BRITISH CENTRE FOR ENGLISH AND EUROPEAN LEGAL STUDIES

At Warsaw University, Faculty of Law and Administration

Sponsored by

Clifford Chance

Central and East European Moot Court Competition 2008

2nd – 5th May 2008

hosted by

The Law Faculty
Adam Mickiewicz University
POZNAN

Competition rules, problem
Collected cases and materials available to participants

Warsaw 2008

TABLE OF CONTENTS

A. PRELIMINARIA
PAGE NOS.

1	Index	2-3
2	Moot Question	4-8
3	Competition Rules	9-139
4	Mooting Tips for Teams	14-15
5	Preliminary Information on the ECJ	16
6	Draft Programme (*subject to revision*)	17
7	Acknowledgements	18

B. LEGISLATION

8	EC Treaty (as amended): Articles 2,3,10, 12, 13, 17, 18, 39,125-128, 136-137, 149, 234, 249 and 254	19-23
9	Council Regulation 1612/68 (extracts)	24-26
10	Charter of Fundamental Rights (extract as amended by Lisbon Treaty)	27-28
11	Employment Framework Directive 2000/78	29-34
12	Citizens' Rights Directive 2004/38	35-46

C. BACKGROUND READING)

13	J Steiner & L Woods, 'Textbook on EC Law' (8th ed, London: Blackstone 2003) pp 64-71 & 85-86, pp 88-126 & 153- 182	47-86
15	S. Weatherill, 'Cases & Materials on EU Law' (5th ed, London: Blackstone, 2000) pp 103-116, 128-136	87-96
16	Guidance Notes for preliminary references to ECJ	97-98
17	J Steiner & L Woods, 'Textbook on EC Law' (8th ed, London: Blackstone, 2003) pp. 544-575	99-108
18	C.Barnard, 'Substantive law of EC' –Extracts from Chapters 12 and 15	109-143

D. JURISPRUDENCE

19	C-212/04	Adeneler –v-ELOG	144-147
20	C-427/06	Bartsch –v- Bosch and Siemens	148
21	C-138/02	Collins-v-Secretary of State for work and pensions	149-155
22	C-147/03	Commission –v- Austria (AG only)	156-163
23	C-212/06	Government of the French Community and Walloon Government-v-Flemish Government (AG only)	164-179

24	C-319/97	Kortas (criminal prosecution)	180-183
25	C-144/04	Mangold –v- Helm AG and judgment extracts	184-204
26	C-129/96	Inter-Environnement Wallonie ASBL v Région wallonne	205-206
27	C11 &12/06	Morgan –v- Bezirksregierung and Bucher –v-Landrat des Kreises Duren	207-212
28	C-411/05	Felix Palacios de la Villa-v- Cortefiel Servicios SA AG and Judgment extracts	213-233
29	C-76/05	Schwarz & Gootjes-Schwarz–v-Finanzamt Bergisch Gladbach	234-240
30	C-209/03	The Queen ex.p Bidar-v- London Borough of Ealing	241-248
31	C438/05	The ITWF and FSU-v-The Viking Line (AG only)	249-256
32	C-109/92	Wirth –v-Landeshaupt Hannover	257-259

Participants should note that not all cases are provided in full and some may include only extracts. Should you wish to look at the full text of these cases, they may be found by doing a search at the following web-site:
http://www.amicuria.org/service/cx3-fr.htm

MOOT QUESTION 2008

A. The Kingdom of LAREDEF as a federal State

1. The Kingdom of LAREDEF is a Member State of the EU and is divided into 3 autonomous Regions (DEINOM, ELDDIM, ROOP) and 3 linguistic regions.

2. The DEINOM region contains the national capital city and uses Deinom (language) as its regional tongue. Since it also contains the most developed industrial and commercial areas, it has traditionally been the richest of the 3 autonomous regions in the Kingdom. The percentage of school-leavers who attend University or are engaged in other higher-education is 75%. Unemployment amongst the same age group is 5%.

3. The ROOP region is predominantly English-speaking and is comprised mainly of agricultural land. It has historically been the poorest autonomous region in the Kingdom. The percentage of school-leavers who attend University or are engaged in other higher-education is 25%. Unemployment amongst the same age group is 25%.

4. The Constitution of the Kingdom of LAREDEF grants the autonomous regions mutually exclusive spheres of competence for certain matters and empowers them to act as autonomous legislators in regard to these competences. Regional legislative competence is exercised by way of decrees, which have the same force as federal laws. The relevant constitutional provisions states as follows:

Section 4: Issues devolved to the autonomous regions […]

4.10 Autonomous regions shall be entitled to regulate all issues concerning the availability, content, organisation and financing of higher educational courses within their territorial borders." […]

4.12 Autonomous regions shall be entitled to regulate employment policy within the territorial borders.

B. The Sumsare University

5. The Sumsare University is located in the ROOP region and was created in 2000 as a "non-public University". There had previously been a public university on the same site, but this had closed due to a shortage of funding. The Sumsare University deliberately chose not to seek official status as a "public University", despite the fact that this precluded the possibility of it receiving guaranteed government financial subsidies, because the status of "non-public University" allowed it to be exempted from many of the requirements imposed on "public Universities" by the national *Higher Education Act 1989*.

6. Non-public Universities in ROOP are entitled to recruit staff from a wider category of persons and to attract teaching staff from amongst celebrities and politicians who did not meet the statutory requirement that staff need to possess a Masters degree that applies in the case of public Universities. They are also exempt from statutory rules applicable to public Universities which limit the fee levels chargeable for courses and require such Universities to disregard candidates' financial positions (i.e. whether or not they have the finances to pay for the course) when deciding whether or not to admit them to a particular course. Furthermore, non-public Universities are exempt from a statutory list of compulsory courses which must be offered by every public University. Nevertheless, many of the provisions of the *Higher Education Act 1989* apply to all higher education institutions, regardless of their status. For example, all Universities must obtain a license from the ROOP regional government before they may lawfully offer educational services. They must also supply the ROOP Ministry of Education with annual statistical data on a wide range of issues laid down by statute.

7. While the Sumsare University is financed from a number of sources, the principal source of finance comes from student fees. In 2006-7, almost 70% of students attending the University were recipients of an educational loan available in ROOP. The University has also received a number of discretionary educational research grants awarded by the ROOP Regional government, amounting to approximately 10% of the Sumsare University's annual budget. It has also received some financial support as part of the regional government's Youth Employment Scheme, which is aimed at encouraging employment of young workers (see paragraph E.3 below).

C. First claimant – Slamina

8. Slamina, a 20 year old national of the Kingdom of LAREDEF, was born in DEINOM and, until recently, resided there. He wished to study agricultural law but no such course was available at Universities in DEINOM so he

applied to the Sumsare University where he was accepted to study for a 3-year Degree in animal husbandry, beginning in the academic year 2007-2008. Slamina moved to ROOP and planned to live there for the duration of his studies and subsequently to seek employment within the region.

9. In order to finance his studies, Slamina applied for an educational loan offered by the ROOP regional government. The loan is available for students on all higher-education courses studied in the ROOP region and is repaid by students following completion of their studies, once they have begun to earn an income which exceeds the national average income.

10. Slamina's application for the loan was rejected. The rejection letter explained that Slamina was ineligible to claim the loan since he did not fulfil the requirements laid down by *Decree 1066/2000 on Educational Loans for Higher Education Courses* (adopted by the government of ROOP on 18th January 2000). This legislation ('the 2000 Decree') states that the loan sought by Slamina was available only to persons who were either (1) born within the ROOP region or (2) who have been granted permanent resident status within that region. Permanent resident status is obtainable by citizens of other EU Member States under Directive 2004/38, following 5 years of continual and lawful residence within ROOP, but is not obtainable by people who are nationals of Kingdom LAREDEF but who were not born in ROOP. Since Slamina was born in DEINOM and is a national of LAREDEF, he was ineligible to claim the loan on the grounds that he was neither born in ROOP nor did he have permanent resident status there.

11. Slamina challenged this decision to refuse him a loan before the Educational Loans Dispute Resolution Authority (ELDRA), a public body set up by the ROOP region's Ministry of Education, alleging that the reasons for the decision were discriminatory and contrary to European Community law. When his appeal was turned down, Slamina initiated proceedings in the ROOP High Court against the regional government of ROOP, alleging that the conditions of eligibility laid down by the 2000 Decree contravened EC law. They were therefore unlawful and so could not be taken into account when assessing his eligibility for the loan. Slamina relied on the principle of non-discrimination (*Article 12 ECT*) in conjunction with the rules governing citizenship of the Union (*Articles 17 and 18 ECT*).

12. The government of ROOP region argued that this was a purely internal matter concerning only the Kingdom of LAREDEF and therefore fell outside the scope of EC law competence. Accordingly, the issue was governed exclusively by national law and, pursuant to *section 4* of the Constitution, the applicable law in this case was *the 2000 Decree*. Furthermore, the government of ROOP argued that, as the aim of *the 2000 Decree* was to implement a regional policy encouraging and assisting young nationals up to the age of 25 from ROOP to enter higher education courses, ROOP's policy in respect of the loans was entirely justified from the perspective of both national and Community law. This regional policy sought to improve the employment prospects of young persons and thereby reduce unemployment so helping to redress the historically poorer economic situation of the ROOP region. The ineligibility of other Kingdom LAREDEF nationals to claim the loan merely reflected limitations in the budgets of each regional government and had to be reviewed in the light of the finances and other opportunities already available to members of the other two autonomous regions within LAREDEF.

D. Second Claimant – Rekees

13. When Slamina moved to ROOP, he found shared accommodation with Rekees, a citizen of REDISTOU (an EU Member State). Rekees is 24 years old and came to ROOP 3 years ago following the death of his grandmother, from whom he inherited sufficient money to prove that he had the right to enter and reside in Kingdom LAREDEF on the basis of *The Citizens' Rights Directive* 2004/38. Unfortunately, Rekees began to run out of money in early 2007 and was forced to register as a job seeker in ROOP. Hoping that some agricultural knowledge would give him a better chance of obtaining employment in ROOP, Rekees applied for a place on the 3-year degree course in animal husbandry at the Sumsare University.

14. Rekees also applied for the educational loan offered by ROOP, but his application was refused. The rejection letter stated that, although Rekees is an EU national lawfully resident in ROOP within the meaning of the Citizens' Rights Directive, he had not yet acquired permanent resident status. Accordingly, he did not fulfil the criteria laid down by *the 2000 Decree*.

15. Rekees appealed against this decision, arguing that the criteria laid down in *the 2000 Decree* constituted a breach of the right to non-discrimination as guaranteed by EC law, in particular *Articles 12, 17* and *18 ECT*. This appeal was rejected by ELDRA, which declared that *the 2000 Decree* was lawful on the basis of *Article 24(2)* of the *Citizens' Rights Directiv.e* ELDRA also rejected Rekees' arguments that, as a job-seeker, he fell within *Article 39 ECT* and therefore fell outside the scope of *Article 24(2)* and in the scope of Article 7(2) of Regulation 1612/68

instead.

16. In the meantime, Rekees began to seek alternative funding opportunities and was thrilled to see an advertisement for a part-time job at the Sumsare University. Rekees estimated that the wages for the job were sufficient for subsistence purposes but was most attracted by the fact that the successful applicant would be entitled not only to payment but also to subsidised University accommodation, since the job involved being 'on call' at weekends. The job was described as a "logistics assistant" and involved the carrying-out of various unskilled tasks at, or on behalf of, the University. One such task was using a University car to provide a courier service to deliver letters or packages between the University sites and local businesses.

17. Rekees applied for the job and was originally invited for interview but was later advised that he was ineligible because the conditions laid down by the University stated that all applicants must either be a minimum of 25 years old or, if under this age, must sign an employment contract for a minimum of 4 years Since Rekees's course would last only 3 years, the University thought he would not satisfy the 4 year requirement.

18. Rekees informed the University authorities that he considered the restrictive employment conditions to be discriminatory on the grounds of age contrary to the provisions of *EC Directive 2000/78* ('the Employment Directive'). The University informed Rekees of the following reasons for imposing the aforementioned conditions:

a) Regional law (*Decree 49/2004*) allows employers to impose *"restrictive measures"* in employment contracts with persons aged below 25 in order to facilitate the aim of guaranteeing more long-term employment for younger persons.

b) The Central Body of the University passed a resolution in January 2005 supporting the initiative of the ROOP Regional government to improve the employment prospects of young persons in the region by encouraging them and employers to enter into long-term contracts and so to encourage young persons to remain within the ROOP region.

c) The financial costs of employing persons under the age of 25 are greater than employing persons over this age, since the University is required to pay higher car-insurance rates for young employees. Furthermore, past experience shows that younger workers have tended to seek alternative employment fairly soon after beginning employment as a "logistics assistant" and so this increases the University's recruitment and re-training costs. If not for the fact that the University received financial support as part of the regional government's Youth Employment Scheme, the University admitted that it would be completely unwilling to employ anyone under the age of 25.

E. National employment policy law

19. The government of ROOP implemented *Decree 49/2004 ("The 2004 Decree")* on 18th January 2004. The decree was adopted on the basis of recommendations made by the regional Ministry of Employment, following consultation with the ROOP Regional Trade Union Association, the regional Chamber of Commerce and various organisations representing employers' interests.

20. The preamble to the decree expresses the desire to encourage more stability and continuity in employment of young persons. It cites statistics showing that, of those persons aged below 25 and lawfully employed, only 25% had employment contracts lasting more than 6 months and a further 60% of such persons had contracts for no longer than one year's duration. The decree also noted the need to encourage employers to invest in younger workers and to provide employers with incentives to be more willing to offer longer-term contracts to younger workers. Such incentives include government subsidies paid to private employers to cover the costs of any additional training that may be necessary in respect of young workers. Funds are also payable to private employers who are willing to offer long-term contracts (classified as 4 years or above) to first time workers aged below 25, in order to promote job security. All such financial assistance is provided via the regional government's "Youth Employment Scheme (YES!)".

21. The relevant part of the 2004 decree states that: *"…employment contracts entered into between an employer and a person aged below 25 may be subject to minimum age limits or other restrictive measures whose aim is to increase employment opportunities or stability for such young persons."*

22. Since *Section 4.12* of the Constitution empowers autonomous regions to regulate employment policy within the territorial borders, the duty to implement EC law in relation to employment policy (including *Directive 2000/78*)

also falls within the competence of the various autonomous regions of Kingdom. Although that Directive was to have been implemented by 2nd December 2003, *Article 18* permits a further 4 year extension period which the Kingdom of LAREDEF utilised on behalf of ROOP, given the poor economic situation in that region and its problems with youth unemployment. Accordingly, ROOP was not required to implement *the Employment Directive* until 2ndnDecember 2006.(*see note)

F. Rekees's action in the High Court

23. Rekees began proceedings before the ROOP High Court against both the Sumsare University and the ROOP Government, seeking the annulment of the employment conditions imposed by the University and the 2004 decree upon which they were based. Rekees alleged that these measures constituted a breach of the equal treatment provisions governing access to employment contained in *Article 2* of *Directive 2000/78*. Rekees alleges that neither the terms of the 2004 decree nor the employment conditions imposed by the University are justified under *Article 6(1)* of that Directive.

2. *Article 6(1)* of the Employment Directive states that:-
'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
Such differences of treatment may include, among others:

a) *the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
b) *….. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;…..*

24. In the event that the court found *the Employment Directive to* be inapplicable, Rekees argued that the aforementioned measures contravened various provisions of the EC Treaty (*Articles 12, 13, 18 and 39 ECT*) and/or infringed a general principle of Community law prohibiting age discrimination, as reflected in *Article 13 ECT* and *Article 21* of the *EU Charter of Fundamental Rights* ('the Charter').

25. The Sumsare University argued that, as a private body, it could not be held liable under the provisions of an unimplemented EC Directive, especially in light of the fact that, at the time, the 2007 deadline for implementing the Directive has not yet expired. Furthermore, the contested employment conditions complied fully with *the 2004 Decree* and, even if the court found that *the Employment Directive* was applicable, those conditions were justified by *Article 6 (1)* of that Directive.

26. The government of ROOP agreed that *the Employment Directive* is incapable of applying until the expiry of the 2007 extended implementation deadline. It argued that it would undermine the ECJ's jurisprudence regarding *Article 249 ECT* and the capacity for Directives to have direct effect if Directives were capable of producing legal results prior to expiry of their date of implementation, even if this was an extended period of implementation. The only exception to this principle was to be found in the case of *Inter-Environnement Wallonie ASBL v Région wallonne* which permitted a Directive to create legal effects prior to expiry of the implementation date only where the Member State had introduced new legislation which blatantly infringed the aims of the Directive, which was not the case here. In the event that the court concluded that the *Employment Directive* was capable of producing legal effects, the regional government argued that, in any case, *the 2004 Decree* was justified on the basis of *Article 6(1)* of that Directive. Relying on the recent jurisprudence of the Court of Justice, and in particular *Case C 411/-05 Félix Palacios de la Villa*, the government argued that the Member States are permitted a wide margin of discretion in the application of *Article 6(1)*. The government denied that *Article 13 ECT* was capable of being relied upon directly, since it is simply an empowering provision, enabling the Council to take appropriate action to combat, *inter alia*, discrimination on grounds of age. As such, it cannot have direct effect; nor can it preclude the application of a national law such as the 2004 Decree. Equally, it argued that the *EU Charter of Fundamental Rights* was not binding and that *Article 21* thereof was an insufficient basis on which to declare the existence of a general principle of Community law against age discrimination.

27. The ROOP High Court decided to conjoin the cases of Slamina and Rekees in view of the linked issues and factual background, and further decided that it required clarification of a number of points of Community law before it could give judgment in these cases. Accordingly, the court referred the following questions to the European Court

of Justice, pursuant to *Article 234 ECT*.

The questions referred for a preliminary ruling

Question 1

(a) ***Do the ECJ decisions in Palacios (C-411/05) and Mangold (C-144/04) mean that a Member State is bound by the provisions of a Directive in respect of which an extended time-limit for implementation has been granted, prior to the expiry of such extended period, solely on the basis that an autonomous region within that Member State has adopted legislation falling within the legal area covered by that Directive?***

(b) ***Is it possible to derive a general principle of Community law prohibiting age discrimination from Article 13 ECT and/or Article 21 of the EU Charter of Fundamental Rights?***

Question 2

(a) In the event that question 1(a) is answered in the affirmative, where a Member State wishes to introduce an exception to the prohibition against age discrimination laid down in Directive 200/78, is it incumbent upon that Member State to prove before the national court that such an exception is appropriate and necessary in order to achieve a legitimate aim, or should the national court assume that such an exception is lawful unless it is apparent that the Member State measures adopted to pursue that aim are inappropriate and unnecessary?

(b)***In the event that question 1(b) is answered in the affirmative is a Member State entitled to enact exceptions to the prohibition against age discrimination arising from a general principle of Community law and, if so, are the requirements for introducing such exceptions the same as those laid down in Article 6(1) of Directive 2000/78?***

Question 3

(a) ***Is a private body such as the Sumsare University a body which falls within the definition of the State and so is required to comply with the obligations contained in secondary EC law such as the Employment Directive 2000/78 and the Citizens' Rights Directive 2004/38, implementing the principles contained in Articles 12, 13 and 18?***

(b) ***If the answer part (a) is in the negative, does any prohibition on age discrimination age arising from the answer to question 1 also apply directly between private employers, on the one hand, and prospective employees, on the other hand?***

Question 4

Must Articles 18 ECT, 39 ECT be interpreted as precluding an autonomous region of a federal EC Member State from adopting provisions which, in the exercise of its powers, allow only persons born in that autonomous region and, in relation to citizens of the European Union, persons exercising their right of free movement who have acquired permanent resident status in that region, to be entitled to a loan designed to facilitate their access to a course of higher education, to the exclusion of persons who were born in another autonomous region of the same federal State?

Question 5

(a) ***In the event that question 4 is answered in the affirmative, is a citizen of a federal Member State who was born and resided within one autonomous region of that Member State entitled to rely upon Articles 12, 17 and 18 EC to seek the benefit of an educational loan awarded by another autonomous region of that federal Member State, despite the provisions contained in Article 24 (2) of Directive 2004/38 ('the Citizens' Rights Directive)?***

(b) ***Is an EU citizen lawfully resident in another Member State and registered as a job seeker in that state outside the scope of Article 24 (2) of Directive 2004/38 by virtue of that status and therefore eligible to receive an educational loan such as that in the facts of the present case on the basis of Article 7 (2) of Regulation 1612/68?***

*(*In para 22,for the purpose of this moot please assume that Article 18 of the Employment Directive allows a 4 year extension to Member States rather than the 3 year extension set out in the original text).*

COMPETITION RULES 2008

1. Competition

This is the fourteenth year of this annual competition, this year to be held in Poznan, Poland

This competition was originally designed to assist countries from the region which were associated with or trading with the European Union, to better understand its law and structure.
In recognition of the enlargements in 2004 and 2007 the competition has widened its eligibility requirements. It will continue to include those countries who have joined the EU in 2004 and 2007 as well as those that remain associated in the region of Central and Eastern Europe, but will be extended to allow interested teams from Malta, Cyprus and Turkey to compete.
.
IMPORTANT: To be eligible to participate written registration and acknowledgement is required by e-mail to the British Centre on or before the 1st March 2008 and written pleadings are to be submitted by e-mail attachment on or before the 1st April 2008 (address and contact details at end)

A moot is an argument (and not a debate) between students acting as advocates representing different parties in a legal action (a case). The facts and history together with supporting material and authorities are given in advance to the students.

The aim is to reproduce, as closely as possible, the discussion and argument of a genuine hearing in the European Court of Justice. The case is based upon an area of European Community Law and has been prepared by a writing committee of the organisers and external experts.

The organisers are aware that access of the competing teams to European Community law materials will vary greatly. Therefore a full bundle of supporting materials and authorities is included and encompasses all the authorities which teams are permitted to refer to in this case, to ensure that no unfair advantage is gained from those with greater facilities.

2. Language

This official language of this competition shall be English

3. Participation

The competition is open to all students, nationals of Central and East European states including southern states who have applied for entry or have just entered the EU (specifically Turkey, Cyprus and Malta) , who are enrolled on a course at a participating University and are:

not older than 30 years
not practising as a lawyer and
have not previously participated in the competition.

Any university (with participants who are nationals from the regions mentioned) may enter no more than one team of 3 to 4 members who may be accompanied by one academic/coach. In case of doubt, please e-mail the organizers directly at the address below.

4. The Case

This will be a problem based upon an area of European Community substantive and/or procedural law, containing a referral to the European Court of Justice from a Member State national court under Article 234 TEC. Both written and oral pleadings on the part of applicant and respondent will be required from each competing team.

5. Scoring

The competition will be held over three rounds.

First Round

In this round all teams will be invited to argue both the sides of the case. This will require members from the team to represent the appellant's case against another team arguing on behalf of the respondent and then represent the respondent's case against a different team arguing on behalf of the appellant. It is required that all members of the team speak as either respondent or applicant but it is not required that all members speak both as respondent and applicant during the first round. During this part of the competition, the courts will focus on **questions 1, 2 and 3** which were referred for judgment by the fictitious EC Member State for a ruling by the ECJ.

Scores will be allocated at the conclusion of this round on the basis of both the written and oral pleadings.

The following scoring criteria will be applied throughout by the judges:-

Criteria	**Maximum Points Awarded**
Form and content of written pleadings (only in first round)	20
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Effectiveness of reply/rejoinder	20
Ability to respond effectively to judges' questions.	10

Second Round (Semi-Finals)

In this round, the best teams from the first round will again be invited to plead both sides of the case against other teams. This round will focus on **questions 4 and 5** referred by the fictitious EC Member State national court for ruling by the ECJ (an

additional question may be added from 1-3 in the judges' discretion to be advised at the announcement of the semi final teams). Marks will be awarded for the same criteria as apply to the first round, with the exception that marks from written pleadings are no longer counted. During this round, it is necessary for ***all*** members of the team to speak both as applicant and respondent in the semi-finals.

In the third round (final) each team will represent one side of the case (to be chosen by lot) and the judges will indicate which questions they wish to hear. Each member of the team is expected to speak in the final and so the team must be prepared to re-allocate those questions covered to ensure that each team member speaks. It is of course permissible for one member of the team to do the reply or rejoinder at this stage. The time allowed for the main argument of each party will be a **maximum of 45 minutes** and will not be extendable. Teams are expected at this stage to have the experience to ensure that their main arguments are fitted into the time allowed.

Three judges will sit in the first and second round. A plenary court will be convened for the final.

The decision of the judges will be conclusive in selecting the semi-finalists, finalists and eventual winning team and best speaker. A special prize of a short stage in the ECJ at Luxembourg will be awarded to the individual deemed to be the best speaker from the semi-finalists or finalists.

Written and oral pleadings
The competition will consist of a written and oral part;

Written pleadings
ALL participating teams must prepare written pleadings for both applicant and defendant

This should be an outline of your case for both applicant and defendant, not exceeding 10 typed sides of argument on A4 paper each for the applicant and respondent respectively (no specific requirements for font or spacing are prescribed and an attached list of authorities is not included in the 10 pages allowance)

You should set out your argument in numbered paragraphs, which should be supported and cross-referenced to a separate list of the authorities on which you intend to rely.

One copy of each of your written pleadings for the respondent and applicant must be ***received on or before the 1st April 2008 by e-mail attachment sent to d.ashmore@uw.edu.pl and due receipt of this will be confirmed when the mail has been acknowledge by the organizers. No printed copies of the pleadings will be required. The pleadings should be accompanied by a completed copy of the team registration form.***
ONLY teams lodging these pleadings in due time will be invited to participate in the oral rounds of the competition.
In the event that more than one team sends written pleadings from one university, the team to participate will be that submitting the best written pleadings.

A prize for the best written pleadings will be awarded (which is presented by our main sponsors Clifford Chance).

Oral Argument

This argument need not be limited to the scope of the participant's written pleadings, but strict time limitations are to be maintained. Teams will be advised of the schedule of courts at registration on arrival in Poznan.

The main argument of each party shall be presented within 20 minutes (in the final this will be 45 minutes)

The applicant then has 5 minutes to reply, but is limited in this reply to the matters raised in the defendant's oral pleadings.

The defendant then has 5 minutes to reply in rejoinder and is also limited to matters raised in the applicant's reply.

Permission must be sought of the President of the Court, if any time limit is to be exceeded. Only a further 5 minutes can be allowed at his/ her discretion.

6. Roles

Each team may have up to four members. Teams should be in a position to argue both sides and can divide in which manner they wish to achieve that either as a full group or by dividing their teams, however the judges will expect to have heard from each member of the team individually at least once during the first round of the competition.

This will change in the second and third rounds of the competition where the judges will expect to hear from each member of the team during their presentation for both applicant and respondent.

7. Fees

Each participating team is responsible for their return travel costs to Budapest and any additional costs incurred due to earlier arrival or later departures. In addition a registration fee is payable for participation in the oral rounds in Poznan. This fee will allow the participation of a one team to include their accommodation and basic subsistence costs during the competition dates (a team will include 3/4 team members and one accompanying coach).This fee may be paid by bank transfer in which case it must be received by the organizers and confirmation of payment sent by e-mail ***no later than*** the 20th April 2008 (the original copy of the payment confirmation is to be produced at registration). The fee may also be paid by cash payment on the 2nd May at the registration of the team in Poznan. The participation fee for this year is £475 (four hundred and seventy five pounds) or by payment in Polish zloty in which case the fee due will be 2,700 zloty. PLEASE NOTE THAT ALL FEES DUE OR EXTRA MONIES PAYABLE MUST BE RECEIVED NO LATER THAN CLOSURE OF REGISTRATION ON THE 2nd May 2008.
In addition this year, teams who are from outside the EU and will need to find

additional monies to pay for the Schengen visa to enter Poland, are entitled to seek assistance from a special fund set up by the Moot sponsors Clifford Chance, to provide sponsorship for this extra cost. **Any team wishing to apply for such assistance should contact D. Ashmore by e-mail at d.ashmore@uw.edu.pl no later than 1st April 2008**, providing full details of the team and linked visa information, including the Polish consulate where their visa application will be processed.

Bank Details

Account name	Juris Angliae Scientia
Bank name and address	Bank Handlowe w Warszawie S.A. Citibank VII Oddzial w Warszawie Ul Chalubinskiego 8, 00-950 Warsawa Skr poczt 129 CITIPLPX
Account number	PL 38103016540000000031691000 (GBP account)

MOOTING TIPS FOR TEAMS

Mooting is an acquired skill which improves with practice and you should expect your performance to improve throughout the competition. Nevertheless, for those with little or no mooting practice, there are still a number of helpful tips which may be adopted to ensure that your first attempt is consistent with the behaviour the judges will expect from the advocates before them.

1. Opening speeches

The advocate opening the case on behalf of the appellant should, as a matter of courtesy, introduce himself/herself, his fellow team-mates ("My Learned Friends...") and the advocates for the respondent to the court. Check that you know the full names of the other team before the case begins.

The first advocate to speak should also ask the court if they require the facts of the case to be read out. If the court asks you to read out the facts, it is best to have prepared a brief summary of your own rather than simply reading the facts as they are contained in the bundle. You cannot change or depart from the facts in the bundle, although you are free to interpret them in the manner most favourable to your side.

2. Main arguments

Your main speech should begin by telling the judge which points of law you will be arguing and how the case will be divided between yourself and your team-mates. You cannot hope to convince the court of your answer unless they know which point you are addressing and what your main arguments will be *before* you begin discussing them in detail.

Your submissions should be logically structured and presented confidently and clearly. Although time is limited, it is better to take your arguments slowly to ensure the court understands them, rather than rushing them and having too deal with the resulting questions which the court asks to clarify your position. You should try to avoid reading a prepared speech, since the court will almost inevitably ask you questions which draw you away from your text and it will then be very difficult to rejoin your speech after such questioning. It is a better compromise to use 'prompt-cards' which you refer to occasionally to remind you of all the points you wished to make.

You should ensure, wherever possible, that you use legal authority to back-up your arguments. Be prepared to fully cite the details of the case (name, year etc.) and to provide the court with a brief résumé of the facts if the judges so request. Where such authority is not available, you should indicate why, for policy reasons, your proposed solution is to be preferred to alternative solutions. Remember that the only authorities that are to be cited before the court are those contained in this bundle: all others will be ignored by the judges.

You should conclude your submissions by reiterating the main points and asking the court whether you may be of any further assistance. If not, you may sit down and pass over to your team-mate or to the advocates for the opposition.

3. Questions

As mentioned earlier, you can expect to face questions from the judges. Listen carefully and make sure you have properly understood the question before attempting to give an answer: it

is far better to ask for clarification than to begin providing information on a question which the court has not actually raised.

The advocate to whom the question is addressed should attempt to answer the questions but may, if necessary, consult with other members of the team before responding. A second member of the team may seek permission to address the court in response to its question to conclude the answer thereafter.

Watch for 'leads' from the questions asked by the court: they can sometimes help you to assess the courts willingness to accept your proposals and allow you to amend your arguments accordingly or use questions asked of your opponents to criticise their submissions.

4. Reply/Rejoinder

The secret of success of a good advocate is to be able to respond to the issues raised by your opponents, not simply to repeat the pre-prepared arguments in favour of your client whilst ignoring other issues or arguments raised by the opposition. Although it is only the respondents who have the opportunity to address many of these issues in their main speech, both teams have the 5 minute reply/rejoinder to comment on the arguments of the opposition. You should not avoid issues raised by the opposition, since this gives the court the impression that you are unable to deal with them and this will clearly weaken the strength of your case.

Your reply/rejoinder should aim to avoid simply repeating arguments that you have put before the court and should instead be used as an opportunity to clarify any points of confusion which may have been left after your main speech and the questions posed to you by the court. You should also use the reply/rejoinder to highlight problems with the submissions made by the opposition.

5. Addressing the Court

When addressing a judge the following courtesies should be observed. You must investigate the title of the judge and qualification. If a Lord, he must be formally addressed as "My Lord" or "Sir". A more general term is "Your Excellency". If addressing a judge other than a Lord, you may use the general term "Your Honour".

Be polite to the judges. Listen carefully to their questions and try to ensure you follow their statements. Answer the questions they put and not those you wish they had asked or those to which you know the answer. Never argue with the judge and never talk whilst the judge is speaking, if you want to win your case. The same point could always be put politely and just as effectively. (e.g. "With respect Your Honour...")

Always address your arguments to the court rather than to the opposition: this is a moot *not* a debate. Also remember that, as the advocate, it is your role to *answer* questions posed by the judges, *not* to ask questions to the judges or the opponents.

Always try to stick to time-limits and do not automatically assume that the court will give you additional time to complete your submissions. Be prepared to adapt them and summarise some issues if you appear to be running out of time.

6. Organisation and Preparation

Although much of the skill in mooting lies in responding 'on your feet' to judges questions or the arguments of your opponents, even the best advocates do not rely solely on their quick-wits and instincts to deal with such problems. The presentation of the case in court is the culmination of many hours of careful preparation, rehearsal of the arguments to be made, study of the legal authority and policy arguments behind your submissions and anticipation of the arguments of your opponents. The more time you spend in organising and preparing your case the easier it will be to act 'on your feet' and yet it will look more impressive.

7. Conclusion

Although, this is a competition, we also want you to have fun. Preparing for a moot takes a lot of time and effort and you should try your best to enjoy the opportunity to show the judges how much law you have managed to learn during this preparation. Also, the more relaxed you are, the likelier it is that you will be able to provide a confident presentation style to the judges.

Good luck to all and we look forward to welcoming you in Poznan!

ORGANISING COMMITTEE
Denise Ashmore and Steve Terrett

CONTACT NUMBERS AND ADDRESS FOR PLEADINGS.
Tel/Fax: ++ 48 22/831 86 34
e-mail: da208@cam.ac.uk/ or d.ashmore@uw.edu.pl
Address:British Centre for English and European Legal Studies
(Moot competition)
ul Rajcow 2, apt1, 00-220 Warszawa, Poland.

POZNAN CONTACT
Katarzyna Wasniowska/ Krzysztof Koch
kwasn@amu.edu.pl

PRELIMINARY INFORMATION ON THE ECJ

The following is a short introductory guide to the role of the ECJ within the European Communities system and its relationship with the national courts of the Member States.

- The ECJ's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EC law. It is the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the ECJ on behalf of an EC institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions *against a Member State* it suspects to be in breach of Community law stems from *Article 226*. The power of one Member State to bring an action *against another Member State* comes from *Article 227* but such cases are rare. Institutions or Member States may also challenge *secondary legislation adopted by institutions of the TEC* on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the ECJ to rule upon a certain issue of European law, it is most common for such a case to begin in that person's national courts and for the national court to make an *Article 234* reference to the ECJ asking for guidance on the interpretation, application or validity of an EC measure.

- The ECJ is assisted by Advocate-Generals, who produce reasoned opinions on a case before the ECJ rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are *not binding* on the ECJ but they are very influential and are often followed in practice.

- The ECJ is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the ECJ has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the ECJ's rulings on Community law but it is for the national court to apply that Community law to the facts of the case in front of it.

PROVISIONAL TIMETABLE

FRIDAY 2nd May 2008

16.00-19.00	Registration of teams
19.00	Welcome Reception and Opening Ceremony

SATURDAY 3rd May 2008

9.00	Opening words by Organising Committee and Judges

Round 1 of Competition

9.30 - 11.00	**Group 1**
11.15 - 12.45	**Group 2**
13.00 - 14.30	LUNCH
14.30-16.00	**Group 3**
16.00-17.30	**Group 4**
20.00	DINNER (Announcement of semi-finalists)

SUNDAY 4th May 2008

9.00 - 11.00	**First semi-finals**
11.15-13.15	**Second semi-finals**
13.30	LUNCH BREAK (Announcement of finalists)
15.00	**FINAL**
20.00	Celebration dinner
23.00	Party

MONDAY 5th May 2008

Departure of teams and time for sightseeing.

ACKNOWLEDGMENTS

The Organising Committee wish to thank the following for their invaluable help:

- Catherine Barnard, Trinity College, Cambridge

- Carsten Zatschler and Geert de Baere, ECJ (referendaires)

- Michal Bobek, European University Institute, Florence.

- The University of Cambridge, Lord Slynn of Hadley and the Court of Justice of the European Community (in particular Eleanor Sharpston A.G) for their continuing support of the Moot Court Competition

The Organisers would particularly like to thank Professors Steiner, Weatherill and Catherine Barnard for agreeing to the reproduction of extracts from their textbooks to assist the students preparing for the competition.

The Organising Committee would also like to offer special thanks to the Central and East European branches of *Clifford Chance*, the main financial sponsors of the moot court competition.

CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article 2

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and no inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3

1.For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) a common commercial policy;
(c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(d) measures concerning the entry and movement of persons as provided for in Title IV;
(e) a common policy in the sphere of agriculture and fisheries;
(f) a common policy in the sphere of transport;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
(j) a policy in the social sphere comprising a European Social Fund;
(k) the strengthening of economic and social cohesion;
(l) a policy in the sphere of the environment;.(m) the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans European networks;
(p) a contribution to the attainment of a high level of health protection;
(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r) a policy in the sphere of development cooperation;
(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t) a contribution to the strengthening of consumer protection;
(u) measures in the spheres of energy, civil protection and tourism.
2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 10

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

Article 12

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Article13
1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

PART TWO
CITIZENSHIP OF THE UNION
Article 17
1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 18
1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.
3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL
CHAPTER 1
WORKERS

Article 39
1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this article shall not apply to employment in the public service.

Article 21
Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.
Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.
Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.

EMPLOYMENT

Article 125
Member States and the Community shall, in accordance with this title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty.

Article 126
1. Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 125 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2).
2. Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 128.

Article 127
1. The Community shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.
2. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities.

Article 128
1. The European Council shall each year consider the employment situation in the Community and adopt conclusions thereon, on the basis of a joint annual report by the Council and the Commission.
2. On the basis of the conclusions of the European Council, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the Employment Committee referred to in Article 130, shall each year draw up guidelines which the Member States shall take into account in their employment policies. These guidelines shall be consistent with the broad guidelines adopted pursuant to Article 99(2).

SOCIAL PROVISIONS

Article 136
The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.
To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.
They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Article 137
1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in Community territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 150;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).
2. To this end, the Council:
(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

EDUCATION, VOCATIONAL TRAINING AND YOUTH

Article 149
1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

Article 234
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 249
In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety upon those to whom it is addressed.
Recommendations and opinions shall have no binding force.

Article 254
1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.

REGULATION (EEC) No 1612/68 OF THE COUNCIL of 15 October 1968 on freedom of movement for workers within the Community
THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 49 thereof;
Having regard to the proposal from the Commission;
Having regard to the Opinion of the European Parliament1;
Having regard to the Opinion of the Economic and Social Committee2;
Whereas freedom of movement for workers should be secured within the Community by the end of the transitional period at the latest ; whereas the attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health;
Whereas by reason in particular of the early establishment of the customs union and in order to ensure the simultaneous completion of the principal foundations of the Community, provisions should be adopted to enable the objectives laid down in Articles 48 and 49 of the Treaty in the field of freedom of movement to be achieved and to perfect measures adopted successively under Regulation No 153 on the first steps for attainment of freedom of movement and under Council Regulation No 38/54/EEC4 of 25 March 1964 on freedom of movement for workers within the Community;
Whereas freedom of movement constitutes a fundamental right of workers and their families ; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States ; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed;
Whereas such right must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services;
Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country;
Whereas the principle of non-discrimination between Community workers entails that all nationals of Member States have the same priority as regards employment as is enjoyed by national workers;
Whereas it is necessary to strengthen the machinery for vacancy clearance, in particular by developing direct co-operation between the central employment services and also between the regional services, as well as by increasing and co-ordinating the exchange of information in order to ensure in a general way a clearer picture of the labour market ; whereas workers wishing to move should also be regularly informed of living and working conditions ; whereas, furthermore, measures should be provided for the case where a Member State undergoes or foresees disturbances on its labour market which may seriously threaten the standard of living and level of employment in a region or an industry ; whereas for 1 OJ No 268, 6.11.1967, p. 9. 2 OJ No 298, 7.12.1967, p. 10. 3 OJ No 57, 26.8.1961, p. 1073/61. 4 OJ No 62, 17.4.1964, p. 965/64. this purpose the exchange of information, aimed at discouraging workers from moving to such a region or industry, constitutes the method to be applied in the first place but, where necessary, it should be possible to strengthen the results of such exchange of information by temporarily suspending the abovementioned machinery, any such decision to be taken at Community level;
Whereas close links exist between freedom of movement for workers, employment and vocational training, particularly where the latter aims at putting workers in a position to take up offers of employment from other regions of the Community ; whereas such links make it necessary that the problems arising in this connection should no longer be studied in isolation but viewed as inter-dependent, account also being taken of the problems of employment at the regional level ; and whereas it is therefore necessary to direct the efforts of Member States toward co-ordinating their employment policies at Community level;
Whereas the Council, by its Decision of 15 October 19681 made Articles 48 and 49 of the Treaty and also the measures taken in implementation thereof applicable to the French overseas departments;
HAS ADOPTED THIS REGULATION:
PART I EMPLOYMENT AND WORKERS' FAMILIES

TITLE I Eligibility for employment

Article 1
1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.
2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.
Article 2
Any national of a Member State and any employer pursuing an activity in the territory of a Member State may

exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

Article 3

1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply: - where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals ; or

- where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

2. There shall be included in particular among the provisions or practices of a Member State referred to in the first subparagraph of paragraph 1 those which: (a) prescribe a special recruitment procedure for foreign nationals;

(b) limit or restrict the advertising of vacancies in the press or through any other medium or subject it to conditions other than those applicable in respect of employers pursuing their activities in the territory of that Member State;

(c) subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that State are concerned.

Article 4

1. Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.

2. When in a Member State the granting of any benefit to undertakings is subject to a minimum percentage of national workers being employed, nationals of the other Member States shall be counted as national workers, subject to the provisions of the Council Directive of 15 October 1963.2 1 OJ No L 257, 19.10.1968, p. 1. 2 OJ No 159, 2.11.1963, p. 2661/63.

Article 5

A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.

Article 6

1. The engagement and recruitment of a national of one Member State for a post in another Member State shall not depend on medical, vocational or other criteria which are discriminatory on grounds of nationality by comparison with those applied to nationals of the other Member State who wish to pursue the same activity.

2. Nevertheless, a national who holds an offer in his name from an employer in a Member State other than that of which he is a national may have to undergo a vocational test, if the employer expressly requests this when making his offer of employment.

TITLE II Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

……..

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. Such worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist ; he shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

…….

TITLE III Measures for controlling the balance of the labour market

Article 19

1. Twice a year, on the basis of a report from the Commission drawn up from information supplied by the Member

States, the latter and the Commission shall together analyse: - the results of Community arrangements for vacancy clearance;
- the number of placings of nationals of non-Member States;
- the foreseeable developments in the state of the labour market and, as far as possible, the movements of manpower within the Community.
2. The Member States shall examine with the Commission all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Community. They shall adopt all measures necessary for this purpose.

Article 20
1. When a Member State undergoes or foresees disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation, that State shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars.
2. The Member States and the Commission shall take all suitable measures to inform Community workers so that they shall not apply for employment in that region or occupation.
3. Without prejudice to the application of the Treaty and of the Protocols annexed thereto, the Member State referred to in paragraph 1 may request the Commission to state that, in order to restore to normal the situation in that region or occupation, the operation of the clearance machinery provided for in Articles 15, 16 and 17 should be partially or totally suspended.
The Commission shall decide on the suspension as such and on the duration thereof not later than two weeks after receiving such request. Any Member State may, within a strict time limit of two weeks, request the Council to annul or amend any such decision. The Council shall act on any such request within two weeks.
4. Where such suspension does take place, the employment services of the other Member States which have indicated that they have workers available shall not take any action to fill vacancies notified directly to them by employers in the Member States referred to in paragraph 1.

…….
TITLE II Final provisions
Article 42
1. This Regulation shall not affect the provisions of the Treaty establishing the European Coal and Steel Community which relate to workers with recognised qualifications in coalmining or steelmaking, nor those of the Treaty establishing the European Atomic Energy Community which deal with eligibility for skilled employment in the field of nuclear energy, nor any measures taken in pursuance of those Treaties.
Nevertheless, this Regulation shall apply to categories of workers referred to in the first subparagraph and to members of their families in so far as their legal position is not governed by the above-mentioned Treaties or measures.
2. This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty.
3. This Regulation shall not affect the obligations of Member States arising out of: - special relations or future agreements with certain non-European countries or territories, based on institutional ties existing at the time of the entry into force of this Regulation ; or
- agreements in existence at the time of the entry into force of this Regulation with certain non-European countries or territories, based on institutional ties between them.
Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.
Article 43
Member States shall, for information purposes, communicate to the Commission the texts of agreements, conventions or arrangements concluded between them in the manpower field between the date of their being signed and that of their entry into force.
Article 44
The Commission shall adopt measures pursuant to this Regulation for its implementation. To this end it shall act in close co-operation with the central public authorities of the Member States.
Article 45
The Commission shall submit to the Council proposals aimed at abolishing, in accordance with the conditions of the Treaty, restrictions on eligibility for employment of workers who are nationals of Member States, where the absence of mutual recognition of diplomas, certificates or other evidence of formal qualifications may prevent freedom of movement for workers.
Article 46
The administrative expenditure of the Committees referred to in Part III shall be included in the budget of the European Communities in the section relating to the Commission.
Article 47
This Regulation shall apply to the territories of the Member States and to their nationals, without prejudice to Articles 2, 3, 10 and 11.
Article 48
Regulation No 38/64/EEC shall cease to have effect when this Regulation enters into force.
This Regulation shall be binding in its entirety and directly applicable in all Member States.
Done at Luxembourg, 15 October 1968.

Charter of fundamental rights of the European Union
(2007/C 303/01)
The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
Preamble
The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.
Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.
The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.
To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.
This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.
Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.
The Union therefore recognises the rights, freedoms and principles set out hereafter.

…….

Article 14
Right to education
1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15
Freedom to choose an occupation and right to engage in work
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.
……

TITLE III
EQUALITY

Article 20
Equality before the law
Everyone is equal before the law.

Article 21
Non-discrimination
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.
……

TITLE VII
GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 51
Field of application
1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52
Scope and interpretation of rights and principles
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53
Level of protection
Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54
Prohibition of abuse of rights
Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.

Council Directive 2000/78/EC
of 27 November 2000
establishing a general framework for equal treatment in employment and occupation

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,
Having regard to the proposal from the Commission(1),
Having regard to the Opinion of the European Parliament(2),
Having regard to the Opinion of the Economic and Social Committee(3),
Having regard to the Opinion of the Committee of the Regions(4),
Whereas:
(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions(5).
(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.
(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.
(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.
(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.
(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.
(10) On 29 June 2000 the Council adopted Directive 2000/43/EC(6) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.
(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.
(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.
(14) This Directive shall be without prejudice to national provisions laying down retirement ages.
(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.
(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.
(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.
(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.
(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.
(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.
(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.
(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.
(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.
(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community(7), the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities(8), affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.
(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
(32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.
(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

(34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.
(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.
(37) In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2
Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3
Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals and pay;
(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4
Occupational requirements
1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

……
Article 6
Justification of differences of treatment on grounds of age
1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7
Positive action
1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8
Minimum requirements
1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II
REMEDIES AND ENFORCEMENT

Article 9
Defence of rights
1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10
Burden of proof
1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case
.
Article 11
Victimisation
Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12
Dissemination of information
Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13
Social dialogue
1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.
2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14
Dialogue with non-governmental organisations
Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

……
CHAPTER IV
FINAL PROVISIONS

Article 16
Compliance
Member States shall take the necessary measures to ensure that:
(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17
Sanctions
Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18
Implementation
Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.
When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.NOTE FOR THE PURPOSE OF THIS MOOT COMPETITION ONLY THIS ARTICLE SHALL READ THAT MEMBER STATES SHALL HAVE A MAXIMUM PERIOD OF 4 YEARS, SO A TOTAL OF 7 YEARS IN WHICH TO IMPLEMENT THE TERMS OF THE DIRECTIVE.

Article 19
Report
1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20
Entry into force
This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 21
Addressees
This Directive is addressed to the Member States.
Done at Brussels, 27 November 2000.

DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 29 April 2004
on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 12, 18, 40, 44 and 52 thereof,
Having regard to the proposal from the Commission 1 ,
Having regard to the Opinion of the Economic and Social Committee 2 ,
Having regard to the Opinion of the Committee of the Regions 3 ,
Acting in accordance with the procedures laid down in Article 251 of the Treaty 4 ,
Whereas:
(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.
(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.
(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community 1, and to repeal the following acts:
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
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
Council Directive 90/364/EEC of 28 June 1990 on the right of residence
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
and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students
(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to
decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.
(7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.
(8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15

March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement 1 or, where appropriate, of the applicable national legislation.
(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.
(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.
(11) The fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.
(12) For periods of residence of longer than three months, Member States should have the possibility to require Union citizens to register with the competent authorities in the place of residence, attested by a registration certificate issued to that effect.
(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.
(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.
(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.
(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.
(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.
(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.
(19) Certain advantages specific to Union citizens who are workers or self-employed persons and to their family members, which may allow these persons to acquire a right of permanent residence before they have resided five years in the host Member State, should be maintained, as these constitute acquired rights, conferred by Commission Regulation (EEC) No 1251/70 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 1 and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity
(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.
(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or

their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.
(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25 February 1964 on the coordination of special
measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health .
(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.
(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.
(25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.
(26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.
(27) In line with the case-law of the Court of Justice prohibiting Member States from issuing orders excluding for life persons covered by this Directive from their territory, the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order, should be confirmed.
(28) To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.
(29) This Directive should not affect more favourable national provisions.
(30) With a view to examining how further to facilitate the exercise of the right of free movement and residence, a report should be prepared by the Commission in order to evaluate the opportunity to present any necessary proposals to this effect, notably on the extension of the period of residence with no conditions.
(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics,
language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS
Article 1
Subject
This Directive lays down:
(a) the conditions governing the exercise of the right to move and reside freely within the Member States by Union citizens and their family members;
(b) the right of permanent residence in the Member States for Union citizens and their family members;

(c) the limits placed on these rights on grounds of public policy, public security and public health.

Article 2
Definitions
For the purposes of this Directive:
(1) "*Union citizen*" means any person having the nationality of a Member State;
(2) "*Family member*"means:
(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
(3) "*Host Member State*" means the Member State to which a Union citizen goes in order to exercise his right of free movement and residence.

Article 3
Persons entitled
1 This Directive shall apply to all Union citizens who move to and reside in a Member State of the Union other than that of which they are a national and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.
The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

CHAPTER II
RIGHT OF EXIT AND ENTRY
Article 4
Right of exit
1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.
2. No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies.
3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.
4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. Where the law of a Member State does not provide for identity cards to be issued, the period of validity of any passport on being issued or renewed shall be not less than five years.

Article 5
Right of Entry
1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.
No entry visa or equivalent formality may be imposed on Union citizens.
2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.
Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.
3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for

in Article 10.
4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.
5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

CHAPTER III
RIGHT OF RESIDENCE FOR UP TO SIX MONTHS
Article 6
Right of residence for up to three months
1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7
Right of residence for more than three months
1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(a) are workers or self-employed persons in the host Member State; or
(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
are enrolled at a private or public establishment, accredited or financed by the host (c) – Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).
3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
(a) he/she is temporarily unable to work as the result of an illness or accident;
(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.
4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 8
Administrative formalities for Union citizens
1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.
2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person

registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.
3. For the registration certificate to be issued, Member States may only require that
Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or – passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons;
- Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or – passport and provide proof that they satisfy the conditions laid down therein;
- Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources.
4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.
5. For the registration certificate to be issued to family members of Union citizens, who are themselves Union citizens, Member States may require the following documents to be presented:
(a) a valid identity card or passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 9
Administrative formalities for family members who are not nationals of a Member State
(1) Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned stay is for more than three months.
(2) The deadline for submitting the residence card application may not be less than three months from the date of arrival.
(3) Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory penalties.

Article 10
Issuing of residence cards
(1) The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issue of a document bearing the words “residence card of a family member of an EU citizen” no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately..
(2) For the residence card to be issued, Member States shall require presentation of the following documents:
(a) a valid passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
(d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
(f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Article 11
Validity of the residence card
(1) The residence card provided for by Article 10(1**)** shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years.

(2) The validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or third country.

Article 12
Retention of the right of residence by family members in the event of death or departure of the Union citizen
(1) Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of the family members of a Union citizen who are nationals of a Member State.
Before acquiring the right of permanent residence, the persons concerned must themselves meet the requirements laid down in in points (a), (b), (c) or (d) of Article 7 (1).
(2) Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of the family members of a Union citizen who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.
.
Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
Such family members shall retain their right of residence exclusively on a personal basis.
3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

Article 13
Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership
1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.
Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).
Such family members shall retain their right of residence exclusively on personal basis.

Article 14
Retention of the right of residence
1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.
In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.
3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's

recourse to the social assistance system of the host Member State.
4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
(a) the Union citizens are workers or self-employed persons, or
(b) the Union citizens entered the territory of the host Member State in order to seek employment. in this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15
Procedural safeguards
1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.
2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.
3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

CHAPTER IV
RIGHT OF PERMANENT RESIDENCE
Section I
Eligibility
Article 16
General rule for Union citizens and their family members
1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.
2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.
3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.
4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17
Exemptions for persons no longer working in the host Member State and their family members
(1) By way of derogation from Article 16, the right of permanent residence on the territory of the host Member State shall be enjoyed before completion of a continuous residence of five years of residence by:
(a) workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years.
If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60;
(b) workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work.
If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence;
(c) workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.
For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in the host Member State.
Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident shall be regarded as periods of employment.
2. The conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person.
3. Irrespective of nationality, the family members of a worker or a self-employed person who are residing with him

in the territory of the host Member State shall have the right of permanent residence in that Member State, if the worker or self-employed person has acquired himself the right of permanent residence in that Member State on the basis of paragraph 1.
4. If, however, the worker or self-employed person dies while still working but before acquiring permanent residence status in the host Member State on the basis of paragraph 1, his family members who are residing with him in the host Member State shall acquire the right of permanent residence there, on condition that:
(a) the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years; or
(b) the death resulted from an accident at work or an occupational disease; or
(c) the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

Article 18
Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State
Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12**(2)** and 13**(2)** apply and who satisfy the conditions laid down therein shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

SECTION II
ADMINISTRATIVE FORMALITIES
Article 19
Document certifying permanent residence for Union citizens
1. Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.
2. The document certifying permanent residence shall be issued as soon as possible.

Article 20
Permanent residence card for family members who are not nationals of a Member State
1. Member States shall issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application. The permanent residence card shall be renewable automatically every ten years.
2. The application for a permanent residence card shall be submitted before the residence card expires. Failure to comply with the requirement to apply for a permanent residence card may render the person concerned liable to proportionate and non-discriminatory sanctions.
3. Interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card.

Article 21
Continuity of residence
For the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State. Continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

CHAPTER V
PROVISIONS COMMON TO THE RIGHT OF RESIDENCEAND THE RIGHT OF PERMANENT RESIDENCE
Article 22
Territorial scope
The right of residence and the right of permanent residence shall cover the whole territory of the Member State. Member States may impose territorial restrictions on the right of residence and right of permanent residence only where the same restrictions apply to their own nationals.

Article 23
Related rights
Irrespective of nationality, family members of an EU citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment and self-employment there.

Article 24
Equal treatment
1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in

Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Article 25
General provisions concerning residence documents
1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.
2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

Article 23
Checks
Member States may carry out checks on compliance with any requirement deriving from their national legislation for non-nationals always to carry their registration certificate or residence card, provided that the same requirement applies to their own nationals as regards their identity card.
In the event of failure to comply with this requirement, Member States may impose the same sanctions as those imposed on their own nationals for failure to carry their identity card.

CHAPTER VI
RESTRICTIONS ON THE RIGHT OF ENTRY AND RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH
Article 27
General principles
1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.
Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.
3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have.
Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.
4. The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 28
Protection against expulsion
1 Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host country and the extent of his/her links with the country of origin.
2 A host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory or against family members who are minors, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Article 29
Public health
1. The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or

contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
2. Diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.
3. Where there are serious indications that it is necessary, Member States may, within three months of the date of arrival, require persons entitled to the right of residence to undergo, free of charge, a medical examination to certify that they are not suffering from any of the conditions referred to in paragraph 1. Such medical examinations may not be required as a matter of routine.

Article 30
Notification of decisions
1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.
2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.
3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31
Procedural safeguards
1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
where the expulsion decision is based on a previous judicial decision; or –
where the persons concerned have had previous access to judicial review; or –
where the expulsion decision is based on imperative grounds of public security under – Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

Article 32
Duration of exclusion orders
1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which has been validly adopted in accordance with Community law, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion.
The Member State concerned shall reach a decision on this application within six months of its submission.
2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State concerned while their application is being considered.

Article 33
Expulsion as a penalty or legal consequence
1 Expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29.
2. If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

CHAPTER VII
FINAL PROVISIONS
Article 34
Publicity
Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication.

Article 35
Penalties
Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.
Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Article 36
Sanctions
Member States shall lay down provisions on the sanctions applicable to breaches of national rules adopted for the implementation of this Directive and shall take the measures required for their application. The sanctions laid down shall be effective and proportionate. Member States shall notify the Commission of these provisions not later than .....* and as promptly as possible in the

case of any subsequent changes.

Article 37
More favourable national provisions
The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

Article 38
Repeals
1 Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from 30th April 2006.
2 Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC are repealed with effect from 30th April 2006
3 References made to the repealed provisions and Directives shall be construed as being made to this Directive.

Article 39
Reports
No later than 30th April 2008, the Commission shall submit a report on the application of this Directive to the European Parliament and the Council, together with any necessary recommendations notably on the opportunity to extend the period of time during which Union citizens and their family members may reside in the territory of the host Member State without any conditions. The Member States shall provide the Commission with the information needed to produce the report.

Article 40
Transposition
1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30th April 2006
When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.
2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

Article 41
Entry into force
This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*
.
Article 42
Addressees
This Directive is addressed to the Member States.
Done at Strasbourg 29th April 2004,
For the EP and the Council
The President

4 **Principle of supremacy of EC law**

4.1 **The problem of priorities**

The wide scope of the RC Treaty, covering a number of areas normally reserved to national law alone, coupled with the extended application by the ECJ of the principle of direct effects, led inevitably to a situation of conflict between national and EC law. In such a case, which law was to prevail? The way in which that conflict was resolved was of crucial importance to the Community legal order; it was a constitutional problem of some magnitude for Member States.

The EC Treaty is silent on the question of priorities. Perhaps this was a diplomatic omission; perhaps it was not thought necessary to make the matter explicit, since the extent to which Community law might be directly effective was not envisaged at the time of signing the Treaty. In the absence of guidance, the matter has been left to be decided by the courts of Member States, assisted by the EC} in its jurisdiction under Article 234 (ex 177) EC (see chapter 26). As with the concept of direct effects, the Court has proved extremely influential in developing the law.

The question of priorities between directly effective international law and domestic law is normally seen as a matter of national law, to be determined according to the constitutional rules of the State concerned. It will depend on a number of factors. Primarily it will depend on the terms on which international law has been incorporated into domestic law. This in turn will depend on whether the State is monist or dualist in its approach to international law. If monist, it will be received automatically into national law from the moment of its ratification, without the need for further measures of incorporation. If dualist, international law will not become binding internally, as part of domestic law, until it is incorporated by a domestic statute. In the EC, France, for example, is monist; Germany, Belgium, Italy and the UK are dualist. But whether received automatically, by process of 'adoption', or incorporated by statute, by way of , transformation', this does not settle the question of priorities. This will depend on the extent to which the State has provided for this, either in its constitution, where it has a written constitution, or, where it has no written constitution, in its statute of incorporation.

There is wide variation in the way in which, and the extent to which, Member States of the EC have provided for this question of priorities. Where States have a written constitution, provision may range from the whole-hearted acceptance of international law of the Dutch constitution (Article 66), which accords supremacy to *all* forms of international law, whether prior or subsequent to domestic law, to Article 55 of the French constitution, which, at the time of French accession to the Community, provided that treaties or agreements duly ratified 'have authority superior to that of laws' (thus leaving open the question of secondary legislation), to Article 24 of the German constitution, which provided, rather loosely, that the State 'may transfer sovereign powers' to international organisations (although Article 23 has been introduced to deal specifically with the EU) or Article 11 of the Italian constitution whereby the State 'consents, on conditions of reciprocity with other States, to limitations of sovereignty necessary for an arrangement which may ensure peace and justice between the nations'. (Under the principle of reciprocity, if one party to an agreement breaches his obligations, the other contracting parties may regard themselves as entitled to be relieved of theirs.)

A State which does not have a written constitution, and which is dualist, such as the UK, must provide for priorities in the statute of incorporation itself. This statute will have the same status as any other statute. As such it will be vulnerable to the doctrine of implied repeal, or *'lex posterior derogat priori',* whereby any inconsistency between an earlier and a later statute is resolved in favour of the latter. The later statute is deemed to have impliedly repealed the earlier one (see *Ellen Street Estates Ltd* v *Minister of Health* [1934] 1 KB 590).

On a strict application of this doctrine, any provision of a domestic statute passed subsequent to the statute incorporating EC law, in the British case the European Communities Act 1972, which was inconsistent with EC law, would take priority.

Given the differences from State to State it is clear that if national courts were to apply their own constitutional rules to the question of priorities between domestic law and EC law, there would be no uniformity of application, and the primacy of EC law could not be guaranteed throughout the Community. This was the principal reason advanced by Advocate-General Roemer in *Van Gend en Loos* (case 26/62) for denying the direct effects of Article 12 of the EEC Treaty (now 25 ECJ. Not only would this weaken the effect of Community law, it would undermine solidarity among the Member States, and in the end threaten the Community itself.

It is no doubt reasons such as these which led the RC] to develop its own constitutional rules to deal with the problem, in particular the principle of supremacy, or primacy, of EC law.

4.2 The Court of Justice's' contribution

4.2.1 Development of the principle of supremacy

The first cautious statement of the principle of supremacy of EC law came in the case of *Van Gend en Loos* (case 26/62). The principal question in the case was the quest ion of the direct effects of Article 25 (ex 12) EC. The conflict, assuming that Article were found directly effective, was between the Article 2S (ex 12) and an.~ *earlier* Dutch law. Under Dutch law, if Article 2S were directly effective it would, under the Dutch constitution, take precedence over domestic law. So the questions referred to the ECJ under Article 234 (ex 177) did not raise the issue of sovereignty directly. Nevertheless, in addition to declaring that Article 2S was directly effective, the Court went on to say that:

. . . the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields.

Although the main emphasis of the judgment relates to the doctrine of direct effect, it is also significant because, by referring to the 'new legal order', the ECJ indicated that the Community was not just a 'normal' international law: organisation. In particular, the Community had a more independent status as well as, arguably, greater impact on the national legal systems of the Member" States.

The conflict in *Costa* v *ENEL* (case 6/64) posed a more difficult problem for the Italian courts. This case too involved an alleged conflict between a number of Treaty provisions and an Italian statute nationalising the electricity company of which the defendant, Signor Costa, was a shareholder, but here the Italian law was later in time. On being brought before the Milan *tribunale* for refusing to pay his bill (the princely sum of Ll,925, or approximately £1.10), Signor Costa argued that the company was in breach of EC law. They argued *'lex posterior';* the Italian Act nationalising the electricity company was later in time than the Italian Ratification Act, the Act incorporating EC law. Therefore it took priority. The Italian court referred this question of priorities to the ECJ. It also referred the matter to its own, constitutional court. This time the principle of supremacy was clearly affirmed by the Court. It cited *Van Gend;* the States had 'limited their sovereign rights'. It went further. It looked to the Treaty; it noted that Article 249 (ex 189) indicate that there had been a transfer of powers to the Community institutions; Article 10 (ex 5) underlined States' commitment to observe Community law. The Court concluded:

The reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. . .

Such a measure cannot be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty. .

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called into question by subsequent legislative acts of the signatories. . .

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer, by Member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent *unilateral law, incompatible with the aims of the Community, cannot prevail. (Emphasis added.)*

The reasoning used by the ECJ is worthy of note as, in developing its argument, the ECJ uses a teleological - or purposive - approach that is not tied in particularly closely to the actual wording of the Treaty. The ECJ's arguments can be divided into two main groups:

(a) those relating to the *nature* of the Community; and
(b) those relating to the *purposes* of the Community.

The first category comprises the ECJ's assertion about the independent nature of the new Community legal order and the mechanism by which this legal order was created: the permanent limitation of Member States' sovereign rights. There is no express basis in the Treaty for either of these points. The other arguments, referring to the aims of the Treaty, are more practical. They look to the purpose of the Community and the need to ensure that those goals are not undermined. These arguments are based on the need to make Community law effective.

In the case of *lnternationale Handelsgesellschaft mbH* (case 11/70) the Court went even further. Here, the conflict was between not a treaty provision and a domestic statute, but between an EC regulation and provisions of the German constitution. The claimant argued that the regulation infringed, *inter alia,* the principle of proportionality enshrined in the German constitution and sought to nullify the regulation on those grounds. Normally, any ordinary law in breach of the constitution is invalid, since the constitution is superior in the hierarchy of legal rules to statute law. EC law had been incorporated into German law by statute, the Act of Ratification. There was no provision in the constitution that the constitution could be overridden by EC law. Article 24 merely provided for 'the transfer of sovereign powers to intergovernmental institutions'. So the question before the German administrative court (Verwaltungsgericht, Frankfurt) was: If there were a conflict between the regulation and the German constitution, which law should prevail? As in *Costa,* the German judge referred the question to the ECJ and his own federal constitutional court (Bundesverfassungsgericht).

The ruling from the ECJ was in the strongest terms. The legality of a Community act cannot be judged in the light of national law:

. . . the law born from the Treaty [cannot] have the courts opposing to it rules of national law of any nature whatever. *. . the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure. (Emphasis added.)*

Underlying this judgment one can see concerns similar to those expressed in *Costa:* the need to ensure the effectiveness of Community law, whatever the cost to the national legal order. If the Court's ruling seems harsh in the light of the importance of the rights protected in a State's constitution, many of which are regarded as fundamental human rights, it is worth adding that the Court went on to say that respect for such rights was one of the principal aims of the Community and as such it was part of its own (albeit unwritten) law (see chapter 7).

The principle of supremacy of Community law applies not only to internal domestic laws, but also to obligations entered into with third countries, that is, countries outside the EU. In the *ERTA* case (case 22/70) the ECJ held, in the context of a challenge to an international road transport agreement to which the Community was a party, that once the Community, in implementing a common policy, lays down common rules, Member States no longer have the right, individually or collectively, to contract obligations towards non-Member States affecting these common rules. And where the Community concludes a treaty in pursuance of a common policy, this excludes the possibility of a concurrent authority on the part of the Member States. This means that where a State attempts to exercise concurrent authority it will be overridden to the extent that it conflicts with Community law. This principle does not, however, appear to apply to Member States' pre-accession agreements with third countries. Where such agreements are 'not compatible' with the EC Treaty, Member States are required to 'take all appropriate steps to eliminate the incompatibilities established' (Article 307 (ex 234) ECJ. In *R* v *Secretary of State for Home the Department, ex parte Evans Medical Ltd* (case C-324/93), the Court conceded that provisions of such an agreement contrary to Community law may continue to be applied where the performance of that agreement may still be required by non-Member States which are parties to it. The Court has, however, urged national courts to give effect to such provisions only to the extent that it is necessary to meet the demands of that agreement *(Minne* (case C-13/93). Thus, subject to this exception, as far as the ECJ is concerned *all* EC law, whatever its nature, must take priority over *all* conflicting domestic law, whether it be prior or subsequent to Community law. Given the fact that the Court was approaching the matter *tabula rasa,* there being no provision in the Treaty to this effect, on what basis did the Court justify its position?

All these cases show a common theme in the ECJ's approach: the need to ensure the effectiveness of Community law. The position can be summarised as follows. The Court's reasoning is pragmatic, based on the purpose, the general aims and spirit of the Treaty. States freely signed the Treaty; they agreed to take all appropriate measures to comply with EC law (Article 10 (ex 5) ECJ; the Treaty created its own

institutions, and gave those institutions power to make laws binding on Member States (Article 249 (ex] 89) ECJ. They agreed to set up an institutionalised form of control by the Commission (under Article 226 (ex 69), see chapter 28) and the Court. The Community would not survive if States were free to act unilaterally in breach of their obligations. If the aims of the Community are to be achieved, there must be uniformity of application, This will not occur unless all States accord priority to EC law.

4.2.2 Problems for the national Courts

The reasoning is convincing. Nonetheless national courts were understandably reluctant to disregard their own constitutional rules and the Italian and German constitutional courts in *Costa* v *ENEL* [1964] CMLR 425 at p. 430 and *Internationale Handelsgesellschaft mbH (Solange I)* [1974] 2 CMLR 540, adhering to their own traditional view, refused to acknowledge the absolute supremacy of EC law.

There were other problems too for national courts - problems of application. Even if the principle of primacy of EC law were accepted in theory, what was a national judge to do in practice when faced with a conflict? No English judge can declare a statute void or unlawful; in countries with a written constitution only the constitutional court has power to declare a domestic law invalid for breach of the constitution. Must the national judge wait for the offending national law to be repealed or legally annulled before he can give precedence to EC law?

The *ECJ* suggested a solution to this problem in *Simmenthal SpA* (case 106/77). This case involved a conflict between a Treaty provision, the then Article 30 (now 28) EC on the free movement of goods, and an Italian law passed *subsequent* to the Italian Act incorporating EC law, a similar clash to the one in *Costa* v *ENEL* (case 6/64). Following *Costa,* the Italian constitutional court had revised its view and declared that it would be prepared to declare any national law conflicting with EC law invalid. When the problem arose in *Simmenthal* the Italian judge, the Pretore di Susa, was perplexed. Should he apply EC law at once to the case before him, or should he wait until his own constitutional court had declared the national law invalid? He referred this question to the ECJ. The Court's reply was predictable:

. . . any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community (para. 18).

. . . a national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing. . . to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (para. 24).

The reasoning behind the judgment is clear. Unless Community law is given priority over conflicting national law at once, from the moment of its entry into force, there can be no uniformity of application throughout the Community. Community law will be ineffective. According to the ECJ, national judges faced with a conflict between national law, whatever its nature, and Community law, must ignore, must shut their eyes to national law; they need not, indeed must not, wait for the law to be changed. Any incompatible national law is automatically inapplicable.

The principles expressed in *Simmenthal SpA* were applied by the Court in *R v Secretary of State for Transport, ex parte Factortame Ltd* (case *C-213/89),* in the context) of a claim before the English courts by a group of Spanish fishermen for an interim injunction to prevent the application of certain sections of the Merchant Shipping Act 1988, which denied them the right to register their boats in the UK, and which the claimants alleged were in breach of EC law. The question of the 'legality' of the British provisions under Community law had yet to be decided, following a separate reference to the Court of Justice. The British courts were being asked to give primacy to a *putative* Community right over an allegedly conflicting national law, and to grant an interim injunction against the Crown, something which *they* considered they were not permitted to do under national law. Following a reference by the House of Lords asking whether they were obliged to grant the relief in question as a matter of Community law, the ECJ pointed out that national courts were obliged, by Article 10 (ex 5) EC, to ensure the legal protection which persons derive from the direct effect of provisions of Community law. Moreover:

The full effectiveness of Community law would be . . . impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under

Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule (para. 21).

The obligation on Member States to ensure the full effectiveness of Community law requires national courts not only to 'disapply' the offending national law but also to supply a remedy which is not available under national law. It now seems that the obligation to disapply inconsistent national law extends beyond the courts to administrative agencies. In *Larsy* (Case C-118/00), reasoning from its judgments in *Simmenthal* and *Factortame* (Case *C-213/89),* the ECJ held that the national social security institution, INASTI, should disapply national laws that precluded effective protection of Larsy's Community law rights (para. 53). The issue of procedural rules and remedies is discussed further in chapter 6.
A finding that a provision of national law is 'inapplicable' because of its incompatibility with Community law does not, however, result in its annulment, or even prevent its application in situations falling outside the scope of Community law. In *IN. CO. GE. '90* (cases C-10 & 22/97) the Court held that *'it does not follow from Simmenthal that a domestic rule which is incompatible with EC law is non-existent'*. Similarly in *Arcaro* (case *C-168/95)* it made it clear that there was *'no method or procedure in Community law allowing national courts to eliminate national provisions contrary to a directive which has not been transposed where that provision may not be relied on before the national court'*. In *ICl* v *Colmer* (case *C-264/96)* the ECJ found a system of tax relief for holding companies with a seat in the EU discriminatory, and therefore contrary to EC law, when applied to subsidiary companies in other Member States, but lawful in a situation where holding companies control subsidiaries in non-Member States. Despite its inapplicability in the former context, the national court was under no obligation to disapply national law in the latter situation, since that lay outside the scope of Community law. However:

Where the same legislation must be disapplied as contrary to EC law in a situation covered by Community law it is for the competent body of the Member State concerned to remove that legal uncertainty insofar as it might affect rights deriving from Community rules.

4.2.3 EC rules which do not have direct effect

It may be noted that all the earlier landmark rulings of the Court, up to and including *Simmenthal* (case 106/77), were expressed in terms of directly effective Community law, that is, rules that gave rise to rights that could be relied on within the national legal system. Until the Court introduced the principle of indirect effects in *von Colson* (case 14/83) and the principle of State liability in *Francovich* (cases *C-6* & 9/90) (see chapter 5), it was thought that national courts would only be required to apply, and give priority to, EC law which was directly effective. This proved not to be the case. The obligation on national courts to interpret domestic law to comply with EC directives which are not directly effective (because invoked horizontally), as extended in *Mar/easing,* impliedly requires those courts to give priority to EC law. Similarly, although the granting of a remedy in damages against the State under *Francovich* does not require the *application* of Community law, the remedy, based on Member States' obligation to guarantee full and effective protection for individuals' rights under Community law, is premised on the supremacy of EC law. This obligation was held in *Francovich* (at para. 42) to apply to all rights *'which parties enjoy under Community law'*. That protection cannot be achieved unless those rights prevail over conflicting provisions of national law. As *Brasserie du Pecheur* and *R* v *Secretary of State for Transport, ex parte Factortame* (cases *C-46* & 48/93) have now made clear, individuals' Community rights, including the right to damages, must prevail over *all* acts of Member States, legislative, executive or judicial, which are contrary to Community law.

[…]

4.4 Conclusions

The ECJ, in introducing the notion of supremacy, was instrumental in providing a view of the Community as a body that went beyond what was normal for an international law organisation. In a number of key judgments it identified the Community as an independent legal order, supreme over the national legal systems. One of the mechanisms used to justify this was the effectiveness of Community law, a doctrine that the ECJ has used again and again in different contexts to justify the development of Community law in a particular direction. As has been noted, however, the success of this project cannot be ascribed entirely to the ECJ. To a large part, it has been dependent on the cooperation of the

Member States, particularly their courts. In a relatively short space of time the courts of Member States, despite their different constitutional rules and traditions, have adapted to the principle of supremacy of EC law where it is found to be directly effective. Their application of directives, particularly their indirect application, remains uncertain. Their reaction to *Francovich,* as refined in *Brasserie du Pecheur* (cases C-46 & 48/93) has been positive. Credit for national courts' acceptance of the principle of supremacy of EC law must go to the ECJ, which has supplied persuasive reasons for doing so. However, equal credit must go to the courts of Member States, which have contrived to embrace the principle of primacy of Community law while at the same time insisting that ultimate political and judicial control remains within the Member States. As *Fragd, Brunner* and *Carlsen* v *Rasmussen* indicate, the courts of Member States, particularly their supreme courts, will be vigilant, and use all the means at their disposal, to ensure that the EC institutions do not exceed their powers or transgress fundamental constitutional rights, particularly in the new post-Maastricht climate, with its emphasis on subsidiarity. As Kumm suggests, *'they need to keep a handle on the emergency brake'*; but they would disapply a Community act or a ruling from the ECJ only where that act or that ruling was manifestly and gravely erroneous. So far they have stopped short of outright defiance, thereby avoiding the unthinkable, a claim for damages against the State in respect of judicial breaches of Community law, as could in theory be brought following the ECJ's ruling in *Brasserie de Pecheur*.

5 Principles of direct applicability and direct effects: State liability under *Francovich*

5.1 Introduction

It has already been seen that EC law is supreme to national law and that domestic courts are under an obligation to give full effect to EC law (see chapter 4). With this in mind, the question then arises to what extent individuals can rely on EC law before the national courts, particularly where a Member State has failed to implement a particular measure, or where the implementation is in some way defective and does not provide the full extent of the rights an individual should enjoy by virtue of the relevant EC measure. To deal with this question, and very much in accordance with the principle of supremacy, the *ECJ* has developed three inter related doctrines: direct effect, indirect effect and state liability. Taken together, these seek to ensure that individuals are given the greatest possible level of protection before their national courts. This chapter considers the scope of these three doctrines, as well as identifying difficulties in the jurisprudence. One particular area in which difficulties arise is that of ensuring the enforceability of directives.

5.2 Doctrine of direct effects

5.2.1 Direct applicability

As was noted in chapter 3, the European Community Treaties were incorporated into UK law by the European Communities Act 1972. With the passing of this Act all Community law became, in the language of international law, directly applicable, that is, applicable as part of the British internal legal system. Henceforth, 'Any rights or obligations created by the Treaty are to be given legal effect in England without more ado' (per Lord Denning MR in *H.P. Bulmer Ltd* v *J. Bollinger SA [1974]* Ch 401). As directly applicable law, EC law thus became capable of forming the basis of rights and obligations enforceable by individuals before their national courts.

Provisions of international law which are found to be capable of application by national courts *at the suit of individuals* are also termed 'directly applicable'. This ambiguity (the same ambiguity is found in the alternative expression 'self-executing') has given rise to much uncertainty in the context of EC law. For this reason it was suggested by Winter that the term 'directly effective' be used to convey this secondary meaning. Although this term has generally found favour amongst British academic writers, the *ECJ* as well as the British courts tend to use the two concepts of direct applicability and direct effects interchangeably. However, for purposes of clarity it is proposed to use the term 'directly effective' or 'capable of direct effects' in this secondary meaning, to denote those provisions of EC law which give rise to rights or obligations which individuals may enforce before their national courts.

Not all provisions of directly applicable international law are capable of direct effects. Some provisions are regarded as binding on, and enforceable by States alone; others are too vague to form the basis of rights or obligations for individuals; others are too incomplete and require further measures of implementation before they can be fully effective in law. Whether a particular provision is directly effective is a matter of construction, depending on its language and purpose as well as the terms on which the Treaty has been incorporated into domestic law. Although most States apply similar criteria of clarity and completeness, specific rules and attitudes inevitably differ, and since the application of the criteria often conceals an underlying policy decision, the results are by no means uniform from State to State.

5.2.2 Relevance of direct effect in EC law

The question of the direct effects of Community law is of paramount concern to EC lawyers. If a provision of EC law is directly effective, domestic courts must not only apply it, but, following the principle of primacy of EC law (discussed in chapter 4), must do so in priority over any conflicting provisions of national law. Since the scope of the EC Treaty is wide, the more generous the approach to the question of direct effects, the greater the potential for conflict.

Which provisions of EC law will then be capable of direct effect? As far as the UK is concerned the European Communities Act, s. 2(1), provides that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under

the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

This section thus provides for the direct application of Community law but offers no guidance as to which provisions of EC law are to be directly effective. The EC Treaty merely provides in Article 249 (ex 189) that regulations (but only regulations) are 'directly applicable'.

Since, as has been suggested, direct applicability is a necessary pre-condition for direct effects this would seem to imply that only regulations are capable of direct effects.

This has not proved to be the case. In a series of landmark decisions, the ECJ, principally in its jurisdiction under Article 234 (ex 177) EC to give preliminary rulings on matters of interpretation of EC law on reference from national courts, has extended the principle of direct effects to treaty articles, directives, decisions, and even to provisions of international agreements to which the EC is a party.

5.2.3 Treaty Articles

5.2.3.1 The starting point: Van Gend en Loos

The question of the direct effect of a Treaty article was first raised in *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* (case 26/62). The Dutch administrative tribunal, in a reference under Article 234 (ex 177), asked the ECJ:

Whether Article 12 of the EEC Treaty [now 25 EC] has an internal effect…in other words, whether the nationals of Member States may, on the basis of the Article in question, enforce rights which the judge should protect?

Article 25 (ex 12) EC prohibits States from:

. . . introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect.

It was argued on behalf of the defendant customs authorities that the obligation in the then Article 12 (now 25) was addressed to States and was intended to govern rights and obligations between States. Such obligations were not normally enforceable at the suit of individuals. Moreover the Treaty had expressly provided enforcement procedures under what are now Articles 226 (ex 169) and 227 (ex 170) (see chapter 27) at the suit of the Commission or Member States. Advocate-General Roemer suggested that Article 25 (ex 12) was too complex to be enforced by national courts; if such courts were to enforce Article 25 (ex 12) directly there would be no uniformity of application. Despite these persuasive arguments the *ECJ* held that Article 25 (ex 12) was directly effective. The Court held:

. . . this Treaty is more than an agreement creating only mutual obligations between the contracting parties. . . Community law. . . not only imposes obligations on individuals but also confers on them legal rights.

These rights would arise:

. . . not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on Member States and the Community institutions.

. . . The text of Article 12 [now 25] sets out a clear and unconditional prohibition, which is not a duty to act but a duty not to act. This duty is imposed without any power in the States to subordinate Its application to a positive act of internal law. The prohibition is perfectly suited by its nature to produce direct effects in the legal relations between the Member States and their citizens.

And further:

The vigilance of individuals interested in protecting their rights creates an effective control additional to that entrusted by Articles 169 to 170 [now 226-227] to the diligence of the Commission and the Member States.

Apart from its desire to enable individuals to invoke the protection of EC law the Court clearly saw the principle of direct effects as a valuable means of ensuring that EC law was enforced uniformly in all Member States even when States had not themselves complied with their obligations.

5.2.3.2 Subsequent developments

It was originally thought that, as the Court suggested in *Van Gend,* only prohibitions such as Article 25 (ex 12) ('standstill' provisions) would qualify for direct effects; this was found in *Alfons Lutticke GmbH* v *Hauptzollamt Saarlous* (case 57/65) not to be so. The article under consideration in this case was Article 95(1) and (3) (now 90); this article contains a prohibition on States introducing discriminatory taxation; Article 95(3) contained a positive obligation that:

Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.

The *ECJ* found that the then Article 95(1) was directly effective; what was Article 95(3), which was subject to compliance within a specified time-limit, would, the Court implied, become directly effective once that time-limit had expired.

The Court has subsequently found a large number of Treaty provisions to be directly effective. All the basic principles relating to free movement of goods and persons, competition law, discrimination on the grounds of sex and nationality may now be invoked by individuals before their national courts.

5.2.3.3 Criteria for direct effect

In deciding whether a particular provision is directly effective certain criteria are applied; the provision must be sufficiently clear and precise; it must be unconditional, and leave no room for the exercise of discretion in implementation by Member States or Community institutions. The criteria are, however, applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects. Even where they are conditional and subject to further implementation they have been held to be directly effective once the date for implementation is past. The Court reasons that while there may be discretion as to the means of implementation, there is no discretion as to ends.

5.2.3.4 Vertical and horizontal effect of Treaty provisions

In *Van Gend* the principle of direct effects operated to confer rights on Van Gend exercisable against the Dutch customs authorities. Thus the obligation fell on an organ of the State, to whom Article 25 (ex 12) was addressed. (This is known as a 'vertical' direct effect, reflecting the relationship between individual and State.) But Treaty obligations, even when addressed to States, may fall on individuals too. May they be invoked by individuals against individuals? (This is known as a 'horizontal effect', reflecting the relationship between individual and individual.)

Van Gend implies so, and this was confirmed in *Defrenne* v *Sabena (No.* 2) (case 43/75). Ms Defrenne was an air hostess employed by Sabena, a Belgian airline company. She brought an action against Sabena based on Article 119 (now 141 EC) of the EEC Treaty. It provided that:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

Ms Defrenne claimed, *inter alia,* that in paying their male stewards more than their air hostesses, when they performed identical tasks, Sabena was in breach of the then Article 119. The gist of the questions referred to the ECJ was whether, and in what context, that provision was directly effective. Sabena argued that the Treaty articles so far found directly effective, such as Article 12 (now 25), concerned the relationship between the State and its subjects, whereas former Article 119 was primarily concerned with relationships between individuals. It was thus not suited to produce direct effects. The Court, following Advocate-General Trabucci, disagreed, holding that:

. . the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

This same principle was applied in *Walrave* v *Association Union Cycliste Internationale* (case 36/74) to Article 12 (ex 6, originally 7) EC which provides that:

Within the scope of application of this Treaty, and without prejudice to any special provisions

contained therein, any discrimination on grounds of nationality shall be prohibited.

The claimants, Walrave and Koch, sought to invoke Article 12 in order to challenge the rules of the defendant association which they claimed were discriminatory. The ECJ held that the prohibition of any discrimination on grounds of nationality

. . . does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

To limit the prohibition in question to acts of a public authority would risk creating inequality in their application.

As will become evident in the chapters of this book devoted to the substantive law of the Community, many Treaty provisions have now been successfully invoked vertically and horizontally. The fact of their being addressed to, and imposing obligations on, States has been no bar to their horizontal effect.

5.2.4 Regulations

A regulation is described in Article 249 (ex 189) EC as of 'general application ... binding in its entirety and directly applicable in all Member States'. It is clearly intended to take immediate effect without the need for further implementation.

Regulations are thus by their very nature apt to produce direct effects. However, even for regulations direct effects are not automatic. There may be cases where a provision in a regulation is conditional, or insufficiently precise, or requires further implementation before it can take full legal effect. But since a regulation is of 'general application', where the criteria for direct effects are satisfied, it may be invoked vertically or horizontally.

In *Antonio Munoz Cia SA* v *Frumar Ltd* (Case C-253/00), the ECJ confirmed that regulations by their very nature operate to confer rights on individuals which must be protected by the national courts. In this case, Regulation 2200/96 ([1996] OJ L 297/1) laid down the standards by which grapes are classified. Munoz brought civil proceedings against Frumar who had sold grapes under particular labels which did not comply with the corresponding standard. The relevant provision in the regulation did not confer rights specifically on Munoz, but applied to all operators in the market. A failure by one operator to comply with the provision could have adverse consequences for other operators. The ECJ held that, since the purpose of the regulation was to keep products of unsatisfactory quality off the market, and to ensure the full effectiveness of the regulation, it must be possible for a trader to bring civil proceedings against a competitor to enforce the regulation. This decision is noteworthy for several reasons. As with the early case law on the treaty articles, it reasons from the need to ensure the effectiveness of Community law. It also confirms that, as directly applicable measures, regulations can apply horizontally between private parties as well as vertically against public bodies. In terms of enforcement, it also seems to suggest that it is not necessary that rights be conferred expressly on the claimant before that individual may rely on the sufficiently clear and unconditional provisions of a regulation. In this, there seems to be the beginning of a divergence between the jurisprudence on regulations and that on directives (see the discussion at 5.6.6).

5.2.5 Directives

5.2.5.1 The problem of the direct effect of directives

A directive is (Article 249 (ex 189) EC): *…binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

Because directives are not described as 'directly applicable' it was originally thought that they could not produce direct effects. Moreover the obligation in a directive is addressed to States, and gives the State some discretion as to the form and method of implementation; its effect thus appeared to be conditional on the implementation by the State.

5.2.5.2 The principle of direct effect of directives

This was not the conc1usion reached by the ECJ, which found, in *Grad* v *Finanzamt Traunstein* (case

9/70) that a directive could be directly effective. The c1aimant in *Grad* was a haulage company seeking to challenge a tax levied by the German authorities which the c1aimant c1aimed was in breach of an EC directive and decision. The directive required States to amend their VAT systems to comply with a common EC system. The decision required States to apply this new VAT system to, *inter alia,* freight transport from the date of the Directive's entry into force. The German government argued that only regulations were directly applicable. Directives and decisions took effect internally only via national implementing measures. As evidence they pointed out that only regulations were required to be published in the *Official Journal.* The ECJ disagreed. The fact that only regulations were described as directly applicable did not mean that other binding acts were incapable of such effects:

It would be incompatible with the binding effect attributed to Decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a Decision. . . the effectiveness of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law.

Although expressed in terms of a decision, it was implied in the judgment that the same principle applied in the case of directives. The dIrect effect of directives was established beyond doubt in a c1aim based on a free-standing directive in *Van Duyn* v *Home Office* (case 41/74). Here the c1aimant sought to invoke Artic1e 3 of Directive 64/221 to challenge the Home Office's refusal to allow her to enter to take up work with the Church of Scientology. Under EC law Member States are allowed to deny EC nationals rights of entry and residence only on the grounds of public policy, public security and public health (see chapter 17). Article 3 of Directive 64/221 provides that measures taken on the grounds of public policy must be based exc1usively on the personal conduct of the person concerned. Despite the lack of clarity as to the scope of the concept of 'personal conduct' the ECJ held that Mrs Van Duyn was entitled to invoke the directive directly before her national court. It suggested that even if the provision in question was not c1ear the matter could be referred to the ECJ for interpretation under Artic1e 234 (ex 177) EC.

So both directives and decisions may be directly effective. Whether they will in fact be so will depend on whether they satisfy the criteria for direct effects – they must be sufficiently clear and precise, unconditional, leaving no room for discretion in implementation. These conditions were satisfied in *Grad.* Although the directive was not unconditional in that it required action to be taken by the State, and gave a time-limit for implementation, once the time limit expired the obligation became absolute. At this stage there was no discretion left. *Van Duyn* demonstrates that it is not necessary for a provision to be particularly precise for it to be deemed 'sufficiently' clear. Significantly, the ECJ held in *Riksskatterverket* v *Soghra Gharehveran* (Case C-441/99) that a provision in a directive could be directly effective where it contained a discretionary element if the Member State had already exercised that discretion. The reason for this was that it could then no longer be argued that the Member State still had to take measures to implement the provision.

The reasoning in *Grad* was followed in *Van Duyn* and has been repeated on many occasions to justify the direct effect of directives once the time-limit for implementation has expired. A more recent formulation of the test for direct effects, and one that is generally used, is that the provision in question should be 'sufficiently clear and precise and unconditional'.

A directive cannot, however, be directly effective before the time-limit for implementation has expired. It was tried unsuccessfully in the case of *Pubblico Ministero* v *Ratti* (case 148/78). Mr Ratti, a solvent manufacturer, sought to invoke two EC harmonisation directives on the labelling of dangerous preparations to defend a criminal charge based on his own labelling practices. These practices, he c1aimed, were not legal according to the directive. The ECJ held that since the time-limit for the implementation of one of the directives had not expired it was not directly effective. He could, however, rely on the other directive for which the implementation date had passed.

Even when a State has implemented a directive it may still be directly effective. The ECJ held this to be the case in *Verbond van Nederlandse Ondernemingen (VNO)* v *Inspecteur der Invoerrechten en Accijnzen* (case 51/76), thereby allowing the Federation of Dutch Manufacturers to invoke the Second VAT Directive despite implementation of the provision by the Dutch authorities. The grounds for the decision were that the useful effect of the directive would be weakened if individuals could not invoke it before national courts. By allowing individuals to invoke the directive the Community can ensure that national authorities have kept within the limits of their discretion. Arguably this principle could apply to enable an individual to invoke a 'parent' directive even before the expiry of the time-limit, where domestic measures have been introduced for the purpose of complying with the directive (see *Officer van Justitie* v *Kolpinguis Nijmegen* (case 80/86». This view gains some support from the case of *Inter-Environment Wallonie ASBL* v *Region Wallonie* (case C-129/96). Here the ECJ held that even

within the implementation period Member States are not entitled to take any measures which could seriously compromise the result required by the directive.

5.2.5.3 Member States' response

Initially national courts were reluctant to concede that directives could be directly effective. The Conseil d'Etat, the supreme French administrative court, in *Minister of the Interior v Cohn-Bendit* [1980] 1 CMLR 543, refused to follow *Van Duyn* v *Home Office* and allow the claimant to invoke Directive 64/221. The English Court of Appeal in *O'Brien* v *Sim-Chem Ltd* [1980] ICR 429 found the Equal Pay Directive (75/117) not to be directly effective on the grounds that it had purportedly been implemented in the Equal Pay Act 1970 (as amended 1975). *VNO* was apparently not cited before the court. The German federal tax court, the Bundesfinanzhof, in *Re VAT Directives* [1982] 1 CMLR 527 took the same view on the direct effects of the Sixth VAT Directive, despite the fact that the time-limit for implementation had expired and existing German law appeared to run counter to the directive. The courts' reasoning in all these cases ran on similar lines. Article 249 (ex 189) expressly distinguishes regulations and directives; only regulations are described as 'directly applicable'; directives are intended to take effect within the national order via national implementing measures.

On a strict interpretation of Article 249 (ex 189) EC this is no doubt correct. On the other hand the reasoning advanced by the ECJ is compelling. The obligation in a directive is 'binding "on Member States" as to the result to be achieved'; the useful effects of directives would be weakened if States were free to ignore their obligations and enforcement of EC law were left to direct action by the Commission or Member States under Article 226 (ex 169) or Article 227 (ex 170). Moreover States are obliged under Article 10 (ex 5) to 'take all appropriate measures. . . to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'. If they have failed in these obligations why should they not be answerable to individual litigants?

5.2.5.4 Vertical and horizontal direct effects: a necessary distinction

The reasoning of the EC) is persuasive where an individual seeks to invoke a directive against the State on which the obligation to achieve the desired results has been imposed. In cases such as *VNO, Van Duyn,* and *Ratti,* the claimant sought to invoke a directive against a public body, an arm of the State. This is known as *vertical* direct effect, reflecting the relationship between the individual and the State. Yet as with treaty articles, there are a number of directives, impinging on labour, company or consumer law for example, which a claimant may wish to invoke against a private person. Is the Court's reasoning in favour of direct effects adequate as a basis for the enforcement of directives against individuals? This is known as *horizontal* direct effect, reflecting the relationship between individuals.

The arguments for and against horizontal effects are finely balanced. Against horizontal effects is the fact of uncertainty. Prior to the entry into force of the TEU, directives were not required to be published. More compelling, the obligation in a directive is addressed to the State. In *Becker* v *Finanzamt Miinster-Innenstadt* (case 8/81) the Court, following *dicta* in *Pubblico Ministero* v *Ratti* (case 148/78), had justified the direct application of the Sixth VAT Directive against the German tax authorities on the grounds that the obligation to implement the directive had been placed on the State. It followed that 'a Member State which has not adopted, within the specified time limit, the implementing measures prescribed in the Directive cannot raise the objection, as against individuals, that it has not fulfilled the obligations arising from the Directive'. This reasoning is clearly inapplicable in the case of an action against a private person. In favour of horizontal effects is the fact that directives have always in fact been published; that Treaty provisions addressed to, and imposing obligations on, Member States have been held to be horizontally effective; that it would be anomalous, and offend against the principles of equality, if an individual's rights to invoke a directive were to depend on the status, public or private, of the party against whom he wished to invoke it; that the useful effect of Community law would be weakened if individuals were not free to invoke the protection of Community law against *all* parties.

Although a number of references were made in which the issue of the horizontal effects of directives was raised, the ECJ for many years avoided the question, either by declaring that the claimant's action lay outside the scope of the directive, as in *Burrton* v *British Railways Board* (case 19/81) (Equal Treatment Directive 76/207) or by falling back on a directly effective treaty provision, as in *Worringham* v *Lloyds Bank Ltd* (case 69/80) in which Article 119 (now 141) was applied instead of Directive 75/117, the Equal Pay Directive.

The nettle was finally grasped in *Marshall* v *Southampton & South West Hampshire Area Health*

Authority (Teaching) (case 152/84). Here Mrs Marshall was seeking to challenge the health authority's compulsory retirement age of 65 for men and 60 for women as discriminatory, in breach of the Equal Treatment Directive 76/207. The difference in age was permissible under the Sex Discrimination Act 1975, which expressly excludes 'provisions relating to death or retirement' from its ambit. The Court of Appeal referred two questions to the ECJ:

(a) Whether a different retirement age for men and women was in breach of Directive 76/2077?
(b) If so, whether Directive 76/207 could be relied on by Mrs Marshall in the circumstances of the case?

The relevant circumstances were that the area health authority, though a 'public' body, was acting in its capacity as employer.

The question of vertical and horizontal effects was fully argued. The Court, following a strong submission from Advocate-General Slynn, held that the compulsory different retirement age was in breach of Directive 76/207 and could be invoked against a public body such as the health authority. Moreover:

. . . where a person involved in legal proceedings is able to rely on a Directive as against the Slate he may do so regardless of the capacity in which the latter is acting, whether employer or public authority.

On the other hand, following the reasoning of *Becker,* since a directive is, according to Article 249 (ex 189), binding only on 'each Member State to which it is addressed':

It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person.

If this distinction was arbitrary and unfair:

Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

So, with *Marshall* v *Southampton & South West Hampshire Area Health Authority (Teaching)* the issue of the horizontal effect of directives was, it seemed, finally laid to rest (albeit in an *obiter* statement, since the health authority was arguably a public body at the time). By denying their horizontal effect on the basis of the then Article 189 (now 249) the Court strengthened the case for their vertical effect. The decision undoubtedly served to gain acceptance for the principle of vertical direct effects by national courts (see, e.g., *R* v *London Boroughs Transport Committee, ex parte Freight Transport Association Ltd* [1990] 3 CMLR 495). But problems remain, both with respect to vertical and horizontal direct effects.

5.2.5.5 Vertical direct effects

First, the concept of a 'public' body, or an 'agency of the State', against whom a directive may be invoked, is unclear. In *Fratelli Costanzo SPA* v *Comune di Milano* (case 103/88), in a claim against the Milan Comune based on the Comune's alleged breach of Public Procurement Directive 71/305, the Court held that since the reason for which an individual may rely on the provisions of a directive in proceedings before the national courts is that the obligation is binding on all the authorities of the Member States, where the conditions for direct effect were met, 'all organs of the administration, including decentralised authorities such as municipalities, are obliged to apply these provisions.' The area health authority in *Marshall* was deemed a 'public' body, as was the Royal Ulster Constabulary in *Johnston* v *RUC* (case 222/84). But what of the status of publicly-owned or publicly-run enterprises such as the former British Rail or British Coal? Or semi-public bodies? Are universities 'public' bodies and what is the position of privatised utility companies?

These issues arose for consideration in *Foster* v *British Gas plc* (case C-188/89). In a claim against the British Gas Corporation in respect of different retirement ages for men and women, based on Equal Treatment Directive 76/207, the English Court of Appeal had held that British Gas, a statutory corporation carrying out statutory duties under the Gas Act 1972 at the relevant time, was not a public body against which the directive could be enforced. On appeal the House of Lords sought clarification on this issue from the ECJ. That court refused to accept British Gas's argument that there was a

distinction between a nationalised undertaking and a State agency and ruled (at para. 18) that a directive might be relied on against organisations or bodies which were 'subject to the authority or control of the State or had special powers beyond those which result from the normal relations between individuals'. Applying this principle to the specific facts of *Foster* v *British Gas plc* it ruled' (at para. 20) that a directive might be invoked against 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals'. On this interpretation a nationalised undertaking such as the then British Gas would be a 'public' body against which a directive might be enforced, as the House of Lords subsequently decided in *Foster* v *British Gas plc* [1991] 2 AC 306.

It may be noted that the principle expressed in para. 18 is wider than that of para. 20, the criteria of 'control' and 'powers' being expressed as alternative, not cumulative; as such it is wide enough to embrace any nationalised undertaking, and even bodies such as universities with a more tenuous public element, but which are subject to *some* State authority or control. However, in *Rolls-Royce plc* v *Doughty* [1992] ICR 538, the Court of Appeal, applying the 'formal ruling' of para. 20 of *Foster,* found that Rolls-Royce, a nationalised undertaking at the relevant time, although 'under the control of the State', had not been 'made responsible pursuant to a measure adopted by the State for providing a public service'. The public services which it provided, for example, in the defence of the realm, were provided to the *State* and not to the *public* for the purposes of benefit to the State: nor did the company possess or exercise any special powers of the type enjoyed by British Gas. Mustill LJ suggested that the test provided in para. 18 was 'not an authoritative exposition of the way in which cases like *Foster* should be approached': it simply represented a 'summary of the (Court's) jurisprudence to date'.

There is little evidence to support such a conclusion. The Court has never distinguished between its 'formal' rulings (i.e., on the specific issue raised) and its more general statements of principle. Indeed such general statements often provide a basis for future rulings in different factual situations. A restrictive approach to the Court's rulings, as taken in *Rolls Royce plc* v *Doughty,* is inconsistent with the purpose of the ECJ, namely to ensure the effective implementation of Community law and the protection of individuals' rights under that law by giving the concept of a public body the widest possible scope. This was acknowledged by the Court of Appeal in *National Union of Teachers* v *Governing Body ofSt Mary's Church of England (Aided) Junior School* [1997] 3 CMLR 630 when it suggested that the concept of an emanation of the state should be a 'broad one': the definition provided in para. 20 of *Foster* should not be regarded as a statutory definition: It was, in the words of para. 20, simply *'included among* those bodies against which the provisions of a Directive can be applied'.

The British courts' approach to, and the outcome of the enquiry as to whether a particular body is an 'emanation of the state' for the purpose of enforcement of EC directives is unpredictable. It is not altogether surprising that they fail to take a generous view when the result would be to impose liability on bodies which are in no way responsible for the non-implementation of directives, a factor which was undoubtedly influential in *Rolls-Royce plc* v *Doughty.* But even if national courts were to adopt a generous approach, no matter how generously the concept of a 'public' body is defined, as long as the public/private distinction exists there can be no uniformity in the application of directives as between one State and another. Neither will it remove the anomaly as between individuals. Where a State has failed to fulfil its obligations in regard to directives, whether by non-implementation or inadequate implementation, an individual would, it appeared, following *Marshall,* be powerless to invoke a directive in the context of a 'private' claim.

5.2.5.6 Horizontal direct effects

In 1993, in the case of *Dori* v *Recreb Sri* (case C-91/92), the Court was invited to change its mind on the issue of horizontal direct effects in a claim based on EC Directive 85/577 on Door-step Selling, which had not at the time been implemented by the Italian authorities, against a private party. Advocate-General Lenz urged the Court to reconsider its position in *Marshall* and extend the principle of direct effects to allow for the enforcement of directives against *all* parties, public and private, in the interest of the uniform and effective application of Community law. This departure from its previous case law was, he suggested, justified in the light of the completion of the internal market and the entry into force of the Treaty on European Union, in order to meet the legitimate expectations of citizens of the Union seeking to rely on Community law. In the interests of legal certainty such a ruling should however not be retrospective in its effect (on the effect of Article 234 (ex 177) rulings see chapter 26).

The Court, no doubt mindful of national courts' past resistance to the principle of direct effects, and the reasons for that resistance, declined to follow the Advocate-General's advice and affirmed its position in *Marshall:* Article 249 (ex 189) distinguished between regulations and directives; the case

law establishing vertical direct effects was based on the need to prevent States from taking advantage of their own wrong; to extend this case law and allow directives to be enforced against individuals 'would be to recognise a power to enact obligations for individuals with immediate effect, whereas (the Community) has competence to do so only where it is empowered to adopt Regulations'; This decision was followed in two cases decided in 1996, *El Corte Ingles SA* v *Rivero* (case C-192/94) and *Arcaro* (case C-168/95).

However, in denying horizontal effects to directives in *Dori,* the Court was at pains to point out that alternative remedies might be available based on principles introduced by the Court prior to *Dori,* namely the principle of indirect effects and the principle of State liability introduced in *Francovich* v *Italy* (cases C-6 & 9/90). *Francovich* was also suggested as providing an alternative remedy in *El Corte Ingles SA* v *Rivero.*

……..

5.3 Principle of indirect effects

Although the ECJ has not shown willing to allow horizontal direct effect of directives, it has developed an alternative tool by which individuals may rely on directives against another individual. This tool is known as the principle of 'indirect effect', which is an interpretative tool to be applied by domestic courts interpreting national legislation which conflicts with a directive in the same area. It is sometimes also called the principle of consistent interpretation.

The principle of indirect effects was introduced in a pair of cases decided shortly before *Marshall, Von Colson* v *Land Nordrhein-Westfalen* (case 14/83) and *Harz* v *Dcutsclle Tradax GmbH* (case 79/83).

Both cases were based on Article 6 of Equal Treatment Directive 76/207. Article 6 provides that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of-equal treatment. . . to pursue their claims by judicial process after possible recourse to other competent authorities.

The claimants had applied for jobs with their respective defendants. Both had been rejected. It was found by the German court that the rejection had been based on their sex, but it was justifiable. Under German law they were entitled to compensation only in the form of travelling expenses. This they claimed did not meet the requirements of Article 6. Ms von Colson was claiming against the prison service; Ms Harz against Deutsche Tradax GmbH, a private company. So the vertical/horizontal, public/private anomaly was openly raised and argued in Article 234 (ex 177) proceedings before the ECJ.

The Court's solution was ingenious. Instead of focusing on the vertical or horizontal effects of the directive, it turned to Article 10 (ex 5) of the EC Treaty. Article 10 requires States to 'take all appropriate measures' to ensure fulfilment of their' Community obligations.

This obligation, the Court said, applies to *all* the authorities of Member States, including the courts. It thus falls on the courts of Member States to interpret national law in such a way as to ensure that the objectives of the directive are achieved. It was for the German courts to interpret German law in such a way as to ensure an effective remedy as required by Article 6 of the directive. The result of this approach is that although Community law is not applied directly - it is not 'directly effective' - it may still be applied indirectly as domestic law by means of interpretation.

The success of the *von Colson* principle of indirect effect depended on the extent to which national courts perceived themselves as having a discretion, under their own constitutional rules, to interpret domestic law to comply with Community law. Courts in the UK are constrained by the terms of the European Communities Act. It was thought by some commentators that s. 2(1) of this Act, which provides for the direct application of Community law within the UK, only applied to directly effective Community law. If such were the case it would leave little room for the application of the *von Colson* principle. This was the view taken by the House of Lords in *Duke* v *GEC Reliance Ltd* [1988] AC 618. However, special facts obtained in that case. The House of Lords was being asked to construe s. 6(4) of the Sex Discrimination Act 1975 to comply with EC Equal Treatment Directive 76/207, as interpreted in *Marshall.* The Sex Discrimination Act had been amended to comply with the Court's ruling in *Marshall,* but it had not been made retrospective. The claimant's claim for damages, based on unequal treatment (different retirement ages for men and women), was in respect of the period prior to the amendment of the Sex Discrimination Act. The House of Lords clearly felt that it would be most unfair to penalise the defendant, a 'private' party, by interpreting the section against its literal meaning in order

to comply with the 'oblique language' of the Directive, *a fortiori* when Parliament had clearly chosen *not* to amend the Act retrospectively.

A similarly constituted House of Lords took a different view in *Litster* v *Forth Dry Dock & Engineering Co. Ltd* [1990] 1 AC 546. Here, in a 'private' claim against an employer based on EC Directive 77/187 (safeguarding employees' rights in the event of transfer of undertakings), the House was prepared to interpret a domestic regulation contrary to its prima facie meaning in order to comply with the directive as interpreted by the ECJ in the case of *Bork* (case 101/87). The reason for its so doing was that the domestic regulation in question had been introduced *for the purpose of* complying with the directive.

The House of Lords' approach in *Litster* clearly represented an advance on *Duke* v *GEC Reliance Ltd.* However, it could not ensure that the *von Colson* principle would be applied to give directives an indirect effect where, either deliberately or inadvertently, legislation has not been introduced for the purpose of complying with a directive; nor where the question of whether legislation which has been introduced, either before or after the EC directive, was intended to comply with community law, is unclear.

In *Finnegan* v *Clowney Youth Training Programme Ltd* [1990] 2 AC 407, in a claim under the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042), on facts very similar to those of *Duke* v *GEC Reliance Ltd,* concerning different retirement ages for men and women, the House of Lords refused to interpret art. 8(4) of the order to comply with Directive 76/207, as interpreted in *Marshalll, even though the order had been made after the ECJ's decision* in *Marshall.* Their lordships' reason for so doing was that the provision in question, an exclusion from the non-discrimination principle for provision 'in relation to death or retirement' was enacted in terms identical to the parallel provision (s. 6(4)) of the Sex Discrimination Act 1975 which had been considered in *Duke* v *GEC Reliance Ltd,* and 'must have been intended to' have the same meaning as in that Act.

5.3.1 The scope of the doctrine: Marleasing

The ECJ considered these matters in *Marleasing SA* v *La Comercial Internacional de Alimentacion SA* (case C-106/89). In this case, which was referred to the ECJ by the Court of First Instance, Oviedo, the claimant company was seeking a declaration that the contracts setting up the defendant companies were void on the grounds of 'lack of cause', the contracts being a sham transaction carried out in order to defraud their creditors. This was a valid basis for nullity under Spanish law. The defendants argued that this question was now governed by EC Directive 68/151. The purpose of Directive 68/151 was to protect the members of a company and third parties from, *inter alia,* the adverse effects of the doctrine of nullity. Article 11 of the directive provides an exhaustive list of situations in which nullity may be invoked. It does not include 'lack of cause'. The directive should have been in force in Spain from the date of accession in 1986, but it had not been implemented. The Spanish judge sought a ruling from the ECJ on whether, in these circumstances, Article 11 of the directive was directly effective.

The ECJ reiterated the view it expressed in *Marshall* that a directive cannot of itself 'impose obligations on private parties'. It reaffirmed its position in *von Colson* hat national courts must *as far as possible* interpret national law in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive (para. 8). And it added that this obligation applied *whether the national provisions in question were adopted before or after the directive.* It concluded by ruling specifically, and without qualification, that national courts were 'required' to interpret domestic law in such a way as to ensure that the objectives of the directive were achieved (para. 13).

Given that in *Marleasing* no legislation had been passed, either before or after the issuing of the directive, to comply with the directive, and given the ECJ's suggestion that the Spanish court must nonetheless strive to interpret domestic law to comply with the directive, it seems that, according to the ECJ, it is not necessary to the application of the *von Colson* principle that the relevant national measure should have been introduced for the purpose of complying with the directive, nor even that a national measure should have been specifically introduced at all.

5.3.2 The limits of Marleasing

The strict line taken in *Marleasing* was modified in *Wagner Miret* v *Fondo de Garantira Salaria* (case C-334/92), in a claim against a private party based on Directive 80/987. This directive is an employee protection measure designed, *inter alia,* to guarantee employees arrears of pay in the event of their employer's insolvency. Citing its ruling in *Marleasing* the Court suggested that, in interpreting national law to conform with the objectives of a directive, national courts must *presume* that the State intended to comply with Community law. They must strive *'as far as possible'* to interpret domestic law to

achieve the result pursued by the directive. But if the provisions of domestic law cannot be interpreted in such a way (as was found to be the case in *Wagner Miret)* the State may be obliged to make good the claimant's loss on the principles of State liability laid down in *Francovich* v *Italy* (cases 6 & 9/90).

Wagner Miret thus represents a tacit acknowledgment on the part of the Court that national courts will not always feel able to 'construe' domestic law to comply with an EC directive, particularly when the provisions of domestic law are clearly at odds with an EC directive, and there is no evidence that the national legislature Intended national law to comply with its provisions, or with a ruling on its provisions by the ECJ. In *Webbv EMO Air Cargo (UK)Ltd* [1993] 1 WLR 49, HL, Lord Keith of Kinkel noted that the ECJ in *Marleasing* had required national courts to construe domestic law to accord with the directive 'only if it was possible to do so'. Invoking his own remarks in *Duke* v *GEC Reliance Ltd* [1988] AC 618 he suggested that this would only be possible if it could be done without 'distorting' the meaning of domestic legislation, that is, where a domestic law was 'open to an interpretation consistent with the Directive whether or not it is also open to an interpretation inconsistent with it'. Happily, in its final decision *(Webb* v *EMO Air Cargo Ltd (UK) (No.* 2) 1 WLR 1454 the House found, contrary to its original view (but it is submitted legitimately), that it was able to interpret the relevant sections of the Sex Discrimination Act to accord with the ECJ's ruling on the substance of the claim. In *R* v *British Coal Corporation, ex parte Vardy* [1993] ICR 720, a case decided after, but without reference to, *Marleasing,* the English High Court adverted to the House of Lords judgment in *Litster* but found that it was 'not possible' to interpret a particular provision of the Trade Union and Labour Relations Act 1992 to produce the same meaning as was required by the relevant EC directive (see also *Re Hartlebury Printers Ltd* [1993] 1 All ER 470 at p. 478b, ChD). Similarly, In *Re a Rehabilltation Centre* [1992] 2 CMLR 21, in a claim for damages based on Equal Treatment Directive 76/207, against a private party, the German Federal Supreme Labour Court refused to 'construe' certain sections of the German Civil Code to comply with the directive. It held that:

even an interpretation of statutes by reference to conformity with the Constitution reaches its limits when it could come into conflict with the wording and evident intention of the legislature. The position can be no different as regards the interpretation of national law in the light of the wording and purpose of a Directive under Article 189(3) [now 249(3)] EEC.

Although the case was decided before *Marleasing* it is doubtful whether the court would depart from this view, so strongly stated, to give effect, albeit indirect, to a directive which was not directly effective. Thus the indirect application of EC directives by national courts cannot be guaranteed. This reluctance on the part of national courts to comply with the *von Colson* principle, particularly as applied in *Marleasing,* is hardly surprising. It may be argued that in extending the principle of indirect effect in this way the ECJ is attempting to give horizontal effect to directives by the back door, and impose obligations, addressed to Member States, on private parties, contrary to their understanding of domestic law. Where such is the case, as the House of Lords remarked in *Duke* v *GEC Reliance Ltd* (see also *Finnegan* v *Clowney Youth Training Programme Ltd.*), this could be 'most unfair'.

However in the case of *Kolpinghuis Nijmegen* (case 80/86) the ECJ had suggested a limitation to the *von Colson* principle which might meet this objection. Here, in the context of criminal proceedings against Kolpinghuis for breach of EC Directive 80/ 777 on water purity, which at the relevant time had not been implemented by the Dutch authorities, the Court held that national courts' obligation to interpret domestic law to comply with EC law was 'limited by the general principles of law which form part of Community law [see chapter 7] and in particular the principles of legal certainty and non-retroactivity'. Although expressed in the context of criminal liability, to which these principles were ‘especially applicable’, it was not suggested that the limitation should be confined to such situations. Where an interpretation of domestic law would run counter to the legitimate expectations of individuals *a fortiori* where the State is seeking to invoke a Directive against an individual to determine or aggravate his criminal responsibility, as was the case in *Arcaro* (case C-168/95, see further below), the *Von Colson* principle will not apply. The decision in *Duke v GEC Reliance Ltd* could be justified on this basis; that of *Finnegan* v *Clowney Youth Training Programme Ltd,* concerning, as it did, an order made after *Marshall,* and capable of interpretation in compliance with *Marshall,* could not. Where domestic legislation has been introduced to comply with a Community directive, it is legitimate to expect that domestic law will be interpreted in conformity with Community law, provided that it is capable of such an interpretation. Where legislation has not been introduced with a view to compliance domestic law may still be interpreted in the light of the aims of the directive as long as the domestic provision is reasonably capable of the meaning contended for. But in either case an interpretation which conflicts with the clear words and intentions of domestic law is unlikely to be acceptable to

national courts. This has now been acknowledged by the Court in *Wagner Miret* (case C-334/92) and *Arcaro* (case C-168/95).

Arcaro (Case C-168/95) could also be seen as introducing further limitations on the scope of indirect effect. There, the ECJ held that the 'obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law *reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed* or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions'. Although the reference to criminal liability is not new, the 'imposition on an individual of an obligation' could be interpreted to mean that indirect effect could never require national law to be interpreted so as to impose obligations on individuals not apparent on the face of the relevant national provisions. It is submitted, however, that the ECJ's view in *Arcaro* is limited to the confines of criminal proceedings, and that the application of the doctrine of indirect effect can result in the imposition of civil liability not found in domestic law (see also Advocate-General Jacobs in *Centrosteel Sri* v *Adipol Gl1IbH* (Case C-456/98), para. 31-35).

In *Oceano Grupo Editorial* v *Rocio Murciano Quintero* (Case C-240/98), Oceano had brought a claim in a Barcelona court for payment under a contract of sale for encyclopaedias. The contract contained a term which gave jurisdiction to the Barcelona court rather than a court located near the consumer's home. That court had doubts regarding the fairness of the jurisdiction clause. The Unfair Contract Terms Directive (93/13/EEC) requires that public bodies be able to take steps to prevent the continued use of unfair terms. It also contains a list of unfair terms, including a jurisdiction clause, but this only became effective in Spanish law *after* Oceano's claim arose. Spanish law did contain a general prohibition on unfair terms which could have encompassed the jurisdiction clause, but the scope of the relevant Spanish law was unclear. The question arose whether the Barcelona court should interpret Spanish legislation in accordance with the Unfair Contract Terms Directive. The ECJ reaffirmed the established position that a

national court is obliged, when it applies national law provisions predating or postdating a directive, to interpret those provisions, so far as possible, in the light of the wording of the directive' (para. 32).

The Court went on to say that in light of the emphasis on public enforcement in the Unfair Contract Terms Directive, the national court may be required to decline of its own motion the jurisdiction conferred on it by an unfair term. As a consequence, Oceano would be deprived of a right which it might otherwise have enjoyed under existing Spanish law. This latter consideration should not prevent the national court from interpreting domestic law in light of the directive. In terms of the scope of the doctrine of indirect effect, it would be nonsensical to distinguish between cases which involve the imposition of obligations and those which concern restrictions on rights. Often, in a relationship between individuals, one individual's right is an obligation placed on another individual. The reasoning in *Arcaro* is best confined to the narrow context of criminal penalties.

It may therefore be stated that the doctrine of indirect effect continues to be significant. However, there will be circumstances when it will not be possible to apply it. In such a situation, as the Court suggested in *Wagner Miret,* it will be necessary to pursue the alternative remedy of a claim in damages against the State under the principles laid down in *Francovich* v *Italy* (cases C-6 & 9/90). It may be significant that in *El Corte lngtes SA* v *Rivero* (case C-192/94) the Court, in following the *Dori* ruling that a directive could not be invoked directly against private parties, did not suggest a remedy based on indirect effect, as it had in *Dori,* but focused only on the possibility of a claim against the State under *Francovich.*

5.4 Principle of state liability under *Francovich* v *Italy*

5.4.1 The Francovich ruling

The shortcomings of the principles of direct and indirect effects, particularly in the context of enforcement of directives, as outlined above, led the Court to develop a third and separate principle in *Francovich* v *Italy* (cases C-6 & 9/90), the principle of State liability. Here the claimants, a group of ex-employees, were seeking arrears of wages following their employers' insolvency. Their claim (like that in the subsequent case of *Wagner Miret* (case C-334/92)) was based on Directive 80/ 987, which required Member States, *inter alia,* to provide for a guarantee fund to ensure the payment of employees' arrears of wages in the event of their employers' insolvency. Since a claim against their former employers would have been fruitless (they being insolvent and 'private' parties), they brought

their claim for compensation against the State. There were two aspects to their claim. The first was based on the State's breach of the claimants' (alleged) substantive rights contained in the directive, which they claimed were directly effective. The second was based on the State's primary failure to implement the directive, as it was required to do under Article 249 (ex 189) and Article 10 (ex 5) of the EC Treaty. The Court had already held, in Article 226 (ex 169) proceedings, that Italy was in breach of its Community obligations in failing to implement the directive *(Commission* v *Italy* (case 22/87)).

With regard to the first claim, the Court found that the provisions in question were not sufficiently clear, precise and unconditional to be directly effective. Although the content of the right, and the class of intended beneficiaries, was clear, the State had a discretion as to the appointment of the guarantee institution; it would not necessarily itself be liable under the directive. The claimants were, how ever, entitled in principle to succeed in their second claim. The Court held that where, as here, a State had failed to implement an EC directive it would be obliged to compensate individuals for damage suffered as a result of its failure to implement the directive if certain conditions were satisfied. That is, where:

(a) the directive involved rights conferred on individuals,
(b) the content of those rights could be identified on the basis of the provisions of the directive, and
(c) there was a causal link between the State's failure and the damage suffered by the persons affected.

The Court's reasoning was based on Member States' obligation to implement directives under Article 249 (ex 189) and their general obligation under Article 10 (ex 5) EC to 'take all appropriate measures. . . to ensure fulfilment of' their obligations under Community law; on its jurisprudence in *Van Gend en Loos* (case 26/62) and *Costa* v *ENEL* (case 6/64) that certain provisions of EC law are intended to give rise to rights for individuals, and that national courts are obliged to provide effective protection for those rights, as established in *Ammnistrazione delle Finanze dello Stato* v *Simmenthal SpA* (case 106/77) and *Factortame* (case C-213/89), see further chapters 4 and 6). It concluded that 'a principle of State liability for damage to individuals caused by a breach of Community law for which it is responsible is inherent in the scheme of the Treaty'.

Thus, where the three conditions of *Francovich* are fulfilled, individuals seeking compensation as a result of activities and practices which are inconsistent with EC directives may proceed directly against the State. There will be no need to rely on the principles of direct or indirect effects. Responsibility for the non-implementation of the directive will be placed not on the employer, 'public' or 'private', but squarely on the shoulders of the State, arguably, where it should always have been.

5.4.2 Extending the principle: Brasserie du Pecheur

The reasoning in *Francovich* is compelling; its implications for Member States, however, remained unclear. Although expressed in terms of a State's liability for the non-implementation of a directive, *Francovich* appeared to lay down a wider principle of liability for all breaches of Community law 'for which the State is responsible'. Would it then apply to legislative or administrative acts and omissions in breach of treaty articles or other provisions of EC law? Would it be an additional remedy, or available only in the absence of other remedies based on direct or indirect effects? Apart from the three conditions for liability, which are themselves open to interpretation, what other conditions would have to be fulfilled? Would liability be strict or dependent on culpability, even serious culpability, as was the case with actions for damages against Community institutions under Article 288 (ex 215(2) (see chapter 31))? In the case of non-implementation of directives, as in *Francovich* itself, the State's failure is clear; *a fortiori* when established by the Court under Article 226 (ex 169). But in cases of faulty or inadequate implementation it is not. The State's 'failure' may only become apparent following an interpretation of the directive by the Court (see, e.g., the sex discrimination cases such as *Marshall* and *Barber* in chapter 6). Here the case for imposing liability in damages on the State is less convincing. Many of these questions were referred to the Court of Justice for interpretation in *Brasserie de Pecheur SA* v *Germany* and *R* v *Secretary of State for Transport, ex parte Factortame* (cases C-46 &: 48/93). Advocate-General Tesauro suggested, in response to the questions referred, that:

(a) The principle of State liability should not be confined to failure to implement EC directives: it should attach to other failures to comply with Community law, including legislative failures.
(b) A remedy under *Francovich* should be available whether or not there were other means by which Community rights might be enforced, that is, on the principles of direct or indirect effects.
(c) As regards the conditions for liability, apart from the three conditions laid down in *Francovich,* the principles of State liability should be brought into line with the principles governing the Community's

non-contractual liability under Article 288(2) (ex 215). A State should only be liable for 'manifest and serious breaches' of Community law. In order for the breach to be 'manifest and serious' the content of the obligation breached must be clear and precise in every respect, or the national authority's interpretation 'manifestly wrong'. If the provision allegedly breached is not in itself clear and precise, the Court's case law must have provided sufficient clarification as regards its meaning and scope in identical or similar situations. If these conditions are fulfilled there is no need to add a further criterion of fault in the subjective sense, requiring actual knowledge or a deliberate breach of EC law.

The Court's decision was broadly in line with the Advocate-General's submissions on most of these issues. It held that the principle of State liability is applicable to *all* domestic acts and omissions, legislative, executive and judicial, in breach of Community law. In his opinion in *Kobler* v *Allstria* (case C-224/01), Advocate General Leger stated that a judgment by a supreme court which infringed EC-law could give rise to state liability (opinion of 8 April 2003).

Provided the conditions for liability are fulfilled it applies to breaches of *all* Community law, whether or not directly effective. However, arguing from the principles applicable to the Community's non-contractual liability under Article 288(2) (ex 215), the Court held that where a State is faced with situations involving choices comparable to those made by Community institutions when they adopt measures pursuant to a Community policy it will be liable only where three conditions are met (see paras 50 and 51 of the judgment):

(a) the rule of law infringed must be intended to confer rights on individuals;
(b) the breach must be sufficiently serious; and
(c) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

The 'decisive *test'* for whether a breach is sufficiently serious is whether the institution concerned has 'manifestly and gravely exceeded the limits of its discretion' (para. 55). The factors to be taken into account in assessing this question included:

'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or voluntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law' (para. 56).

For liability to arise it is not necessary for the infringement of Community law to have been established by the Court under Article 226 (ex 169) or 234 (ex 177); nor is it necessary to prove fault on the part of the national institution concerned *going beyond that of a sufficiently serious breach of Community law.* In *Brasserie du Pecheur* the Court rephrased the three conditions laid down in *Francovich* and incorporated a requirement that the breach be sufficiently serious. Condition (b) of *Francovich* (the content of the right infringed must be sufficiently clear) may now be regarded as contained within the definition of 'sufficiently serious'.

The Court based its decision on its past case law, particularly its reasoning in *Francovich:* States are obliged under Articles 249 (ex 189) and 10 (ex 5) to provide effective protection for individuals' Community rights and ensure the full effect of Community law. As regards its own jurisdiction to rule on the matter of States' liability in damages, challenged by the German government, it reasoned that, since the EC Treaty had failed to provide expressly for the consequences of breaches of Community law, it fell to the Court, pursuant to its duty under Article 220 (ex 164), to ensure that 'in the interpretation and application of this Treaty the law is observed'. The application of the Court's ruling and questions of damages and causation are discussed further in chapters 4 and 6.

Despite the hostility with which this decision was greeted in anti-European quarters, it is submitted that the Court's ruling on the question of, and conditions for, liability is prima facie consistent with existing principles and, provided that the multiple test in para. 56 of what will constitute a 'sufficiently serious' breach is rigorously applied, strikes a fair balance between the interests of the Community in enforcing Community law and the interests of Member States in restricting liability to culpable breaches of Community law.

5.4.3 Meaning of 'sufficiently serious'

For liability to arise, the institution concerned must have 'manifestly and gravely exceeded the limits of

its discretion': the breach must be 'inexcusable'. If there is to be equality of *responsibility* as between the liability of the Community under Article 288(2) (ex 215(2» EC and Member States under *Francovich,* the criterion of a 'sufficiently serious' breach laid down in *Brasserie du Pecheur* should be interpreted strictly. The question remaining was whether the Court would apply the 'sufficiently serious' test to *all* claims based on *Francovich,* including claims for damage resulting from breaches of Community law which do *not* involve legislative 'choices' analogous to those made by Community institutions when implementing policy. Alternatively it might continue to 'interpret' Member States' actions as involving such choices, as it did, surprisingly, in *Brasserie du Pecheur.* To limit the application of the sufficiently serious test to situations in which Member States are involved in 'legislative choices', by analogy with the position of Community institutions under Article 288(2) (ex 215(2) (see chapter 31), as was suggested in *Brasserie du Pecheur,* would be to ignore the essential difference between the position of Member States, when *implementing* Community law, and that of Community institutions when *making* Community law. Since liability depends on the breach by a Member State of a Community obligation, liability should in all cases depend on whether the breach is sufficiently serious. This is reflected in the multiple test laid down in para. 56.

Given the lack of clarity of much EC law, and that Member States have no 'choice' to act in breach of Community law, it is submitted that the crucial element in para. 56 will often be the clarity and precision of the rule breached, as suggested by Advocate-General Tesauro in *Brasserie du Pecheur.*

This view obtained some support in *R* v *Her Majesty's Treasury, ex parte British Telecommunications plc* (case *C-392/93),* a case decided shortly after *Brasserie du Pecheur.* The case, brought by BT, concerned the alleged improper implementation of Council Directive *90/351* on public procurement in the water, energy, transport and telecommunication sectors (OJ *L297/1,* 1990). BT, which claimed to have been financially disadvantaged as a result of this wrongful implementation, was claiming damages based on *Francovich.* The Court, appearing to presume that the other conditions for liability were met, focused on the question whether the alleged breach was sufficiently serious. It applied the test of para. 56 of *Brasserie du Pecheur.*

Although it found that the UK implementing regulations were contrary to the requirements of the directive, it suggested that the relevant provisions of the directive were sufficiently unclear as to render the UK's error excusable. At para. 43 of its judgment the Court said that the Article in question (Article 8(1)) was:

... imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it [by the ECJ] the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which arc not entirely void of substance. The interpretation, which was also shared by other Member States was not manifestly contrary to the wording of the Directive or to the objective pursued by it.

This interpretation was, it is submitted, generous to the UK. The Court held that in the context of the transposition of directives, 'a restrictive approach to State liability is justified' for the same reasons as apply to Community liability in respect of legislative measures, namely, 'to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests' (para. 40).

The Court adopted a rather different approach in *R* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* (case C-5/94). This case concerned a claim for damages by an exporter, Hedley Lomas, for losses suffered as a result of a UK ban on the export of live sheep to Spain. The ban was imposed following complaints from animal welfare groups that Spanish slaughterhouses did not comply with the requirements of Council Directive 74/577 on the stunning of animals before slaughter (0) L316/l0, 1974). The Spanish authorities had implemented the directive, but had made no provision for monitoring compliance or providing sanctions for non-compliance. The UK raised the matter with the Commission, which, following discussion with the Spanish authorities, decided not to take action against Spain under Article 226 (ex 169). Although the UK ban was clearly in breach of Article 29 (ex 34) of the EC Treaty, the UK argued that it was justified on the grounds of the protection of health of animals under Article 30 (ex 36) (for further discussion of the substantive issues see chap. 11). However, the UK provided no evidence that the directive had in fact been breached, either by particular slaughterhouses or generally.

The Court found that the ban was in breach of Article 29, and was not justified under Article 30. The fact that the Spanish authorities had not provided procedures for monitoring compliance with the directive or penalties for non-compliance was irrelevant. 'Member States must rely on trust in each other to carry out inspections in their respective territories' (para. 19). Furthermore, the breach was

'sufficiently serious' to give rise to liability under *Francovich.* The Court suggested (at para. 28) that:

where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

This ruling, delivered two months after *R* v *Her Majesty's Treasury, ex parte British Telecommunications plc,* was surprising. While a finding that the UK would in principle be liable in damages was justified on the facts, the UK having produced no evidence of breach of the directive constituting a threat to animal health to justify the ban under Article 30, the suggestion that a 'mere infringement' of Community law might be sufficient to create liability where the State is not 'called upon to make any legislative choices' or has 'considerably reduced, or no, discretion' is questionable. While a State may have a choice as to the 'form and method of implementation' of directives, and some discretion under the Treaty to derogate from basic Treaty rules, its discretion is strictly circumscribed, and it has no discretion to act in breach of Community law. The UK had no more 'legislative' discretion in implementing Directive 90/531 in *BT,* indeed possibly less, than it had under Article 30 in *Hedley Lomas.* Indeed, prior to the Court's decision in *Hedley Lomas,* it was thought that a Member State *would* have a discretion to derogate from the prohibition of Article 29 where this was necessary to protect a genuine public interest (see chapter 11). To pursue the analogy between the Community's liability for 'legislative choices involving choices of economic policy' and Member States' liability under *Francovich,* as the Court has done in all these cases, is to disguise the fact that *the two situations are not similar.* The principal reason for limiting liability under *Francovich* is not because Member States' 'discretion' in implementing Community law must not be fettered, but because the rules of Community law are often not clear. To hold them liable in damages for 'mere infringements' of such rules, thereby introducing a principle akin to strict liability, would not only be politically dangerous, it would be contrary to the principle of legal certainty, itself a respected principle of Community law (for further analysis see chapter 31).

Nevertheless the principle of liability for a 'mere infringement' of Community law in situations in which Member States are not required to make legislative choices was invoked by the ECJ in *Dillenkofer* v *Germany* (cases C-178, 179, 188, 189 and 190/94) in a situation in which Germany's failure, on all fours with that of the Italian government in *Francovich,* was clearly 'inexcusable' and therefore, as the Court acknowledged, 'sufficiently serious' to warrant liability. In neither *Hedley Lomas* nor *Dillenkofer* did the Court attempt to apply the multiple test laid down in para. S6 of *Brasserie du Pecheur.* However, in *Denkavit International BV* v *Bundesamt fur Finanzen* (cases C-283, 291 & 292/94), which were cases involving claims for damages resulting from the faulty implementation of a directive decided shortly after *Dillenkofer,* the Court reverted to its approach in *BT.* Following a strong submission from Advocate-General Jacobs it applied the criteria of para. 56 of *Brasserie du Pecheur* and concluded that, as a result of the lack of clarity and precision of the relevant provisions of the directive, and the lack of clear guidance from the Court's previous case law, Germany's breach of Community law could not be regarded as sufficiently serious to justify liability. Significantly, the Court did not draw a distinction, for the purposes of liability, between acts of Member States involving 'choices of economic policy' and 'mere infringements' of Community law. In an attempt to rationalise this aspect of state liability, Advocate-General Jacobs in *Sweden* v *Stockholm Lindopark AB* (Case C-150/99) commented on the origins of the phrase 'sufficiently serious breach'. At paragraph 59 of his opinion, he noted that:

'In French, the Court has always used - originally with regard to liability incurred by the Community - the term "violation suffisamment caracterisee". This is now normally translated into English as "sufficiently serious breach". However, the underlying meaning of "caracterise", which gives rise to its inherent implication of seriousness, includes the notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite, clear-cut breach. This may help to explain why the term was previously translated as "sufficiently flagrant violation" and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is "sufficiently serious":

On this reasoning, a clear-cut breach of Community law would be sufficiently serious.

The ECJ's approach to the assessment of the matter of a 'sufficiently serious' breach remains inconsistent. In *Brinkman Tabakfabriken GmH* v *Skatteministeriet* (case C-319/96), it followed the more moderate line it had taken in *BT* (case C-392/ 93), and found that the Danish authorities' failure

properly to implement Directive 79/30 on taxes other than turnover taxes affecting the consumption of manufactured tobacco was not sufficiently serious to incur liability. The classification adopted by the authorities, which resulted in the applicant having to pay the higher rates of taxes, was not 'manifestly contrary' to the wording and aim of the directive. It was not clear from the directive whether the tobacco rolls imported by the applicant, which had to be wrapped in paper to be smoked, constituted 'cigarette tobacco' or 'cigarettes'. Significantly, both the Commission and the Finnish government supported the classification adopted by the Danish authorities. The question of liability was in fact decided by the Court on the basis of causation. The directive in question had not been implemented in Denmark by legislative decree, although the authorities had given immediate (albeit imperfect) effect to its provisions. There was no direct causal link between that former (legislative) failure and the damage suffered by the applicant. It is implicit in the decisions that, contrary to the view of some commentators, provided that the requirements of a directive are complied with in practice, a failure to implement a directive by legislative means will not necessarily constitute a sufficiently serious breach to warrant liability.

Rechberger and Greindle v *Austria* (case C-140/97) concerned a claim for damages for losses suffered as a result of Austria's alleged imperfect implementation of Directive 90/314, designed to protect consumers in the event of travel organisers' insolvency. The ECJ found that the implementing measures, which failed to provide the level of protection required under the directive, and which set the period for the commencement of claims at a date some months later than the time-limit for implementation of the directive, were 'manifestly' incompatible with the directive, and sufficiently serious to attract liability.

In both *Brinkman* and *Rechberger,* the assessment as to whether the breach was sufficiently serious depended primarily on the clarity and precision of the provisions breached. However, in *Norbrook Laboratories Ltd* v *Minister of Agriculture, Fisheries and Food* (case C-127/9S), a case involving a claim for damages for wrongful implementation of EC directives on the authorisation of veterinary products, the ECJ, following an extensive examination of the provisions of the directive allegedly breached, which revealed a number of clear breaches, invoked the *Hedley Lomas/Dillenkofer* mantra: 'Where... the Member State was not called upon to make legislative choices, and had considerably reduced, if no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach'. It was left to the national court to assess whether the conditions for the award of damages based on *Francovich* were fulfilled.

In *Klaus Konle* v *Austria* (case C-302/97), in a claim for damages for losses suffered as a result of laws of the Tyrol governing land transactions, allegedly contrary to Article 46 (ex 56) and Article 70 of the Act of Accession, the Court, having examined these provisions for their compatibility with Community law, and finding some (but not all) of the laws 'precluded' by Community law, left it to the national court 'to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law in accordance with the guidelines laid down by the Court of Justice'. Thus the national court was required to decide whether Austria's breach of Community law was sufficiently serious. The ECJ took a similar approach in *Haim* v *KLV* (case C-424/97). However, it seems that the *ex parte BT* approach will not be followed where the ECJ has previously interpreted a particular provision of Community law and a Member State has subsequently failed to apply that provision in accordance with the ECJ's interpretation *(Gervais Larsy* v *Institut national d'assurances sociales pour travailleurs independents (Inasti)* (Case C-118/00). In that case, it can no longer be said that the Member State has a legislative choice.

If national courts are to assess this crucial question of the seriousness of the breach, as was required in *Klaus Konle* (and as, in principle, given the nature of the ECJ's jurisdiction under Article 234 (ex 177), they should, see chapter 26), it is essential that these guidelines are clear. The multiple criteria laid down in para. S6 of *Brasserie du Pecheur* are clear and comprehensive. The *Hedley Lomas* requirement, that in some circumstances a 'mere infringement' of Community law will suffice to establish liability, clouds the issue. It is submitted that if it is to be invoked, it will be applicable only *following* an examination of the Community law allegedly breached under the multiple test in para. 56; for only then will the issue of whether the State has any 'discretion' in the exercise of its legislative powers be resolved. If the aim, and the substance, of the Community obligation allegedly infringed is 'manifest', the State will have no discretion to act in its breach. If it is not, the breach will not be sufficiently serious. The *Hedley Lomas* mantra is, it is submitted, superfluous. Nevertheless, it was invoked in *Haim* v *KLV* alongside the multiple test of paragraph 56. This case also made it clear that legally independent public bodies may also be liable under *Francovich.*

In *Sweden* v *Stockholm Lindopark AB* (Case C-150/99), the Court again followed *Hedley -Lomas.* Lindopak had not been entitled to deduct VAT on goods and services used for the purposes of its business activities in breach of the Sixth VAT directive (91/680/EEC, DJ L 376/1, 1991). Sweden had

amended its VAT legislation with effect from 1 January 1997, following which Lindopak was entitled to deduct VAT. It claimed for a return of VAT payments made between Sweden's accession to the Community on 1 January 1995 and 1 January 1997. The ECJ observed that the right to deduct VAT was capable of being directly effective. Although the question of Member State liability did not strictly speaking arise, the ECJ was nevertheless prepared to indicate whether Sweden had committed a sufficiently serious breach. It noted that

given the clear wording of [the directive], the Member State concerned was not in a position to make any legislative choices and had only a considerably reduced, or even no, discretion.

The mere infringement of the directive was therefore enough to create liability. In contrast, in *Schmidberger* v *Austria* (Case C-112/00), Advocate-General Jacobs suggested that a breach of Article 28 in that case would not be sufficiently serious. Austria had authorised a 28-hour demonstration which blocked the main transit route across the Alps. Although technically a breach of Article 28, the Advocate-General thought that this had to be balanced against the freedom of expression of the demonstrators (see further chapter 7). This and the short duration of the disruption would not be a sufficiently serious breach of Community law. The ECJ, having decided that there was no breach of Article 28, declined to deal with this question (see judgment of 12 June 2003).

5.4.4 The claimant must prove that damage has been suffered

It is also important that the claimant is able to establish that he has suffered loss or damage. In *Schmidberger* v *Austria* (Case C-112/00), Austria had allowed a public protest to take place on the main motorway across the Alps which closed the motorway for 28 hours. Schmidberger claimed damages for delay to his business of transporting goods from Germany to Italy on the basis that this amounted to a breach of Article 28 (see chapter 10). Advocate-General Jacobs noted that it was necessary for the claimant to establish loss or damage which is attributable, by a direct causal link, to a sufficiently serious breach of Community law. Importantly, this included a right to claim for lost profit. However, if the claimant is unable to establish the existence of any loss or damage, then there cannot be a claim for state liability. The Advocate-General was willing to accept that It may not be possible to quantify exactly the loss suffered, in which case this may be calculated on an appropriate flat-rate basis. As noted above, the ECJ did not address the question of State liability in its judgment.

5.4.5 Brasserie du Pecheur in the English courts

In 1997 the ECJ's ruling in *Brasserie du Pecheur* and *R* v *Secretary of State for Transport, ex parte Factortame Ltd* (cases C-46 and 48/93) was applied in the English High Court with a view to ascertaining whether the UK's action in introducing the Merchant Shipping Act 1988 in fact constituted a sufficiently serious breach of Community law *(R* v *Secretary of State for Transport, ex parte Factortame Ltd (No.* 5) [1998] 1 CMLR 1353. Hobhouse LJ considered the ECJ's case law on State liability and concluded that whether or not a Member State's action involved the exercise of discretion (ie. 'legislative choices') the same test, requiring proof of a sufficiently serious breach of Community law, applied. That test, requiring a 'manifest and grave disregard of whatever discretion the Member State might possess', was based on the same principles as applied to Community liability under Article 288(2), and was a relatively difficult one to meet. Having reasoned impeccably thus far he concluded that the UK's breach as regards the Merchant Shipping Act 1988 was sufficiently serious to warrant liability and referred the case back to the Divisional Court to decide the question of causation. Two factors in particular were cited by Hobhouse L as rendering the breach of Community law (Article 43 (ex 52) EC) sufficiently serious: (a) the UK had introduced the measures in question in primary legislation in order to ensure that the implementation would not be delayed by legal challenge (at the time it was thought that primary legislation could not be challenged, but see now *R* v *Secretary of State for Transport, ex parte Factortame Ltd* (case C-213/89), noted in chapter 4); and (b) the Commission had from the start been opposed to the legislation on the grounds that it was (in its opinion) contrary to Community law.

Both the Court of Appeal and the House of Lords agreed with Hobhouse J that the UK's breach of Community law was sufficiently serious to warrant liability. Both courts applied the multiple test laid down in para. 56 of *Brasserie du Pecheur* (cases C-46 and 48/93) (although they suggested that the list was 'not exhaustive') and found that the balance tipped in favour of the respondents. In pressing ahead with its legislation, against the advice of the Commission, despite its clear adverse impact on the respondents, and in a form (statute) which it was thought could not be challenged, the UK Government

was clearly taking a 'calculated risk'. Lord Slynn did, however, express the opinion, contrary to the view of Hobhouse J and the Court of Appeal, that the considered views of the Commission, although of importance, could not be regarded as conclusive proof as to:

(a) whether there had been a breach of Community law, and
(b) whether the breach was sufficiently serious to justify an award of damages.

Lords Hoffmann and Clyde expressed a similar view; the position taken by the Commission was 'a relevant factor to be taken into account' in deciding whether a breach was sufficiently serious, but it was not conclusive.

Following the House of Lords' decision in *Factortame,* Sullivan J in the English High Court, in assessing the seriousness of the Department of Social Security's breach of Article 7(1) of Sex Discrimination Directive 79/7 in *R* v *Department of Social Security, ex parte Scullion* [1999] 3 CMLR 798, also applied the multiple test of para. 56 of *Brasserie du Pecheur,* which he described as the 'global' or 'basket' approach, and decided that, since there the scope of Article 7 (1) was not clear at the relevant time, and there was no evidence that the Department had sought legal advice on the matter either from the Commission or from its own legal advisers, the breach was sufficiently serious.

5.4.6 Impact of the principle of State liability under Francovich

It remains to be seen whether, or the extent to which, the principle of State liability will have an impact on the principles of direct and indirect effects, particularly in the context of enforcement of directives. If it is necessary to prove in all cases the existence of a sufficiently serious breach - and this is a difficult test to satisfy - there will still be a need for individuals to rely on these principles. Until now, liability under the principles of both direct and indirect effect has been strict (this was confirmed in *Draehmpaehl* v *Urania Immobilienservice OHG* (case *C-180/95*)); there has been no need to consider whether the alleged breach of Community law is 'sufficiently serious'. For direct effects, the criteria have in the past been loosely applied sometimes, in the case of indirect effects (and sometimes in the case of direct effects), they have not been applied at all. On the other hand national courts' reluctance to apply these principles in some cases (e.g., *Duke* v *GEC Reliance Ltd; Rolls-Royce plc* v *Doughty)* appears to have stemmed in part from the perceived injustice of imposing liability, retrospectively, on parties, public or private, when the precise nature of their obligations under Community law at the relevant time was not clear. The existence of a remedy under *Francovich* could lead to a more rigorous application of the criteria for direct effects, especially following the denial by the Court of the direct effects of the relevant provisions of Directive 80/987 in *Francovich* itself. This latter fact was noted by, and appeared to be influential on, Blackburne J in *Griffin* v *South West Water Services Ltd* [1995] IRLR 15. In *Three Rivers District Council* v *Bank of England (No. 3)* [1996] 3 All ER 558, a case involving a claim for damages based on the defendants' breach of statutory duty in failing to supervise the credit institutions in the BCCI affair, Clarke J in the English High Court construed the EC directive which the defendants had allegedly breached, and on which the claimants based their claim, as *not intended to give rise to rights far individuals* and therefore not directly effective. Does this represent an attempt on the part of the Court to limit the direct effect of directives? lf so, is it legitimate?

The ECJ's test for direct effects (the provision must be sufficiently clear, precise and unconditional) has never expressly included a requirement that the directive should be intended to give rise to rights for the individual seeking to invoke its provisions. However, the justification for giving direct effect to EC law has always been the need to ensure effective protection for individuals' Community rights. Furthermore, the *ECJ* has, in a number of recent cases, suggested that an individual's right to invoke a directive may be confined to situations in which he can show a particular interest in that directive. In *Becker* v *Finanzamt Munster-Innenstadt* (case 8/81), in confirming and clarifying the principle of direct effects as applied to directives, the Court held that 'provisions of Directives can be invoked by individuals *insofar as they define rights which individuals are able to assert against the state'*. Drawing on this statement in *Verholen* (cases C-87-C-89/90), the Court suggested that only a person with a direct interest in the application of the directive could invoke its provisions: this was held in *Verholen* to include a third party who was directly affected by the directive. In *Verholen,* the husband of a woman suffering sex discrimination as regards the granting of a social security benefit, contrary to Directive 79/7, was able to bring a claim based on the directive in respect of disadvantage to himself consequential on the discriminatory treatment of his wife.

In most recent cases in which an individual seeks to invoke a directive directly, the existence of a direct interest is clear. The question of his or her standing has not therefore been in issue. Normally the rights he or she seeks to invoke, be it for example a right to equal treatment, or to employment

protection, are contained in the directive. Its provisions are clearly, if not explicitly, designed to benefit persons such as the individual. There are circumstances, however, where this is not so.

As noted in 5.2.5.7, individuals seeking to base their claim on a breach of a directive by the State will now need to establish that the breach interfered with a right or interest intended to be conferred on them. However, where this right or interest can be proved, the problem of adverse horizontal effects in cases involving third party situations, such as *CIA Security International SA* v *Signalson SA, Panagis Parfitis* and *Ruiz Bernaldez,* remains. Where individuals suffer damage in these situations, their only possible remedy lies in a claim under *Francovich.*

It is worthy of note that in *Three Rivers DC* v *Bank of England* (No. 3) (noted above), Clarke J invoked the same reasoning as he applied to the question of direct effects to the applicants' claim for damages under *Francovich.* He found that the directive allegedly breached contained no right intended to benefit the claimant. If they had no sufficient right or interest for direct effects, they had no claim under *Francovich,* because 'here too it is necessary to establish the same right or interest' (at para. 66). The cases from the ECJ considered above suggest that it too may be moving towards the same approach, thereby achieving some sort of consistency between the rules relating to individual standing in claims based on the principle of direct effect and claims under *Francovich.* This approach was also adopted by Beldam J in the English Court of Appeal in *Bowden* v *South West Water Services [1999]* 3 CMLR 180. In examining the Environmental Directive 79/903, he found it to confer rights on the claimant for the purposes of a claim for damages based on direct effects and under *Francovich.*

5.5 Conclusions

The principle of direct effects, together with its twin principle of supremacy of EC law, discussed in chapter 4, has played a crucial part in securing the application and integration of Community law within national legal systems. By giving individuals and national courts a role in the enforcement of Community law it has ensured that EC law is applied, and Community rights enforced, even though Member States have failed, deliberately or inadvertently, to bring national law and practice into line with Community law. Thus, as the Court suggested in *Van Gend* (case 26/62), the principle of direct effects has provided a means of control over Member States additional to that entrusted to the Commission under Article 226 (ex 169) and Member States under Article 227 (ex 170) (see further chapter 27). This control has now been reinforced by the rights which may be claimed by individuals under the principles of indirect effect and *Francovich.* But there is no doubt that the ECJ has extended the concept of direct effects well beyond its apparent scope as envisaged by the EC Treaty. Furthermore, although the criteria applied by the EC) for assessing the question of direct effects appear straightforward, in reality they have in the past been applied loosely, and any provision which is justiciable has, until recently, been found to be directly effective, no matter what difficulties may be faced by national courts in its application, or what impact it may have on the parties, public or private, against whom it is enforced. Thus the principle of direct effects created problems for national courts, particularly in its application to directives.

In recent years there have been signs that the ECJ, having, with a few exceptions, won acceptance from Member States of the principle of direct effects, or at least in the case of directives of vertical effects (but see the Conseil d'Etat's decision in *Campagnie Generale des Eaux* [1994] 2 CMLR 373, noted in chapter 4), had become aware of the problems faced by national courts and was prepared to apply the principles of direct and indirect effect with greater caution. Its more cautious approach to the question of standing, demonstrated in *Lemmens* (case C-226/97), has been noted above. Its decision in *Francovich* (cases C-6 & 9/90), that the relevant articles of Directive 80/987 were not sufficiently clear and precise for direct effects, appeared significant. While it is likely that it wished in that case to establish a separate principle of State liability to remedy the inadequacies of the principles of direct and (particularly) indirect effects, it is possible that *Francovich* was seen by the Court as providing a more legitimate remedy. In *Camitata di Caardinamenta per la Difesa della Cava* v *Regiane Lambardia* (case C-236/92), the Court found that Article 4 of Directive 75/442 on the Disposal of Waste, which required States to 'take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment', was not unconditional or sufficiently precise to be relied on by individuals before their national courts. It 'merely indicated a programme to be followed and provided a framework for action' by the Member States. The Court suggested that in order to be directly effective the obligation imposed by the directive must be 'set out in unequivocal terms'. In *R* v *Secretary of State for Social Security, ex parte Sutton* (case C-66/95) the Court refused to admit a claim for the award of interest on arrears of social security benefit on the basis of Article 6 of EC Directive 79/7 on Equal Treatment for Men and Women in Social Security, although in *Marshall (Na* 2) (case C-271/91) it had upheld a claim for compensation for discriminatory treatment based on an identically

worded Article 6 of Equal Treatment Directive 76/207. The Court's attempts to distinguish between the two claims ('amounts payable by way of social security are not compensatory') were unconvincing. In *El Carte Ingles SA* v *Rivero* (case C-192/94) it found the then Article 129a (now 153) of the EC Treaty requiring the Community to take action to achieve a high level of consumer protection insufficiently clear and precise and unconditional to be relied upon as between individuals. This may be contrasted with its earlier approach to the former Article 128 EC, which required the Community institutions to lay down general principles for the implementation of a vocational training policy, which was found, albeit together with the non-discrimination principle of (the then) Article 7 EEC, to be directly effective (see *Gravier* v *City of Liege* (case 293/83), discussed in chapter 17).
Thus, a directive may be denied direct effects on the grounds that:

(a) the right or interest claimed in the Directive is not sufficiently clear, precise and unconditional; or
(b) the individual seeking to invoke the Directive did not have a direct interest in the provisions invoked *(Verholen,* cases C-87-9/90); or
(c) the obligation allegedly breached was not intended for the benefit of the individual seeking to invoke its provisions *(Lemmens).*

In the area of indirect effects, in *Dori* v *Recreb Sri* (case C-91/92), the EC), following its lead in *Marshall* (case 152/84), declared unequivocally that directives could not be invoked horizontally. This view was endorsed in *El Corte Ingles SA* v *Rivero* and in *Arcaro* (case C-168/9S). In *Wagner Miret* (case C-334/92) the EC) acknowledged that national courts might not feel able to give indirect effect to Community directives by means of 'interpretation' of domestic law. This was also approved in *Arcaro.* In almost all of these cases, decided after *Francovich,* the Court pointed out the possibility of an alternative remedy based on *Francovich.*

However, as subsequent case law on State liability has shown, *Francovich* is not a universal panacea. To succeed in a claim for damages the applicant must establish that the law infringed was intended to confer rights on individuals and that the breach is sufficiently serious (as well as the requisite damage and causation). In cases of non-implementation of directives, as in *Francovich* or *Dillenkofer,* where there is no doubt about the nature of the Community obligation, the breach is likely to be sufficiently serious. However, where the Community obligation allegedly breached is less clear, the breach may well be found to be excusable. It will still be necessary to rely on the principles of direct and even indirect effects. In doubtful situations all possible remedies should be pursued.

7. General principles of law

7.1 Introduction

7.1.1 *The relevance of general principles*

After the concept of direct effects and the principle of supremacy of EC law the third major contribution of the ECJ has been the introduction of general principles of law into the corpus of EC law. Although primarily relevant to the question of remedies and enforcement of EC law, a discussion of the role of general principles of law is appropriate at this stage in view of their fundamental Importance in the jurisprudence of the ECJ.

General principles of law are relevant in the context of EC law in a number of ways. First, they may be invoked as an aid to interpretation: EC law, including domestic law implementing EC law obligations, must be interpreted in such a way as not to conflict with general principles of law. Secondly, general principles of law may be invoked by both States and individuals to challenge Community action, either to annul or invalidate acts of the institutions (under Articles 230, 241, 234 and 236 (ex 173, 184, 177 and 179) EC), or to challenge inaction on the part of these institutions (under Articles 232 or 236 (ex 175 and 179) EC). Thirdly, as a logical consequence of its second role, but less generally acknowledged, general principles may also be invoked as a means of challenging action by a Member State, whether in the form of a legal or an administrative act, where the action is performed in the context of a right or obligation arising from *Community* law (see *Klensch* (cases 201 &: 202/85); *Wachauf* v *Germany* (case 5/88); *Lageder* v *Amministrazione delle Finanze dello Stato* (case C-31/91); but *cf. R* v *Ministry of Agriculture, Fisheries and Food, ex parte Bostock* (case C-2/93). This would follow in the UK from the incorporation into domestic law, by s. 2(1) of the European Communities Act 1972, of *'All* such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties'. The degree to which general principles of law affect actions by Member States will be discussed in more detail later in this chapter. Lastly, general principles of law may be invoked to support a claim for damages against the Community (under Article 288(2) (ex 215(2)). Where' damages are claimed as a result of an illegal act on the part of the Community Institutions, it is necessary (but not sufficient) to prove that a sufficiently serious breach of a *superior rule of law for the protection of the individual* has occurred *(Aktien-Zuckerfabrlk Schoppenstedt v Council* (case 5/71)) (see chapter 31).

7.1.2 Fundamental principles

General principles of law are not to be confused with the fundamental principles of Community law, as expressed in the EC Treaty, for example, the principles of free movement of goods and persons, of non-discrimination on the grounds of sex (Article 141 (ex 119) EC) or nationality (Article 12 (ex 6) EC). General principles of law constitute the 'unwritten' law of the Community. This area has become a steadily evolving aspect of Community law. This chapter examines the general historical development of the Court's jurisprudence to explain how general principles have been received into Community law. It will be seen that general principles, in particular fundamental rights, are invoked with increasing frequency before the European courts. Some of these general principles are examined in more detail. However, this chapter does not provide a full survey of the substantive rights which are now recognised in Community law. Such a discussion is beyond the scope of this book and readers should refer to the specialist texts which are now available.

7.2 Rationale for the introduction of general principles of law

The legal basis for the incorporation of general principles into community law is slim, resting precariously on three Articles. Article 230 (ex 173) gives the ECJ power to review the legality of Community acts on the basis of, *inter alia,* 'infringement of this Treaty', or *'any rule of law relating to* its *application'.* Article 288(2) (ex 215(2)), which governs Community liability in tort, provides that liability is to be determined *'in accordance with the general principles common* to *the laws of the Member States'.* And Article 220 (ex 164), governing the role of the ECJ, provides that the Court 'shall ensure that in the interpretation and application of this Treaty *the law* is observed'.

In the absence of any indication as to the scope or content of these general principles, it has been left to the ECJ to put flesh on the bones provided by the Treaty. This function the Court has amply fulfilled, to the extent that general principles now form an important element of Community law.

One of the reasons for what has been described as the Court's 'naked law-making' in this area is best

illustrated by the case of *Internationale Handelsgesellschaft GmbH* (case 11/70). There the German courts were faced with a conflict between an EC regulation requiring the forfeiture of deposits by exporters if export was not completed within an agreed time, and a number of principles of the German constitution, in particular, the principle of proportionality. It is in the nature of constitutional law that it embodies a State's most sacred and fundamental principles. Although these principles were of particular importance, for obvious reasons, in post-war Germany, other States of the Community also had written constitutions embodying similar principles and rights. Clearly it would not have done for EC law to conflict with such principles. Indeed, as the German constitutional court made clear ([1974] 2 CMLR 540), were such a conflict to exist, national constitutional law would take precedence over EC law. This would have jeopardised not only the principle of primacy of EC law but also the uniformity of application so necessary to the success of the new legal order. So while the ECJ asserted the principle of primacy of EC law in *Internationale Handelsgesellschaft,* it was quick to point out that respect for fundamental rights was in any case part of EC law.

Another reason now given to justify the need for general principles is that the Community's powers have expanded to such a degree that some check on the exercise of the institutions' powers is needed. Furthermore, the expansion of Community competence means that the institutions' powers are now more likely to operate in policy areas in which human rights have an influence. Although those who wish to see sovereignty retained by the nation State may originally have been pleased to see the limitation of the EC institutions' powers, the development of human rights jurisprudence in this context can be seen as a double-edged sword, giving the ECJ increased power to impugn both acts of the Community institutions and implementing measures taken by Member States on grounds of infringement of general principles.

7.3 Development of general principles

……..

7.3.2 Role of International human rights treaties

Following *Internationale Handelsgesellschaft* the scope for human rights protection was further extended in the case of *J. Nold KG* v *Commission* (case 4/73). In this case J. Nold KG, a coal wholesaler, was seeking to challenge a decision taken under the ECSC as being in breach of the company's fundamental right to the free pursuit of business activity. While the Court did not find for the company on the merits of the case, it asserted its commitment to fundamental fights in the strongest terms. As well as stating that fundamental rights form an integral part of the general principles of law, the observance of which it ensures, it went on to say:

In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The reasons for this inclusion of principles of certain international treaties as part of EC law are clearly the same as those upholding fundamental constitutional rights; it is the one certain way to guarantee the avoidance of conflict.

In this context, the most important international treaty concerned with the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), to which all Member States are now signatories. The Court has on a number of occasions confirmed its adherence to the rights protected therein, an approach to which the other institutions gave their support (Joint Declaration, OJ No. CI03, 27.4.77, p. 1). In *R* v *Kirk* (case 63/ 83), in the context of criminal proceedings against Kirk, the captain of a Danish fishing vessel, for fishing in British waters (a matter subsequently covered by EC regulations), the principle of non-retroactivity of penal measures, enshrined in Article 7 of the ECHR, was invoked by the Court and applied in Captain Kirk's favour. The EC regulation, which would have legitimised the British rules under which Captain Kirk was charged, could not be applied to penalise him retrospectively. (See also *Johnston* v *Chief Constable of the Royal Ulster Constabulary* (case 222/84) (ECHR, Article 6, right to judicial process); *Hoechst* (cases 46/87, 227/88) contrast substantive ruling in *Roquette Freres* (case C-94/00); *National Panasonic* v *Commission* (case 136/79) (ECHR Article 8, right to respect for private and family life, home and correspondence - not infringed).)

Thus, it seems that any provision in the ECHR may be invoked, provided it is done in the context of

a matter of EC law. In *Kaur v Lord Advocate* ([1980] 3 CMLR 79), Court of Session of Scotland, an attempt was made to invoke the Convention (Article 8 'respect for family life') by an Indian immigrant seeking to challenge a deportation order made under the Immigration Act 1971. She failed on the grounds that the Convention had not been incorporated into British law. Its alleged incorporation via the European Communities Act 1972 did not enable a party to invoke the Convention before a Scottish court in a matter *wholly unrelated to EC law* (see also *SPUC* v *Grogan* (case 159/90) and *Kremzow* v *Austria* (case C-299/95)). In *Mannesmannrohren-Werke AG* v *Commission* (Case T-112/98), the CFI emphasised that although the ECHR has special significance in defining the scope of fundamental rights recognised by the Community because it reflects the constitutional traditions common to the Member States, the Court has no jurisdiction to apply the ECHR itself. The CFI therefore rejected arguments based directly on Article 6 ECHR in relation to an application to annul a Commission decision, but allowed the application on other grounds (see 7.6.7, below). The CFI's view with regard to invoking ECHR articles may be technically correct, but it sits somewhat uneasily with other judgments both by the CFI and the ECJ in which the courts appeared more willing to refer directly to ECHR provisions, and even to the jurisprudence of the European Court of Human Rights itself (see e.g., *Roquette Freres* (Case C-94/00)).

Other international treaties concerned with human rights referred to by the Court as constituting a possible source of general principles are the European Social Charter (1971) and Convention 111 of the International Labour Organisation *(1958) (Defrenne* v *Sabena (No.* 3) (case 149/77)). In *Ministere Public* v *Levy* (case C-158/91) the Court suggested that a Member State might even be obliged to apply a national law which conflicted with a ruling of its own on the interpretation of EC Directive 76/207 where this was necessary to ensure compliance with an international convention (in this case ILO Convention 89, 1948) concluded prior to that State's entry into the EC.

We saw at the beginning of this chapter that one of the central reasons for the introduction of fundamental rights into EC law was the resistance of some of the constitutional courts to giving effect to Community rules which conflicted with national constitutional principles. The EC]'s tactics to incorporate these principles and stave off rebellion were undoubtedly successful as exemplified by the *Wunsche* case ([1987] 3 CMLR 225), in which the German constitutional court resiled from its position in *Internationale Handelsgesellschaft* ([1974] 2 CMLR 540) (see chapter 4). This does not, however, mean that the ECJ can rest on its laurels in this regard. The Italian constitutional court in *Fragd (SpA Fragd* v *Amministrazione delle Finanze* Decision No. 232 of 21 April 1989) reaffirmed its right to test Community rules against national constitutional rules and stated that Community rules which, in its view, were incompatible with the Italian constitution would not be applied. Similarly, the German constitutional courts have reasserted the right to challenge Community legislation which is inconsistent with the German constitution (see, e.g., *Brunner v European Union Treaty* [1994] 1 CMLR 57; *M GmbH v Bundesregierung* (case 2 B&Q 3/89) [1990] 1 CMLR 570 (an earlier tobacco advertising case) and the bananas cases - *Germany* v *Council* (Re Banana Regime) (case C-280/93), *Germany* v *Council* (Bananas 11) (case C-122/95) and *T. Port GmbH* v *Hauptzollamt HamburgJonas* (cases C-364 & 365/95) - discussed further in chapter 4). Although the supremacy of Community law *vis-à-vis* national law might not be threatened by the possibility of its review in accordance with provisions of national constitutions embodying general principles of international law, its uniformity and the supremacy of the ECJ might well be eroded if national courts seek themselves to interpret these broad and flexible principles, rather than referring for a Community ruling on these matters from the EC]. Equally, a failure on the part of national courts to recognise fundamental principles, in conjunction with a failure to refer, may have a similar effect.

Deferring to the ECJ does, however, concentrate a significant degree of power in that Court, against whose rulings there is no appeal. One suggested safeguard for fundamental rights would be for the Community to accede to the ECHR. Questions of human rights and, in particular, interpretation of the ECHR, could then be taken to the European Court of Human Rights, a court which specialises in these issues. This would minimise the risk of the ECJ misinterpreting the ECHR and avoid the possibility of two conflicting lines of case law developing (e.g., *Orkem* (case 374/87) and *Funke* v *France* (case SA 256A)). The ECJ, however, has ruled that accession to the ECHR would not be within the present powers of the Community: Treaty amendment would be required before the Community could take this step *(Opinion* 2/94 on the *Accession by the Community to the European Convention on Human Rights).*

This has been one of the issues under discussion by the Convention on the Future of Europe preparing for the 2004 IGC. Treaty amendment, however, requires the unanimous agreement of all Member States, which is sometimes difficult to obtain. Nonetheless, recent Treaty amendments have seen a progressive raising of the profile of human rights protection within the Community.

The TEU had included in the Union general provisions a reference to the ECHR to the effect that, 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the

Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional tradition common to the Member States, as general principles of Community law' (Article 6(2) (ex F(2) TEU)). Additionally, Article 6(1) (ex F(1)) TEU stated that the Union was founded on respect for 'liberty, democracy and respect for human rights'. However, by Article L TEU, as it then was (now amended and re-numbered as Article 46 TEU), the ECJ's jurisdiction as regards the general Union provisions was excluded. The ToA amended Article 46 (ex L) TEU to give the ECJ express competence in respect of Article 6(2) (ex F(2)) TEU with regard to action of the institutions 'insofar as the ECJ has jurisdiction either under the treaties establishing the Communities or under the TEU'. This would seem to be little more than a confirmation of the existing position, at least as far as the EC Treaty is concerned.

The ToA also inserted a new Article 7 into the TEU. This provided that where there has been a persistent and serious breach of a principle mentioned in new Article 6(1) TEU, the Council may suspend certain of the rights of the offending Member State, including its voting rights. Were this provision to be used, it could have serious consequences for the Member State in question; such a Member State would lose its opportunity to influence the content of Community legislation by which it would be bound, even in sensitive areas where otherwise it could have vetoed legislation. On this viewpoint, one might suggest that the need to comply with fundamental principles is being taken seriously indeed. It is likely, though, that this provision will be used only rarely given the severity of the breach needed to trigger the procedure which itself is long-winded, requiring unanimity (excluding the offending Member State) in the first instance. Given the potential consequences for Member States, however, the complexity of the procedure is perhaps appropriate. Nonetheless, it does detract from the effectiveness of the procedures.

7.4 Relationship between the EC/EU and the ECHR in the protection of human rights

All Member States of the EU have signed the ECHR, and in most Member States, the Convention has been incorporated into domestic law. (It was incorporated in the UK by the Human Rights Act 1998, which came into force in October 2000.) When it is so incorporated, the Convention's provisions may be invoked before the domestic courts in order to challenge *national* rules or procedures which infringe the rights protected by the Convention. Even without the Convention being incorporated into domestic law, the Member States are bound by its terms and individuals, after they have exhausted national remedies, have a right of appeal under the Convention to the European Court of Human Rights.

The ECJ has done a great deal to ensure the protection of human rights within the context of the application of Community law, whether by Community institutions or by Member States. But, as the ECHR has not so far been incorporated into *Community* law, its scope has been limited and the relationship between the ECHR and the Union legal system is somewhat unclear. The difficulties are illustrated by the decision of the European Court of Human Rights in the *Matthews* case (ECHR judgment, 18 February 1999).

Matthews concerned the rights of UK nationals resident in Gibraltar to vote in European Parliamentary elections. They were excluded from participating in the elections as a result of the 1979 agreement between the Member States which established direct elections in respect of the European Parliament. The applicants argued that this was contrary to Protocol I, Article 3 of the ECHR, which provides that signatory States to the Convention are under an obligation 'to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. The British government argued that not only was Community law not within the jurisdiction of the ECHR (as the Community had not acceded to the Convention), but also that the UK Government could not be held responsible for joint acts of the Member States. The European Court of Human Rights found, however, that there had been a violation of the Convention.

The Court held that States which are party to the ECHR retain residual obligations in respect of the rights protected by the Convention, even as regards areas of law-making which had been transferred to the Union. Such a transfer of power is permissible, provided Convention rights continue to be secured within the Community framework. In this context the Court of Human Rights noted the ECJ's jurisprudence in which the ECJ recognised and protected Convention rights. In this case, however, the existence of the direct elections was based on a *sui generis* international instrument entered into by the UK and the other Member States which could not be challenged before the ECJ, as it was not a normal Community act. Furthermore, the TEU, which extended the European Parliament's powers to include the right to co-decision thereby increasing the Parliament's claim to be considered a legislature and taking it within the terms of Protocol 1, Article 3 of the ECHR, was equally an act which could not be challenged before the ECJ. There could therefore be no protection of Convention rights in this regard

by the ECJ. Arguing that the Convention is intended to guarantee rights that are not. theoretical or illusory, the Court of Human Rights held that:

The United Kingdom, together with all other parties to the Maastricht Treaty, is responsible ratione materiae under Article 1 of the Convention and, in particular, under Article 3 of Protocol 1, for the consequences of that Treaty. (para. 33.)

It may be noted that it is implicit in the reasoning in this judgment that the EU is regarded by the Court of Human Rights as being the creature of the Member States, which remain fundamentally responsible for the Community's actions and for those of the Union. This corresponds with the conception of the EU expressed by some of the Member States' constitutional courts (e.g., see the German constitutional court's reasoning in *Brunner* [1994] 1 CMLR 57).

Arguably, this judgment opens the way for the Member States to be held jointly responsible for those Community (or Union) acts that currently fall outside the jurisdiction of the ECJ, sealing lacunae in the protection offered to individual human rights within the Community legal order. The difficulty is, of course, that in this case only the UK was the defendant. The British government is dependent on the cooperation of the other Member States to enable it to fulfil its own obligations under the ECHR. It is possible that a case could be brought under the ECHR against all Member States jointly. (See e.g. *Societe Guerin Automobiles* Application No. 51717/99, inadmissible on other grounds; *DSR Senator Lines,* Application No. 56672/00, pending before Grand Chamber.) Although this would not obviate the need for cooperation to remedy any violation found, it would avoid the situation where one Member State alone was carrying the responsibility for Union measures that were the choice of all Member States.

The implication that the Court of Human Rights will step in only where there is no effective means of securing human rights protection within an existing international body (i.e., that the ECJ has primary responsibility for these issues in the EU) is underlined by its approach in another case involving another European supranational organisation, Euratom *(Waite and Kennedy* v *Germany,* ECHR judgment 18 February 1999). There the Court emphasised the necessity for an independent review board which is capable of protecting fundamental rights to exist within the organisational structure.

7.5 The EU Charter of Fundamental Rights

7.5.1 Background

We have already seen that there has been a debate about whether the EC/EU should accede to the European Convention on Human Rights. In 1999, the Cologne European Council set up a Convention, under the chairmanship of Roman Herzog, to produce a draft Union charter as an alternative mechanism to ensure the protection of fundamental rights. This was completed in time for the 2000 European Council meeting at Nice, where the European institutions solemnly proclaimed the charter (published at [2000] OJ C364/1 - hereinafter EUCFR). At the present time, the EUCFR does not have legal effect. However, the next IGC, which is scheduled for 2004, will consider whether the Charter should have full legal effect and if it should be made part of the treaties. However, the ECJ has already referred to the EUCFR in a number of judgments by way of reference in confirming that the European legal order recognises particular fundamental rights (see e.g., *R* v *SoS ex parte BAT* (Case C-491/01), where the Court observed that 'the right to property, . . . is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR") and *enshrined in Article* 17 *of the Charter of Fundamental Rights of the European Union'* (para. 144, emphasis added). See also *Jego-Quere et Cie* v *Commission* (Case T-I77 /01 para. 42; see further chapter 28 and *Mannesmannrohren-Werke AG* v *Commission* (Case T-1l2/98) paragraphs 15 and 76). However, there has been no judgment to date in which the EC) has *based* its judgment on the EUCFR.

7.5.2 Scope

By virtue of Article 51 (1) EUCFR, its provisions are addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. As far as the institutions and bodies of the Union are concerned, due regard is to be had to the principle of subsidiarity. It is not entirely clear what the significance of this reference is, other than perhaps to confirm that the Union must always act in accordance with the principle of subsidiarity. With regard to the Member States, Article 51(1) EUCFR confirms existing case law which has held that there is only an obligation on the

Member States to respect fundamental rights under EU law when they are acting in the context of Community law (see *Karlsson and others* (Case C-292/97), para. 37). Outside this context, Member States are, of course, obliged to respect fundamental rights under the ECHR (see 7.4., above, on 'residual obligations').

Article 52(1) EUCFR provides that limitations on the exercise of the rights and freedoms guaranteed by the EUCFR must be provided by law. Any such limitations must be proportionate and are only permitted if they are necessary and genuinely meet objectives recognised by the EU. In this, there are similarities to the approach taken with regard to the derogation provisions in the ECHR. Article 52(2) EUCFR further confirms that those rights which derive from the treaties are subject to the conditions and limitations that apply to the corresponding treaty provisions.

7.5.3 Substance

The EUCFR is divided into six substantive chapters.

Chapter I, Dignity includes:
(a) human dignity;
(b) the right to life;
(c) the right to the integrity of the person and
(d) prohibitions on torture, inhuman or degrading treatment or punishment, slavery and forced labour.

Chapter II, Freedoms provides for:
(a) right to liberty and security;
(b) respect for private and family life;
(c) protection of personal data;
(d) right to marry and found a family;
(e) freedom of:
(i) thought, conscience and religion;
(ii) expression and information;
(iii) assembly and association;
(iv) the arts and sciences;
(v) a right to education;
(vi) choose an occupation and a right to engage in work;
(vii) conduct a business, right to property, right to asylum, and protection in the event of removal, expulsion or deportation.

Chapter III, Equality guarantees:
(a) equality before the law, non-discrimination, cultural, religious and linguistic diversity;
(b) equality between men and women;
(c) the rights of the child and the elderly; and
(d) the integration of persons with disabilities.

The solidarity rights in chapter IV are:
(a) the workers' right to information and consultation with the right of collective bargaining and action;
(b) right of access to placement services;
(c) protection in the event of unjustified dismissal;
(d) fair and just working conditions;
(e) prohibition of child labour and protection of young people at work;
(f) family and professional life;
(9) social security and social assistance;
(h) health care;
(i) access to services of general economic interest;
(j) environmental protection; and
(k) consumer protection.

Chapter V provides for citizenship rights (see also chapter 18), which are the right to:
(a) vote and stand as candidate at elections to the European Parliament and at municipal elections;
(b) good administration;
(c) access to documents;
(d) access to the Ombudsman;

(e) petition the European Parliament;
(f) freedom of movement and residence; and
(g) diplomatic and consular protection.

Finally, chapter VI: Justice guarantees a right to:
(a) effective remedy and to a fair trial;
(b) presumption of innocence and right of defence;
(c) principles of legality and proportionality of criminal offences and penalties; and
(d) not to be tried or punished twice in criminal proceedings for the same criminal offence.

The preceding enumeration of all the rights contained in the EUCFR demonstrates that the Charter consists of a mixture of human rights found in the ECHR, rights derived from other international conventions and provisions of the EC Treaty. The Council of the European Union has published a booklet which explains the origin of each of the rights contained in the EUCFR.

7.5.4 Overlap between the Charter and the ECHR

Article 52(3) deals with the complex problem of overlap between the ECHR and the EUCFR. It specifies that those rights in the EUCFR which correspond with ECHR rights must be given the same meaning and scope as the ECHR rights. EU law may provide more generous protection, but not a lower level of protection than guaranteed under the ECHR and other international instruments (Article 53).

At present, the question of overlap is not a cause for concern, because the EUCFR has no legal status. However, if the 2004 IGC decides to incorporate the EUCFR into the treaties (or the proposed 'constitution'), it will be necessary to determine to what extent the ECJ has jurisdiction to enforce the Charter. Presumably, Article 51 would mean that the EUCFR rights are not free-standing rights, but are only relevant in matters of European law. In that case, the position would probably not be any different from the current situation.

If, however, certain EUCFR rights (such as those based on the ECHR) are regarded as free-standing rights, then the ECJ may be in danger of 'competing' with the European Court of Human Rights. The ECJ would be obliged to interpret EUCFR rights in accordance with the ECHR, but a difficulty may arise if the ECJ interprets an ECHR-based right in one way and the Court of Human Rights subsequently takes a different view. Member States may then face a conflict between complying with their obligations under European law, in particular the doctrine of supremacy (see chapter 4) and under the ECHR respectively. It is submitted that in such a case, the ECHR should prevail. This seems to be the current position under the ECJ's case law. In *Roquette Freres* (Case C-94/00), the question arose whether business premises could be protected under Article 8 ECHR against 'dawn raids' by the Commission under Regulation 17 (see chapter 22). In its earlier decision in *Hoechst* (Case C-46/87), the ECJ had held that Article 8 required no such protection. However, subsequent ECHR case law has extended the scope of Article 8 to cover business premises. In *Roquette,* the ECJ held that the case law under the ECHR must be taken into account in applying the *Hoechst* decision. The ECJ therefore appears to recognise that ECHR case law can have an impact on the scope of fundamental rights guaranteed by Community law.

7.5.5 Conclusion

Currently, the EUCFR has only declaratory status and it remains to be seen whether it will become legally binding. If this were to happen, some thought would need to be given to the relationship between the ECHR and the EUCFR and the role of the ECJ in interpreting the fundamental rights contained in the EUCFR. It may be necessary to reconsider whether the EU should accede to the ECHR and thereby acknowledge the supremacy of the Convention and the European Court of Human Rights.

The general principles of Community law have been expanded through the case law of the ECJ to cover a wide variety of rights and principles developed from many sources. We will now look at some specific examples of those rights. The following is not, however, an exhaustive list, and there may be degrees of overlap between the categories mentioned.

7.6 Rules of administrative justice

7.6.1 Proportionality

This was the principle invoked in *Internationale Handelsgesellschaft mbH* (case 11/70). It is now enshrined in Article 5 (ex 3b) EC (see 7.8 below). The principle, applied in the context of administrative law, requires that the means used to achieve a given end must be no more than that which is appropriate and necessary to achieve that end. The test thus puts the burden on an administrative authority to justify its actions and requires some consideration of possible alternatives. In this respect it is a more rigorous test than one based on reasonableness.

The principle has been invoked on many occasions as a basis of challenge to EC secondary legislation, often successfully (e.g., *Werner A. Bock KG* v *Commission* (case *62/70); Bela-Muhle Josef Bergmann KG* v *Grows-Farm GmbH & Co. KG* (case 114/76). It was applied in *R* v *Intervention Board for Agricultural Produce, ex parte E.D. & F. Man (Sugar) Ltd* (case 181/84) in the context of a claim by E.D. & F. Man (Sugar) Ltd before the English Divisional Court, on facts very similar to *Internationale Handelsgesellschaft.* Here the claimant, E.D. & F. Man (Sugar) Ltd, was seeking repayment of a security of £1,670,370 forfeited when it failed to comply with an obligation to submit licence applications to the Board within a specified time-limit. Due to an oversight they were a few hours late. The claimant's claim rested on the alleged illegality of the EC regulations governing the common organisation of the sugar market. The regulations appeared to require the full forfeiture of the deposit (lodged by the exporter at the time of the initial offer to export) in the event of a breach of both a *primary* obligation to export goods as agreed with the Commission and a *secondary* obligation to submit a licence application following the initial offer within a specified time-limit. The ECJ held, on a reference from the Divisional Court on the validity of the regulations, that to require the same forfeiture for breach of the secondary obligation as for the primary obligation was disproportionate, and to the extent that the regulation required such forfeiture, it was invalid. As a result of this ruling, the claimant was held entitled in the Divisional Court to a declaration that the forfeiture of its security was unlawful: a significant victory for the claimant.

The proportionality principle has also been applied in the context of the EC Treaty, for example, in the application of the provisions relating to freedom of movement for goods and persons. Under these provisions States are allowed some scope for derogation from the principle of free movement, but derogations must be 'justified' on one of the grounds provided (Articles 30 (ex 36) and 39(3) (ex 48(3))). This has been interpreted by the ECJ as meaning that the measure must be *no more than* is *necessary* to achieve the desired objective (see chapters 10 and 11 (goods), 15-18 (persons).

In *Watson* (case 118/75) the proportionality principle was invoked in the sphere of the free movement of persons to challenge the legality of certain action by the Italian authorities. One of the defendants, Ms Watson, was claiming rights of residence in Italy. The right of free movement of workers expressed in Article 39 (ex 48) EC is regarded as a fundamental Community right, subject only to 'limitations' which are 'justified' on the grounds of public policy, public security or public health (Article 39(3) (ex 48(3). The Italian authorities sought to invoke this derogation to expel Ms Watson from Italy. The reason for the defendants' expulsion was that they had failed to comply with certain administrative procedures, required under Italian law, to record and monitor their movements in Italy. The ECJ, on reference from the Italian court, held that, while States were entitled to impose penalties for non-compliance with their administrative formalities, these must not be disproportionate; and they must never provide a ground for deportation. Here, it is worth noting, it is a Member State's action which was deemed to be illegal for breach of the proportionality principle. Likewise, in *Wijsenbeek* (Case C-378/97) the ECJ held that, although Member States were still entitled to check the documentation of EC nationals moving from one Member State to another, any penalties imposed on those whose documentation was unsatisfactory must be proportionate: in this case, imprisonment for failure to carry a passport was disproportionate. (See further chapter 18.)

Similarly, in the context of goods, in a case brought against Germany in respect of its beer purity laws (case 178/84), a German law imposing an absolute ban on additives was found in breach of EC law (Article 30 (new 28 (ex 30) EC) and not 'justified' on public health grounds under Article 36 (new 30 (ex 36). Since the same (public health) objective could have been achieved by other less restrictive means, the ban was not 'necessary'; it was disproportionate.

More recently, however, there seems to have been a refinement of the principle of proportionality. In the case of *Sudzucker Mannheim/Ochsenfurt AG* v *Hauptzollamt Mannheim* (case C-161/96) the ECJ confirmed the distinction between primary and secondary (or administrative) obligations made in *R* v *Intervention Board for Agricultural Produce* (case 181/84). The breach of a secondary obligation should not be punished as severely as a breach of a primary obligation. On the facts of the case, the ECJ held that a failure to comply with customs formalities by not producing an export licence was a breach of a primary and not a secondary obligation. The ECJ stated that the production of the export licence was necessary to ensure compliance with export requirements and thus the production of the export licence was part of the primary obligation. On this reasoning, it may be difficult to distinguish

between primary and secondary obligations.

Further, the ECJ has held that, where an institution has significant discretion in the implementation of policies, such as in CAP, the ECJ may only interfere if the 'measure is manifestly inappropriate having regard to the objectives which the competent institution is seeking to pursue' *(Germany* v *Council (Re Banana Regime)* (case C-280/93), para. 90). The same is also true of actions of Member States where they have a broad discretion in the implementation of Community policy (see *R* v *Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94). In these circumstances, the distinction between proportionality and *Wednesbury* reasonableness is not great.

7.6.2 Legal certainty

The principle of legal certainty was invoked by the Court of Justice in *Defrenne* v *Sabena (No.* 2) (case 43/75). The principle, which is one of the widest generality, has been applied in more specific terms as:

(a) the principle of legitimate expectations;
(b) the principle of non-retroactivity.

The principle of legitimate expectations, derived from German law, means that, in the absence of an overriding matter of public interest, Community measures must not violate the legitimate expectations of the parties concerned. A legitimate expectation is one which might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. It does not extend to anticipated windfalls or speculative profits. In *Efisol SA* v *Commission* (case T-336/94) the CFI commented that an individual would have no legitimate expectations of a particular state of affairs existing where a 'prudent and discriminating' trader would have foreseen the development in question. Furthermore, in *Germany* v *Council (Re Banana Regime)* (case C-280/93), the EC} held that no trader may have a legitimate expectation that an existing Community regime will be maintained. In that the principle requires the encouragement of a reasonable expectation, a reliance on that expectation, and some loss resulting from the breach of that expectation, it is similar to the principle of estoppel in English law.

