in proceedings before the Court under Article 169 of the Treaty, the subject-matter of the dispute is not determined solely by the default alleged, but also by the points relied on in support of the complaints raised against the Member State concerned.

19 In response, the Commission argues that throughout the procedure the complaint — non-transposition of the two directives — has remained the same and, therefore, the subject-matter of the dispute has not changed.

20 In support of that assertion, the Commission points out that the reasoned opinion refers expressly to the letter of 2 June 1993, to which the communication of 31 March 1993 was annexed. The actual wording of the reasoned opinion makes it clear that the Commission had studied not only the official reply of 5 January 1993 to the letter of formal notice, but also the subsequent correspondence which made no reference, however, to the procedure under way.

21 The Commission further states that, if the reasoned opinion did not contain a detailed rebuttal of the reasoning set out in the communication of 31 March 1993, that was because the Commission was awaiting the German Government's adoption of the supplementary legislation referred to in the letter of 5 January 1993 and in subsequent correspondence. The Commission explains that, when drafting the reasoned opinion, it had not regarded the arguments based on the primacy of Community law as crucial, since they could not in any case justify the infringement.

22 On that point, it should be noted first that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission (Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13).

23 As the Court has consistently held (see, in particular, Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11), the subject-matter of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any complaints other than those formulated in the reasoned opinion (see also Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 17).

24 The Court has also held (see, in particular, Case 301/81 *Commission* v *Belgium* [1983] ECR 467, paragraph 8) that the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty.

25 Admittedly, in the present case, it is only in its application that the Commission explicitly sets out its arguments to show that Paragraph 2(2) of the Ausländergesetz was insufficient to transpose Directives 90/364 and 90/365 into national law.

26 The first point to note, however, is that, throughout the procedure, the allegation made against the Federal Republic of Germany has remained the same, namely that it has failed to transpose Directives 90/364 and 90/365 into national law.

27 Secondly, the Commission did not alter the subject-matter of the declaration sought by changing the grounds relied upon. Significantly, although in its correspondence with the Commission the Federal Republic of Germany expressed the view that the two directives had already been transposed by the national legislation in force, it stressed its intention of formally incorporating them into national law in the interests of legal clarity. Moreover, it gave the Commission details of the measures planned, the enactment of which had commenced during the pre-litigation procedure with the incorporation in Paragraph 15a of the Aufenthaltsgesetz/EWG of a new subparagraph 3 which subsequently entered into force.

28 Consequently, in pointing out in its reasoned opinion that the German authorities had not yet adopted the measures planned, the Commission did not create any ambiguity, either as to the grounds for the complaint or as to the measures needed, in its view, to remedy the alleged default.

29 Furthermore, it cannot be inferred from the file that the Commission had neglected to take into account the arguments put forward in the communication of 31 March 1993, since in its reasoned opinion it also refers to the German Government's letter of 2 June 1993 to which that communication was annexed (see, on that point, the order of 11 July 1995 in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 20).

30 In the light of the above considerations, the arguments put forward by the Commission in its application, to the effect that Paragraph 2(2) of the Ausländergesetz is not sufficient to transpose the two directives at issue into national law, cannot be deemed to alter the subject-matter of the alleged infringement, and the reasons set out in the reasoned opinion must be considered adequate.

31 The action is therefore admissible.

Substance

32 The German Government contends that the action is unfounded, arguing that the principle of the primacy of Community law over national law, embodied in Paragraph 2(2) of the Ausländergesetz, has had the effect of conferring on persons covered by the two directives at issue a general derogation from the domestic legislation on aliens. There is therefore no lacuna in the arrangements for their implementation.

33 In support of that contention, the German Government emphasizes, first of all, that the two directives are characterized by detailed rules permitting the national authorities, on the basis of clearly and comprehensively defined criteria for assessment, to acknowledge the right to freedom of movement. Moreover, the administrative authorities of the *Länder* have been duly informed of the change in the legal situation.

34 Secondly, the German Government considers that a national rule referring to Community law can satisfy the requirement of legal clarity, where individuals are able to consult statutory provisions in their favour through publicly accessible sources such as the *Official Journal of the European Communities* and thus acquire

comprehensive and definitive knowledge of the legal status conferred on them by such provisions (see Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567), *a fortiori* in a case such as this, where both directives are self-executing, thus enabling individuals to ascertain in full the limits and conditions attaching to the right of residence.

35 On that point, it is settled law (see, in particular, *Commission* v *Germany*, cited above, paragraph 15) that the transposition of a directive into national law does not necessarily require its provisions to be formally incorporated verbatim in express, specific legislation; a general legal context may, depending on the content of the directive in question, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. That condition is of particular importance where the directive in question is intended to confer rights on nationals of other Member States (Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9).

36 In the present case, the mere fact that Paragraph 2(2) of the Ausländergesetz contains a general reference to Community law does not amount to transposition ensuring in a sufficiently clear and precise manner the actual implementation in full of Directives 90/364 and 90/365, both of which are intended to confer rights on nationals from other Member States. Furthermore, the fact that the German legislation expressly takes into account Community provisions on freedom of movement for certain categories of persons other than those covered by the two directives at issue exacerbates the difficulties faced by persons in the latter categories in ascertaining their rights.

37 That view is not affected by the German Government's argument that the two directives are so detailed that the national authorities could recognize, and individuals perceive, the right to freedom of movement on the basis of their provisions

alone. The right of persons to rely in law on a directive against a Member State in specific circumstances is no more than a minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of directives under the third paragraph of Article 189 of the Treaty, which cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see, *inter alia*, Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12).

38 As regards the argument that the *Länder* administrative authorities were informed of the implications of the two directives at issue, it should be recalled that a Member State cannot discharge its obligations under a directive by means of a mere circular which can be amended by the administration at will (Case 239/85 *Commission* v *Belgium* [1986] ECR 3645, paragraph 7).

39 The fact that the competent national administrative authorities were informed of the implications of the two directives in question cannot be regarded as satisfying, by itself, the requirements of publicity, clarity and certainty as to the legal situations governed by those directives.

40 As regards the argument based on the fact that the directives in question were published in the *Official Journal of the European Communities*, suffice it to note that a publication of that kind cannot relieve Member States of the obligation, expressly laid down by Article 5 of both directives, to adopt the necessary implementing measures.

41 It must therefore be held that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary for transposing Directives 90/364 and 90/365 into national law, the Federal Republic of Germany has failed to fulfil its obligations under Article 5 of those two directives.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has asked for the Federal Republic of Germany to be ordered to pay the costs. Since the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by not adopting within the prescribed period the laws, regulations and administrative provisions necessary for transposing into national law Council Directive 90/364/EEC of 28 June 1990 on the right of residence, or Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, the Federal Republic of Germany has failed to fulfil its obligations under Article 5 of those two directives;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Sevón Gulmann Edward

Puissochet Jann

Delivered in open court in Luxembourg on 20 March 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber