OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 19 September 1996 *

1. In these proceedings the Commission seeks a declaration that the Federal Republic of Germany (Germany) has failed to fulfil its obligations by not transposing Council Directives 90/364/EEC [1] and 90/365/EEC [2] ('the Directives') into national law. Germany contests the Commission's findings, contending that the Directives have been properly implemented.

2. Before considering the merits of the parties' arguments, I think it best to explain the legislative background to this matter, further details of which are to be found in the Report for the Hearing.

Legislative background

3. The purpose of the Community legislation at issue is to grant the right of residence to nationals of Member States 'who do not enjoy this right under other provisions of Community law and to members of their families' (Article 1 of Directive 90/364) and 'who have pursued an activity as an employee or self-employed person and to members of their families' (Article 1 of Directive 90/365).

Directive 90/364 makes the exercise of that right subject to the requirement 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'. In the case of Directive 90/365, the persons concerned must be '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 'covered by sickness insurance in respect of all risks in the host Member State'.

4. Under Article 2 of both Directives, 'the right of residence shall be evidenced by

* Original language: Italian.

1 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

2 — 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).

means of the issue of a document known as a "Residence permit for a national of a Member State of the EEC", whose validity may be limited to five years on a renewable basis'.

Article 5 of each Directive provides as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 30 June 1992. They shall forthwith inform the Commission thereof.'

5. The national legislation, on the other hand, basically contains two relevant provisions.

Paragraph 2(2) of the Ausländergesetz (Law on Aliens) [3] states that it 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'.

Secondly, Paragraph 15a(3) (inserted in 1993) of the Aufenthaltsgesetz/EWG [4] (Law on EEC Residence) provides as follows:

'(3) The Bundesminister des Innern (Federal Minister for the Interior) may issue a decree, subject to the approval of the Bundesrat (Federal Council), adopting such provisions regarding the entry and residence of persons ... as are necessary for the implementation of the Council directives of the European Community concerning:

(1) the right of residence, in accordance with Council Directive 90/364/EEC of 28 June 1990;

(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 ...'.

3 — Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet as laid down by the Gesetz zur Neuregelung des Ausländerrechts of 9 July 1990 (BGBl. I, 1354, as amended by the Gesetz zur Änderung des Gesetzes zur Neuregelung des Ausländerrechts of 12 October 1990, BGBl. I, 2170).

4 — Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft of 22 July 1969 (BGBl. I, 927) as laid down by the Bekanntmachung of 31 January 1980 (BGBl. I, 116) (BGBl. III, 26-2). Paragraph 15a(3), the salient provision in this case, was inserted by the EWR-Ausführungsgesetz of 27 April 1993 (BGBl. I, 512, 528).

Facts

6. By the close of the period prescribed by Article 5 of the Directives for their implementation, the Commission had not received from Germany any communication in compliance with that provision. By letter of 14 October 1992, the Commission therefore called on the German Government to submit its observations, in accordance with Article 169 of the Treaty, within two months.

7. In its reply dated 17 December 1992 (forwarded to the Commission by letter of 5 January 1993), the German Government explained that the Federal Minister for the Interior had informed the Interior Ministers of the *Länder* by memorandum of 30 June 1992 that a residence permit as prescribed by the German legislation on aliens had to be granted to persons in the categories defined by the two Directives. Thus the Community rules had essentially been transposed into domestic law. The German Government added, however, that it intended to incorporate those rules into German law formally by inserting a new subparagraph (subparagraph 3, cited above) in Paragraph 15a of the Law on EEC Residence. That supplementary provision would confer on the Federal Minister for the Interior specific powers to adopt, subject to the Bundesrat's approval, the regulations necessary to transpose Directives 90/364 and 90/365 into German law.

8. This was followed by a flurry of correspondence between the parties. On 23 April 1993 the Commission sent Germany a letter regarding the transposition of Directive 90/366/EEC. [5] By letter of 5 May 1993, the German Government forwarded to the Commission a communication dated 31 March 1993 concerning the transposition of both Directive 90/366/EEC and the Directives at issue. Lastly, on 2 June the German Government sent the Commission a communication dated 20 May 1993 by way of a reply — on the question of Directive 90/366 — to the Commission's letter of 23 April 1993.

9. On 22 September 1993 the Commission sent the Federal Republic of Germany a reasoned opinion in which — inferring from the observations submitted by the German authorities in reply to its earlier letter that the promised transposition of the Directives into the German legislation on EEC residence had not yet been accomplished — it called on Germany to adopt the necessary measures within two months of the date of notification of that opinion.

10. In its observations of 24 November 1993 on the reasoned opinion, the German Government argued that the Commission's view with respect to the alleged failure to fulfil obligations had already been challenged in the communication of 31 March 1993, in which the German Government had stated that the general clause inserted in

5 — Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30).

Paragraph 2(2) of the Ausländergesetz and expressly affirming the primacy of Community law over national law rendered the adoption of *ad hoc* implementing measures redundant. The provision adopted had in fact been specifically drafted as an 'open-ended' rule enabling the national legislation to be adjusted to accommodate future developments in the Community rules introduced by new directives or as a result of rulings by the Court of Justice. The German Government repeated that, solely for the sake of consistency, the German legislation on EEC residence (which already incorporated Community law on freedom of movement) would be supplemented by means of regulations concerning the Directives at issue when the measures implementing the Agreement on the European Economic Area came to be adopted. [6]

11. By application lodged on 24 March 1995, the Commission asked the Court (a) to declare that, by not adopting within the period prescribed the laws, regulations and administrative provisions necessary for the implementation of the Directives, or by not communicating them forthwith to the Commission, Germany has failed to fulfil its obligations under the Treaty and (b) to order Germany to pay the costs.

12. In its pleadings in defence, Germany contended that the action should be dismissed and that the Commission should be ordered to pay the costs. Its arguments in support of those contentions concern both the admissibility and the merits of the Commission's action. I shall consider both aspects in turn.

Admissibility

13. The German Government contends, with respect to the first plea in law in the application, that the Commission has introduced in its action before the Court legal arguments which were not raised during the pre-litigation procedure. The action should therefore be held inadmissible. [7] More specifically, when the Commission alleged in its reasoned opinion (as it subsequently alleged before the Court) that Germany had failed to fulfil its obligations, it merely pointed out that the implementation measures announced in the letters of 5 January 1993 and 2 June 1993 had neither been adopted nor communicated to it.

14. The Commission had not, however, according to the German Government, answered the argument put forward in its official communication of 31 March 1993 to

6 — See the communication of 31 March 1993 from the Federal Republic of Germany to the Legal Services of the Council and the Commission (paragraph 2).

7 — On the basis of the judgment in Case C-296/92 *Commission v Italy* [1994] ECR I-1, in which it was held that, in proceedings under Article 169 of the Treaty, the application cannot be based on complaints other than those formulated in the reasoned opinion.

the effect that the transposition of the Directives had been effected through the reference in the German legislation on aliens to the primacy of Community law. That argument had been expressly addressed solely in the application, where the Commission stated that, in its view, implementation by such means did not satisfy the criteria established by the Court. [8]

15. The Commission, however, maintains that the subject-matter of the action — failure to transpose the Directives into domestic law — remained unchanged throughout the procedure and continues to do so. Contrary to Germany's contention, the reasoned opinion did not ignore the arguments put forward in the German Government's communications of 5 January 1993 and 2 June 1993: quite simply, it did not accept them. According to the Commission, there was no need to consider Germany's arguments at length, either as regards the merits — since the facts relied on did not amount to an adequate defence of the infringement complained of — or in the interests of procedural economy — since Germany was expected to adopt the legislation necessary for the correct transposition of the Directives within the period prescribed.

16. Those then are the parties' positions on the question of admissibility. Each of them, to my mind, has a different understanding of the pre-litigation procedure. In the Commission's view, that procedure, so far as its purpose is concerned, is limited to precisely defining the alleged infringement. According to Germany, however, it must offer an opportunity for genuine debate enabling the States concerned not only to submit their own observations but also to obtain from the Commission a proper reply to the observations submitted in response to the letter of formal notice. If the pre-litigation procedure is to serve its purpose of persuading a State to put an end to its infringement of the Treaty, thereby avoiding recourse to judicial proceedings, there must be a 'debate involving the Member State's own arguments'. [9]

17. This case thus raises an issue of considerable practical importance. How do the Commission and the Member States stand in relation to each other during the pre-litigation procedure? There can be no concealing the fact that the answer to that question is of significance in determining both the obligations on those involved in the prescribed procedure and how the Commission may effectively pursue the objectives underlying the rules laid down in Article 169 of the Treaty.

18. Consequently, in order to establish which of the two approaches described above (point 16) represents the better view,

8 — The Commission cites the following judgments as the source of those criteria: Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, in particular paragraphs 4 to 7, and Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567.

9 — See the German Government's rejoinder, paragraph 4.

the first step is to identify the purpose of the pre-litigation procedure. That purpose is, it seems to me, twofold. [10] In the first place, through the provision of a phase governed by the *audi alteram partem* principle, it was sought to delimit the subject-matter of the dispute, to define the legal points and the facts at issue, and to give the allegedly defaulting State an opportunity to prepare an effective defence. [11] The successful attainment of those objectives constitutes, in the words of the Court, 'an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure under Article 169'. [12]

19. Its second function is to encourage — by harnessing 'the maieutic powers of *inter partes* proceedings' [13] — an amicable settlement, thus avoiding recourse to the Court whilst achieving the primary purpose underlying the infringement procedure. [14]

20. In considering either of those functions, it should be borne in mind how serious the outcome of the infringement procedure may be, that is to say, that the conduct of a Member State may be censured. As a consequence of such a decision a defaulting State may even incur liability. As Advocate General Gand rightly observed in another case, 'to censure the course of action of a Member State, with the wide margin of error involved in appraising a course of action, is a responsibility not lightly to be undertaken'. [15] Academic lawyers agree. 'Given the *serious nature* of a finding that a Member State has failed to fulfil its obligations', it has been observed, 'Member States must be given *effective procedural safeguards*'. [16]

21. That then is the conceptual framework of the pre-litigation procedure. The Commission's obligations under that procedure must now be defined. The question to be addressed is therefore whether the Commission is under a duty to provide a satisfactory response in its reasoned opinion to the Member State's observations submitted in reply to the Commission's letter of formal notice.

22. What can be said regarding the arguments raised by the German Government regarding admissibility? First of all, the

10 — Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 19.

11 — Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13.

12 — Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 6.

13 — Quotation from F. Benvenuti, 'Contraddittorio' (Dir. Amm.), *EdD.*, Vol. II, p. 743.

14 — See, on this point, Case 48/65 *Lütticke* v *Commission* [1966] ECR 19: 'The part of the procedure which precedes reference of the matter to the Court constitutes an administrative stage intended *to give* the Member State concerned *the opportunity* of conforming with the Treaty' (p. 27; emphasis added).

15 — Opinion of Advocate General Gand in Case 31/69 *Commission* v *Italy* [1970] ECR 25, in particular, p. 42.