The principle was applied in *August Topfer & Co. GmbH* v *Commission* (case 112/ 77) (see chapter 28). August Topfer &. Co. GmbH was an exporter which had applied for, and been granted, a number of export licences for sugar. Under Community law, as part of the common organisation of the sugar market, certain refunds were to be payable on export, the amount of the refunds being fixed in advance. If the value of the refund fell, due to currency fluctuations, the licence holder could apply to have his licence cancelled. This scheme was suddenly altered by an EC regulation, and the right to cancellation withdrawn, being substituted by provision for compensation. This operated to Topfer's disadvantage, and it sought to have the regulation annulled, for breach, *inter alia,* of the principle of legitimate expectations. Although it did not succeed on the merits, the principle of legitimate expectations was upheld by the Court. (See also *CNTA SA* v *Commission* (case 74/74), monetary compensation scheme ended suddenly and without warning: chapter 31.) In *Opel Austria GmbH* v *Council* (case T-1l5/4) the Court held that the principle of legitimate expectations was the corollary of the principle of good faith in public international law. Thus, where the Community had entered into an obligation and the date of entry into force of that obligation is known to traders, such traders may use the principle of legitimate expectations to challenge measures contrary to any provision of the international agreement having direct effect.

The principle of non-retroactivity, applied to Community secondary legislation, precludes a measure from taking effect before its publication. Retrospective application will only be permitted in exceptional circumstances, where it is necessary to achieve particular objectives and will not breach individuals' legitimate expectations. Such measures must also contain a statement of the reasons justifying the retroactive effect *(Diversinte SA* v *Administracion Principal de Aduanos e Impuestos Especiales de la Junqueros* (case C-260/91).

In *R* v *Kirk* (case 63/83) the principle of non-retroactivity of penal provisions (activated in this case by a Community regulation) was invoked successfully. However, retroactivity may be acceptable where the retroactive operation of the rule in question improves an individual's position (see, for example, *Road Air BV v Inspecteur der Invoerrechten en Accijnzen* (case C-31O/95).

This principle also has relevance in the context of national courts' obligation to interpret domestic law to comply with Community law when it is not directly effective (the *Von Colson* principle, see chapter 5). In *Pretore di Sala* v *Persons Unknown* (case 14/86) in a reference from the Salo magistrates' court on the compatibility of certain Italian laws with EEC Water Purity Directive 78/659, which had been invoked against the defendants in criminal proceedings, the Court held that:

A Directive cannot of itself have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of the Directive.

The Court went further in *Officier van Justitie* v *Kolpinghuis Nijmegen* (case 80/86). Here, in response to a question concerning the scope of national courts' obligation of interpretation under the *von Colson* principle, the Court held that that obligation was 'limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity'. Thus where EC law is not directly effective national courts are not required to interpret domestic law to comply with EC law in violation of these principles.

Problems also arise over the temporal effects of EC} rulings under Article 234 (ex 177). In *Defrenne* v *Sabena (No.* 2) (case 43/75) the Court held that, given the exceptional circumstances, 'important considerations of legal certainty' required that its ruling on the direct effects of the then Article 119 (now 141) should apply prospectively only. It could not be relied on to support claims concerning pay periods prior to the date of judgment, except as regards workers who had already brought legal proceedings or made an equivalent claim. However, in *Ariete SpA* (case 811/79) and *Meridionale Industria Salumi Sri* (cases 66, 127 & 128/79) the Court affirmed that *Defrenne* was an exceptional case. In a 'normal' case a ruling from the ECJ was retroactive; the Court merely declared the law as it always was. This view was approved in *Barra* (case 309/85). However, in *Blaizot* (case 24/86), a case decided the same day as *Barra,* 'important considerations of legal certainty' again led the Court to limit the effects of its judgment on the lines of *Defrenne.* It came to the same conclusion in *Barber* v *Guardian Royal Exchange Assurance Group* (case 262/88). These cases indicate that in exceptional cases, where the Court introduces some new principle, or where the judgment may have serious effects as regards the past, the Court will be prepared to limit the effects of its rulings. *Kolpinghuis Nijmegen* may now be invoked to support such a view. Nevertheless, the Court did not limit the effect of its judgment in *Francovich* (cases C-6, 9/90) contrary to Advocate-General Mischo's advice, despite the unexpectedness of the ruling and its 'extremely serious financial consequences' for Member States. Nor did it do so in *Marshall (No.* 2) (case C-271/91) when it declared that national courts were obliged, by Article 5 of Directive 76/207 and their general obligation under Article 10 (ex 5) EC to ensure that the objectives of the directives might be achieved, to provide full compensation to persons suffering loss as a result of infringements of the directive, a matter which could not have been deduced either from the ECJ's case law or from the actual wording of the directive (see further chapter 24).

The question of the temporal effect of a ruling from the ECJ under Article 234 (ex 177) EC was considered by the Italian constitutional court in *Fragd (SpA Fragd* v *Amministrazione delle Finanze* Decision No. 232 of 21 April 1989) in the light of another general principle. Although the point did not arise out of the reference in question, the Italian court considered the effect that a ruling under Article 234 holding a Community measure void should have on the referring court if the ECJ had held that the ruling would apply for future cases only, excluding the judgment in which it was given. The Italian constitutional court suggested that in the light of the right to judicial protection given under the Italian constitution, such a holding should have effect in the case in which the reference was made. A finding of invalidity with purely prospective effect would offend against this principle and would therefore be unacceptable.

……..

…….

7.6.5 The duty to give reasons

The duty was affirmed in *Union Nationale des Entraineurs et Cadres Techniques Professionels du Football (UNECTEF)* v *Heylens* (case 222/86). In this case, M. Heylens, a Belgian and a professional football trainer, was the defendant in a criminal action brought by the French football trainers' union, UNECTEF, as a result of his practising in Lille as a professional trainer without the necessary French diploma, or any qualifications recognised by the French government as equivalent. M. Heylens held a Belgian football trainers' diploma, but his application for recognition of this diploma by the French authorities had been rejected on the basis of an adverse opinion from a special committee, which gave no reasons for its decision. The ECJ, on a reference from the Tribunal de Grande Instance, Lille, held that the right of freemovement of workers, granted by Article 39 (ex 48) EC, required that a decision refusing to recognise the equivalence of a qualification issued in another Member State should be subject to legal redress which would enable the legality of that decision to be established with regard to Community law, and that the person concerned should be informed of the reasons upon which the decision was based.

Similarly in *Al-Jubail Fertiliser Company (SAMAD)* v *Council* (case C-49/88) in the context of a challenge to a Council regulation imposing antidumping duties on the import of products manufactured by the applicants, the Court held that since the applicants had a right to a fair hearing the Community institutions were under a duty to supply them with all the information which would enable them effectively to defend their interests. Moreover if the information is supplied orally, as it may be, the Commission must be able to prove that it was in fact supplied.

……

7.8 Subsidiarity

The principle of subsidiarity in its original philosophical meaning, as expressed by Pope Pius XI (Encyclical letter, 1931), that:

it is an injustice, a grave evil and disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies

was invoked in the Community context during the 1980s when the Community's competence was about to be extended under the Single European Act. It was incorporated into that Act, in rather different form, in respect of environmental measures, in the then Article 130r (now 174) EC, and introduced into the EC Treaty in Article 5 (ex 3b) by the TEU. Article 5 EC requires the Community to act:

only if and so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community.

As expressed in Article 5 (ex 3b) EC, subsidiarity appears to be a test of comparative efficiency; as such it lacks its original philosophical meaning, concerned with fostering social responsibility. This latter meaning has however been retained in Article 1 (ex A) TEU, which provides that decisions of the European Union 'be taken as closely as possible to the people'. Although it has not been incorporated into the EC Treaty it is submitted that this version of the principle of subsidiarity could be invoked as a general principle of law if not as a basis to challenge EC law at least as an aid to the interpretation of Article 5 (ex 3b) EC (see chapter 3).

7.9 General principles applied to national legislation

It has been suggested that general principles of law, incorporated by the EC} as part of Community law, also affect certain acts of the Member States. These fall into three broad categories:

(a) when EC rights are enforced within national courts;
(b) when the rules of a Member State are in (permitted) derogation from a fundamental principle of Community law, such as free movement of goods (Articles 25 and 28 (ex 12 and 30) EC) or persons (Articles 39 and 49 (ex 48 and 59); and
(c) when the Member State is acting as an agent of the Community in implementing Community law (e.g., *Klensch* v *Secretaire d'Etat a l'Agriculture et a la Viticulture* (cases 201 &: 202/85).

……

7.9.2 Derogation from fundamental principles

Most Treaty rules provide for some derogation in order to protect important public interests (e.g., Articles 30 (ex 36) and 39(3) (ex 48(3))). The ECJ has insisted that any derogation from the fundamental principles of Community law must be narrowly construed. When Member States do derogate, their rules may be reviewed in the light of general principles, as the question of whether the derogation is within permitted limits is one of Community law. Most, if not all, derogations are subject to the principle of proportionality (e.g., *Watson* (case 118/75). The *ERT* case *(Elliniki Radiophonia Tileorassi AE* v *Dimotiki Etairia Pliroforissis* (case C-260/89) concerned the establishment by the Greek government of a monopoly broadcaster. The ECJ held that this would be contrary to Article 49 (ex 59) regarding the freedom to provide services. Although the Treaty provides for derogation from Article 49 (ex 59) in Articles 46 and 55 (ex 56 and 66), any justification provided for by Community law must be interpreted in the light of fundamental rights, in this case the principle of freedom of expression embodied in Article 10 ECHR. Similarly, in *Vereinigte Familiapress Zeitungsverlags- und*

vertriebs GmbH v *Heinrich Bauer Verlag* (case C-368/95), the need to ensure plurality of the media (based on Article 10 ECHR) was accepted as a possible reason justifying a measure (the prohibition of prize games and lotteries in magazines) which would otherwise breach Article 28 (ex 30) EC. More recently, in *Schmidberger* (C-112/00), Advocate-General Jacobs argued that the right to freedom of expression and assembly permits a derogation from the free movement of goods (Article 28 (ex 30) EC) in a context where the main transit route across the Alps was blocked for a period of 28 hours on a single occasion and steps were taken to ensure that the disruption to the free movement of goods was not excessive. The ECJ agreed with this analysis, and noted the wide margin of discretion given to the national authorities in striking a balance between fundamental rights and Treaty obligations (and contrast *Commission* v *France* (Case C-265/95). (See also on Article 8 ECHR *Mary Carpenter* v *SoS for the Home Department* (Case C-60/00).

……

7.9.4 Scope of Community law

In all three situations listed above, general principles have an impact because the situations fall *within the scope* of Community law. The ECJ has no power to examine the 'compatibility with the ECHR of national rules which do not fall therein *(Cinetheque SA* v *Federation Nationale des Cinemas Fran~aises* (cases 60 & 61/84). The problem lies in defining the boundary between Community law and purely domestic law. The scope of Community law could be construed very widely, as evidenced by the approach of the Advocate-General in *Konstantinidis* v *Stadt Altensteig-Standesamt* (case C-168/91). As noted above, he suggested that, as the applicant had exercised his right of free movement under Article 43 (ex 52) EC, national provisions affecting him fell within the scope of Community law; therefore he was entitled to the protection of his human rights by the ECJ. The Court has not gone this far and seems, in recent cases, to be taking a more cautious approach than hitherto. This can be illustrated by contrasting two cases which arose out of similar circumstances: *Wachauf v Germany* (case 5/88) and *R* v *Ministry of Agriculture, Fisheries and Food, ex parte Bostock* (case C-2/93).

Wachauf was a tenant farmer who, upon the expiry of his tenancy, requested compensation arising out of the loss of 'reference quantities' on the discontinuance of milk production. When this was refused, he claimed that this was an infringement of his right to private property, protected under the German constitution. The German authorities claimed that the rules they applied were required by the Community regulation, but the ECJ held that on its proper interpretation the regulation required no such thing: although the regulation did not itself provide the right to compensation, equally it did not preclude it. The discretion thereby given to the Member States by the regulation should be exercised in accordance with fundamental rights, thus, in practice meaning that the applicant should receive the compensation.

Bostock similarly had been a tenant farmer. Following *Wachauf* (case 5/88) he argued that he too should be entitled to compensation for the value of the reference quantities on the expiry of his lease. Unlike the situation in Germany, though, this right was not protected by British law at the time when Bostock's lease ended. Bostock therefore sought to challenge that British law on the basis that the provisions breached general principles of non-discrimination and unjust enrichment. Despite its approach in *Wachauf,* the ECJ ruled that the right to property protected by the Community legal order did not include the right to dispose of the 'reference quantities' for profit. The ECJ held that the question of unjust enrichment, as part of the legal relations between lessor and lessee, was a matter for national law and therefore fell outside the scope of Community law.

It is difficult to reconcile these two cases. One clear message seems to be that there are limits to the circumstances when general principles will operate and that a challenge to national acts for breach of a general principle is likely to be successful only when national authorities are giving effect to clear obligations of *Community* law. In matters falling within the discretion of Member States, national authorities are not required to recognise general principles not protected by that State's national laws. With the incorporation of the ECHR into British law, these principles have become part of domestic law, but their impact will depend on their interpretation by the British courts.

7.10 Conclusions

This chapter illustrates the importance of general principles of law in the judicial protection of individual rights. Member States' commitment to fundamental human rights has now been acknowledged in Article 6 (ex F) TEU. Nonetheless, certain points should be noted.

The fact that a particular principle is upheld by the ECJ and appears to be breached does not automatically lead to a decision in favour of the claimant. Fundamental rights are not absolute rights.

As the Court pointed out in *J. Nold KG* v *Commission* (case 4/73), rights of this nature are always subject to limitations laid down in the public interest, and, in the Community context, limits justified by the overall objectives of the Community (e.g., *O'Dwyer* v *Council* (cases T-466, 469, 473-4 & 477 /93). The pursuit of these objectives can result in some hard decisions (e.g., *Dowling v Ireland* (case C-85/90), although the Court has held that it may not constitute a 'disproportionate and intolerable interference, impairing the very substance of those rights' (*Wachauf* (case 5/88) at para. 18). This principle was applied in *Germany* v *Commission (Re Banana Regime)* (case C-280/93), para. 78, another harsh decision.

Thus, where the objectives are seen from the Community standpoint to be essential, individual rights must yield to the common good. In *J. Nold KG* v *Commission* the system set up under an ECSC provision whereby Nold, as a small-scale wholesaler, would be deprived of the opportunity, previously enjoyed, to buy direct from the producer, to its commercial disadvantage, was held to be necessary in the light of the system's overall economic objectives. 'The disadvantages claimed by the applicant', held the Court, 'are in fact the result of economic change and not of the contested Decision'.

A similar example is provided in *Walter Rau Lebensmittelwerke* v *Commission* (case 279,280,285 & 286/84). Here the claimants were a group of margarine producers. They were seeking damages for losses suffered as a result of the Commission's 'Christmas butter' policy. This was an attempt to reduce the 'butter mountain' (surplus stocks acquired as a result of the Community's system of intervention buying under the common agricultural policy (CAP) by selling butter stocks at greatly reduced prices to certain groups of the population over the Christmas period. As a basis for their claim the claimants alleged that the regulations implementing the Christmas butter policy were in breach of the principles of equality and proportionality. Since margarine and butter are clearly in competition with each other it might have been imagined that, following the first isoglucose cases (e.g., *Royal Scholten-Honig Holdings Ltd* v *Intervention Board for Agricultural Produce* (cases 103 & 145/77), they had a good chance of success. But they failed. The Court held that the measure must be assessed with regard to the general objectives of the organisation of the butter market:

. . . taking into consideration the objective differences which characterised the legal mechanisms and the economic conditions of the market concerned, the producers of milk and butter on the one hand and the producers of oils and fats and margarine manufacturers on the other, are not in comparable situations.

The measures were no more than was necessary to achieve the desired objective.

This latitude shown to the Community institutions, particularly where they are exercising discretionary powers in pursuit of common Community policies (most notably the CAP) does not always extend to Member States in their implementation of Community law. Where Member States are permitted a certain discretion in implementation (and Member States have little discretion as regards the ends to be achieved), the Court will not substitute its own evaluation for that of the Member State: it will restrict itself solely to the question of whether there was a patent error in the Member State's action *(R* v *Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations* (case C-44/94). Otherwise, general principles of law are strictly enforced. Thus under the guise of the protection of individual rights general principles of law also serve as a useful (and concealed) instrument of policy.

The adoption of the Charter of Fundamental Rights marks a significant further step. Although little more than a summary of the current level of protection recognised by the Community, it may evolve into a legally binding instrument which reaches beyond fundamental human rights to include employment and social rights. If it is to assume legal status, the accession of the Community to the ECHR will have to be considered again to prevent the development of conflicting jurisprudence on fundamental rights between the ECJ and the European Court of Human Rights.

From: S. Weatherill, 'Cases & Materials on EC Law' (5th ed, London: Blackstone, 2000) pp 103-116, 128-136

(C) THE DIRECT EFFECT OF DIRECTIVES

(i) Establishing the principle

The most difficult area relating to 'direct effect' arises in the application of the notion to EC *Directives.* Although the rest of this chapter concentrates on this area, it is important not to develop an inflated notion of the importance of the problem of the direct effect of Directives. Directives are after all only one source of Community law. However, the issue deserves examination in some depth, because Directives are a rather peculiar type of act - Community law but implemented at national level through national legal procedures. An examination of this area, then, should reveal much about the general problem of the interrelation of national law with the Community legal order.

The starting point is Article 249 EC, formerly Article 189, set out at p. 40. This suggests that a Directive, in contrast to a Regulation, would *not* be directly effective. Regulations are directly applicable, and if they meet the *Van Gend en Loos* (Case 26/62) test for direct effect they are directly effective too. They are law in the Member States (direct applicability) and they may confer legally enforceable rights on individuals (direct effect). Directives, in marked contrast, are clearly dependent on implementation by each State, according to Article 249. When made by the Community, they are not designed to be law in that form at national level. Nor are they designed directly to affect the individual. Yet in *Van Duyn* (Case 41/74), at p. 93 above, the Court held that a Directive might be relied on by an individual before a national court. In the next case, *Pubblico Ministero* v *Ratti* (Case 148/78), the European Court explains how, when and why Directives can produce direct effects (or, at least, effects analogous thereto) at national level.

Pubblico Ministero* v *Ratti (Case 148/78)
[1979] ECR 1629; [1980] 1 CMLR 96
Court of Justice of the European Communities

Directive 73/173 required Member States to introduce into their domestic legal orders rules governing the packaging and labelling of solvents. This had to be done by December 1974. Italy had failed to implement the Directive and maintained in force a different national regime. Ratti produced his solvents in accordance with the Directive, not the Italian law. In 1978 he found himself the subject of criminal proceedings in Milan for non-compliance with Italian law. Could he rely on the Directive which Italy had left unimplemented?

[18] This question raises the general problem of the legal nature of the provisions of a directive adopted under Article 189 of the Treaty.

[19] In this regard the settled case-law of the Court, last reaffirmed by the judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* [1977] 1 ECR 126, lays down that, whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects.

[20] It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned.

[21] Particularly in cases in which the Community authorities have, by means of directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law.

[22] Consequently a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails.

[23] It follows that a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise.

[24] Therefore the answer to the first question must be that after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law - even if it is provided with penal sanctions - which has not yet been adapted in compliance with the directive, to a person who has complied with the requirements of the directive.

Note
Directive 77/728 applied a similar regime to varnishes. But here Ratti had jumped the gun. The deadline for implementation was November 1979. Yet in 1978 his varnishes were already being made according to the Directive, not Italian law. In the criminal prosecution for breach of Italian law he sought to rely on this Directive too. He argued that he had a legitimate expectation that compliance with the Directive prior to its deadline for implementation would be permissible:

Pubblico Ministero* v *Ratti (Case 148/78)
[1979] ECR 1629; [1980] 1 CMLR 96
Court of Justice of the European Communities

[43] It follows that, for the reasons expounded in the grounds of the answer to the national court's first question, it is only at the end of the prescribed period and in the event of the Member State's default that the directive - and in particular Article 9 thereof - will be able to have the effects described in the answer to the first question.

[44] Until that date is reached the Member States remain free in that field.

[45] If one Member State has incorporated the provisions of a directive into its internal legal order before the end of the period prescribed therein, that fact cannot produce any effect with regard to other Member States.

[46] In conclusion, since a directive by its nature imposes obligations only on Member States, it is not possible for an individual to plead the principle of 'legitimate expectation' before the expiry of the period prescribed for its implementation.

[47] Therefore the answer to the fifth question must be that Directive No 77/728 of the Council of the European Communities of 7 November 1977, in particular Article 9 thereof, cannot bring about with respect to any individual who has complied with the provisions of the said directive before the expiration of the adaptation period prescribed for the Member State any effect capable of being taken into consideration by national courts.

Note
A small indentation into the Court's insistence that the expiry of the period prescribed for a Directive's implementation is the vital trigger for its relevance in law before national courts was made in Case C-129/96 *Inter-Environnement Wallonie ASBL* v *Region Wallone* [1997] ECR 1-7411. In advance of the deadline, Member States are obliged 'to refrain . . . from adopting measures liable seriously to compromise the result prescribed' by the Directive. In normal circumstances, however, it is the expiry of the prescribed deadline which converts an unimplemented (and sufficiently unconditional) Directive into a provision on which an individual may rely before a national court.

Question
Why did the European Court decide to uphold Ratti's ability to rely on the unimplemented 1973 solvents Directive in the face of the apparently conflicting wording of the Treaty (Article 189, now 249)? One may return to Judge Mancini for one explanation:

E Mancini, 'The Making of a Constitution for Europe'
(1989) 26 CMLR Rev *595*

(Footnotes omitted.)

3. *Costa* v *Enel* may be therefore regarded as a sequel of *Van Gend en Loos.* It is not the only sequel, however. Eleven years after *Van Gend en Loos,* the Court took in *Van Duyn* v *Home Office* a further step forward by attributing direct effect to provisions of Directives not transposed into the laws of the Member States within the prescribed time limit, so long as they met the conditions laid down in *Van Gend en Loos.* In order to appreciate fully the scope of this development it should be borne in mind that while the principal subjects governed by Regulations are agriculture, transport, customs and the social security of migrant workers, Community authorities resort to Directives when they intend to harmonise national laws on such matters as taxes, banking, equality of the sexes, protection of the environment, employment contracts and organisation of companies. Plain cooking and haute cuisine, in other words. The hope of seeing Europe grow institutionally, in matters of social relationships and in terms of quality of life rests to a large extent on the adoption and the implementation of Directives.

Making Directives immediately enforceable poses, however, a formidable problem. Unlike Regulations and the Treaty provisions dealt with by *Van Gend en Loos,* Directives resemble international treaties, in so far as they are binding *only* on the States and *only* as to the result to be achieved. It is understandable therefore that, whereas the *Van Gend en Loos* doctrine established itself within a relatively short time, its extension to Directives met with bitter opposition in many quarters. For example, the French *Conseil d'Etat* and the German *Bundesfinanzhof bluntly* refused to abide by it and Professor Rasmussen, in a most un-Danish fit of temper, went so far as to condemn it as a case of 'revolting judicial behaviour'.

Understandable criticism is not necessarily justifiable. It is mistaken to believe that in attributing direct effect to Directives not yet complied with by the Member States, the Court was only guided by political considerations, such as the intention of by-passing the States in a strategic area of law-making. Non-compliance with Directives is the most typical and most frequent form of Member State infraction; moreover, the Community authorities often turn a blind eye to it and, even when the Commission institutes proceedings against the defaulting State under Article 169 of the Treaty, the Court cannot impose any penalty on that State. [See now Article 228 EC, a Maastricht innovation.] This gives the Directives a dangerously elastic quality: Italy, Greece or Belgium may agree to accept the enactment of a Directive with which it is uncomfortable knowing that the price to pay for possible failure to transpose it is non-existent or minimal.

Given these circumstances, it is sometimes submitted that the *Van Duyn* doctrine was essentially concerned with assuring respect for the rule of law. The Court's main purpose, in other words, was 'to ensure that neither level of government can rely upon its malfeasance - the Member State's failure to comply, the Community's failure or even inability to enforce compliance', with a view to frustrating the legitimate expectation of the Community citizens on whom the Directive confers rights. Indeed, 'if a Court is forced to condone wholesale violation of a norm, that norm can no longer be termed law'; nobody will deny that 'Directives are intended to have the force of law under the Treaty'.

Doubtless, in arriving at its judgment in *Van Duyn,* the Court may also have considered that by reducing the advantages Member States derived from noncompliance, its judgment would have strengthened the 'federal' reach of the Community power to legislate and it may even have welcomed such a consequence. But does that warrant the revolt staged by the *Conseil d'Etat* or the *Bundesfinanzhof?* The present author doubts it; and so did the German Constitutional Court, which sharply scolded the *Bundesfinanzhof* for its rejection of the *Van Duyn* doctrine. This went a long way towards restoring whatever legitimacy the Court of Justice had lost in the eyes of some observers following *Van Duyn.* The wound, one might say, is healed and the scars it has left are scarcely visible.

Question

Do you agree with Mancini that the Court's work in this area is 'essentially concerned with assuring respect for the rule of law'? See also N. Green, 'Directives, Equity and the Protection of Individual Rights' (1984) 9 EL Rev 295.

Note

Difficult constitutional questions arise at Community level and at national level in relation to the direct effect of Directives. You will quickly notice that many of the issues have arisen in the context of cases about sex discrimination. This has happened because equality between the sexes constitutes an area of Community competence which is given shape by a string of important Directives, often inadequately implemented at national level (see further Chapter 15).

(ii) Curtailing the principle

The next case allowed the Court to refine its approach to the direct effect of Directives.

Marshall* v *Southampton Area Health Authority (Case 152/84)
[1986] ECR 723; [1986] 1 CMLR 688
Court of Justice of the European Communities

Ms Marshall was dismissed by her employers, the Health Authority, when she reached the age of 62. A man would not have been dismissed at that age. This was discrimination on grounds of sex. But was there a remedy in law? Apparently not under the UK's Sex Discrimination Act 1975, because of a provision excluding discrimination arising out of treatment in relation to retirement. Directive 76/207, requiring equal treatment between the sexes, *did* appear to envisage a legal remedy for such discrimination, but that Directive had not been implemented in the UK, even though the deadline was past. So could Ms Marshall base a claim on the unimplemented Community Directive before an English court? The European Court was asked this question in a preliminary reference by the Court of Appeal.
The European Court first held that Ms Marshall's situation was an instance of discrimination on grounds of sex contrary to the Directive. It continued:

[39] Since the first question has been answered in the affirmative, it is necessary to consider whether Article 5(1) of Directive No 76/207 may be relied upon by an individual before national courts and tribunals.

[40] The appellant and the Commission consider that that question must be answered in the affirmative. They contend in particular, with regard to Articles 2(1) and 5(1) of Directive No 7 6/207, that those provisions are sufficiently clear to enable national courts to apply them without legislative intervention by the Member States, at least so far as overt discrimination is concerned.

[41] In support of that view, the appellant points out that directives are capable of conferring rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a directive, in conjunction with Article 5 of the EEC Treaty, to give effect to the provisions of directives where possible, in particular when construing or applying relevant provisions of national law (judgment of 10 April 1984 in Case 14/83 *von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891). Where there is any inconsistency between national law and Community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the directive is inapplicable.

[42] The Commission is of the opinion that the provisions of Article 5(1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. They may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.

[43] The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. They admit that a directive may, in certain specific circumstances, have direct effect as against a Member State in so far as the latter may not rely on its failure to perform its obligations under the directive. However, they maintain that a directive can never impose obligations directly on individuals and that it can only have direct effect against a Member State *qua* public authority and not against a Member State *qua* employer. As an employer a State is no different from a private employer. It would not therefore be proper to put persons employed by the State in a better position than those who are employed by a private employer.

[44] With regard to the legal position of the respondent's employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are Crown bodies and their employees are Crown servants, nevertheless the administration of the National Health Service by the health authorities is regarded as being separate from the Government's central administration and its employees are not regarded as civil servants.

[45] Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of Article 5 is quite imprecise and requires the adoption of measures for its implementation.

[46] It is necessary to recall that, according to a long line of decisions of the Court (in particular its judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53), wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.

[47] That view is based on the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

[48] With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.

[491 In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[50] It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), is a public authority.

[51] The argument submitted by the United Kingdom that the possibility of relying on provisions of the directive against the respondent *qua* organ of the State would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the directive in national law.

[52] Finally, with regard to the question whether the provision contained in Article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in Article 2(1) of the directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the State, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.

[53] It is necessary to consider next whether the prohibition of discrimination laid down by the directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to Article 5(2) thereof the Member States are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.

[54] With regard, in the first place, to the reservation contained in Article 1(2) of Directive No 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the directive *ratione materiae,* it does not lay down any condition on the application of that principle in its field of operation and in particular in

relation to Article 5 of the directive. Similarly, the exceptions to Directive No 7 6/207 provided for in Article 2 thereof are not relevant to this case.

[55] It follows that Article 5 of the Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to Article 5(1).

[56] Consequently, the answer to the second question must be that Article 5(1) of Council Directive No 76/207 of 9 February 1976, which prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, may be relied upon as against a State authority acting in its capacity as employer, in order to avoid the application of any national provision which does not conform to Article 5(1).

Notes

1. Ms Marshall was able to rely on the Directive because she was employed by the State. Her subsequent quest for compensation took her back to the European Court, where it was made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy (Case C-271/91 [1993] ECR 1-4367). However, had she been employed by a private firm she would have been unable to rely on the direct effect of the Directive. So, as far as direct effect is concerned, there are requirements which always apply - those explained above in *Van Gend en Loos* (Case 2 6/62) (pp. 91-93). But for Directives there are extra requirements: first, that the implementation date has passed; and, second, that the State is the party against which enforcement is claimed. Directives may be vertically directly effective, but not horizontally directly effective.

2. In rejecting the horizontal direct effect of Directives, the Court in fact made a choice between competing rationales for the direct effect of Directives. In its early decisions the Court laid emphasis on the need to extend direct effect in this area in order to secure the 'useful effect' of measures left unimplemented by defaulting States. Consider para. 12 of *Van Duyn* (Case 4 1/74) (p. 93 above); and, for example, *in Nederlandse Ondernemingen* (Case
51/76) [1977] ECR 113, the Court observed (at para. 23) that:

where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.

This dictum came in the context of a case against the State, but this logic would lead a bold court to hold an unimplemented Directive enforceable against a private party too, in order to improve its useful effect. However, in *Ratti* (Case 148/78) (p. 103 above) and in *Marshall* (Case 152/84) (p. 107 above), the Court appears to switch its stance away from the idea of 'useful effect' to 'estoppel' as the legal rationale for holding Directives capable of direct effect. See para. 49 of the judgment in *Marshall* (Case 152/84).

3. The Court's curtailment of the impact of Directives before national courts may also be seen as a manifestation of judicial minimalism, mentioned at p. 37 above. The realist would examine the awareness of the Court that in this area it risks assaulting national sensitivities if it insists on deepening the impact of Community law in the national legal order. The next case was mentioned in passing by Judge Mancini (p. 106 above), but the decision deserves further attention.

Minister of the Interior* v *Cohn Bendit
[1980] 1 CMLR 543
Conseil d'Etat

The matter concerned the exclusion from France of Cohn Bendit, a noted political radical (who subsequently became a Member of the European Parliament!). He relied on Community rules governing free movement to challenge the exclusion. The Conseil d'Etat, the highest court in France dealing with administrative law, addressed itself to the utility of a Directive in Cohn Bendit's action before the French courts.

According to Article 56 of the Treaty instituting the European Economic Community of 25 March 1957, no requirement of which empowers an organ of the European Communities to issue, in matters of *ordre public,* regulations which are directly applicable in the member-States, the co-ordination of statute and of subordinate legislation *(dispositions legislatives et réglementaires)* 'providing for special treatment for foreign nationals on grounds of public policy *(ordre public),* public security or public health' shall be the subject of Council directives, enacted on a proposal from the Commission and after consultation with the European Assembly. It follows clearly from Article 189 of the Treaty of 25 March 1957 that while these directives bind the member-States 'as to the result to be achieved' and while, to attain the aims set out in them, the national authorities are required to adapt the statute law and subordinate legislation and administrative practice of the member-States to the directives which are addressed to them, those authorities alone retain the power to decide on the form to be given to the implementation of the directives and to fix themselves, under the control of the national courts, the means appropriate to cause them to produce effect in national law. Thus, whatever the detail that they contain for the eyes of the member-States, directives may not be invoked by the nationals of such States in support of an action brought against an individual administrative act. It follows that M. Cohn-Bendit could not effectively maintain, in requesting the Tribunal Administratif of Paris to annul the decision of the Minister of the Interior of 2 February 1976, that that decision infringed the provisions of the directive enacted on 25 February 1964 by the Council of the European Communities with a view to coordinating, in the circumstances laid down in Article 56 of the EEC Treaty, special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. Therefore, in the absence of any dispute on the legality of the administrative measures taken by the French Government to comply with the directives enacted by the Council of the European Communities, the solution to be given to the action brought by M. Cohn-Bendit may not in any case be made subject to the interpretation of the directive of 25 February 1964. Consequently, without it being necessary to examine the grounds of the appeal, the Minister of the Interior substantiates his argument that the Tribunal Administratif of Paris was wrong when in its judgment under appeal of 21 December 1977 it referred to the Court of Justice of the European Communities questions relating to the interpretation of that directive and stayed proceedings until the decision of the European Court.
In the circumstances the case should be referred back to the Tribunal Administratif of Paris to decide as may be the action of M. Cohn-Bendit.

Note
See, similarly, the *Bundesfinanzhof* (German federal tax court) in *VAT Directives* [1982] 1 CMLR 527.
As D. Anderson observed in the wake of the Court's rejection in *Marshall* (Case 152/84) of the enforceability of unimplemented Directives against private parties, '[t]he present concern of the Court is to consolidate the advances of the 1970s rather than face the legal complexities and political risks of attempting to extend the doctrine [of direct effect] further' *(Boston College International & Comparative Law Review* (1988) XI 91, 100). This implies that the Court might be expected to return to the matter. This proved correct. In 1993 and 1994 three Advocates-General pressed the Court to reconsider its rejection of the horizontal direct effect of Directives: Van Gerven in '*Marshall* 2'(Case C-271/91) [1993] ECR 1-4367; Jacobs in *Vaneetveld* v *SA Le Foyer* (Case C-316/93) [1994] ECR 1-763 and Lenz *in Paola Faccini Dori* v *Recreb Sri* (Case C-91/92) [1994] ECR I-3325. Advocate-General Lenz insisted that the Citizen of the Union was entitled to expect equality before the law throughout the territory of the Union and observed that, in the absence of horizontal direct effect, such equality was compromised by State failure to implement Directives. Advocate-General Jacobs thought that the effectiveness principle militated against drawing distinctions based on the status of a defendant. All three believed that the pursuit of coherence in the Community legal order dictated acceptance of the horizontal direct effect of Directives. Only in the third of these cases, *Faccini Dori* v *Recreb,* was the European Court unable to avoid addressing the issue directly.

Paola Faccini Dori* v *Recreb Srl (Case C—91192)
[1994] ECR 1—3325
Court of Justice of the European Communities

Ms Dori had concluded a contract at Milan Railway Station to buy an English language correspondence course. By virtue of Directive 85/577, which harmonises laws governing the protection of consumers in

respect of contracts negotiated away from business premises, the so-called 'Doorstep Selling Directive', she ought to have been entitled to a 'cooling-off' period of at least seven days within which she could exercise a right to withdraw from the contract. However, she found herself unable to exercise that right under Italian law because Italy had not implemented the Directive. She therefore sought to rely on the Directive to defeat the claim brought against her by the private party with which she had contracted. The ruling in *Marshall* (Case 152/84) appeared to preclude reliance on the Directive and the Court, despite the promptings of Advocate-General Lenz, *refused* to overrule *Marshall.* It maintained that Directives are incapable of horizontal direct effect.

[23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations - or those of State entities - with individuals and to confer certain rights on individuals, were able to rely on its own failure. to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities) (see the judgment in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839 and the judgment in Case 8/81 *Becker* v *Finanzamt Munster-Innenstadt* [1982] ECR 53).

[24] The effect of extending that case-law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.

[25] It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.

Note
Paragraph 48 of the ruling in *Marshall* expresses comparable sentiments to those expressed in para. 24 of the *Dori* ruling, but the emphasis in the latter on the limits of Community competence (specifically under Article 189 EC) is noticeably firmer. Although the Court did not consider that Ms Dori was wholly barred from relying on the Directive (see p. 122 below on 'indirect' effect and p. 130 on a claim against the defaulting State), it nevertheless refused to allow a Directive to exert direct effect in relations between private individuals. In rulings subsequent to *Dori,* the Court has repeated its rejection of the horizontal direct effect of Directives: e.g., Case C-192/94 *El Corte Inglés* v *Cristina Blasquez Rivero* [1996] ECR 1-1281; Case C-97/96 *Verband Deutscher Daihatsu Handler eV v Daihatsu Deutschland GmbH* [1997] ECR 1-6843. (For discussion of an unusual sub-set of cases, see K. Lackhoff and H. Nyssens, 'Direct Effect of Directives in Triangular Situations' (1998) 23 EL Rev 397.) The reader is invited to consider whether, just as the Conseil d'Etat's ruling in *Cohn Bendit* (p. 111 above) may have prompted the European Court's caution in *Marshall,* so too the *Bundesverfassungsgericht's* anxiety about Treaty amendment in the guise of judicial interpretation (p. 15 above) may have prompted the European Court in *Dori,* less than a year later, to emblazon its fidelity to the text of the EC Treaty by declining to extend Community legislative competence to include the enactment of obligations for individuals with immediate effect.

(iii) *The scope of the principle: the State*
Whatever one's view of the Court's motivations in ruling against the horizontal direct effect of Directives in *Marshall* (Case 152/84), confirmed in *Dori* (Case C-91/92) and subsequently, the decision left many questions unanswered. First, what is the 'State'? The more widely this is interpreted, the more impact the unimplemented Directive will have.

Foster* v *British Gas (Case C-188/89)
[1990] ECR I-3133
Court of Justice of the European Communities

The applicant wished to rely on the Equal Treatment Directive 76/207 against her employer before English courts. She and other applicants had been compulsorily retired at an age earlier than male employees. This raised the familiar issue of the enforceability of Directives before national courts where national law is inadequate. The Court examined the nature of the defendant (the British Gas Corporation: BGC).

[3] By virtue of the Gas Act 1972, which governed the BGC at the material time, the BGC was a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain, and had a monopoly of the supply of gas.

[4] The members of the BGC were appointed by the competent Secretary of State. He also had the power to give the BGC directions of a general character in relation to matters affecting the national interest and instructions concerning its management.

[5] The BGC was obliged to submit to the Secretary of State periodic reports on the exercise of its functions, its management and its programmes. Those reports were then laid before both Houses of Parliament. Under the Gas Act 1972 the BGC also had the right, with the consent of the Secretary of State, to submit proposed legislation to Parliament.

[61 The BGC was required to run a balanced budget over two successive financial years. The Secretary of State could order it to pay certain funds over to him or to allocate funds to specified purposes.

It then proceeded to explain the legal approach to defining the 'State' for these purposes:

[13] Before considering the question referred by the House of Lords, it must first be observed as a preliminary point that the United Kingdom has submitted that it is not a matter for the Court of Justice but for the national courts to determine, in the context of the national legal system, whether the provisions of a directive may be relied upon against a body such as the BGC.

[14] The question what effects measures adopted by Community institutions have and in particular whether those measures may be relied on against certain categories of persons necessarily involves interpretation of the articles of the Treaty concerning measures adopted by the institutions and the Community measure in issue.

[15] It follows that the Court of Justice has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on. It is for the national courts, on the other hand, to decide whether a party to proceedings before them falls within one of the categories so defined.

The Court then disposed of the question referred:

[16] As the Court has consistently held (see the judgment of 19 January 1982 in Case 8/81, *Becker* v *Hauptzollamt Münster-Innenstadt,* [1982] ECR 53 at paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.

[17] The Court further held in its judgment of 26 February 1986 in Case 152/84 *(Marshall,* at paragraph 49) that where a person is able to rely on a directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.

[181 On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.

[19] The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments of 19 January 1982 in Case 8/8 1, *Becker,* cited above, and of 22 February 1990 in Case C-221/88 *ECSC* v *Acciaierie e Ferriere Busseni (in liquidation)),* local or regional authorities (judgment of 22 June 1989 in Case 103/88, *Fratelli Costanzo* v *Comune di Milano),* constitutionally independent authorities responsible for the maintenance of public order and safety (judgment of 15 May 1986 in Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary,* [1986] ECR 1651), and public authorities providing public health services (judgment of 26 February 1986 in Case 152/84, *Marshall,* cited above).

[20] It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

[21] With regard to Article 5(1) of Directive 76/207 it should be observed that in the judgment of 26 February 1986 in Case 152/84 *(Marshall,* cited above, at paragraph 52), the Court held that that provision was unconditional and sufficiently precise to be relied on by an individual and to be applied by the national courts.

[22] The answer to the question referred by the House of Lords must therefore be that Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

(G) THE COURT'S NOTES FOR GUIDANCE

In 1996 the Court issued guidelines on the use of what was then Article 177 EC, now Article 234 EC post-Amsterdam (p. 29 above). These serve as a useful distillation of the principles of law and the practice explained in the course of this chapter.

Note for guidance on references by national courts for preliminary rulings issued by the European Court of Justice

The development of the Community legal order is largely the result of cooperation between the Court of Justice of the European Communities and national courts and tribunals through the preliminary ruling procedure under Article 177 of the EC Treaty and the corresponding provisions of the ECSC and Euratom Treaties.[1]
In order to make this cooperation more effective, and so enable the Court of Justice better to meet the requirements of national courts by providing helpful answers to preliminary questions, this Note for Guidance is addressed to all interested parties, in particular to all national courts and tribunals.
It must be emphasised that the Note is for guidance only and has no binding or interpretative effect in relation to the provisions governing the preliminary ruling procedure. It merely contains practical information which, in the light of experience in applying the preliminary ruling procedure, may help to prevent the kind of difficulties which the Court has sometimes encountered.

1. Any court or tribunal of a Member State may ask the Court of Justice to interpret a rule of Community law, whether contained in the Treaties or in acts of secondary law, if it considers that this is necessary for it to give judgment in a case pending before it.
Courts or tribunals against whose decisions there is no judicial remedy under national law must refer questions of interpretation arising before them to the Court of Justice, unless the Court has already ruled on the point or unless the correct application of the rule of Community law is obvious.[2]
2. The Court of Justice has jurisdiction to rule on the validity of acts of the Community institutions. National courts or tribunals may reject a plea challenging the validity of such an act. But where a national court (even one whose decision is still subject to appeal) intends to question the validity of a Community act, it must refer that question to the Court of Justice.[3]
Where, however, a national court or tribunal has serious doubts about the validity of a Community act on which a national measure is based, it may, in exceptional cases, temporarily suspend application of the latter measure or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers that the Community act is not valid.[4]
3. Questions referred for a preliminary ruling must be limited to the interpretation or validity of a provision of Community law, since the Court of Justice does not have jurisdiction to interpret national law or assess its validity. It is for the referring court or tribunal to apply the relevant rule of Community law in the specific case pending before it.
4. The order of the national court or tribunal referring a question to the Court of Justice for a preliminary ruling may be in any form allowed by national procedural law. Reference of a question or questions to the Court of Justice generally involves stay of the national proceedings until the Court has given its ruling, but the decision to stay proceedings is one which it is for the natibnal court alone to take in accordance with its own national law.
5. The order for reference containing the question or questions referred to the Court will have to be translated by the Court's translators into the other official languages of the Community. Questions concerning the interpretation or validity of Community law are frequently of general interest and the Member States and Community institutions are entitled to submit observations. It is therefore desirable that the reference should be drafted as clearly and precisely as possible.
6. The order for reference should contain a statement of reasons which is succinct but sufficiently complete to give the Court, and those to whom it must be notified (the Member States, the Commission and in certain cases the Council and the European Parliament), a clear understanding of the factual and legal context of the main proceedings.[5] In particular, it should include:

— a statement of the facts which are essential to a full understanding of the legal significance of the main proceedings;
— an exposition of the national law which may be applicable;

---

[1] A preliminary ruling procedure is also provided for by protocols to several conventions concluded by the Member States, in particular the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[2] Judgment in Case 283/81 *CILFITv Ministry of Health* [1982] ECR 3415.
[3] Judgment in Case *314/85 Foto-Frost* v *Hauptzollamt Lubeck-Ost* [1987] ECR 4199.
[4] Judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithrnarschen and Zuckerfabrik Soest* [1991] ECR 1-415 and in Case C-465/93 *Atlanta Fruchthandelsgcsselschaft* [1995] ECR 1-3761.
[5] Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR 1-393

— a statement of the reasons which have prompted the national court to refer the question or questions to the Court of Justice; and
— where appropriate, a summary of the arguments of the parties.

The aim should be to put the Court of Justice in a position to give the national court an answer which will be of assistance to it.
The order for reference should also be accompanied by copies of any documents needed for a proper understanding of the case, especially the text of the applicable national provisions. However, as the case-file or documents annexed to the order for reference are not always translated in full into the other official languages of the Community, the national court should ensure that the order for reference itself includes all the relevant information.
7. A national court or tribunal may refer a question to the Court of Justice as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment. It must be stressed, however, that it is not for the Court of Justice to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define, if only as a working hypothesis, the factual and legal context of the question; on any view, the administration of justice is likely to be best served if the reference is not made until both sides have been heard.[6]
8. The order for reference and the relevant documents should be sent by the national court directly to the Court of Justice, by registered post, addressed to:

The Registry
Court of Justice of the European Communities
L-2925 Luxembourg
Telephone (352) 43031

The Court Registry will remain in contact with the national court until judgment is given, and will send copies of the various documents (written observations, Report for the Hearing, Opinion of the Advocate General). The Court will also send its judgment to the national court. The Court would appreciate being informed about the application of its judgment in the national proceedings and being sent a copy of the national court's final decision.
9. Proceedings for a preliminary ruling before the Court of Justice are free of charge. The Court does not rule on costs.

[6] Jugdment on Case 70/77 *Simmenthal v Administrazione delle Finanze dello Statto* [1978] ECR 1453.

26 The preliminary rulings procedure

26.1 Introduction

The preliminary rulings procedure is important for a number of reasons relating not only to the substantive development of EC law, but also to the relationship between EC law and national law. A glance through the preceding chapters of this book will reveal that the majority of cases cited, and almost all the major principles established by the ECJ, were decided in the context of a reference to that court for a preliminary ruling under Article 234 (ex 177) EC. Cases such as *Van Gend en Loos* (case 26/62), *Costa* v *ENEL* (case 6/64) and *Defrenne* v *Sabena (No.* 2) (case 43/75), concerned with questions of interpretation of EC law, enabled the ECJ to develop the crucial concepts of direct effects and the supremacy of EC law. *Internationale Handelsgesellschaft mbH* (case 11/70); *Stauder* v *City of Ulm* (case 29/69) and *Royal Scholten-Honig (Holdings) Ltd* (cases 103 & 145/77) (see chapter 7), which raised questions of the validity of EC law, led the way to the incorporation of general principles of law into EC law. The principle of State liability in damages was laid down in *Francovich* (cases C-6, 9/90) in preliminary ruling proceedings. In all areas of EC law, the Article 234 procedure has played a major role in developing the substantive law. The procedure accounts for over 50 per cent of all cases heard by the ECJ. This percentage has of course increased as the CFI has taken over responsibility for judicial review actions (chapters 28 and 29) and actions for damages (chapter 31). Nonetheless, the preliminary rulings procedure plays a central part in the development and enforcement of EC law.

If the procedure has been valuable from the point of view of the Community, as a means of developing and clarifying the law, it has been equally valuable to the individual, since it has provided him or her with a means of access to the ECJ when other, direct avenues have been closed. In this way the individual has been able to indirectly to challenge action by Member States (e.g., *Van Gend en Loos* – import charge levied in breach of the then Article 12 (now 25) or by Community institutions (e.g., *Royal Scholten-Honig* - EC Regulation invalid for breach of principle of equality) before the ECJ and obtain an appropriate remedy from his national court (see chapter 6).

The importance of the Article 234 procedure, both in absolute terms and relative to other remedies, has been greatly increased by the development by the ECJ of the concept of direct effects. Where originally only 'directly applicable' regulations might have been expected to be invoked before national courts, these courts may now be required to apply treaty articles, decisions and even directives. Even where EC law is not directly effective it may be invoked before national courts on the principles of indirect effects or State liability under *Francovich.* As a result, national courts now play a major role in the enforcement of EC law. As we will see, the co-operative relationship between the ECJ and the national courts has been a key factor in the success of the preliminary rulings procedure.

Although the preliminary rulings procedure has assumed such an importance in the ways outlined above, its primary and original purpose was to ensure, by means of authoritative rulings on the interpretation and validity of EC law, the correct and uniform application of EC law by the courts of Member States. In assessing its effectiveness, and the attitudes of national courts and the ECJ towards its use, this function, as well as its importance both for individuals and for the Community, should be borne in mind.

26.2 The procedure

Article 234 EC provides that:
The Court of Justice shall have Jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if It considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Since the TEU, Article 234 is not the only preliminary reference mechanism. Maastricht introduced the possibility for preliminary references within the JHA pillar by virtue of Article 35 TEU. With Amsterdam and the introduction of the new title into the EC Treaty came a separate preliminary rulings

mechanism In Article 68 EC for questions relating to that title. The majority of this chapter is devoted to Article 234; Articles 68 EC and 36 TEV will be discussed briefly below at 26.9.

26.2.1 Nature of the preliminary rulings procedure

The preliminary rulings procedure is not an appeals procedure. An appeals procedure implies a hierarchy between the different types of court, some courts being higher and having more authority than those lower down the judicial architecture. Typically, appeal courts can overrule the decisions of lower courts. The decision whether or not to appeal lies, in the first place, in the hands of the parties, although in some instances leave to appeal from certain courts is required. In contrast, the preliminary rulings procedure merely provides a means whereby national courts, when questions of EC law arise, may apply to the ECJ for a preliminary ruling on matters of interpretation or validity prior to themselves applying the law. In principle, it is a matter for the national courts to decide whether or not to make a reference. (See further 25.6.7.) It is an example of shared jurisdiction, depending for its success on mutual cooperation. As Advocate-General Lagrange said in *De Gells ell Uitdenbogerd* v *Robert Bosch GmbH* (case 13/61), the first case to reach the ECJ on an application under Article 234:

Applied judiciously - one is tempted to say loyally - the provisions of Article 177 [now 234] must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdiction.

To assess how this collaboration operates, in principle and in practice, it is necessary to examine the procedure from the point of view of: (a) the ECJ, and (b) national courts.

26.3 **Jurisdiction of the Court of Justice**

The jurisdiction of the ECJ is twofold. It has jurisdiction to give preliminary rulings concerning:
(a) interpretation, and
(b) validity.

26.3.1 Interpretation

In its interpretative role, the Court may rule on the interpretation of the Treaty, of acts of the institutions, and of statutes of bodies established by an act of the Council, where those statutes so provide. Its jurisdiction with regard to interpretation is thus very wide. 'Interpretation of the Treaty' includes the EC Treaty and all treaties amending or supplementing it. It did not, however, pursuant to original Article L TEU, have jurisdiction to interpret Articles A-F, J and K TEU (save for Article K, 3(2)(c)(3) *(Grau Gomis* (case C-167/94), effectively excluding a number of the common provisions of the TEU, together with the JHA and CFSP pil1ars. As noted in chapter 2, the ToA amended the original Article L, now 46 TEU, to give the ECJ jurisdiction in relation to the JHA Pillar of the TEU (subject to the requirement in new Article 35 TEU that Member States must, by declaration, accept the ECJ's jurisdiction) and the TEU provisions on closer cooperation (now Articles 43-45 TEU). These changes will be discussed further below.

'Acts of the institutions' is a broad concept. It covers not only binding acts in the form of regulations, directives and decisions, but even non-binding acts such as recommendations and opinions, since they may be relevant to the interpretation of domestic implementing measures. On the same reasoning the Court has held that an act need not be directly effective to be subject to interpretation under Article 234 *(Mazzalai* (case 111/75), nor need the party concerned have relied on the act before his national court: that court can raise it before the ECJ of its own motion *(Verholen* (cases 87, 88 & 89/90). The Court has also given rulings on the interpretation of international treaties entered into by the Community, on the basis that these constitute 'acts of the institutions' (see *R. & V. Haegeman Sprl* v *Belgium* (case 181/73). This includes 'mixed agreements', such as the WTO agreement, where interpretation relates to obligations undertaken by the Community (*Hermes* (case C-53/96), noted (1999) 36 CML Rev 663). However, the Court has held in the context of a claim based on the Statute of the European School, that it has no jurisdiction to rule on agreements which, although linked with the Community and to the functioning of its institutions, have been set up by agreement *between Member States* and not on the basis of the Treaty or EC secondary legislation *(Hurd* v *lones* (case 44/84) - headmaster of European School unable to invoke Statute against HM Tax Inspectorate).

26.3.2 Validity

Here the Court's jurisdiction is confined to acts of the institutions. It has been suggested, by extension of the reasoning in *R. & V. Haegeman Sprl* v *Belgian State,* that 'acts of the institutions' would include international agreements entered into by the Community. Here, however, the ruling would be binding only on the Community members; it would be ineffective against third-party signatories. The grounds for invalidity are the same as in an action for annulment under Article 230 (ex 173) (see chapter 28).

As with interpretation, Article 46 (ex L) TEU excludes the majority of the TEU from the ECJ's jurisdiction, Although the ECJ has not had to consider the limits to its jurisdiction under Article 46 TEU in respect of references for a preliminary ruling, it has had to consider these matters in the context of a judicial review action *(Commission* v *Council (Airport transit visas)* (case C-170/96). The case concerned the appropriate Treaty base for airport transit visas, the Council arguing that the then Article K.3 TEU (which has been significantly amended by the ToA) was the appropriate base, the Commission (and the Parliament) considering that the then Article l00c EC (repealed by the ToA), which dealt with visas, was more appropriate. The Council claimed that the ECJ had no jurisdiction to hear the case as the then Article 46 (ex L) TEU, in its original form, applied to exclude the ECJ's jurisdiction. The ECJ emphasised that that provision was subject to Article 47 (ex M) TEU, which provides that nothing in the TEU shall affect the EC Treaty, which the ECJ has interpreted to include the *acquis* (i.e., the entire body of EC law). The ECJ from this basis argued that it had the duty to review measures made under TEU provisions to ensure that they did not erode Community law. Presumably, it would take a similar approach were a similar question to arise under an Article 234 EC reference on validity. This boundary would seem now be of less significance as the ToA, in amending Article 46 TEV, permitted the ECJ jurisdiction to interpret and review the validity of certain acts and agreements made under the JHA pillar, should the Member States agree thereto (see Article 35 TEV).

One important question in relation to the ECJ's jurisdiction under Article 234 and correspondingly the national courts' right to refer was identified in *T. Port GmbH & Co. KG* v *Bundesanstadt fur Landwirtschaft und Ernahrung* (case C-68/95). There the ECJ held that the preliminary ruling procedure did not give the Member States' courts the power to refer questions concerning an EC institution's alleged failure to act. Any such claim would have to be brought under Article 232 (ex 175) EC.

26.4 Scope of the Court's jurisdiction

26.4.1 Matters of Community law

The Court is only empowered to give rulings on matters of Community law. It has no jurisdiction to interpret domestic law, nor to pass judgment on the compatibility of domestic law with EC law. The Court has frequently been asked such questions (e.g., *Van Gend en Loos* (case *26/62)j Costa* v *ENEL* (case 6/64), since it is often the central problem before the national court. But as the Court said in *Costa* v *ENEL:* 'a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned Treaty Articles in the context of the points of law stated by the Giudice Conciliatore'. Where the Court is asked to rule on such a matter it will merely reformulate the question and return an abstract interpretation on the point of EC law involved.

26.4.2 Interpretation, not application

The Court maintains a similarly strict dividing line in principle between interpretation and application. It has no jurisdiction to rule on the application of Community law by national courts. However, since the application of Community law often raises problems for national courts, the Court, in its concern to provide national courts with 'practical' or 'worthwhile' rulings, will sometimes, when interpreting Community law, also offer unequivocal guidance as to its application (see e.g., *Stoke-on-Trent City Council* v *B&Q* (case *C-169/91)j R* v *Her Majesty's Treasury, ex parte British Telecommunications plc* (case C-392/93); *Arsenal Football Club* v *Reed* (case C-206/01).

26.4.3 Non-interference

The Court maintains a strict policy of non-interference over matters of what to refer, when to refer and how to refer. Such matters are left entirely to the discretion of the national judge. As the Court said in *De Geus en Uitdenbogerd* v *Robert Bosch GmbH* (case 13/61), its jurisdiction depends 'solely on the existence of a request from the national court'. However, it has no jurisdiction to give a ruling when, at

the time when it is made, the procedure before the court making it has already been terminated *(Pardini* (case 338/85); *Grogan* (case C-159/90).

No formal requirements are imposed on the framing of the questions. Where the questions are inappropriately phrased the Court will merely reformulate the questions, answering what it sees as the relevant issues. It may interpret what it regards as the relevant issues even if they are not raised by the referring court (e.g., *OTO SpA* v *Ministero delle Finanze* (case C-130/92). Nor will it question the timing of a reference. However, since 'it is necessary for the national court to define the legal context in which the interpretation requested should be placed', the Court has suggested that it might be convenient for the facts of the case to be established and for questions of purely national law to be settled at the time when the reference is made, in order to enable the Court to take cognisance of all the features of fact and law which may be relevant to the interpretation of Community law which it is called upon to give *(Irish Creamery Milk Suppliers Association* v *Ireland* (cases 36 & 71/80); approved in *Pretore di Salo* (case 14/86). In *Telemarsicabruzzo SpA* v *Circostel* (cases C-320, 321, 322/90) it rejected an application for a ruling from an Italian magistrates' court on the grounds that the reference had provided no background factual information and only fragmentary observations on the case. The ECJ has since reaffirmed this approach in several cases (e.g., *Pretore di Genova* v *Banchero* (case C-157/92); *Monin Automobiles* v *France* (case C-386/92). The ECJ has held, however, that the need for detailed factual background to a case is less pressing when the questions referred by the national court relate to technical points *(Vaneetveld* v *Le Foyer SA* (case C-316/93) or where the facts are clear, for example, because of a previous reference *(Crispoltoni* v *Fattoria Autonoma Tabacchi* (cases C-133, 300 & 362/92). The concern seems to be that not only must the ECJ know enough to give a useful ruling in the context, but that there is also enough information for affected parties to be able to make representations. This, according to the ECJ, is especially relevant in competition cases (*Deliege* (case C-191/97), paras 30 and 36). (See further chapter 22.) The Court has issued 'Guidelines to National Courts Making References' (1996), consolidating its rulings in these cases. The circumstances in which the ECJ will decline jurisdiction are discussed further below.

26.4.4 Limitations in practice

The above limitations of the Court's jurisdiction are more apparent than real. The line between matters of Community law and matters of national law, between interpretation and application are more easily drawn in theory than in practice. An interpretation of EC law may leave little room for doubt as to the legality of a national law and little choice to the national judge in matters of application if he is to comply with his duty to give priority to EC law. The Court has on occasions, albeit in abstract terms, suggested that a particular national law is incompatible with EC law (e.g., *R* v *Secretary of State for Transport, ex parte Factortame Ltd* (case *C-221/89); Johnston* v *RUC* (case *222/84*). The Court may even offer specific guidance as to the application of its ruling. In the *BT* case (case *C-392/93),* for example, the ECJ commented:

Whilst it is in principle for the national courts to verify whether or not the conditions of State liability for a breach of Community law are fulfilled, in the present case the Court has all the necessary information to assess whether the facts amount to a sufficiently serious breach of Community law.

The Court then went on to hold that there had been no breach. Further, in rephrasing and regrouping the questions the Court is able to select the issues which it regards as significant, without apparently interfering with the discretion of the national judge.

It may be argued that some encroachment by the ECJ onto the territory of national courts' jurisdiction is necessary to ensure the correct and uniform application of Community law. However, its very freedom of manoeuvre in preliminary rulings proceedings, combined with its teleological approach to interpretation, have resulted on occasions in the Court overstepping the line, laying down broad general (and sometimes unexpected) principles, with far-reaching consequences, in response to *particular* questions from national courts (e.g., *Barber* (case *262/88); Marshall (No.* 2) (case C-271/91). This has not been conducive to legal certainty. Such activism has not gone without criticism, as calculated to invite 'rebellion', even 'defiance' by national courts (see Rasmussen noted in chapter 2).

The potential difficulties arising from the ECJ overstepping the boundary between its role of interpreting EC law and the national courts' role of applying that ruling to the facts can be seen in the recent case of *Arsenal Football Club* v *Reed* ([2002] All ER (D) 180 (Dec). The case before the national court concerned the action commenced by Arsenal to prevent Reed from continuing to sell souvenirs which carried its name and logos. The national court referred a number of questions to the ECJ on the interpretation of the Trade Mark Directive (see case *C-206/01).* The main issue was

whether trade mark protection extended only to the circumstances in which the sign was used as a trade mark or whether an infringement would occur irrespective of how the marks were used. The ECJ handed down a judgment in the following terms:

In a situation which is not covered by Article 6(1) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(1)(a) of that directive to prevent that use. It is immaterial that, in the context of that use, the sign is perceived as a badge of support for or loyalty or affiliation to the trade mark proprietor.

The phrase 'in circumstances such as those in the present case' would seem to give the national court little freedom in its determination of the case for which the preliminary ruling was originally made. In the *Arsenal* case, however, the referring court accepted the argument of the defendant's counsel to the effect that in the course of its judgment and in particular by tying the operative part of its judgment to the facts of the case, the ECJ had made a determination of fact which in some aspects was inconsistent with the finding of fact made by the national court. On this basis, the national court commented:

If this is so, the ECJ has exceeded its jurisdiction and I am not bound by its final conclusion. I must apply its guidance on the law to the facts as found at the trial (para. 27).

It further remarked:
The courts of this country cannot challenge rulings of the ECJ within its areas of competence. There is no advantage to be gained by appearing to do so. Furthermore national courts do not make references to the ECJ with the intention of ignoring the result. On the other hand, no matter how tempting it may be to find an easy way out, the High Court has no power to cede to the ECJ a jurisdiction it does not have (para. 28).

Although the court has phrased this in terms of the limits of jurisdiction, rather than an overt defiance, the assertion by the national court of the limits of the ECJ's jurisdiction is itself a form of rebellion. Certainly there now appears to be a discrepancy between English law and that of the European Community. The High Court before which the *Arsenal case* was heard did point out that there was the possibility of an appeal to the Court of Appeal, which might make a different finding on the facts and thereby remove this discrepancy. For the time being, however, it seems that English High Court has taken a stand, albeit in an isolated case, on the limits of the ECJ's jurisdiction. It remains to be seen whether the English Court of Appeal will overturn this judgment.

26.4.5 Restrictions on the type of reference

Although the ECJ has in a few, albeit increasing number of cases refused its jurisdiction, it has generally, despite a constantly growing workload, encouraged national courts to refer. We have already seen that the ECJ will refuse jurisdiction when the referring court has not included enough information to enable the ECJ to give a ruling on the question referred (at 25.4.3; see e.g., *Telemarsicabruzzo SpA* v *Circostel* (cases C-320, 321, 322/90). Another example of an exception to this open door policy in the early years occurred in the cases of *Foglia* v *Novello (No.* 1) (case *104/79)* and *Foglia* v *Novello (No. 2)* (case 244/80). Here for the first time the Court refused its jurisdiction to give a ruling in both a first and a second application in the same case. The questions, which were referred by an Italian judge, concerned the legality under EC law of an import duty imposed by the French on the import of wine from Italy. It arose in the context of litigation between two Italian parties. Foglia, a wine producer, had agreed to sell wine to Mrs Novello, an exporter. In making their contract the parties agreed that Foglia should not bear the cost of any duties levied by the French in breach of EC law. When duties were charged and eventually paid by Foglia, he sought to recover the money from Mrs Novello. In his action before the Italian court for recovery of the money that court sought a preliminary ruling on the legality under EC law of the duties imposed by the French. The ECJ refused its jurisdiction. The proceedings, it claimed, had been artificially created in order to question the legality of the French law; they were not 'genuine'.

The parties were no more successful the second time. In a somewhat peremptory judgment the Court declared that the function of Article 234 (ex 177) was to contribute to the administration of justice in the Member States; not to give advisory opinions on general or hypothetical questions.

The ECJ's decision has been criticised. Although the proceedings were to some extent artificial, in that the duty should ideally have been challenged at source, by the party from whom it was levied, the Italian judge called upon to decide the case was faced with a genuine problem, central to which was the issue of EC law. If, in his discretion, he sought guidance from the ECJ in this matter, surely it was not for that Court to deny it. The principles expressed in *Foglia* v *Novello* were, however, applied in *Meilicke* v *ADV ORGA AG* (case C-83/91). Here the Court refused to answer a lengthy and complex series of question relating *inter alia,* to the interpretation of the second Company Law Directive. The dispute between the parties centred on a disagreement as to the interpretation of certain provisions of German company law. It appeared that the EC directive was being invoked in order to prove one of the parties' (a legal academic's) theories. The Court held that it had no jurisdiction to give advisory opinions on hypothetical questions submitted by national courts.

It has been suggested that political considerations and national (wine) rivalries played their part in the *Foglia* decision (the Court held it 'must display special vigilance when. . . a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law': *Foglia* v *Novello (No.* 2). This assessment is supported by the recent case of *Bacardi-Martini SAS* v *Newcastle United Football Company Ltd* (case C-318/00). Bacardi entered into a contract for advertising time on an electronic revolving display system during a match between Newcastle and Metz, a French football club. The match was to be televised live in the United Kingdom and France. Although the advertising deal was in compliance with English law, it contravened French law and Newcastle therefore pulled out of the advertising agreement. Bacardi brought an action against Newcastle, claiming that it could not rely on the French law to justify its actions, as the French law was incompatible with Article 49 (ex 59) on the freedom to provide services. The High Court made a reference on this point. When discussing the question of admissibility, the ECJ referred to *Foglia* and the special need for vigilance when the law of another Member State was in issue; it then reviewed whether the national court had made it clear why an answer was necessary. The ECJ concluded:

In those circumstances, the conclusion must be that the Court does not have the material before it to show that it is necessary to rule on the compatibility with the Treaty of legislation of a Member State other than that of the court making the reference. (para. 53.)

From this case, it seems that although a national court is not precluded from referring questions relating to the national laws of other Member States, the ECJ will review the justification for the reference more stringently than it would otherwise do.

Another area in which the ECJ has sometimes limited references has been when the subject matter of the case is 'internal' and does not involve Community law directly. This issue came before the Court in *Dzodzi* v *Belgium* (cases C-297/88 and C 197/89). Here the Court was prepared to provide a ruling on the interpretation of EC social security law in a purely 'internal' matter, for the purpose of clarifying provisions of Belgian law invoked by a *Togolese national.* The Court held that it was 'exclusively for national courts which were dealing with a case to assess, with regard to the specific features of each case, both the need for a preliminary ruling in order to enable it to give judgment, and the relevance of the question'. Following *Dzodzi,* in *Leur Bloem* (case C-28/95), the ECJ held that it has jurisdiction to interpret provisions of Community law where the facts of the case lie outside these provisions but are applicable to the case because the national law governing the main dispute has transposed the Community rule to a non-Community context ('spontaneous harmonisation'). This is subject to the proviso that national law does not expressly prohibit it (*Kleinwort Benson* (case C-346/93)).

The lines of reasoning established in *Foglia* and *Meilicke* on the one hand and *Dzodzi, Leur Bloem* and *Kleinwort Benson* on the other have been followed by others in which the ECJ declined jurisdiction either on the basis that the questions referred were not relevant to the dispute before the national court (e.g., *Dias* v *Director da Alfandega do Porto* (case C-343/90); *Corsica Ferries Italia Sri* v *Corpo dei Piloti del Porto di Genova* (case C-18/93) or because the matter was purely internal, although recent case law seems to have conflated these two points (see e.g., *Banque Internationale pour L'Afrique occidentale SA (BIAO)* v *Finanzamt fur Grossuntemehmen in Hamburg* (case C-306/99), para. 89). Another potential limitation on the ECJ's willingness to accept references can be seen in *Monin Automobiles - Maison du Deux-Roues* (case C-428/93). There the ECJ suggested that the questions referred must be 'objectively required' by the national court as 'necessary to enable that court to give judgment' in the proceedings before it as required under Article 234(2) (ex 177(2). This case concerned a company which was in the process of being wound up. It argued that it should not be finally wound up until certain questions relating to EC law had been answered. Conversely, the company's creditors thought that the company had been artificially kept in existence for too long already and should be

wound up immediately. The national court referred the EC law questions to determine the strength of the company's argument. The ECJ held that, although there was a connection between the questions and the dispute, answers to the question would not be *applied* in the case. The ECJ therefore declined jurisdiction.

It is submitted that these cases should not be construed as constituting a restrictive approach on the part of the ECJ towards applications under Article 234 (ex 177). Admittedly, the ECJ has declined jurisdiction in a number of cases, but, looking at the facts of these cases, and of *Telemarsicabruzzo SpA* v *Circostel* (cases C320-2/90) and similar cases, it can be argued that rejection was justified in the circumstances. This point is reinforced if we contrast the above cases with *Lec1ercSiplec* v *TF1 Publicite SA* (case C-412/93), which, in effect, concerned a challenge to French law. The Commission suggested that, in the light of the *Foglia* cases, there was no dispute before the national court because the parties were agreed about the outcome and that, therefore, the ECJ did not have jurisdiction to answer the question. The ECJ disagreed, holding that the parties' agreement did not render the dispute less real and that the question needed an answer because, without it, the referring court could not deal with the dispute before it. Furthermore, in *LeurBloem* (case C-28/9S) the ECJ despite the opinion of the Advocate-General to the contrary, distinguished *Kleinwort Benson* and returned to its more generous approach in *Dzodzi.* Whether the ECJ should, in the light of increasing workload, the more established nature of the Community legal order and imminent further enlargement, impose greater controls on the cases referred to it is discussed further below.

26.4.6 Challenges to validity: relationship with Article 230

More worrying is the Court's decision, in March 1994, in *TWD Textilwerke GmbH* v *Germany* (case C-188/92). Here the Court refused to give a ruling on the validity of a Commission decision, addressed to the German Government, demanding the recovery from the applicants of State aid granted by the government in breach of EC law. Its refusal was based on the fact that the applicants, having been informed by the government of the Commission's decision, and advised of their right to challenge it under Article 230 (ex 173), had failed to do so within the two-month limitation period. Having allowed this period to expire the Court held that the applicants could not, in the interests of legal certainty, be permitted to attack the decision under Article 234 (ex 177). This decision, wholly out of line with its previous jurisprudence, which has been to encourage challenges to validity under Article 234 rather than (the more restrictive) Article 230, has caused concern, as calculated to drive parties, perhaps prematurely, into action under Article 230, for fear of being denied a later opportunity to challenge Community legislation under Article 234 (see further, chapter 28).

In a slightly more recent judgment, the ECJ mitigated some of the effects of its judgment in *TWD.* In *R* v *Intervention Board for Agriculture, ex parte Accrington Beef Co. Ltd* (case C-241/9S), the parties had not sought to bring an action for annulment within the time limits set out in the then Article 230 (ex 173). Nonetheless, the ECJ was prepared to hear the preliminary ruling reference because it was not clear, as the parties were seeking to challenge a regulation, that they would have had standing to bring an action under Article 230. In addition it may be noted that while a national court is able to interpret Community law without recourse to the Court under Article 234, it has no power to declare a Community law invalid *(Zuckerfabrik Suderdithmarschen AG* v *Hauptzollamt Itzehoe* (cases C-143/88, C-92/89)).

26.5 'Court or tribunal'

Jurisdiction to refer to the ECJ under Article 234 (ex 177) is conferred on 'any court or tribunal'. With rare exceptions (e.g., *Nordsee Deutsche Hochseefischerei GmbH* (case 102/81) to be discussed below; *Corbiau* v *Administration des Contributions* (case C-24/92) (a fiscal authority is not a court or tribunal); *Victoria Film A/S* v *Riksskattenverkert* (case C-134/97) (a court exercising its administrative duties is not a court or tribunal), this has been interpreted in the widest sense. Whether a particular body qualifies as a court or tribunal within Article 234 is a matter of *Community* law. The ECJ is generally accepted as having set down a number of criteria by which a 'court or tribunal' might be identified. The early case law identified five criteria:

…….

26.6.3 When will a decision be necessary?

The ECJ was asked to consider this matter in *CILFIT Sri* (case 283/81). The reference was from the

Italian Supreme Court, the Cassazione, and concerned national courts' mandatory jurisdiction under what was then Article 177(3) (now 234(3)). On a literal reading of Article 234(2) and (3) it would appear that the question of whether 'a decision on a matter of Community law if necessary' only applies to the national courts' discretionary jurisdiction under Article 234(2). However, in *CILFIT* the ECJ held that:

it followed from the relationship between Article 177(2) and (3) [now 234(2) and (3)] that the courts or tribunals referred to in Article 177(3) [now 234(3)] have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment.

There would be no need to refer if:

(a) the question of EC law is irrelevant; or
(b) the provision has already been interpreted by the ECJ, even though the questions at issue are not strictly identical; or
(c) the correct application is so obvious as to leave no scope for reasonable doubt. This matter must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise, and the risk of divergences in judicial decisions within the Community.

These guidelines may be compared with Lord Denning's in *HP. Bulmer Ltd* v *J. Bollinger SA* ([1974] Ch 401), Court of Appeal. He suggested that a decision would only be 'necessary' if it was 'conclusive' to the judgment. Even then it would not be necessary if:

(a) the ECJ had already given judgment on the question, or
(b) the matter was reasonably clear and free from doubt.

Although the criteria in both cases are similar, the first and third *CILFIT Sri* criteria are clearly stricter; it would be easier under Lord Denning's guidelines to decide that a decision was not 'necessary'. Lord Denning's guidelines were applied by Taylor J in *R* v *Inner London Education Authority, ex parte Hinde* ([1985] 1 CMLR 716) and he decided not to refer (see also *Brown* v *Rentokil Ltd* [1995] 2 CMLR 85, Scottish Court of Session). The issues at stake in the former case have proved to be both important and difficult, and were only finally resolved by the ECJ in the cases of *Brown* (case 197/86) and *Lair* (case 39/86) (for full discussion of the issues see chapter 15).

……..
On the question of timing, the ECJ has suggested that the facts of the case should be established and questions of purely national law settled before a reference is made *(Irish Creamery Milk Suppliers Association* v *Ireland* (cases 36 & 71/80). This would avoid precipitate referrals, and enable the Court to take cognisance of all the features of fact and law which may be relevant to the issue of Community law on which it is asked to rule. A similar point was made by Lord Denning MR in *H.P. Bulmer Ltd* v *Bollinger SA* ([1974] Ch 401) ('decide the facts first') and approved by the House of Lords in *R* v *Henn* ([1981] AC 850). However, Lord Diplock did concede in *R* v *Henn* that in an urgent, e.g., interim matter, where important financial interests are concerned, it might be necessary to refer *before* all the facts were found.
…….

26.6.7 National courts' ability to refer of their own motion

Another possible limitation on the ability of the national courts to refer questions to the ECJ concerns the degree to which national courts are free to refer an issue of Community law of their own motion. In *R* v *Secretary of Slate for the Environment, ex parte Greenpeace Ltd* ([1994] 4 All ER 352), the English High Court took the approach that since the parties did not request a preliminary rulings reference, then, despite the fact that national rules expressly permit the court to refer of its own motion, the court should not make a reference. It is submitted that this approach is unduly restrictive. It ignores the underlying purpose of Article 234 (ex 177), which is to ensure correct and uniform interpretation of EC law throughout the Community, and it undermines the effectiveness of the Community law remedies (see chapter 6). Although the ECJ has not discussed this point directly, it has itself assumed jurisdiction to rule on questions not referred *(OTO SpA* v *Ministero delle Finanze* (case C-130/92)) and

it has more recently touched on these questions indirectly in *Peterbroeck Van Campenhout & Cie SCS* v *Belgium* (case C-312/93) and *van Schijndel* v *Stichting Pensioenfonds voor Fysiotherapellten* (cases C-430 & 431/93). Unlike the British example cited above, the last two cases involved applications to amend pleadings to include a new point of Community law. In *Peterbroeck* the ECJ held that because the claimant had, in the circumstances, not had the opportunity of amending its pleadings before the time limit for so doing had expired, the effectiveness of Community law would preclude the application of national procedural rules preventing the court from considering an issue of Community law. In *Van Schijndel* the applicants sought to introduce the Community law point on appeal. The ECJ held that if one could include new points of national law on appeal, one could not treat Community rules less favourably, but the national court was otherwise not obliged to raise the issue of its own motion in civil cases where the Community law point was beyond the existing ambit of the dispute. In civil litigation, both parties to the dispute have the opportunity to define the issues relevant to their dispute, and to allow the introduction of new issues might endanger legal certainty and procedural fairness. Thus one may conclude that Community law does not *prevent* national courts from raising issues of their own motion and, where it is desirable to ensure effective protection of individuals' rights, it should be done, provided that both parties have an opportunity to put forward their cases.

26.7 Effect of a ruling

Clearly a ruling from the ECJ under Article 234 is binding in the individual case although the English High Court has taken a narrow view of what this obligation means. In the *Arsenal* v *Reed* case, Laddie J., held that national courts were not, and could not be, bound regarding the ECJ's findings as to the facts, as the ECJ's jurisdiction was limited to interpreting community law. This reasoning enabled Laddie J to come to a decision on the facts diametrically opposed to that suggested, on the circumstances of the case, by the ECJ.

Given Member States' obligation under Article 10 (ex 5) EC to 'take all appropriate measures. . . to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community' and, in the UK, under the European Communities Act 1972, s. 3(2), to take judicial notice of any decision of the ECJ, it should also be applied in all subsequent cases. This does not preclude national courts from seeking a further ruling on the same issue should they have a 'real interest' in making a reference *(Da Costa en Schaake* (cases 28-30/ 62) - interpretation; *International Chemical Corporation SpA* (case 66/80) - validity).

The question of the temporal effect of a ruling, whether it should take effect retroactively *('ex tunc',* i.e., from the moment of entry into force of the provision subject to the ruling) or only from the date of judgment *('ex nunc')* is less clear. In *Defrenne* v *Sabena (No.* 2) (case 43/75) the Court was prepared to limit the effect of the then Article 119 (now 141) to future cases (including *Defrenne* itself) and claims lodged prior to the date of judgment. 'Important considerations of legal certainty' the Court held, 'affecting all the interests involved, both public and private, make it impossible to reopen the question as regards the past'. The Court was clearly swayed by the arguments of the British and Irish Governments that a retrospective application of the equal pay principle would have serious economic repercussions on parties (i.e., employers) who had been led to believe they were acting within the law.

However, in *Ariete SpA* (case 811/79) and *Salumi Sri* (cases 66, 127 & 128/79) the Court made it clear that *Defrenne* was to be an exceptional case. As a general rule an interpretation under Article 234 of a rule of Community law 'clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to be understood and applied *from the time of its coming into force'* (emphasis added). A ruling under that article must therefore be applied to legal relationships arising prior to the date of the judgment provided that the conditions for its application by the national court are satisfied. 'It is only exceptionally', the Court said 'that the Court may, in the application of the principle of legal certainty inherent in the Community legal order and in taking into account the serious effects which its judgments might have as regards the past, on legal relationships established in good faith, be moved to restrict for any person concerned the opportunity of relying on the provision as thus interpreted with a view to calling into question those legal relationships . . .'.

Moreover, 'such a restriction may be allowed *only* in the actual judgment ruling upon the interpretation sought' and 'it is for the Court of Justice *alone* to decide on the temporal restrictions as regards the effects of the interpretation which it gives'.

……..

The Court is more likely to be prepared to limit the effects of a ruling on validity than one on interpretation. Where matters of validity are concerned parties will have relied legitimately on the provision in question. A retrospective application of a ruling of invalidity may produce serious economic repercussions: thus it may not be desirable to reopen matters as regards the past. On the other

hand too free a use of prospective rulings in matters of interpretation would seriously threaten the objectivity of the law, its application to all persons and all situations. Moreover, as the Court no doubt appreciates, a knowledge on the part of Member States and individuals that the law as interpreted may not be applied retrospectively could foster a dangl'1'I HIS spirit of non-compliance.

……..

26.11 Conclusions

The success of the preliminary rulings procedure depends on a fruitful collaboration between the ECJ (and, in future, the CFI) and the courts of Member States. Generally speaking both sides have played their part in this collaboration. The ECJ has rarely refused its jurisdiction or attempted to interfere with national courts' discretion in matters of referral and application of EC law. National courts have generally been ready to refer; cases in which they have unreasonably refused to do so are rare. Equally rare are the cases in which the ECJ has exceeded the bounds of its jurisdiction without justification.
However, this very separation of powers, the principal strength of Article 234, is responsible for some of its weaknesses. The decision whether to refer and what to refer rests entirely with the national judge. No matter how important referral may be to the individual concerned (e.g., *Sandhu*) he cannot compel referral; he can only seek to persuade. And although the ECJ will extract the essential matters of EC law from the questions referred it can only give judgment in the context of the questions referred (see *Hessische Knappschaft* v *Maison Singer et Fils* (case 44/65). Thus, it is essential for national courts to ask the right questions. As the relevance of the questions can only be assessed in the light of the factual and legal circumstances of the case in hand, these details must also be supplied. A failure to fulfil both these requirements may result in a wasted referral or a misapplication of EC law. Given the increasing pressures on the ECJ, wasted references and the drafting of sloppy questions can be seen also as a waste of the limited judicial resources at the Community level.

As the body of case law from the ECJ has developed and national courts have acquired greater confidence and expertise in applying EC law and ascertaining its relevance to the case before them, there should be less need to resort to Article 234 (ex 177). The initial question, of whether a decision on a question of EC law is 'necessary', has become crucial. As we have seen *CILFIT Sri* (case 283/81) has supplied guidelines to enable national courts to answer this question. Where a lower court is in doubt as to whether a referral is necessary the matter may be left to be decided on appeal. On the other hand, where a final court has the slightest doubt as to whether a decision is necessary it should always refer, bearing in mind the purpose of Article 234(3) and its particular importance for the individual litigant. These courts would do well to follow the lead provided by the German Constitutional Court. They will be more likely to do so if they are confident that the ECJ will not abuse its power in these proceedings by interpreting EC law too freely and failing to pay sufficient regard to 'important considerations of legal certainty'.

The significance of the ECJ's rulings and the Article 234 (ex 177) procedure have been well recognised by courts, commentators and Member States, as was evidenced by the suggestion made in the run-up to the 1996 IGC that the original
jurisdiction of the ECJ should be curtailed. As noted above, the ECJ's jurisdiction was not in the end limited. The restrictions placed on its new jurisdiction, however, indicate not only that these areas are sensitive, but that the Member States wished to limit the opportunities for the ECJ to deliver one of its more far-reaching judgments in these areas. One point seems certain: the creation of a new approach to references to the ECJ indicates that both the Court and the procedure have been a victim of their own success, and the occasional excess.

Catherine Barnard extract from Substantibve law of Chapter 12

Free Movement of Workers

Introduction

Article 39 gives workers the right to move freely across the EU to seek and take up employment in another Member State on the same terms as nationals. The principle of free movement was introduced to enable workers from states with high levels of unemployment to move to other states where there was a demand for jobs. In the host state the migrant worker could find a job, probably benefit from higher wages than in their home State and provide the skills needed by the host State. Furthermore, the principle of non-discrimination meant that employers selected candidates based on merit and not nationality. At least, this was the theory. In practice workers - at least those from the original Member States[7] - often preferred to stay (unemployed) in a State they were familiar with, in the company of family and friends. The Community responded by adopting a series of measures giving rights not only to workers but also their families in an attempt to encourage them to move. Most notable in this respect was Regulation 1612/68. The legislature's approach has been reinforced by the Court which was instrumental in helping to secure this objective, first by removing obstacles which impeded free movement and then by finding ways to ensure that workers and their families became integrated into the host State. And with these developments came a change in perspective. Workers were no longer simply viewed as factors of production needed to fulfil the objectives of the common market. Now they were seen as EU citizens with rights enforceable against the host State. Ultimately, this led to the adoption of the Citizens' Rights Directive (CRD) 2004/38 which gave rights not only to migrant workers and the self-employed but also to a range of migrant citizens. This Directive is discussed in detail in Chapter 15. In this chapter we focus on the rights given to workers, principally by the Treaty but also by Regulation 1612/68 most of which has not been repealed by the CRD. We begin by examining the fundamental question: who is a worker?
the definition of a 'worker'

Although there is no definition of the term 'worker' in the Treaty, the Court has insisted that it be given a broad Community meaning, based on objective criteria to ensure uniform interpretation across the Member States.[8] In essence, a worker is in a relationship based on subordination where the individual is under the control of the employer. As the Court put it in *Lawrie-Blum*,[9] the essential feature of an employment relationship is that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. The national court must decide whether a relationship of subordination exists.[10] The sphere of employment[11] and the nature of the legal relationship between employer and employee (whether or not it involves public law status or a private law contract)[12] are immaterial. On the facts of *Lawrie-Blum* the Court found that a trainee teacher was a worker for the purpose of Article 39(1).

The 'worker' must also be engaged in a 'genuine and effective' economic activity within the meaning of Article 2 EC. While most activities satisfy this requirement[13]—including playing professional football,[14] being a prostitute,[15] doing an apprenticeship[16] and other types of training[17] —this may not

---

[7] A patchwork of transitional arrangements apply to workers form the Accession States.

8 See Case 75/63 *Unger* v. *Bestuur der Bedrijfsvereniging voor Detail handel en Ambachten* [1964] ECR 1977, Case 53/81 *Levin* v. *Staatssecretaris van Justitie* [1982] ECR 1035; paras. 11–12; Case 139/85 *Kempf* v. *Staatssecretaris van Justitie* [1986] ECR 1741, para. 15; Case 66/85 *Lawrie-Blum* v. *Land Baden-Württemberg* [1986]

9 ECR 2121, para. 16. An earlier version of this ch. first appeared in C. Barnard, *EC Employment Law* (Oxford, OUP, 2006), ch. 4.

Case 66/85 [1986] ECR 2121, paras. 16–17.

10 Case C–337/97 *Meeusen* v. *Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I–3289, para. 15. According to Case C–107/94 *Asscher* v. *Staatssecretaris van Financiën* [1996] ECR I–3089, para. 26, since company directors are not subordinate the Court said that a director of a company of which he is the sole shareholder was not a worker, but in *Meeusen* the Court said that result could not be automatically transposed to his spouse.

11 Case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 21.

12 Case 152/73 *Sotgiu* v. *Deutsche Bundespost* [1974] ECR 153, para. 5.

13 See, e.g., Case 13/76 *Donà* v. *Mantero* [1976] ECR 1333, para. 12.

14 Case C–415/93 *Union Royale Belge de Société de Football Association* v. *Bosman* [1995] ECR I–4921, para. 73.

15 Case C–268/99 *Aldona Malgorzata Jany and Others* v. *Staatssecretaris van Justitie* [2001] ECR I–8615, para. 33, considered further in Ch. 12.

16 Case C–188/00 *Kurz, née Yüce* v. *Land Baden-Württemberg* [2002] ECR I–10691, decided in the context of the EEC–Turkey Association Agreement.

[17] Case C-109/04 *Kranemann* v. *Land Nordrhein-Westfalen* [2005] ECR I-2421; Case C-10/05 *Mattern* v. *Mininstre du Travail et*

always be the case. For example, work as part of a community-based religion might not constitute an economic activity. This was at issue in *Steymann*[18] where a plumber worked for a Bhagwan community as part of its commercial activities. On the facts, the Court considered that since the community looked after his material needs and paid him pocket money this might constitute an indirect *quid pro quo* for genuine and effective work, and so Steymann could be considered a worker. On the other hand, in *Bettray*[19] the Court found that paid activity provided by the State as part of a drug rehabilitation programme did not represent a genuine and effective economic activity, since the work, which was designed for those who could not take up work under 'normal' conditions, was tailored to an individual's needs and was intended to reintegrate them into the employment market.

By contrast, in *Trojani*[20] the ECJ left it to the national court to decide whether Trojani's work, performed for and under the direction of a Salvation Army hostel for about 30 hours a week as part of a personal reintegration programme, was 'real and genuine' paid activity, taking into account the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.[21]

The economic activity must also not be on 'such a small scale as to be purely marginal and ancillary'.[22] Although this hurdle can raise particular difficulties for part-time workers, the Court has generally found that they can be workers. For example, in *Levin*[23] the Court found that a British woman working part-time as a chambermaid in the Netherlands could be a worker, even though she earned less than a subsistence wage, because part-time work constituted an effective means of improving an individual's living conditions.[24] In *Kempf*[25] the Court also found that the work of a part-time music teacher was not on 'such a small scale as to be purely marginal and ancillary', even though his income was supplemented by social security benefits. The Court said that once a finding of effective and genuine employment had been established, it was irrelevant whether the individual subsisted on his earnings or whether his pay was used to add to other family income[26] or was supplemented by public funds.[27] However, in *Raulin*[28] the Court again emphasized the role of the national court in making the final decision as to who was a worker. It said that an '*oproepkracht*' (an on-call worker on a 'zero hours' contract), who was not actually guaranteed any work or obliged to take up any work offered and often worked only a very few days per week or hours per day, could be a 'worker' but that it was a matter for the national court to decide, taking into account the irregular nature and limited duration of the services.

In *Kurz*[29] the Court summarized its case law:

. . . neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds for which the remuneration is paid or the limited amount of remuneration can have any consequence in regard to whether or not the person is a worker.

The Court has extended the definition of 'worker' to include those seeking work.[30] While the period allowed for work seekers to remain in the host State depends on the rules of that State, they must be given at least three months to look for work,[31] although if they are dependent on social security they

---

de l'emploi [2006] ECR I-000, para. 21.

18 Case 196/87 *Steymann* v. *Staatssecretaris van Justitie* [1988] ECR 6159, para. 14.

19 Case 344/87 *Bettray* v. *Staatssecretaris van Justitie* [1989] ECR 1621, para. 17. Cf. Case C–1/97 *Birden* v. *Stadtgemeinde Bremen* [1998] ECR I–7747, decided in the context of the EEC–Turkey Association Agreement, where a person employed under a job-creation scheme was considered a worker.

20 Case C-456/02 *Trojani* v. *CPAS* [2004] ECR I-7573.

21 Para. 24.

22 See, e.g., Case C–357/89 *Raulin* v. *Minister van Onderwijs en Wetenschappen* [1992] ECR I–1027, para. 10. The mere fact that the employment is of short-duration cannot of itself, exclude the employment from Article 39: Case C–413/01 *Franca Ninni-Orasche* v. *Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-1187, para. 25.

23 Case 53/81 [1982] ECR 1035, para. 17.

24 Para. 15.

25 Case 139/85 [1986] ECR 1741.

26 Case 53/81 *Levin* [1982] ECR 1035.

27 Para. 14.

28 Case C–357/89 [1992] ECR I–1027.

29 Case C–188/00 [2002] ECR I–10691, para. 32.

30 Case C–85/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I–2691, para. 32; Case C-138/02 *Collins* v. *Secretary of State for Work and Pensions* [2003] ECR I-2703, para. 29. Cf Art. 39(3) which envisages that the worker has already found a job before leaving for the host State.

31 In certain circumstances work seekers are entitled to social security benefits for three months under Art. 69, Reg. 1408/71.

may be asked to leave.[32] At the time of the decision in *Antonissen*[33] migrants in the UK could have six months to look for work[34] which the Court found in to be compatible with Community law. If, at the end of the six-month period, work seekers could show that they had genuine chances of being employed, they could not be required to leave the host State. For this reason the Court said in *Commission* v. *Belgium*[35] that a Belgian law requiring a work seeker to leave the State automatically on the expiry of the three-month period breached Article 39. Article 14(4)(b) of Directive 2004/38 (CRD) confirms this line of case law, making clear that Union citizen work seekers (and their family members) cannot be expelled for as long as they can 'provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'. No time limit is specified.