16 — Quotation from G. Vandersanden and A. Barav, *Contentieux Communitaire*, Brussels, 1977, p. 115 (emphasis added).

subject-matter of the action — failure to transpose the Directives into domestic law — has remained the same throughout the procedure. The letter of formal notice, the reasoned opinion and the application all clearly focus on that issue. [17]

23. The Court's first judgment in proceedings under Article 169 provides some useful guidelines on this subject. [18] There it was laid down that the reasoned opinion must contain a coherent statement of the reasons which have led the Commission to believe that the Member State in question has failed to fulfil its obligations. The Court was responding to an objection of inadmissibility raised by the Italian Government which contended that the Commission had not examined 'the pertinence of [Italy's] arguments' in defence. That objection was rejected by the Court, in accordance with the approach suggested by Advocate General Lagrange, who in his Opinion had in particular pointed out that 'the reasoned opinion is intended solely to convey the Commission's point of view in order to enlighten the government concerned and, should the need arise, the Court'. [19]

24. In many respects that position was subsequently re-stated in *Lütticke*. [20] In that judgment the Court states that Article 169 merely empowers the Commission to deliver a reasoned opinion and to initiate proceedings. We are therefore not concerned here with a power, such as that under Article 90(3), for example, to adopt binding measures, in view of which the rights of defence available to addressees of such measures have, rightly, been meticulously set out. [21] In gauging the importance of the administrative procedure *inter partes* and the need for it to be exhaustive, that difference must be borne in mind.

25. Let us suppose for the time being that the pre-litigation procedure entails the obligation to take into consideration the argu-

17 — This case is in direct contrast to Case C-296/92, cited by Germany (see footnote 7), in which the application was dismissed as inadmissible because it was founded on a complaint which was materially different from that formulated in the reasoned opinion. In its reasoned opinion the Commission had complained that the Italian Republic had failed to comply with its obligations under Directive 71/305 in so far as a provincial administration had wrongly awarded public works by a private contract and had failed to publish a notice of invitation to tender in the *Official Journal of the European Communities*; in the application, however, the Commission alleged that the Italian Republic had fallen short of its duty to ensure that the directive was properly implemented by provincial contracting authorities and had not taken steps to preclude the effects of a failure to do so. Obviously, there was a substantive disparity between the legal points argued in the two documents.

18 — Case 7/61 *Commission* v *Italy* [1961] ECR 317; see, in particular, Section B — Admissibility, paragraph (a), p. 326.

19 — Opinion of Advocate General Lagrange in Case 7/61, cited in footnote 18, p. 336. The reasoned opinion differs therefore from the letter of formal notice in so far as the latter 'is intended to define the subject-matter of the dispute and to indicate to the Member State which is invited to submit its observations the factors enabling it to prepare its defence'; see Case 51/83 *Commission* v *Italy* [1984] ECR 2793, paragraph 4.

20 — Case 48/65, cited in footnote 14, p. 27.

21 — Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565.

ments put forward by the defendant. The fact remains that, in the present case, the Commission's reasoned opinion expressly refers to the German Government's communications in which the appraisal of the alleged infringement was not accepted. The tenor of the reasoned opinion alone shows unequivocally that, according to the Commission, the German authorities were under a duty to adopt *ad hoc* provisions in order to implement the Directives in question. This means that, in the Commission's view, the measures which Germany considered to be entirely satisfactory for the transposition of the Directives were insufficient.

26. This leads me to conclude that the German Government was given an opportunity to make its own views known. Both the letter of formal notice and the reasoned opinion allowed it a reasonable length of time to do this. On the other hand, as I have already remarked, so far as the Commission was concerned, implementation by virtue of Paragraph 2(2) of the Law on Aliens was in the reasoned opinion clearly regarded as insufficient. The adoption of separate and appropriate legislation was held to be necessary (moreover, according to the German Government, such legislation was under way).

27. I shall endeavour to explain more clearly why the Commission's *modus operandi* is lawful. That institution's reasoned opinion cannot be understood as a measure designed to provide a full response to the arguments put forward by the Member State called upon to submit observations. Its purpose is rather to define the Commission's position to the extent necessary to enable the State concerned to prepare its defence and the Court to give judgment. Admittedly, the Commission did not provide an express assessment as to the inadequacy of the Directives' implementation until the proceedings before the Court. However, that does not mean to say that it disregarded any procedural requirement or safeguard. Where the reasoned opinion clearly states the legal grounds and the facts supporting the charge of failure to fulfil obligations, the defendant State cannot rely on any legally protected interest in a full *inter partes* procedure.