Article 7(3) of the CRD also makes provision for those Union citizens who are no longer workers (or self employed) to retain worker (or self-employed) status in four situations:
Where the individual cannot work because s/he is temporarily incapacitated through illness or accident);[36] or
Where the individual has become *involuntarily* unemployed after having been employed for more than one year, and has registered as a job-seeker with the relevant employment office; or
Where the individual has become *involuntarily* unemployed after having completed a fixed term contract of less than one year or after having become involuntarily unemployed during the first twelve months and after having registered as a job-seeker with the relevant employment office. In this situation the status of worker can be retained for no less than six months; or
Where the individual embarks on vocational training. Unless the individual is involuntarily unemployed, the retention of the status of worker requires the training to be related to the previous employment.[37]
In so doing, the CRD confirms and extends the case law of the Court.[38]
the rights conferred on workers by ec law
introduction
Article 39(1) provides that workers should enjoy the right of free movement which, according to Article 39(2), includes the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration, and other conditions of work and employment.[39] Article 39(3) then adds that free movement comprises the right to:
— accept offers of employment actually made,
— move freely within the territory of the Member States for this purpose,
— stay in the Member State for the purpose of the employment, and
— remain in the Member State after having been employed.[40]
In addition, the Court has recognized that workers have the right, derived directly from the Treaty, to leave their State of origin, [41] to enter the territory of another Member State, and to reside and pursue an economic activity there.[42] The details of these rights were originally expanded by three secondary measures: Directive 68/360[43] on the rights of entry and residence, Regulation 1612/68 on the free movement of workers,[44] and Regulation 1251/70[45] on the right to remain. Directive 68/360 and Regulation 1251/70[46] along with a number of other Community directives, as well as the family rights laid down in Articles 10 and 11 of Regulation 1612/68, have been replaced by the CRD but the

32 Declaration of the Council accompanying Dir. 68/360 and Reg. 1612/68 ([1968] OJ Spec Ed Series I–475).
33 Case C–292/89 *R* v. *IAT, ex parte Antonissen* [1991] ECR I–745, para. 21. See also Art. 14(4)(b) of the CRD 2004/38.
34 Statement of Changes to the Immigration Rules (HC 169).
35 Case C–344/95 *Commission* v. *Belgium* [1997] ECR I–1035, para. 18.
36 Cf Case C-43/99 *Leclere* [2001] ECR I-4265 considered below at nn. XX.
37 Case 39/86 *Lair* [1988] ECR 3161 considered below at nn. XX.
38 See e g Case C-35/97 *Commission* v. *France* [1998] ECR I-5325, para. 41; Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para. 34.
39 Art. 39(2).
40 Art. 39(3).
41 Case C–10/90 *Masgio* v. *Bundesknappschaft* [1991] ECR I–1119, paras. 18–19; Case C–415/93 *Bosman* [1995] ECR I–4921, para. 104; Case C–18/95 *Terhoeve* [1999] ECR I–345, paras. 37–8; Case C–190/98 *Graf* v. *Filzmoser Maschinenbau GmbH* [2000] ECR I–493, para. 22; Case C–232/01 *Hans van Lent* [2003] ECR I-11525, para.21;Case C-137/04 *Rockler* v. *Försäkringskassan* [2006] ECR I-1141, para. 18.
42 Case C–363/89 *Roux* v. *Belgium* [1991] ECR I–273, para. 9; Case C–18/95 *Terhoeve* v. *Inspecteur van de Belastingdienst Particulieren* [1999] ECR I–345, para. 38.
43 [1968] OJ Spec. Ed (II) L485.
44 [1968] OJ Spec Ed I–475. When enacting the Regulation the Council took into account, first, the importance for the worker, from a human point of view, of having his entire family with him and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State (Case 249/86 *Commission* v. *Germany* [1989] ECR 1263, para. 11).
45 OJ SE [1970] L142/24, 402.
46 This was repealed by Commission Reg. 635/2006 (OJ [2006] L112/9).

provisions of the Treaty still prevail. Therefore, a migrant worker can start working before completing the formalities to obtain any residence certificate because the right of residence is a fundamental right derived from the Treaty and is not dependent upon the possession of a residence permit.[47] Workers' employment rights are also derived from the Treaty but further detail is provided by Regulation 1612/68 which applies exclusively to workers. It is this measure that we shall focus on in this chapter, as complemented by the CRD.

employment rights

Regulation 1612/68[48] was originally designed both to facilitate the free movement of workers and their families and to ensure their integration into the community of the host state. With the repeal of the family provisions (Articles 10 and 11), the rump of Regulation 1612/68 falls into two parts: (1) the right of *access* to a post on non-discriminatory terms (Title I); and (2) the right to equal treatment while doing that job (ie while *exercising* the rights of free movement) (Title II). The basic principle of equal treatment is also enshrined in Article 24(1) CRD which applies equally in these situations.

Access to employment

Article 1 of Regulation 1612/68 reiterates the substance of Article 39: any national of a Member State 'has the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State', enjoying the same priority as a national. The worker may conclude and perform contracts of employment in accordance with the laws of the host State.[49] Any provisions which discriminate against foreign nationals or hinder foreign nationals from obtaining work are not permissible.[50]

(a) Direct Discrimination

As we saw in Chapter 11, the prohibition against discrimination applies to both directly and indirectly discriminatory measures. Measures are directly discriminatory where the migrant worker is treated less favourably than the national worker. This was the case with the '3+2 rule' in *Bosman*[51] and the Italian law in *Commission* v. *Italy*[52] providing that private security work could be carried out only by Italian security firms employing Italian nationals only. Such directly discriminatory measures breach Article 39 (and the Regulation) and can be saved only by reference to one of the express derogations laid down by the Treaty or the secondary legislation (see fig. 11.1).

Regulation 1612/68 itself also identifies and seeks to eliminate other directly discriminatory barriers to access to employment. For example, Article 4(1) provides that national provisions which restrict, by number or percentage, the employment of foreign nationals in any undertaking do not apply to nationals of the other Member States. Therefore in *Commission* v. *France*[53] the Court said that a French rule requiring a ratio of three French to one non-French seamen on a merchant ship contravened Article 4(1). Article 4(2) provides that if there is a requirement that an undertaking is subject to a minimum percentage of national workers being employed, then nationals of the other Member States are counted as national workers. Article 6 says that the engagement and recruitment of a worker must not depend on medical, vocational, or other criteria which are discriminatory on the grounds of nationality. However, it does permit the employer to require the migrant worker to take a vocational test when offering employment.

*(b) Indirect Discrimination*Indirectly discriminatory measures also breach Article 39 and the Regulation unless objectively justified[54] or saved by one of the express derogations (see fig. 11.1). As we have seen, indirect discrimination focuses on the effect of a measure, a point confirmed by Article 3(1) of Regulation 1612/68,[55] which 'makes explicit the principles formulated in Article 39 EC with regard, specifically, to access to employment'.[56] Article 3(1) says that provisions laid down by national

---

47 Case 118/75 *Watson and Belmann* [1976] ECR 1185, paras. 15–16.

48 [1968] OJ Spec Ed I–475, amended by Reg. 312/76 ([1976] OJ L3/2) and Council Reg. 2434/92 ([1992] OJ L25/1).

49 Art. 2.

50 Art. 3(1). Some examples listed in Art. 3(2) are: prescribing a special recruitment procedure for foreign nationals, restricting the advertising of vacancies in the press, and imposing additional requirements on applicants from other Member States of subjecting eligibility for employment to conditions of registration with employment offices.

51 Case C–415/93 [1995] ECR I–4921, considered further in Ch. 11.

52 Case C–283/99 *Commission* v. *Italy* [2001] ECR I–4363.

53 Case 167/73 *Commission* v. *France (French Merchant Seamen)* [1974] ECR 359. See also the '3+2 rule' in Case C–415/93 *Bosman* [1995] ECR I–4921.

54 See, e.g., Case C–15/96 *Kalliope Schöning-Kougebetopoulou* v. *Freie und Hansestadt Hamburg* [1998] ECR I–47. See also Case C–187/96 *Commission* v. *Greece* [1998] ECR I–1095; Case C–350/96 *Clean Car Autoservice* v. *Landeshauptmann von Wien* [1998] ECR I–2521.

55 According to Case C–281/98 *Roman Angonese* v. *Cassa di Risparmio di Bolzano* [2000] ECR I–4139, para. 22, this provision applies only to States, not to employers.

56 Case C-278/03 *Commission* v. *Italy (recruitment of teaching staff)* [2005] ECR I-3747, para. 15.

law, regulation, or administrative action or practices will not apply where, 'though applicable irrespective of nationality, their exclusive or principal aim *or effect* is to keep nationals of other Member States away from employment offered'.[57] Common examples of indirectly discriminatory rules are those requring service in the host state and those requiring residence. Therefore in *Scholz*,[58] the Court found the refusal by an Italian selection board to take into account a German applicant's previous employment in Germany to be unjustified indirect discrimination[59] Similarly, a British rule in *Collins*[60] that entitlement to a jobseeker's allowance was conditional upon a requirement of being habitually resident in the UK was also found to be indirectly discriminatory; the question of proportionality was left to the national court.

Language requirements are also indirectly discriminatory measures but can usually be justified. This is expressly recognized by the second paragraph of Article 3(1) of Regulation 1612/68 which provides that the principle of equal treatment does not apply in respect of 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'. This provision was successfully relied on by the Irish government in *Groener.*[61] The case concerned a Dutch woman who was refused a permanent post at a design college in Dublin where she had been teaching because she did not speak Gaelic. Even though she did not need to use Gaelic for her work, the Court upheld the language requirement because it formed part of government policy to promote the use of the Irish language as a means of expressing national culture and identity.[62] It said that since education was important for the implementation of such a policy the requirement for teachers to have an adequate knowledge of the Irish language was compatible with Article 3(1), provided that the level of knowledge was not disproportionate to the objective pursued.[63]

However, the Court did add in *Groener* that the Irish government could not require that the linguistic knowledge be acquired in Ireland.[64] *Angonese*[65] emphasized this point. The case concerned a requirement imposed by a bank operating in Bolzano (the Italian- and German-speaking province of Italy) that admission to its recruitment competition was conditional on possession of a certificate of bilingualism. Because this certificate could be obtained only in Bolzano, Angonese, an Italian national who had studied in Austria, was not able to compete for a post on the ground that he lacked the Bolzano certificate, even though he submitted other evidence of his bilingualism. The Court found the bank's rule to be indirectly discriminatory,[66] even though the requirement affected Italian nationals resident in other parts of Italy as well as nationals from other Member States. It said that since the majority of residents of the province of Bolzano were Italian nationals the obligation to obtain the certificate put nationals of other Member States at a disadvantage compared with residents of the province, making it difficult, if not impossible, for them to get jobs in Bolzano.[67] On the question of justification, the Court said that while the bank could justify requiring job applicants to have a certain level of linguistic knowledge, the fact that it was impossible to show proof of this knowledge by any other means—in particular by equivalent qualifications from other Member States—was disproportionate,[68] and so the bank's requirement breached Article 39.

(c) Non-discrimination/Obstacles

Non-discriminatory national measures which (substantially) impede access to the market also breach Article 39 and the Regulation unless objectively justified (see fig 11.3). We saw this in the second part of the *Bosman*[69] judgment where the Court found that the football transfer fee rules, albeit non-discriminatory, 'directly affect[ed] players' access to the employment market in other Member States'[70] and therefore constituted an unjustified 'obstacle to the freedom of movement of workers'.[71]

---

57 Emphasis added.
58 Case C–419/92 *Scholz* v. *Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I–505.
59 Para. 11.
60 Case C-138/02 *Collins* v. *Secretary of State for Work and Pensions* [2004] ECR I-2703. See also Case C-346/05 *Charteignier* v. *ONEM* [2006] ECR I-000.
61 Case 379/87 *Groener* v. *Minister for Education* [1989] ECR 3967.
62 Paras. 18–19.
63 Para. 21.
64 Para. 23.
65 Case C–281/98 [2000] ECR I–4139.
66 The Court reasoned that 'in order for a measure to be treated as being discriminatory on grounds of nationality, it is not necessary for the measure to have the effect of putting at an advantage all the workers of one nationality or of putting at a disadvantage only workers who are nationals of other Member States, but not workers of the nationality in question' (para. 41).
67 Para. 39.
68 Para. 44.
69 Case C–415/93 [1995] ECR I–4921, considered in detail in Ch. 11.
70 Para. 103.
71 Para. 104. See E. Johnson and D. O'Keeffe, 'From Discrimination to Obstacles to Free Movement: Recent Developments concerning the Free Movement of Workers 1989–1994' (1994) 31 *CMLRev.* 1313.

On the other hand, if the effect of the national legislation is, as in *Graf*,[72] 'too uncertain and indirect . . . to be capable of being regarded as liable to hinder free movement for workers', then the measure does not breach Article 39 or the Regulation.[73]

Sometimes in cases such as *Bosman* the Court abandons the discrimination analysis altogether and examines instead whether the national measure constitutes an 'obstacle to freedom of movement for workers' (the language used in *Bosman* and confirmed in *Terhoeve*[74]) or is 'liable to hamper or to render less attractive' the exercise of the rights to free movement (*Kraus*).[75] Therefore, in *Commission* v. *Denmark*[76] the Court found a Danish law requiring a company car made available to employees residing in Denmark, by a company established in another Member State, to be registered in Denmark, constituted a barrier to the freedom of movement of workers.[77]

Whichever form of words is used, if the Court finds there is an 'obstacle', 'barrier', 'restriction' or 'impediment',[78] it then examines whether the rule can be objectively justified and whether the steps taken are proportionate. If, on the other hand, the Court finds there is no obstacle to free movement, then there is no breach of Article 39 and the measure is lawful. Therefore, in *Burbaud*[79] the Court said that the requirement of passing an exam in order to take up a post in the public service could not 'in itself be regarded as an obstacle' to free movement.[80]

Equal treatment during the employment relationship

(a) Equal treatment in respect of the terms and conditions of employment

While Title I of Regulation 1612/68 concerns initial access to employment, Title II concerns the 'exercise' of (as opposed to access to) employment ie terms and conditions of employment. Article 7(1) states that a migrant worker must not be treated
differently from national workers in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or reemployment.[81]

Most of the case law concerns indirectly discriminatory measures. For example, in *Allué and Coonan*[82] an Italian law limited the duration of contracts of employment of foreign-language assistants, without imposing the same limitation on other workers. Since only 25 per cent of foreign-language assistants were Italian nationals, the law essentially concerned nationals of other Member States. It was indirectly discriminatory[83] and could not be justified.

As we have already seen, residence requirements are also likely to be indirectly discriminatory. So, in *Clean Car*[84] the Court found that an Austrian rule requiring business managers to be resident in Austria before they could work in Vienna breached Article 39. It noted that the rule was liable to operate mainly to the detriment of nationals of other Member States since the majority of non-residents were foreigners.[85] Austria sought to justify the residence requirement on the grounds that the manager needed to be in a position to act effectively in the business, to be served with a notice of any fines imposed, and to have those fines enforced against him. The Court rejected such justifications. It ruled

---

72 Case C–190/98 [2002] ECR I–493.

73 Paras. 24–25.

74 Case C–18/95 *Terhoeve* [1999] ECR I–345, para. 41; Case C–385/00 *F.W.L. de Groot* v. *Staatssecretaris van Financiën* [2002] ECR I–11819, para. 95.

75 Case C–19/92 *Kraus* v. *Land Baden-Württemberg* [1993] ECR I–1663, para. 32; Case C–431/01 *Mertens* v. *Belgium* [2002] ECR I–7073, para. 37.

76 Case C-464/02 *Commission* v. *Denmark (company vehicles)* [2005] ECR I-7929, paras. 46 and 52. For an equivalent case under Art. 43, see Joined Cases C-151/04 and C-152/04 *Nadin* [2005] ECR I-11203, para. 36.

77 Joined Cases C-151/04 and C-152/04 *Nadin* [2005] ECR I-11203, para. 36.

78 Occasionally it finds no obstacle: Case C–33/99 *Fahmi and Cerdeiro-Pinedo Amado* v. *Bestuur van de Sociale Verzekeringsbank* [2001] ECR I–2415, para. 43.

79 Case C–285/01 *Isabel Burbaud* v. *Ministère de l'Emploi et de la Solidarité* [2003] ECR I-8219.

80 Para. 96. To emphasize the point, the Court said that inasmuch as all new jobs are subject to a recruitment procedure, the requirement of passing a recruitment competition could not 'in itself be liable to dissuade candidates who have already sat a similar competition in another Member State from exercising their right to freedom of movement as workers' (para. 97). In a similar vein see Joined Cases C–51/96 & C–191/97 *Deliège* v. *Ligue Francophone de Judo et Disciplines Associés* [2000] ECR I–2549, para. 64, discussed in Ch. 11.

81 Art. 7(1) only applies to payments made by virtue of statutory or contracted obligations incumbent on the employer as a condition of employment: see Case C–315/94 *Peter de Vos* v. *Stadt Bielefeld* [1996] ECR I–1417.

82 Case 33/88 *Allué and Coonan* v. *Università degli studi di Venezia* [1989] ECR 1591. See also Case 41/84 *Pinna* v. *Caisse d'allocations familiales de la Savoie* [1986] ECR 1 and Case C–272/92 *Spotti* v. *Freistaat Bayern* [1993] ECR I–5185. The Court extended this ruling to nationals of a non-EU State (e.g., Poland) in the context of Art. 37(1) of the Europe Agreement: Case C–162/00 *Land-Nordrhein-Westfalen* v. *Beata Pokrzeptowicz-Meyer* [2002] ECR I–1049, para. 44.

83 Para. 12.

84 Case C–350/96 [1998] ECR I–2521. See also Case C–472/99 *Clean Car Autoservice GmbH* v. *Stadt Wien and Republik Österreich* [2001] ECR I–9687 on the issue of costs following the Court's earlier judgment.

85 Para. 29.

that the residence requirement was either inappropriate to achieve the aim pursued or went beyond what was necessary for that purpose.[86] It also noted that other less restrictive measures were available to achieve the objective, such as serving a notice of the fines at the registered office of the company employing the manager. Austria could also ensure that the fines would be paid by requiring a guarantee in advance.

Length of service requirements may also be indirectly discriminatory. In *Ugliola*[87] German law provided that a period spent performing military service in Germany had to be taken into account by an employer when calculating periods of service for the purposes of pay or other benefits, but this requirement did not apply to military service carried out in other Member States. The Court found the rule to be indirectly discriminatory since it had a greater impact on non-Germans working in Germany who were more likely to have done their military service in their state of origin. Similarly, in *Schöning-Kougebetopoulou,*[88] the Court found that a collective agreement providing for promotion on grounds of seniority but which took no account of service performed in another Member State 'manifestly' worked to the detriment of migrant workers and so breached Article 39. Once again, the Court took a tough line to justification. The German government sought to justify its length of service payments on the grounds of rewarding loyalty to the employer and motivating employees. The Court rejected these justifications, ruling that since it was possible to take into account periods of employment completed with any one of various public institutions, not just the one she actually worked for, this could not be justified by the desire to reward employee loyalty. The system afforded employees considerable mobility within a group of legally separate employers, and therefore the discrimination could not be justified.[89]

Subsequently, in *Köbler*,[90] another case concerning a special length-of-service increment, this time granted by Austria to professors who had worked in an Austrian university for at least fifteen years, the Court departed from the discrimination model in favour of the hindrance/obstacle approach. It said that the Austrian regime was clearly 'likely to impede freedom of movement for workers'[91] because, first, the regime operated to the detriment of migrant workers who were nationals of other Member States and, secondly, it deterred freedom of movement for workers established in Austria by discouraging them from leaving the country to work in other Member States if this period of experience was not taken into account on their return to Austria.[92] The measure was therefore 'likely to constitute an obstacle to freedom of movement for workers'.[93] xxxJUSTIFICAITONxxx

If a clause from a collective agreement or contract discriminates against workers from other Member States, Article 7(4) of Regulation 1612/68 provides that such clauses are null and void in so far as they lay down or authorize discriminatory conditions.[94] Until the parties amend the agreement to eliminate the discrimination, the migrant workers enjoy the same rules as those which apply to nationals.[95]

(b) Equal treatment in respect of social and tax advantages

Tax Advantages

Article 7(2) of Regulation 1612/68provides that a worker will enjoy the same social and tax advantages as national workers.[96] As far as taxation is concerned,[97] most of the cases concern the situation of national rules which treat residents differently from non-residents. As we have already seen, discrimination on the ground of residence can indirectly discriminate against migrants[98] but this presupposes that circumstances of residents and non-residents are comparable. In *Schumacker*[99] the

86 Para. 34.
87 Case 15/69 *Württembergische Milchverwertung Südmilch AG* v. *Ugliola* [1969] ECR 363.
88 Case C–15/96 [1998] ECR I–47. See also Case C–187/96 *Commission* v. *Greece* [1998] ECR I–1095; Case C–195/98 *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst* v. *Republik Österreich* [2000] ECR I–10497; Case C–27/91 *URSSAF* v. *Le Manoir* [1991] ECR I–5531 and Case C–419/92 *Scholz* [1994] ECR I–505.
89 Para. 27.
90 Case C–224/01 *Gerhard Köbler* v. *Republik Österreich* [2003] ECR I-10239..
91 Para. 72.
92 Paras. 73–74.
93 Para. 77.
94 Case C-400/02 *Merida* v. *Bundesrepublik Deutschland* [2004] ECR I-8471.
95 Case C–15/96 *Kalliope Schöning-Kougebetopoulou* [1998] ECR I–47, para. 33, applying by analogy the Art. 141 case law on equal pay: e.g., Case C–184/89 *Nimz* v. *Freie und Hansestadt Hamburg* [1991] ECR I–297, para. 18; Case C–33/89 *Kowalska* v. *Freie und Hansestadt Hamburg* [1990] ECR I–2591, para. 20.
96 For a detailed examination of this provision see D. O'Keeffe, 'Equal Rights for Migrants: the Concept of Social Advantages in Article 7(2), Reg. 1612/68' (1985) 5 *YEL* 92.
97 It has always been clear that direct taxation falls within the competence of the Member States. As the Court pointed out in Case C–246/89 *Commission* v. *UK* [1991] ECR I–4585, the powers retained by the Member States in respect of taxation must, however, be exercised consistently with Community law.
98 Case C–175/88 Biehl v. Administration des contributions du grand-duché de Luxembourg [1990] ECR I–1779, para. 14.
99 Case C–279/93 Finanzamt Köln-Altstadt v. Schumacker [1995] ECR I–225.

Court recognized that this might not always be the case since there may be objective differences between the two situations:[100] usually the state of residence grants taxpayers all the tax allowances relating to their personal and family circumstances because the state of residence can best assess the taxpayers' ability to pay tax since their personal and financial interests are centred there;[101] the same will not apply to non-residents. This distinction is recognized by international tax law (the so-called fiscal principle of territoriality) and may justify the two situations being treated differently.[102]

However, if on the facts of the case the situations of the resident and non-resident taxpayers can be considered comparable, then it would be discriminatory to treat the two situations differently. This is particularly so in the case of frontier workers such as Mr Schumacker,[103] a Belgian national who lived in Belgium with his family but worked in Germany. Because he was a non-resident worker his wages were subject to German income tax on a limited basis. This meant that he was denied certain benefits which were available to resident taxpayers. The Court ruled that a non-resident taxpayer who received all or almost all of his income in the State of employment was objectively in the same situation as a resident in that State who did the same work there. Therefore the situation of residents and non-residents was comparable and the German rules gave rise to discrimination because the non-resident taxpayer did not have his personal and family circumstances taken into account either in his state of residence (where he received no income) or in his state of employment (where he was not resident).[104] Consequently, his overall tax burden was greater than that of a resident taxpayer.[105]

Could the discrimination be justified? In *Bachmann*[106] the Court recognized the 'need to preserve the cohesion of the tax system' as one such justification. The case concerned a Belgian law according to which the cost of life insurance premiums could not be deducted from taxable income where the premiums were paid in other Member States. This was because Belgian tax law gave the individual the choice of either having tax deducted on the premiums and then paying tax on future benefits or not having tax deducted on the premiums and then not paying tax on future benefits. If Bachmann were able to deduct tax on premiums paid in Germany, the Belgian authorities would have no way of being able to tax future benefits also payable in Germany.[107] For this reason the Belgian rules were justified because there was a 'direct link' between the right to deduct contributions and the taxation of sums payable by insurers under pension and life assurance contracts; and that preserving that link was necessary to safeguard the cohesion of the tax system.[108] Since *Bachmann* Member States have regularly invoked fiscal cohesion as a justification for their tax policies, but always without success.[109] The Court has insisted that the cohesion defence requires a direct link between the discriminatory tax rule and the compensating tax advantage and this has not been found in subsequent cases.[110]

The other justification commonly raised by Member States to justify discriminatory treatment is the effectiveness of fiscal supervision[111] but again Member States have had little success in actually relying on it.[112] For instance, in *Schumacker* Germany said that administrative difficulties prevented the state of employment (Germany) from determining the income received by non-residents in their state of residence (Belgium). The Court rejected this argument, reasoning that this difficulty could be overcome through the application of Directive 77/799[113] on mutual assistance in the field of direct taxation.[114]

---

100 See also Art.58(1) EC.
101 Para. 32.
102 For a discussion on the same point in respect of taxation under Art. 90, see further ch. 4.
103 Case C–279/93 [1995] ECR I–225. See also Case C–87/99 Zurstrassen v. Administration des contributions directes [2000] ECR I–3337. See generally M. Wathelet, 'The Influence of Free Movement of Persons, Services and Capital on National Direct Taxation: Trends in the Case Law of the European Court of Justice' (2001) 20 YEL 1.
104 Para. 38.
105 Para. 28.See also Case C-152/03 Ritter-Coulais v. Finanzamt Germersheim [2006] ECR I-1711, para. 38 concerning the host state's failure to take income losses into account when determining income liability. This case was decided solely under Art. 39 EC with no reference to Reg. 1612/68.
106 Case C–204/90 Bachmann v. Belgian State [1992] ECR I–249, para. 21, and Case C–300/90 Commission v. Belgium [1992] ECR I–305, para. 14.
107 Para. 23.
108 Paras. 21–23.
109 See, e.g., Case C–80/94 *Wielockx* v. *Inspecteur der Directe Belastingen* [1995] ECR I–2493; Case C–107/94 *Asscher* v. *Staatssecretaris van Financiën* [1996] ECR I–3089; Case C–264/96 *Imperial Chemical Industries (ICI)* v. *Colmer* [1998] ECR I–4695. In *ICI* the Court also recognized the prevention of tax evasion as an overriding requirement (para. 26).
110 See M.Gammie, 'The Role of the European Court of Justice in the Development of Direct Discrimination in the European Union' (2003) 57 *Bulletin for International Fiscal Documentation* 86, 93.
111 Case 120/78 *Rewe Zentrale* v. *Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649.
112 See, e.g., Case C–254/97 *Baxter and others* v. *Premier Ministre and others* [1999] ECR I–4809; Case C–55/98 *Skatteministeriet* v. *Bent Vestergaard* [1999] ECR I–7641.
113 [1977] OJ L336/15.

114 Para. 45.

Social Advantages

Definition and Scope. Article 7(2) of Regulation 1612/68 also requires 'social advantages' to be provided on a non-discriminatory basis. In *Even*[115] the Court defined social advantages broadly to include all benefits:[116]

which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers *or by virtue of the mere fact of their residence on the national territory* and the extension of which to workers who are nationals of other Member States therefore seems suitable to *facilitate their mobility* within the Community.

The concept of social advantage includes benefits granted as of right[117] or on a discretionary basis[118] and those granted after employment has terminated.[119] It also covers benefits not directly linked to employment, such as language rights,[120] death benefits,[121] and rights to be accompanied by unmarried companions.[122] These benefits do not necessarily 'facilitate mobility', as the *Even* formula requires, but do facilitate the integration of the migrant worker into the host State.[123]

The decision in *Even*, with its reference to 'residence on the national territory', shows that Article 7(2) applies to benefits granted by the host State not just to its workers[124] but also to its residents.[125] This means that both migrant workers *and* their families can enjoy the social advantages offered by the home State.[126] The Court justified this development on the ground that Article 7(2) was essential not only to encourage free movement of workers as well as their families,[127] but also to ensure 'the best possible conditions for the integration of the Community worker's family in the society of the host Member State'.[128] This is now confirmed by Article 24(1) CRD which says that the benefit of the right to equal treatment 'shall be extended to family members who are non-nationals of a Member State and who have the right of residence or permanent residence'.

Christini[129] and *Castelli*[130] show just how wide reaching the principle of equal treatment is in respect of social advantages. In *Christini* the French railways had a scheme which offered a fare reduction for people with large families. Christini, an Italian mother resident in France and the widow of an Italian who had worked in France, was refused the fare reduction on the ground of her nationality, and SNCF justified this on the ground that Article 7(2) applied only to advantages connected with the contract of employment. The Court disagreed, arguing that in view of the equality of treatment Article 7(2) was designed to achieve, the substantive area of application had to be delineated to include all social and tax advantages, regardless of any connection with an employment contract, including fare reductions for large families. It added that Article 7(2) applied to those lawfully entitled to remain in the host State, irrespective of whether the 'trigger' for the rights—the worker—was alive.

The Court adopted a similarly broad approach in *Castelli* concerning an Italian woman who lived in Belgium with her son. She had never worked and was refused a pension on the ground that she was not Belgian and that no reciprocal agreement existed between Belgium and Italy. Nevertheless, the Court

---

115 Case 207/78 Criminal Proceedings against Even [1979] ECR 2019.

116 Para. 22, emphasis added.

117 See, e.g., Case C–111/91 Commission v. Luxembourg [1993] ECR I–817; Case C–85/96 Martínez Sala [1998] ECR I–2691, para. 28.

118 Case 65/81 Reina v. Landeskreditbank Baden-Württemberg [1982] ECR 33, para. 17.

119 See, e.g., Case C–57/96 Meints v. Minister van Landbouw, Natuurbeheer en Visserij [1997] ECR I–6689, para. 36 (payment to agricultural workers whose employment contracts are terminated); Case C–35/97 Commission v. France [1998] ECR I–5325 (supplementary retirement pension points); Case C-258/04 Office national de l'empoli v Ioannidis [2005] ECR I-8275, para. 34.

120 Case 137/84 Criminal proceedings against Mutsch [1985] ECR 2681, para. 18 (criminal proceedings in the defendant's own language).

121 Case C–237/94 O'Flynn v. Adjudication Officer [1996] ECR I–2617 (social security payments to help cover the cost of burying a family member).

122 Case 59/85 Netherlands v. Reed [1986] ECR 1283, para. 28.

123 E. Ellis, 'Social Advantages: A New Lease of Life' (2003) 40 CMLRev. 639, 648.

124 This includes those who are not resident in the territory of the providing State: Case C–57 Meints [1997] ECR I–6689, para. 50; Case C–337/97 Meeusen [1999] ECR I–3289, para. 21.

125 AG Jacobs in Case C–43/99 Leclere and Deaconescu v. Caisse nationale des prestations familiales [2001] ECR I–4265, para. 96; S. Peers, '"Social Advantages" and Discrimination in Employment: Case Law Confirmed and Clarified' (1997) 22 ELRev. 157, 164.

126 Cf. the early decision in Case 76/72 Michel S. v. Fonds national de reclassement social des handicapés [1973] ECR 457, para. 9, where the Court limited social advantages to workers.

127 See, e.g., Case 94/84 ONEM v. Deak [1985] ECR 1873, para. 23.

128 Case C–413/99 Baumbast and R v. Secretary of State for the Home Department [2002] ECR I–7091, para. 50.

129 Case 32/75 *Fiorini (née Christini)* v. *SNCF* [1975] ECR 1085. See also Case C–278/94 *Commission* v. *Belgium* [1996] ECR I–4307 (tideover benefits); Case C–185/96 *Commission* v. *Greece* [1998] ECR I–6601 (attribution of large family status).

130 Case 261/83 *Castelli* v. *ONPTS* [1984] ECR 3199.

found that the concept of social advantage in Article 7(2) should include a pension, reasoning that the principle of equal treatment in Article 7(1) of Regulation 1612/68 was also intended to prevent discrimination against a worker's dependent relatives.[131]

Can work seekers enjoy access to social advantages in the same way as full workers? Early case law suggested not[132] but *Collins*[133] has now changed this position. Collins was an Irish work seeker who came to the UK looking for employment. A week after his arrival in the UK he claimed jobseeker's allowance but was turned down on the grounds that he was not habitually resident in the UK. The Court began by stating that, as a work seeker, the rights he enjoyed under Article 39 and Regulation 1612/68 were limited to equal treatment in respect of access to employment; he did not enjoy equal treatment in respect of social (financial) advantages. However, the Court then said that 'in view of the establishment of citizenship of the Union', it was no longer possible to exclude from the scope of Article 39 benefits of a 'financial nature intended to facilitate access to employment in the labour market of a Member State'. *Collins* therefore sends out a clear message: orthodox tenets of the Court's earlier case law (in particular on workers) must now be read subject to a 'citizenship' interpretation. However, the Court's approach to the *Treaty* provisions in *Collins* sits uncomfortably with Article 24(2) CRD which provides that Member States are not obliged to provide social assistance during the citizen's first three months of residence or longer in the case of work seekers under Article 14(4)(b).

Limits Despite the Court's apparently broad approach to social advantages, it has recognised that there are some limits to the scope of Article 7(2), as the facts of *Even* itself demonstrate.[134] The case concerned Belgian regulations providing that a retirement pension could begin, if requested, up to five years prior to the normal pension age of 65, albeit with a reduction for early payment. This reduction was not made in the case of Belgians who had served in the Allied Forces during World War II and who had received an invalidity pension granted by an Allied country. Mr Even, a French national living in Belgium, received an invalidity pension from the French government, and he wished to receive the full Belgian state pension. The Court said that the relevant Belgian legislation could not be considered a social advantage granted to a national worker because it benefited those who had given wartime service to their own country and 'its essential objective is to give those nationals an advantage by reason of the hardships suffered for that country'.[135] *Even* can perhaps be explained on the basis of the sensitive issues at stake: the Court did not want to face a future claim made by a migrant who was a former soldier but who had not served with the Allied Forces.

In *Leclere*[136] the Court gave a more detailed statement of the limits of Article 7(2). Leclere and his wife were Belgian. He was a frontier worker who lived in Belgium but worked in Luxembourg. When he had an accident in Luxembourg, the Luxembourg authorities paid him an invalidity pension. However, when his wife subsequently had a child he was refused a child birth allowance under Article 7(2) on the ground that he was no longer a worker. The Court upheld this decision. It said that as a former worker Leclere retained his status as worker in respect of the invalidity pension which was linked with his previous employment. He was therefore protected against any discrimination affecting rights acquired during the former employment. On the other hand, since he was not currently engaged in an employment relationship, he could not claim *new* rights which had no links with his former occupation.[137]

Non-discrimination If the benefit does constitute a social advantage, then it must be provided on a non-discriminatory basis. While most of the cases considered so far concern direct discrimination, the Court has also used Article 7(2) to prohibit unjustified indirect discrimination.[138] So, in *O'Flynn*[139] the Court

---

131 Ibid., concerning dependent relatives in the ascending line; in Case 94/84 *Deak* [1985] ECR 1873 the Court extended the benefit to dependent descendants, even though the descendant was a TCN.

132 Case 316/85 *Centre public d'aide sociale de Courcelles (CPAS)* v. *Lebon* [1987] ECR 2811 and Case C–3/90 *Bernini* [1992] ECR I–1071. *Lebon* concerned a French woman living in Belgium with her (French) father who was retired and in receipt of a Belgian pension. As the descendant of a migrant worker she wished to be granted the Belgian minimex. The Court ruled that descendants did not carry on enjoying the right to equal treatment with regard to social benefits once they reached the age of 21 because they were no longer dependant on the worker nor did they have the status of worker.

133 Case C-138/02 *Collins* v. *Secretary of State for Work and Pensions* [2004] ECR I-2703.

134 Case 207/78 [1979] ECR 2019. See also Case C–315/94 *De Vos* [1996] ECR I–1417. Cf. Case 15/69 *Ugliola* [1970] ECR 363.

135 Para. 23. See also Case C-386/02 *Baldinger* v. *Pensionsversicherungsanstalt der Arbeiter* [2004] ECR I-8411, para. 19 where the Court said that an Austrian allowance granted to Austrian prisoners of war was also not a social advantage. It was not granted to national workers because of their status as either workers or residents.

136 Case C–43/99 [2001] ECR I–4265.

137 Para. 59.

138 See, e.g., Case C–299/01 *Commission* v. *Luxembourg* [2002] ECR I–5899. See also Case C–111/91 *Commission* v. *Luxembourg* [1993] ECR I–817.

139 Case C–237/94 [1996] ECR I–2617.

found a British rule making payment to cover funeral costs conditional on the burial taking place in the UK to be indirectly discriminatory and contrary to Article 7(2). However, the Court did say that the UK could limit the allowance to a lump sum or reasonable amount fixed by reference to the normal cost of a burial in the UK. In *Collins*,[140] the work-seeker case, the Court subjected the British 'habitual residence' requirement to a conventional discrimination analysis. It noted that because the rule disadvantaged those who had exercised their rights of free movement it would be lawful only if the UK could justify it based on objective considerations unrelated to nationality and the requirement was proportionate to the aim of the national provisions. The Court accepted that it was legitimate for a national legislature to wish to ensure that there was a 'genuine link'[141] between the person applying for the benefit and the employment market of that state, and that the link could be determined by establishing that the claimant has 'for a reasonable period, in fact genuinely sought work' in the UK.[142] The Court added that while the residence requirement was appropriate to attain the objective it was only proportionate if it rested on clear criteria known in advance, judicial redress was available and the period of residence could not be excessive.[143]

(c) Equal treatment and vocational training

Access to Training

Article 7(3) provides that a worker shall 'have access to training in vocational schools and retraining centres' under the same conditions as national workers. In *Gravier*[144] the Court defined 'vocational training' broadly to include any form of education which prepares an individual for a qualification or which provides the necessary training or skills for a particular profession, trade, or employment. In *Blaizot*[145] the Court confirmed that vocational training could be received at universities, except in the case of courses intended for students 'wishing to improve their general knowledge rather than prepare themselves for a particular occupation'.[146]

Access to training is one thing; payment for that training is another. In *Gravier* the Court said that since access to training was likely to promote free movement of persons by enabling them to obtain a qualification in the Member State where they intended to work,[147] the conditions of access to vocational training fell within the scope of the Treaty. Therefore, if a host State charged a registration fee to migrant students but not to its own students, there was a breach of Article 12 EC.[148]

This line of case law has started to pose significant problems for states, such as the UK and Ireland, which are net recipients of students. In respect of the availability of places, in the UK at least, every incoming migrant EU student will take a place which might have been occupied by a domestic student.[149] Some of the implications of this issue were considered directly by the Court in *Commission* v. *Austria*.[150] Austrian law allowed broad access to higher education for holders of Austrian school leaving certificates but subjected those with comparable certificates from other Member States to more stringent requirements. The principal ground offered by Austria to justify its indirectly discriminatory rules[151] was to preserve the 'homogeneity of the Austrian higher or university education system'. It argued that if it did not impose some limitation, Austria, with its policy of unrestricted access to all levels of education,[152] could expect a large number of students with diplomas awarded in other states (especially Germany), who had failed to be admitted to higher education courses in those states, to try to attend higher education courses in Austria. Such a situation, it argued, would cause 'structural,

---

[140] Case C-138/02 *Collins* v. *Secretary of State for Work and Pensions* [2004] ECR I-2703.

[141] Para. 67. See also Case C-258/04 *Office national de l'empoli v Ioannidis* [2005] ECR I-8275, paras 30-33.

[142] Para. 70.

[143] Para. 72.

144 Case 293/83 *Gravier* v. *Ville de Liège* [1985] ECR 593, para. 30. For background see K. Lenaerts, 'Education in European Community Law after "Maastricht"' (1994) 31 *CMLRev.* 7; J. Shaw, 'From the Margins to the Centre: Education and Training Law and Policy', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, OUP, 1999).

145 Case 24/86 *Blaizot* v. *Université de Liège and Others* [1988] ECR 379.

146 Paras. 19–20.

147 Para. 24.

148 Para. 26.

[149] See the comments of Sir Howard Newby, chief executive of the Higher Education Funding Council for England reported by L.Lightfoot, 'Students face EU fight for Places', Daily Telegraph, 4 March 2004, 1. He said that 'We expect to admit students on their merit. Most universities take the view that they want the most talented students almost irrespective of their origins. If they come from Estonia as opposed to Egham, that is a matter for them'. This problem has been brought into sharp focus by enlargement. A report form the Higher education Policy Institute (http://www.hepi.ac.uk/articles) predicted that 30,000 students will arrive from the accession countries and that this is 'likely to increase competition for places … If the government does not provide the extra places, some of these will be displacing UK students'.

[150] Case C-147/03 [2005] ECR I-000.

[151] Para. 47.

[152] According to the AG's Opinion ,this policy was introduced to improve the percentage of Austrian citizens with a higher education qualification which was one of the lowest in the EU (para. 26).

staffing and financial problems'.[153]

The Court found that there was little evidence that this was in fact a problem[154] and even if it was, the justification based on preserving the homogeneity of the Austrian higher education system was not, in fact, made out by the Austrian government.[155] Even if it was a problem, the Court offered a simple solution: excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade.[156] It also noted that the risks alleged by the Austrian government were not exclusively an Austrian problem 'but have been and are suffered by other Member States'[157] (including Belgium which had introduced similar restrictions which were also found to breach Community law[158]).[159]

Funding

Gravier concerned fees, not grants. Maintenance grants can constitute 'social advantages' within the meaning of Article 7(2).[160] In *Matteucci*[161] an Italian worker working in Belgium applied for a scholarship available on a bilateral (Belgium–Germany) basis to study singing in Berlin. Her application was rejected on the ground that she was not Belgian. The Court said that this was contrary to Article 7(2): a bilateral agreement reserving scholarships for nationals of the two Member States which were the parties to the agreement could not prevent the application of the principle of equality under Community law.

Matteucci's case was a strong one: she had lived and worked in Belgium all her life. But the case law on Article 7(2) is open to exploitation by those who do short-term casual work in another Member State and then claim entitlement to social advantages in the form of a grant for further study in the host State. The Court had to address this problem in two important cases, *Lair*[162] and *Brown*.[163] *Lair* concerned a French woman who had moved to Germany where she worked on a series of part-time contracts. Having decided to study for a languages degree at the University of Hanover she sought a maintenance grant. The Court recognized that people who had previously pursued an effective and genuine activity in the host State could still be considered workers and so could receive a maintenance grant under Article 7(2) but only on condition that there was a link between the previous occupational activity[164] and the studies.[165] However, the Court added that where a migrant worker became involuntarily unemployed no link between the studies and the occupational activity was required before a maintenance grant was awarded.[166]

Brown concerned a student with dual French and British nationality who lived in France for many years before getting a place at Cambridge University to read engineering. He was sponsored by Ferranti and worked for the company in the UK for eight months before starting his course. He then claimed that he was a worker and so was entitled to a grant from the British government under Article 7(2). The Court refused to recognize him as a worker, viewing his work for Ferranti as merely ancillary to his studies.[167] Therefore, he could not receive a maintenance grant under Article 7(2), nor could he

---

153 Para. 50, citing the Court's case law on access to healthcare services (Case C-158/96 Kohll [1998] ECR I-1931, para. 41 and Case C-368/98 Vanbraekel [2001] ECR I-5363 by analogy.

154 Para. 65.

155 Para. 66.

156 Para. 61.

157 Para. 62.

158 Case C-65/03 *Commission* v. *Belgium* [2004] ECR I-000. Nevertheless, in March 2006 the Minister for Higher Education proposed capping the number of foreign students to 30% in areas dominated by foreign students such as veterinary medicine where French students count for 86% of the total students studying in Belgium. The Minister said that the reform could save 15 million euros that could be reinvested in Belgian education: *euobserver.com,* 22.3.06.

159 See Austrian Chancellor Wolfgang Schussel's subsequent criticism of the ECJ for extending its competence into areas where there is 'decidedly no Community law such as 'on access of foreign students to Austrian universities'. He called for the debate on the future of the EU to focus not only on the fate of the Constitution but also on the role of the ECJ: *euobserver.com*, 3 Jan. 2006.

160 Case C–3/90 *Bernini* v. *Minister van Onderwijs en Wetenschappen* [1992] ECR I–1071, para. 23, where the Court ruled that descendants of workers could rely on Art. 7(2) to obtain study finance under the same conditions as children of national workers. This also applies to non-resident children of migrant workers (Case C–337/97 *Meeusen* [1999] ECR I–3289, para. 25) but not to workers who have returned to their States of origin (Case C–33/99 *Fahmi* [2001] ECR I–2415, para. 46).

161 Case 235/87 *Matteucci* v. *Communauté française de Belgique* [1988] ECR 5589.

162 Case 39/86 *Lair* v. *Universität Hannover* [1988] ECR 3161. See also Case C–357/90 *Raulin* [1992] ECR I–1027, para. 21.

163 Case 197/86 *Brown* v. *Secretary of State for Scotland* [1988] ECR 3205.

164 The host State cannot make the right to the same social advantages conditional upon a minimum period of prior occupational activity (Case 39/86 *Lair* [1988] ECR 3161, para. 44). In Case C–413/01 *Ninni-Orasche* [2003] ECR I-13187, para 42, the Court added that the mere fact the individual is employed on a fixed-term contract does not mean that when the contract expires the employee is automatically to be regarded as voluntarily unemployed. See also Art. 7(3)(d) CRD.

165 If no link exists between the study and the previous occupational activities, the person does not retain the status of migrant worker (Case C–357/89 *Raulin* [1992] ECR I–1027).

166 Para. 37.

167 Para. 27.

rely on the general prohibition of discrimination in Article 12 to obtain the grant. The Court said that at that stage of development of Community law the assistance given to students for maintenance and training fell outside the scope of the EC Treaty for the purposes of Article 12.[168] This view was confirmed by Article 3 of the Students' Directive 93/96 which provided that the Directive did not establish any right to payment of maintenance grants by the host State for students who benefit from the right of residence and now Article 24(2) CRD which provides that prior to the acquisition of permanent residence (primarily under Article 16 CRD after five years) the host state is not obliged to grant maintenance aid for studies, including vocational training, consisting in student grants or loans to persons other than workers, the self-employed, persons who retain such status and members of their families.