28. In my view, therefore, the issue of admissibility must be resolved on the basis of criteria which may be derived from the case-law of the Court, namely whether the subject-matter of the dispute remained the same throughout the procedure under Article 169, whether the Member State was allowed a reasonable period in which to comply with its obligations under Community law or effectively to prepare its defence to the charges raised against it by the Commission, [22] whether the opinion contained a coherent statement of the facts and legal grounds on which it was based [23] and whether the Member State was informed of the measures it must adopt if the directive in question is to be correctly transposed into domestic law. [24] It seems to me that in the present case those requirements are satisfied. It follows that Germany was accorded the

22 — Case 293/85, cited in footnote 11, paragraph 14.

23 — Case 7/61, cited in footnote 18.

24 — Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13.

procedural safeguards which the 'serious nature' of the procedure demands. I conclude therefore that the Court should dismiss Germany's objection and declare the action admissible.

Substance

29. Germany contends that it transposed the Directives in question in accordance with the criteria laid down by the Court. [25]

30. Three arguments are put forward to support that contention. The first is that the reference in Paragraph 2(2) of the Ausländergesetz to the primacy of Community law automatically limits the scope of domestic legislation and, accordingly, extends recognition of the right to a residence permit to the persons whose situation is covered by the Directives in question.

Secondly, it is argued that the competent authorities of the *Länder* were duly informed of the need to comply fully with the Community rules within the period prescribed for transposition of the Directives into domestic law. That made it possible for the authorities which are competent to evaluate the preconditions for the right to residence on a case by case basis to ensure that the Directives are properly implemented.

Lastly, according to Germany, the *self-executing* nature of the rules in question must be taken into account. Individuals can easily gain access to Community legislation and are in a position, even though in this context the German rules merely indicate that Community law should be consulted, to acquire a clear and precise knowledge of their rights.

31. I do not find the German Government's arguments convincing. Germany relies on settled case-law of the Court to the effect that transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. That is all very well, but the case-law must be cited correctly, with the meaning intended. What the Court said was that the general legal context must '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'. [26]

25 — The criteria are deduced from the judgment in Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, in particular, paragraph 15.

26 — Case C-361/88, cited in footnote 25, paragraph 15.

32. The transposition measures adopted by Germany do not appear to me to meet those requirements. The other Community legislation on freedom of movement was transposed *ad hoc* by being incorporated in the German rules on EEC residence (Aufenthaltsgesetz/EWG). [27] That substantiates the Commission's view concerning the transposition of the Directives in this case. For some categories of person the 'general legal context' will consist of rights expressly transposed into German law. Individuals in other categories, however, will have to infer their rights from Community law, to which reference is made. This two-fold system of treatment makes it difficult — especially since the Directives in this case confer rights on individuals — for the persons concerned to know the full scope of their rights or how to assert them before the national courts.

33. Nor am I persuaded by the argument that individuals can acquaint themselves with the text of the Directives thanks to their publication in the *Official Journal of the European Communities*.

To subscribe to such a view would amount to underestimating the importance of the obligation on the national legislature to transpose Community law. Individuals may indeed, if they wish to know their rights, always consult the appropriate sources, but that does not alter the fact that, where transposition is necessary, it must be carried out in the appropriate manner and not in some other fashion. [28] On the other hand, as Advocate General Mischo pointed out in *Emmott*, 'the publication of directives in the *Official Journal of the European Communities* [...] is fundamentally different from the publication [therein] of measures binding on individuals; that is not publication required by law producing legal effects, as in the case of regulations, but only publication for information'. [29] Nor is it an answer to point out that the acts at issue here are *self-executing*. The fact remains that they are directives, albeit complex, and both the Treaty and Article 5 of those Directives expressly state that transposition is necessary. Rights conferred by Community law must therefore, as I have said, be sufficiently evident from domestic legislation — and transposition serves to bring this about —

27 — The exception being Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59). The Commission has indicated that there are problems concerning that Directive's implementation which are similar to those which are to be observed in connection with Directives 90/364 and 90/365.

28 — The German Government's argument based on Article 8a of the Treaty is not easy to follow. Article 8a confers the right to freedom of movement 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. That right is qualified, therefore, by the Treaty itself and by secondary legislation, in so far as they give it definition. The German Government goes on to argue that individual citizens must refer to secondary legislation for an understanding of the right conferred by Article 8a. Thus, it maintains, the reference in the German legislation whereby, essentially, individuals are requested to consult Directives 90/364/EEC and 90/365/EEC directly for information concerning their right of residence, is legitimate. In my view, that argument is flawed in that it conflates two issues which are separate and must remain so. Article 8a does no more than point out, in conferring a right, the extent to which it may be qualified, whether directly by other provisions of the Treaty or by measures adopted under the Treaty by the institutions. Clearly, that is completely different from the question of a directive's implementation, which is a mechanism entailing the obligation to transpose the Community rules into domestic law, in default of which it is no defence to maintain that individuals have direct access to Community legislation: otherwise the distinction drawn by Article 189 of the Treaty between the various Community acts would be radically distorted.

29 — Point 27 of the Opinion in Case C-208/90 *Emmott* [1991] ECR I-4269.

without there being any need to refer to the Community provisions transposed.

34. There is another aspect to consider. The reason which, in 1993, prompted the German Government to supplement the legislation on residence by giving the Federal Minister for the Interior authority to adopt regulations implementing Community legislation was to provide the national administration with a uniform legal base. [30] Even if it were accepted that, as Germany contends, the existing laws should have been regarded as sufficient to fulfil the obligation to implement the Directives, it remains necessary, none the less, to clarify and order the matters governed by the Directives at the level of the legal system. This is a further reason for considering that the transposition of the Directives at issue was inadequate, at least from that point of view. The measures adopted fail to provide — in the absence of those requested by the Commission — a 'specific legal framework in the area in question', such as the Member States are required to establish, in accordance with settled case-law, in order to ensure full implementation of the Directives. [31] It is also important to note how that argument is implicitly corroborated by the fact that the German administrative authority has not yet made use of its delegated powers to regulate the position of residents covered by the — hitherto — untransposed Directives. This is evidence that Germany has failed to fulfil its obligations under Article 5 of those Directives — a failure which is arguably partial, but unlawful none the less.

35. Lastly, I agree with the Commission as regards Germany's other argument. Germany maintains that it had pointed out to the competent authorities of the *Länder* that residence permits had also to be granted to individuals covered by the Directives in question. However, administrative circulars do not produce direct legal effects *vis-à-vis* individuals. That is to say, they do nothing to meet the requirement, held by the Court to be indispensable, of ensuring that individuals are fully acquainted with their rights so that they can seek their protection before the national courts.

36. In the light of the foregoing considerations, it must therefore be concluded that the legislative content of the Directives at issue has not been transposed with the detail, precision and clarity required by the case-law of the Court of Justice in order fully to ensure legal certainty and define the legal situation on which individuals may rely in respect of their personal rights.

30 — See the German Government's communication of 23 November 1993 which refers to the communication of 31 March 1993.

31 — See Case C-361/88, cited in footnote 25, paragraph 24.

Conclusion

In conclusion, I propose that the Court should:

(1) declare that the action brought by the Commission for a declaration that, by not transposing Council Directives 90/364/EEC and 90/365/EEC of 28 June 1990, the Federal Republic of Germany has failed to fulfil its obligations is admissible;

(2) declare that, by not adopting within the periods prescribed all measures necessary for the compliance of national legislation with Council Directives 90/364/EEC and 90/365/EEC of 28 June 1990, the Federal Republic of Germany has failed to fulfil its obligations in the matter of transposition;

(3) order the Federal Republic of Germany to pay the costs.