However, *Brown* and the Directive left open the question whether *only* maintenance grants were excluded from the scope of the EC Treaty or whether *all* assistance given to students (maintenance grants *and* income support, housing benefit, and child support) was excluded. This issue was addressed in *Grzelczyk.*[169] A French national studying in Belgium supported himself financially during the first three years of study, as required by Article 1 of Directive 93/96. He then applied to the Belgian authorities for a minimex (a guarantee of minimum income) to fund his fourth and final year. This was refused on the ground that he was not Belgian. Had he been a worker, such (direct) discrimination in respect of access to a social advantage would have contravened Article 7(2).[170] However, the national court thought that he was not a worker so the Court of Justice considered his position as a citizen (Articles 17 and 18 EC)[171] and as a student under the Students' Directive 93/96. The Court noted that while Article 1 of Directive 93/96 (Article 7(1)(c) CRD) required the student to have sufficient resources to avoid becoming a burden on the social assistance system,[172] there were no provisions in the Directive precluding students from receiving social security benefits.[173] The Court therefore concluded that Article 18 EC on the citizen's right to move and reside freely, read in conjunction with Article 12 EC on non-discrimination, precluded Belgium from requiring migrants to be workers before they could receive the minimex when no such condition applied to nationals.[174]

Grzelczyk therefore suggested that *Brown* continued to be good law in respect of maintenance grants but the principle of equal treatment applies in respect of all other benefits classified as general social assistance which are provided to national students.[175] This understanding was subject to further challenge by *Bidar*.[176] Bidar, a French national, came to the United Kingdom in August 1998 to live with his grandmother. Having attended the local secondary school, he started reading economics at University College London in September 2001. While he received assistance with his tuition *fees* following *Gravier*, his application for financial assistance to cover his *maintenance* costs, in the form of a student loan, was refused on the grounds that he did not satisfy the conditions laid down (ie resident in the UK for three years prior to starting their course plus having 'settled' status in the UK, a status that was, in practice, impossible for students to attain).

While the UK government thought that it was on safe ground denying Bidar a maintenance grant and loan due to Article 3 of Directive 93/96 and *Brown/Lair,* the Court of Justice had other ideas. It noted that Bidar, a citizen of the Union, was lawfully resident in the UK due to Article 18 read in conjunction, not with the Students' Directive 93/96, but the Persons of Independent Means Directive 90/364 (now Article 7(1)(b) CRD), the conditions of which he was deemed to have satisfied. And because he was lawfully resident in the UK, he was entitled to equal treatment under Article 12 EC in respect of social assistance benefits. The Court said that these benefits did now include assistance with maintenance costs whether through subsidised loans or grants. It said that given the changes that had occurred at EU level in respect of education and training since *Lair* and *Brown*, and now confirmed by Article 24 CRD, social assistance for a student 'whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs' fell within the scope of application of the Treaty. Bidar was therefore entitled to have the principle of non-discrimination on the grounds of nationality applied to him. The Court then said that the English rules were indirectly discriminatory: requiring students to be settled in the UK and to satisfy certain residence conditions risked placing nationals of other Member States at a disadvantage since both conditions were likely to be more easily satisfied by UK nationals.

---

168 Para. 18.
169 Case C–184/99 *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I–6193.
170 Case 249/83 *Hoeckx* v. *Openbaar Centrum voor Maatschappelijk Welzijn* [1985] ECR 973, para. 25.
171 These are considered further in Ch. 15.
172 Para. 38.
173 Para. 39.
174 Para. 46.
175 A. Iliopoulou and H. Toner (2002) 39 *CMLRev.* 609, 612.
176 Case C-209/03 *R (on the application of Danny Bidar)* v. *London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.

However, the Court also accepted that while, in the organisation and application of their social assistance schemes Member States had to show a certain degree of financial solidarity with nationals of other Member States, it was legitimate for a Member State to grant assistance only to students who had demonstrated a certain degree of integration into the society of that State. This integration could be shown through a period of residence. The Court suggested that a three year residence requirement was compatible with Community law but that the requirement to be settled was not since it was impossible for a student from another Member State ever to obtain settled status.

This case shows that the limits laid down by Article 3 of the Students' Directive (now Article 24(2) CRD) did not apply to those who are students but come to the host state in a capacity other than that of a student (eg where, as in *Bidar*, they come as a person of independent means). The decision also shows that the spirit of the distinction drawn in *Brown* between fees (where full equal treatment was required from day one) and maintenance (where it was not) is still maintained. Had the Court ruled that maintenance grants were to be provided to all migrant students on day one of their arrival in the host state, this would have had a dramatic effect on the education budgets of host states, particularly states which are net recipients of students. The Court staved off this possibility by allowing host states to impose a proportionate residence requirement on all students prior to entitlement to maintenance grants and loans.

(d) Equal treatment and other benefits

Equality is not confined to tax and social advantages and vocational training. Article 8(1) of Regulation 1612/68 provides that migrant workers must also enjoy equality of treatment with nationals in respect of trade union membership and the exercise of rights related to trade union membership, 'including the right to vote and to be eligible for the administration or management posts of a trade union'.[177] In *ASTI I and ASTI II*[178] the Court ruled that Article 8 applied to the right to vote and to stand in elections held by bodies such as occupational guilds to which workers were required to belong, to which they had to pay contributions and which were responsible for defending and representing their interests. However, Article 8 does provide that workers can be excluded from taking part in the management of bodies governed by public law and from holding office governed by public law.[179] The Austrian government relied on this clause in *Commission* v. *Austria (workers' chambers)*[180] to justify its exclusion of all non-Austrians from standing for election to workers' chambers. Unsurprisingly, the Court said that, as a derogation to a fundamental freedom, the public law exception had to be interpreted narrowly.[181] Since there was little difference between the role of workers' chambers in *Commission* v. *Austria* and the role of the guilds in the *ASTI* cases, the case fell within the scope of Article 8 of Regulation 1612/68 (and Article 39 EC)[182] and there was therefore a breach of the principle of equal treatment.

Finally, Article 9 of Regulation 1612/68 provides that workers must enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership, and the right to put their names on housing lists in the region where they are employed. Therefore in *Commission* v. *Greece*[183] the Court found a rule restricting a foreigner's right to own property in Greece breached the free movement rules, since access to housing and ownership of property was the corollary of free movement.[184]

Conclusions

In the case law on workers it is possible to detect the embryo of what later became EU citizenship. In particular, the Court's decisions on social advantages under Article 7(2) of Regulation 1612/68 went far beyond what is necessary to ensure the mobility of workers. The ever-expanding rights given to the worker's family members in cases such as *Christini* and *Castelli* provided the testing ground for the Court's more ambitious jurisprudence on rights for EU citizens who are not economically active. And now, in cases such as *Collins,* we see how the Court is using its citizenship case law to justify removing limitations on the exercise of Community rights.

---

177 See further A. Evans, 'Development of European Community Law regarding the Trade Union Rights and Related Rights of Migrant Workers' (1979) 28 *ICLQ* 354.

178 Case C–213/90 *Association de Soutien aux Travailleurs Immigrés* v. *Chambre des Employés Privés (ASTI I)* [1991] ECR I–3507 and Case C–118/92 *Commission* v. *Luxembourg (ASTI II)* [1994] ECR I–1891

179 Art. 8.

180 Case C-465/01 [2204] ECR I-8291.

181 Para. 39.

182 The Austrian law had already been condemned in Case C–171/01 *Wählergruppe, 'Gemeinsam Zajedno/Birlikte Alternative und Grüne Gewerkschafter Innen/UG' and others* [2003] ECR I–4301 which concerned Art. 10 of the EEC–Turkey Agreement which is interpreted in the same way as Art. 8 of Reg. 1612/68.

183 Case 305/87 *Commission* v. *Greece* [1989] ECR 1461. See also Case 63/86 *Commission* v. *Italy (social housing)* [1988] ECR 29, considered in Ch. 13.

184 Para. 18.

The human rights orientation which underpins much of the Court's case law on workers is less visible in respect of freedom of establishment. In this area we see a greater preoccupation with ensuring that individuals and, increasingly importantly, companies gain access to the host State's market and do not suffer impediments once on that market. It is to this subject that we now turn.

Extracts from Catherine Barnard- Substance Law of EC
Chapter 15

UNION CITIZENSHIP

INTRODUCTION

So far we have considered the position of those nationals who have exercised their rights of free movement—workers, the self-employed, and the providers and recipients of services. These migrants have been described as market citizens (*homo economicus* or the *bourgeois*) who participate in and benefit from the common market.[185] Yet, they constitute only a small percentage of the EU's working population: approximately 1.5% of EU-25 citizens live and work in a different Member State from their country of origin (less that 3 million people) – a proportion that has hardly changed for the last 30 years.[186] This means that the vast majority of Community nationals who are economically active have never exercised their rights of free movement. At the same time there are many Community nationals who are not economically active and so cannot enjoy the rights of free movement under Articles 39, 43 and 49, although some have been assisted by decisions of the Court (on work-seekers, tourists, students) and by the 1990 Residence Directives.[187]

Yet, Community law continues to affect many aspects of the daily lives of those nationals who do not, or cannot, exercise their rights of free movement. Such individuals often feel at best removed, and at worst alienated, from those taking decisions in their name. This legitimacy gap has presented a major challenge for the EU: what can be done to enable all nationals to identify with, and feel loyalty to, the EU? The concept of 'Citizenship of the Union', introduced at Maastricht, formed a key part of the Community's response, aiming to provide the glue to help bind together nationals of all the Member States. Union citizenship is both a retrospective and prospective concept: retrospective in that it contains a recognition that the EU has its own people; prospective in that it is through citizenship that communities and identities are constituted.[188] However, the concept of Union citizenship is itself subject to an important limitation: it can be enjoyed only by those holding the nationality of one of the Member States. It has therefore not helped the 16 million or so (and rising) third-country nationals (TCNs) who are legally resident in the EU.[189] Many contribute to the economies of the host country and so, indirectly, to the EU, but they are excluded from the rights granted to citizens. This chapter will examine the concept of Union citizenship and the rights EU citizens enjoy; in Chapter 18 the position of TCNs is considered.

CITIZENSHIP OF THE UNION

While a desire to create a 'Europe for Citizens'[190] or a 'People's Europe'[191] dates back to the early

185 M. Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More (eds.), New Legal Dynamics of the European *Union* (Oxford, Clarendon, 1995).

186 http://ec.europa.eu/employment_social/workersmobility_2006/index.cfm?id_page_cat. See also A.Taylor, 'Skilled staff reluctant to move in Europe', *Financial Times*, 11 Dec. 2006. As we have seen, obstacles included differences in tax systems, healthcare, benefits, lack of EU-wide integrated employment legislation, patchy cros—border recognition of professional qualifications, difficulty finding work for spouses and availability of housing and schools.

187 Council Dir. 90/364/EEC ([1990] OJ L180/26) on the rights of residence for persons of sufficient means; Council Dir. 90/365/EEC on the rights of residence for employees and self-employed who have ceased their occupational activity ([1990] OJ L180/28) and Council Dir. 93/96 on the rights of residence for students ([1993] OJ L317/59).

188 See J. Shaw, *Citizenship of the Union: Towards Post-National Membership*, specialized course delivered at the Academy of European Law, Florence, July 1995.

189 Commission, *First Annual Report on Migration and Integration*, COM(2004) 508.

190 See the Tindemans Report on the European Union which contained a ch. entitled 'Towards a Europe for Citizens' (Bull.EC.(8) 1975 II no.12, 1) which was drawn up at the request of the Paris summit in 1974.

191 See the two Adonnino Reports of 1985 to the European Council on a People's Europe: Bull.EC.Suppl. 7/85.

1970s it was not until the Spanish pressed the issue at Maastricht[192] that the idea of Union citizenship took concrete form. A new Part Two, entitled Citizenship of the Union, was added to the Treaty on European Union in 1992. Article 17(1) provides that 'Citizenship of the EU is hereby established'. Articles 17(2)–21 then lists a number of specific rights which citizens can enjoy.

The citizenship provisions of the Treaty started a lengthy and ongoing debate about the nature of EU citizenship, focusing on two interrelated questions. First, what model of citizenship can and should the Community adopt? The copious literature is full of suggestions—market citizenship (focusing on the rights of economic actors), social citizenship (emphasizing the social-welfare elements of citizenship), or republican citizenship (based on active citizen participation). Secondly, given that the EU is a *sui generis*, transnational polity, should EU citizenship aim to replicate citizenship of a nation State (so that European citizenship means citizenship of a European nation State), or should the EU aim to create a new, postnational form of citizenship based on multiple-level associations and identifications at regional, national, and European level. If the latter model, this raises the further question of the extent to which it is legitimate to draw on the literature and ideas relating to the development of citizenship of a nation State in mapping and analysing what is occurring at EU level.

In practice, many writers do take this literature as their starting point since this informs most individuals' understanding of citizenship. This chapter takes one particular strand of the literature, examining whether the term citizenship is or should be based on ideas of inclusion or exclusion.[193] An approach to citizenship based on inclusionary ideologies casts the net of potential beneficiaries widely, including not only nationals (whether economically active or not) but also those TCNs who are lawfully resident. It envisages that these citizens enjoy a broad range of civil, political, economic, and social rights. This version of citizenship is sometimes referred to as 'social citizenship'[194] and has some resonance in the EU as the EU develops, albeit in a piecemeal fashion, a broad range of social policies.[195]

By contrast, the exclusionary approach to citizenship constructs the identity of the citizen through the 'Other': the foreigner TCN who needs to be excluded to make the citizen 'secure'.[196] For a while this model seemed to be in the ascendancy in the EU. At Amsterdam a new objective was introduced into Article 2 TEU of maintaining and developing 'an area of freedom justice and security' in which 'the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. This idea is developed further by Title IV of the EC Treaty. Yet the reality is inevitably more complex than this and, as we shall see in Chapter 18, the need to welcome TCN migrant workers to fill jobs in areas where there are skills gaps and to help address problems created by an ageing population has forced the EU to rethink any exclusionary agenda suggested by Article 2 TEU.

We begin by examining the citizenship offered by the EU to its nationals, taking Held's understanding of citizenship as our starting point:[197]

Citizenship has meant a reciprocity of rights against, and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community.

Held's definition suggests that there are three, interconnected strands to citizenship: rights and duties, membership, and participation. These ideas will form the framework in which we examine EU citizenship.

RIGHTS AND DUTIES

INTRODUCTION TO THE RIGHTS

In his classic work on (British) citizenship,[198] Marshall argued that citizenship involves full membership of the community which has gradually been achieved through the historical development of individual rights, starting with civil rights (basic freedoms from state interference), followed by

192 For a full discussion of the background see S. O'Leary, *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996), ch.1. See also the Spanish memorandum on citizenship, 'The Road to European Citizenship', Co.SN 3940/90, 24 Sept. 1990.

193 See e.g. J. D'Oliveira, 'European Citizenship: Its Meaning, its Potential' in R. Dehousse (ed.), *Europe after Maastricht: An Ever Closer Union*? (Munich, Law Books in Europe, 1994), 141–6; J. Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 *ELRev.* 554.

194 M. Dougan, 'Free Movement: the Workseeker as Citizen' (2001) 4 *CYELS* 93, 103.

195 C. Barnard, 'EC Social Policy' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, OUP, 1999).

196 Shaw, above n. 4, 571. See also G. de Búrca, 'The Quest for Legitimacy in the European Union' (1996) 59 *MLR.* 349, 356–61.

197 D. Held, 'Between State and Civil Society: Citizenship' in G. Andrews (ed.) *Citizenship* (London: Lawrence and Wishart, 1991), 20 cited in Shaw, above n. 4.

198 T.H. Marshall, *Citizenship and Social Class* (Cambridge, CUP, 1950), 28–9.

political rights (such as electoral rights), and most recently social rights (including rights to education, health care, unemployment insurance, and old age pensions—the rudiments of a welfare State). Where does the EU stand against this yardstick? Part Two of the EC Treaty lists the following citizens' rights:[199]

— the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect (Article 18(1));[200]

— the right to vote in local and European elections in the host State (Article 19);

— the right to diplomatic and consular protection from the authorities of any Member State in third countries (Article 20);[201]

— the right to petition the European Parliament and the right to apply to the ombudsman in any one of the official languages of the EU (Article 21).

This rather motley collection of rights falls far short of the full panoply envisaged by Marshall. In part this is due to the Community's lack of competence, particularly in fields connected with the welfare state, and in part to the principle of subsidiarity—can and should the Community be attempting to replicate welfare-state provision which is already extensively and expensively provided for at national level? This demonstrates the problem of using literature written in the context of the nation state as a yardstick by which to assess the EU. For this reason, it might be fairer to say that the rights contained in Part Two supplement and complement rights granted at national level.[202]

It is also a mistake to look at the four substantive rights listed in Part Two in a vacuum. Article 17(2) makes clear that 'Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'. Therefore, migrant citizens can enjoy the right to non-discrimination on the ground of nationality found in Article 12 EC,[203] and all citizens (and not just those who have exercised their rights of free movement) can enjoy the right to equal treatment,[204] originally on the ground of sex, now on other grounds,[205] along with other social, environmental, and consumer rights.[206] This prompted Advocate General La Pergola to describe Part Two of the EC Treaty in *Stöber and Pereira* as progress of 'major significance in the construction of Europe'.[207]

Given that a number of citizens' rights do exist, albeit scattered across primary and secondary sources, the Cologne European Council decided that the fundamental rights should be consolidated into a charter and so become more visible.[208] Eventually the Charter on Fundamental Rights was signed in 2000, bringing together both civil and political rights and economic and social rights in a single text.[209] The Charter, which draws on the European Convention on Human Rights, the Constitutional traditions of the Member States, and general principles of Community law, is grouped around six fundamental values shared by the 'peoples' (not just the citizens) of Europe:[210] dignity (Articles 1 to 5); freedoms (Articles 6 to 19); equality (Articles 20 to 26); solidarity (Articles 27 to 38); citizens' rights (Articles

---

199 The Commission must report every 3 years on the application of these provisions: e.g. the Third Commission Report on citizenship COM(2001)506 final.

200 See also Art. 45(1) of the Charter (Art. II-105(1) of the Constitutional Treaty).

201 See also Art. 46 of the Charter (Art. II-106 of the Constitutional Treaty). The implementation of this provision can be found in Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 Dec. 1995 regarding protection for citizens of the EU by diplomatic and consular representations ([1995] OJ L314/73). See also the Commission's Green Paper, 'Diplomatic and consular protection of Union citizens in third countries' COM(2006) 712.

202 See also Art. 17(1) EC 'Citizenship of the Union shall complement and not replace national citizenship'.

203 Art. I–4(2) of the draft Constitution. See e.g. Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 considered below nn. XX.

204 On the centrality of the principle of equality to the new draft Constitution, see Arts I–44, III–2, III–3.

205 See Art. 13 and the Dirs. adopted under it: Dir. 2000/43 on race ([2000] OJ L180/22) and Dir. 2000/78 ([2000] OJ L303/16) and the discussion in M. Bell and L. Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 *ELRev.* 349.

206 See e.g. N. Reich, 'A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law' (1997) 3 *ELJ* 131, 142–57 and 'Union Citizenship—Metaphor or Source of Rights?' (2001) 7 *ELJ* 4, 7.

207 La Pergola AG in Joined Cases C–4 and 5/95 *Stöber and Pereira* v. *Bundesanstalt für Arbeit* [1997] ECR I–511, para. 50.

208 See the conclusions of the Cologne European Council setting up a Convention to draft a human rights Charter: http://ue.eu.int/newsroom/newmain.asp?lang=1, Annex IV, para.44 and Annex IV. Academics have long called for this: e.g. D. O'Keeffe, 'Union Citizenship' in D. O'Keeffe and P.Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Chichester, Chancery, 1994); K. Lenaerts, 'Fundamental Rights to be included in a Community Catalogue' (1991) 16 *ELRev* 367; P. Alston and J. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' in P. Alston (ed.) *The EU and Human Rights* (Oxford, OUP, 1999) who focus on the institutional dimension of a human rights policy, cf. A. von Bogdandy, 'The European Union as Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *CMLRev*. 1307.

209 See e.g. I. Hare, 'Social Rights as Fundamental Human Rights' in B. Hepple (ed.) *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge, CUP, 2002); J. Kenner, 'Economic and Social Rights in the EU Legal Order—The Mirage of Indivisibility' in J. Kenner and T. Hervey (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart, 2003).

210 First recital.

39 to 46); and justice (Articles 47 to 50).[211] The Charter's significance will be all the greater if (when?) it is incorporated into the Treaty.[212] For the present, the visibility of fundamental human rights will depend much on the work of European Union Fundamental Rights Agency[213] created in January 2007 whose task is essentially research rather than enforcement based. Its objective is to collective objective, reliable and comparative data on the fundamental rights situation in the EU in respect of Community – not Union – law, provide data to EU bodies and the Member States and formulate opinions on what should be changed if asked by the Member States or the Community institutions.

However, the Charter's existence serves to highlight an ongoing tension that pervades the area of law on citizenship. Fundamental rights are seen as universal, capable of being enjoyed by all human beings. By contrast, the majority of the rights in Part Two of the EC Treaty can be enjoyed only by EU citizens who benefit from them by virtue of their nationality. It might also be thought that the rights outlined by Part Two of the Treaty and the Charter are all enforceable vertically against the body bestowing the title 'citizen', i.e. the EU. In fact, most are enforced vertically but against the state - either the citizen's own state (in the case of social, consumer, and environmental rights) or the host state (in respect of the free movement rights). Only a few rights are enforceable vertically against the EU (the right to petition the Parliament and to contact the ombudsman).[214] Therefore, one of the conundrums of EU citizenship is that rights intended to foster a commitment to the Union are actually being exercised against the Member States. The relationship between the Union citizen and the Member States also explains another potential tension. The Community gives rights but—despite the wording of Article 17(2)—demands little by way of duties from its citizens (e.g. to pay taxes, to participate in the defence of the country, to obey the law, to vote, willingness to work).[215] These duties are owed to the Member States and thus it is the Member States which pay—with national taxpayers' money—for the costs of the rights. And because the Member States hold the purse strings, and ultimately the decision making power, they are not prepared to relinquish their sovereignty fully. Therefore, while, under international law, citizens of a state cannot be deported, no matter how mad, bad or impecunious they might be, migrant EU citizens can still be deported from the host state.[216] In this respect EU citizenship is more partial than would first appear.

Of the rights laid down in Articles 17–22 EC, Article 18(1) is considered the 'primary'[217] right. It gives citizens the right to move *and* reside freely within the territory of the Member States,[218] subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect.[219] The initial question facing the Court was whether Article 18(1) merely codified the existing case law, in which case it was largely unremarkable,[220] or whether it went beyond the existing case law and created a free-standing right to movement for *all* Union citizens, irrespective of their economic or financial standing. If so, then Article 18 was of considerable importance. After a certain amount of prevarication when the Court made passing reference to the citizenship provisions, but only to reinforce its interpretation of Article 39, 43, or 49,[221] the Court declared in *Grzelczyk*[222] that:

---

211 For criticism see J. H. H.Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *ELJ* 95.

212 See Part II of the Constitutional Treaty. At present the Charter is not legally binding, described instead as a 'Solemn Proclamation', although a number of AGs have referred to it in their Opinions (see e.g. AG Jacobs' Opinion in Case C–50/00 *Unión de Pequeños Agricultores* v. *Council of the European Union* [2002] ECR I–6677; AG Geelhoed's Opinion in Case C–224/98 *D'Hoop* v. *Office National d'Emploi* [2002] ECR I–6191), as has the CFI (Case T–177/01 *Jégo Quéré et Cie SA* v. *European Commission* [2002] ECR II–2365, Case T–54/99 *Max Mobil Telekommunikation Service GmbH* v. *European Commission* [2002] ECR II–313) and, most recently, the ECJ: Case C-540/03 *EP v Council (family reunification Directive)* [2006] ECR I-000, paras. 38 and 58

213 Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights COM(2005)280.

214 See S. O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CMLRev.* 519, 424ff.

215 See, e.g., C. Closa, 'Citizenship of the Union and Nationality of the Member States' (1995) 29 *CMLRev.* 487, 509.

216 This issue is considered in more detail in Ch. 16. Note, in the same spirit, that Member States can still retain certain senior jobs in the public service to nationals only (Art. 39(4) EC and Arts.45 and 55 EC).

217 La Pergola AG in Case C–85/96 *Martínez Sala* v. *Freistaat Bayern* [1998] ECR I–2691, para. 18.

218 As La Pergola AG said in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18 in emphasizing the right to move *and* the right to reside, Art. 18(1) extracted the kernel from the other freedoms of movement.

219 The Council may, however 'adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1' (Art.18(2)) in accordance with the Art. 251 procedure, where the Treaty has not provided the necessary powers. Originally Art.18(2) provided that the Council should act unanimously throughout the procedure. At Nice this sentence was repealed and a new Art. 18(3) included which provides that Art. 18(2) shall not apply to provisions on passports, identity cards, residence permits, or any such document or to provisions on social security or social protection.

220 Even prior to Maastricht there were a number of decisions which can be seen with the benefit of hindsight to have a citizenship component: Case 186/87 *Cowan* [1989] ECR 195; Case 293/83 *Gravier* v. *City of Liège* [1985] ECR 593.

221 See e.g., Case C–193/94 *Skanavi* [1996] ECR I–929. the Court was asked to consider Article 18(1) in the context of Article 43. It applied its case law on Article 12 EC to Article 18(1). The Court said that since Article 12, which contains the general prohibition on discrimination on the ground of nationality, applied independently only to situations where there was no specific prohibition on discrimination, the same would apply to Article 18. Therefore, because Article 43 applied on the facts there was no need to consider Article 18(1). Cf Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 where the Court sent out a more

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[223]
This paved the way for the Court in *Baumbast*[224] to sever the link between migration and being economically active:
the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union.
This resulted in the finding in *Chen*[225] that a baby, born to Chinese parents in Northern Ireland, which gave the baby Irish nationality, enjoyed the rights of Union citizenship. She therefore enjoyed the right to reside in the UK under Article 18(1), subject to the limitations and conditions laid down by the Person of Independent Means Directive 90/364 (now Article 7(1)(b) of the CRD 2004/38). The Court has also used citizenship – a provision laying down a fundamental principle which has to be 'interpreted broadly'[226] - read in conjunction with the proportionality principle, to justify imposing limitations on the limits laid down by the Directive.

From the case law it is now possible to say that, subject to the limitations and conditions laid down in the Treaty and the secondary legislation, all EU citizens enjoy under Article 18(1) EC: [227]
The initial right of entry into another state;[228]
A free standing and directly effective right of residence;[229]
The right to enjoy social advantages on equal terms with nationals[230] for those lawfully resident;[231]

These rights must now be viewed in the context of the Citizens' Rights Directive (CRD) 2004/38. which repeals and replaces the Directives facilitating the migration of the economically active: Directive 68/360[232] on the rights of entry and residence, Regulation 1251/70[233] on the right to remain, the two Community directives on establishment and services,[234] and the three 1990 Residence Directives, together with the provisions on family rights laid down in Articles 10 and 11 of Regulation 1612/68. The CRD applies to all citizens who migrate to another Member State whether they are economically active or not. At the heart of the Directive lies the basic idea that the rights enjoyed by the migrant citizen and their family members increase the longer a person is resident.

THE CITIZENS' RIGHTS DIRECTIVE 2004/38

The Personal Scope of the Citizens' Rights Directive 2004/38

(a) The Rules

The Directive applies to Union citizens, defined, as with Article 17(1) EC, as 'any person having the nationality of a Member State'[235] *who moves to or resides in a Member State other than that of which he or she is a national.*[236] *In fact, as we shall see, for the first five years, it really applies only to those*

---

definite signal that citizenship was a separate ground of claim (para. 15). See H. Toner, 'Judicial Interpretation of European Union Citizenship—Transformation or Consolidation' (2000) 7 *MJ* 158.
222 Case C–184/99 [2001] ECR I–6193, para. 31, echoing La Pergola AG in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 18.
[223] See also La Pergola AG emphasized in Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 20.,[223] the introduction of Union citizenship creates a new status for the individual, 'a new individual legal standing in addition to that already provided for', and Article 18 attaches to that new status the right to move and reside freely.
224 Case C–413/99 [2002] ECR I–7091, para.83. See also AG Jacobs' views in Case C–148/02 *Garcia Avello* [2003], para. 61 and AG Cosmas' even grander claims in Case C–378/97 *Wijsenbeek* [1999] ECR I–6207, para. 85: 'Article [18] does not simply enshrine in constitutional terms the acquis communautaire as it existed when it was inserted into the Treaty and complement it by broadening the category of persons entitled to freedom of movement to include other classes of person not pursuing economic activities. Article [18] also enshrines a right of a different kind, a true right of movement, stemming from the status as a citizen of the Union, which is not subsidiary in relation to European unification, whether economic or not.'
[225] Case C-200/02 *Chen* v. *Secretary of State for the Home Department* [2004] ECR I-9925.
[226] Case C-408/03 *Commission* v. *Belgium (Portuguese migrants)* [2006] ECR I-000, para. 40.
[227] A full discussion of the development of this case law can be found in Ch. 15 of the first edition of this book.
228 Ibid, para. 33.
229 Case C–413/99 *Baumbast and R.* v. *Secretary of State for the Home Department* [2002] ECR I–7091, para. 84.
[230] Case C–274/96 *Bickel and Franz* [1998] ECR I–7637 (translation facilities); Case C–85/96 *Martínez Sala* [1998] ECR I–2691 (child allowance); Case C–184/99 *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I–6193 (minimex).
[231] Case C–85/96 *Martínez Sala* [1998] ECR I–2691; Case C-456/02 *Trojani v. CPAS* [2004] ECR I-000.
[232] [1968] OJ SE (II) L257/13/485.
[233] This was repealed by Commission Reg. 635/2006 (OJ [2006] L112/9).
[234] Dir. 73/148 OJ [1973] L172/14 and Dir. 75/34 (OJ [1975] L14/10).
[235] Art. 2(1).
[236] Art. 3(1).

Union citizens who have sufficient resources, either through employment or independently, who will not become an unreasonable burden on the host state.

The Directive also applies to family members who 'accompany or join them'.[237] *As with the original Article 10 of Regulation 1612/68, the family members, fall into two groups: (1) those who must be admitted*[238] *and (2) those whose entry and residence the host state must facilitate*[239] *(see fig. 15.1). In respect of the first group, the definition of family members is drafted more broadly than in the original Regulation 1612/68. According to Article 2(2) family member means:*[240]

(a) spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in (b).

According to Article 3(2), two groups of family members fall in the second group:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;[241]

(b) the partner with whom the Union citizen has a durable relationship, duly attested.[242]

While Article 3(2) requires the host State merely to 'facilitate entry and residence' of this second group, the burden of proof appears to rest with the Member State to justify refusing entry: Article 3(1) provides: 'The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.' This suggests that the normal rule will be permit entry.

We shall now consider the meaning of the various descriptions of family members, particularly in the light of the Court's case law under Article 10 of Regulation 1612/68.

…….

(a) The Right to Depart the Home State

Provisions which preclude or deter nationals of a Member State from leaving their state of origin interfere with freedom of movement, even if they apply to all migrants.[243] Directive 2004/38 reinforces the Treaty right to depart from a Member State—not necessarily the state of origin—where Union citizens and their families currently live.[244] According to the Directive, Union citizens and their family members may leave the Member State by producing a valid identity card or passport (passport only for TCN family members) which the Member State is obliged to issue or renew.[245] The passport[246] must be valid for all Member States and for any states through which the holder must pass when travelling between Member States.[247] Expiry of the identity card or passport on the basis of which the person entered the host state and was issued with a registration certificate of card (see below) is not to constitute a ground for expulsion from the host state.[248]

---

[237] Ibid.
[238] Art. 3(1).
[239] Art. 3(2).
[240] Art. 2.
[241] The fact that these conditions are satisfied must be proved by a document issued by the relevant authority in the country of origin or country form which they are arriving in the case of those seeking residence under Art. 7: Art. 8(5)(e).
[242] By contrast, the fact that a 'durable relationship, duly attested' exists is satisfied merely by 'proof' for those seeking residence under Art. 7: Art. 8(5)(f).
[243] See. eg the workers' cases: Case C-10/90 *Masgio* v. *Bundesknappschaft* [1991] ECR I-1119, paras. 18–19; Case C-415/93 *Bosman* [1995] ECR I-4921, para. 104; Case C-18/95 *Terhoeve* [1999] ECR I-345, paras. 37–8; Case C-190/98 *Graf* v. *Filzmoser Maschinenbau GmbH* [2000] ECR I-493, para. 22; Case C-232/01 *Hans van Lent* [2003] ECR I-11525, para. 21.
[244] Art. 4(1).
[245] Art. 4(3). No exit visa or equivalent formality may be imposed.
[246] If the passport is the only document with which the person may lawfully leave the country, it must be valid for at least five years: Art. 4(4).
[247] Art. 4(4). Having produced a passport or identity card, the Member State may not demand from the worker an exit visa or similar document (Art. 4(2)).
[248] Art. 15(2).

(b) The Right to Enter the Host State

Host states must allow workers and their families to enter their territory but, in order to find out who is on their territory,[249] host states can ask the migrant to produce an identity card or passport (passport only for TCN family members).[250] No visa or other entry formality can be demanded from Union citizens[251] but they can be demanded from a member of the worker's family who is not an EC national.[252] This is the one of many examples of the way in which the CRD distinguishes between the treatment of EU and non-EU national family members. However, in *MRAX*[253] the Court said that a refusal to allow entry due to the non-production of valid passports/identity cards, and where necessary a visa, would be disproportionate if TCN spouses were able to prove their identity and marital ties and there was no evidence that they represented a risk to public policy, security or health and this is now confirmed in Article 5(4)

Although Member States are entitled to check passports/identity cards (and visas where necessary) at the frontier, the compatibility of such border formalities with the notion of a 'Europe without internal frontiers' laid down in Article 14 EC has been questioned in two cases brought by the Commission. In the first, *Commission* v. *Belgium*,[254] non-Belgian EC nationals residing in Belgium were required to produce their residence or establishment permits in addition to their passports or identity cards. The Court said that such controls could constitute a barrier to free movement if carried out in a systematic, arbitrary, or unnecessarily restrictive manner.[255] In the second case, *Commission* v. *Netherlands*,[256] the Court ruled that national legislation requiring citizens to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal was incompatible with Directive 68/360. In these two cases the Court has curtailed the level of checks that can occur at an internal frontier. Nevertheless, it said in *Wijsenbeek*[257] that, despite Article 14 EC (on the Single Market) and Article 18 EC (on the free movement of citizens), Member States could still require individuals, whether or not EU citizens, to establish their nationality on entering a Member State at an internal frontier of the EU.[258] Therefore, a Dutch MEP was required to hand over his passport to immigration control when he arrived in the Netherlands on a flight from Strasbourg. Further, Member States may impose penalties for breach of the requirement to present an identity card or passport, provided that the penalties are comparable to those which apply to similar national infringements and are proportionate.[259]

Finally, Article 5(5) CRD permits the host Member State to require the migrant to report his/her presence within a reasonable and non-discriminatory period of time. Failure to comply may make the migrant 'liable to proportionate and non-discriminatory sanctions'. In this regard the Directive confirms the Court's case law. For example, in *Watson and Belmann*[260] the Court found that an Italian law providing for migrants to be deported if they failed to register with the Italian authorities within three days of entering Italy was unlawful.[261] This approach was confirmed in the context of a case

---

[249] Case C-265/88 *Messner* [1989] ECR 4209.

[250] Art. 5(1). Art. 5(4) provides that where an EU citizen or a TCN family member does not have the necessary travel documents (or visas), the Member State must: give them every reasonable opportunity to obtain the documents; have the documents brought to them within a reasonable period of time; or to corroborate or prove by other means that they are covered by the right to freedom of movement and residence. This confirms the Court's case law: Case C-459/99 *MRAX* [2002] ECR I-6591.

[251] Art. 5(1), second para.

[252] Art. 3(2). Case 157/79 *R* v. *Pieck* [1980] ECR 2171, para. 10. The list of third countries whose nationals need visas when crossing the external border of the Member States is determined by Council Reg. 539/2001 ([2001] OJ L81/1). Member States must grant TCN family members 'every facility' to obtain the necessary visas which must be issued free of charge and on the basis of n accelerated procedure. Possession of a valid residence card issued under Art. 10 CRD exempts family members from the visa requirement.

[253] Case C-459/99 *Mouvement contre le racisme l'antisémeitisme et la xénophobie ASBL (MRAX)* v. *Belgium* [2002] ECR I-6591, para. 61.

254 Case 321/87 *Commission* v. *Belgium* [1989] ECR 997.

255 Para. 15.

256 Case C–68/89 *Commission* v. *Netherlands* [1991] ECR I–2637.

257 Case C–378/97 *Criminal Proceedings against Florus Ariël Wijsenbeek* [1999] ECR I–6207. The facts of *Wijsenbeek* occurred in Dec. 1993 before the provisions of Title IV of the Treaty of Amsterdam came into force. However, the Schengen provisions were operative at that time and these allowed for the crossing of internal borders without checks. Yet, because this freedom is subject to derogations on the grounds of public policy and national security, the Court said that until common rules were adopted checks could be made (para. 43): C. Jacqueson, 'Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship' (2002) 27 *ELRev.* 260, 264.

258 Para. 45.

[259] Case C-215/03 *Oulane*v. *Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-000, para. 38 CHECK.

[260] Case 118/75 *Watson and Belmann* [1976] ECR 1185.

[261] See also Case C-265/88 *Messner* [1989] ECR 4209. In respect of a TCN spouse of a migrant worker, see Case C-459/99 *MRAX* [2002] ECR I-6591, para. 78.

decided under Article 18(1) EC, *Yiadom.*[262] The Court said that the UK could refuse to allow a suspected Dutch people smuggler leave to enter the UK on the ground of public policy under Article 18(1) EC[263] provided that the UK applied the provisions of Directive 64/221 on derogations (now found in the CRD).[264] The Court then reiterated the general principle that derogations had to be interpreted strictly[265] before concluding that provisions protecting Community nationals who exercise the fundamental freedom of movement under Article 18(1) had to be interpreted in their favour.[266]
Fig 15.2 Residence and Equality under Directive 2004/38

The Right of Residence in the Host State

(a) Right of Residence for up to Three Months

The Directive envisages three tiers of residence (see fig. 15.2). The first tier applies to those resident for up to three months. According to Article 6, if Union citizens (whether economically active or not)[267] can produce a valid identity card or passport, and they wish to stay for up to three months only, Member States must grant them the right of residence.[268] The same applies to TCN family members, including third country nationals, accompanying or joining the Union citizen, on production of a valid passport.[269] However, this right of residence is not unlimited: it is subject to the condition that they do not become 'an unreasonable burden on the social assistance system of the host state'.[270]

(b) Right of Residence for more than Three Months and Up to Five Years Citizens' and Family Members' Rights

The second 'tier' of residence rights is the right of residence beyond three months but for less than five years. According to Article 7(1), all Union citizens have the right of residence on the territory of another Member State for more than three months if they are a worker, a self-employed person,[271] a person with sufficient resources and medical insurance and students, also with sufficient resources and medical insurance.[272] The same right so applies to family members accompanying or joining the Union citizen,[273] whether they are nationals of a Member State or not.[274] Only where the host state has a reasonable doubt as to whether a Union citizen or his/her family members satisfies these conditions can the Member States verify whether the conditions are fulfilled. This verification cannot be carried out systematically.[275]

The host state can require Union citizens to register with the relevant authorities.[276] The deadline for registration may not be less than three months from the date of arrival.[277] A 'registration *certificate*' must then be issued[278] on production of a valid identity card or passport,[279] a confirmation of engagement from the employer or certificate of employment or proof that they are self-employed, or proof that they satisfy the conditions of being of independent means or a student.[280] Failure to comply with the registration requirement may render the person concerned liable to 'proportionate and non-discriminatory sanctions'. The issuing of a registration certificate or equivalent (see below) gives the host state the opportunity to check not only whether the migrant satisfies the conditions laid down in the CRD but also whether that the migrant is a 'desirable' person. This is confirmed by Article 27(3) which provides that the host state may request the Member State of origin and, if necessary, other Member States to provide information concerning any previous police record the migrant may have.

---

262 Ibid, para. 33.
263 Para. 23.
264 See further Ch.16.
265 Para. 24.
266 Para. 25.
267 In this respect the Dir. does not depart so much from the position under the case law when, following Case 186/87 *Cowan* [1989] ECR 195, all tourists were recipients of services.
268 Art. 6(1).
269 Art. 6(2).
270 Art. 14(1).
271 Union citizens retain the right of residence so long as they remain workers/self-employed person: see Art. 7(3) considered further in Ch. 12.
272 The conditions as to sufficient resources and medical insurance are considered in more detail in Ch. 16.
273 A more limited range of family members can enjoy the Article 7 rights where the Union citizen is a student: Art. 7(4).
274 Art. 7(1)(d) and Art. 7(2).
275 Art. 14(2).
276 Art. 8(1).
277 Art. 8(2).
278 Ibid. The issuing of these certificates or equivalent documents must be free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents: Art. 25(2).
279 The expiry of the identity card/passport which was the basis for entering the host state and the issuing of a registration certificate or registration card (see below) cannot constitute a ground for expulsion: Art. 15(2).
280 Art. 8(3).

However, this is the exception not the rule: the Article makes clear that the host ate may request this information only if they consider it 'essential' and '[s]uch enquiries shall not be made as a matter of routine.'

……..

A migrant worker can start working before completing the formalities to obtain a residence permit[281] because the right of residence is a fundamental right derived from the Treaty and is not dependent upon the possession of a residence permit;[282] residence permits have only probative value,[283] as *Martínez Sala*[284] shows. A Spanish national living in Germany since 1956 held various residence permits which had expired and a series of documents saying that she had applied for an extension of her permit. She then had a baby and applied for a child allowance but her application was rejected on the grounds that she did not have German nationality, a residence entitlement or a residence permit. The Court said that it was discriminatory to require a national of another Member State to produce a document to obtain the benefit (the residence permit) when its own nationals were not required to do the same.[285] In *Oulane* the Court said that since the right of residence is derived directly from the Treaty, it was not legitimate for the host state to require the EU migrant to produce a passport to when he could prove his identity by other means.[286] Further, it said that detention and deportation based solely on the failure of the person to comply with legal formalities concerning the monitoring of aliens 'impair the very substance of the right' and are 'manifestly disproportionate to the seriousness of the infringement.[287]

……..

(c) Right of Permanent Residence

The third 'tier' of residence rights is the right to permanent residence. There are two ways of acquiring permanent residence: (1) through five years continuous legal residence; or (2) through a shorter period for those who were economically active either as a worker (under what was Regulation 1251/70 on the right of workers to remain in the territory of the host state after having been employed there[288]) or as a self-employed person (under what was Directive 75/34 on the right of the self-employed to remain[289]). In both situations the Directive considers the migrant to be so assimilated into the host state that they are regarded and treated as nationals in all but name. This is a remarkable development. We shall examine the two situations in turn.

Article 16: Five Years' Residence

Union citizens and their family members, including third country nationals,[290] who have resided *legally* for a continuous period of five years in the host state have the right of permanent residence there.[291] This right is not dependent on the Union citizen being a worker/self employed person or having sufficient resources/medical insurance,[292] albeit that in most cases[293] the migrant will have been a worker/self employed/student/person of independent means/family member under Article 7 during the previous five years in order to accrue the five year period of residence. The family members of a Union citizen to whom Article 12(2) (death/departure of the Union citizen) or Article 13(2)) (divorce or equivalent), who satisfy the conditions laid down in those Articles (eg the family members are workers/self-employed etc) will also acquire the right of permanent residence after residing legally for a period of five consecutive years in the host state.[294]

Continuity of residence is not affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious

---

[281] Art. 5.
[282] Case 118/75 *Watson and Belmann* [1976] ECR 1185, paras. 15–16. This is now confirmed in Art. 25(1) CRD.
[283] To this effect, see Case 48/75 *Royer* [1976] ECR 497, para. 50. The same rule also applies to a TCN spouse of a migrant worker: Case C-459/99 *MRAX* [2002] ECR I-6591, para. 74.
[284] Case C-85/96 [1998] ECR I-2691.
[285] For an extension of this principle to the member of a Turkish worker's family legally residing in a Member State, see Case C-262/96 *Sürül* v. *Bundesanstalt für Arbeit* [1999] ECR I-2685.
[286] Para. 25.
[287] Para. 40.
[288] [1970] OJ L142/24.
[289] [1975] OJ L14/10.
[290] Art. 16(2).
[291] Art. 16(1).
[292] Ibid, second sentence
[293] Cf *Trojani* cf Art. 12(1) para. 2 which expressly requires EU national family members to be economically active/student/have sufficient resources before they acquire the right of permanent residence.
[294] Art. 18.

illness, study or vocational training, or a posting in another Member State or a third country.[295] On the other hand, continuity of residence is broken by any expulsion decision duly enforced against the person concerned.[296] Once acquired, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.[297]

Article 17: Other Ways of Acquiring Permanent Residence

While five years' residence is the usual way for acquiring a right to permanent residence, it is also possible for a migrant or their family member to acquire a right to permanent residence before they have completed a continuous period of five years residence in the situations which were originally laid down in Regulation 1251/70.[298] This made provision for workers and their family members to remain in a Member State after having been employed there. This Regulation has now been repealed[299] and replaced by Article 17 of Directive 2004/38 which maintains the existing acquis but changes the language from the 'right to remain' to the 'right of permanent residence'. Article 17(1) provides that workers and the self-employed have the right to permanent residence in three situations:

(a) retirement at the pension age[300] or through early retirement, provided they have been employed in the host state for the preceding 12 months[301] and resided in the host state continuously for more than three years;

(b) incapacity, provided they have resided for more than two years in the host state[302] and have ceased to work due to some permanent incapacity; or

(c) frontier workers, provided after three years of continuous employment and residence in the host State A, they work in an employed or self-employed capacity in State B, while retaining their residence in State A to which they return each day or at least once a week.

The conditions as to length of residence and employment in parts (a) and (b) do not apply if the worker/self-employed person's spouse or partner[303] is a national of the host state or has lost the nationality of the host state through marriage to the worker/self-employed person.[304]

The worker/self-employed person's family members residing with him in the host state are also entitled to benefit from the reduced period of residence. According to Article 17(4), they too can enjoy permanent residence in the host state where (1) the worker/self-employed person is entitled to permanent residence under Article 17(1);[305] and (2) the worker/self-employed person dies during his working life but before having acquired the right to permanent residence under 17(1) and:

(a) the worker/self-employed person had resided continuously in the host state for two years at the time of death, or

(b) the death resulted from an accident at work or occupational disease, or

(c) the surviving spouse lost the nationality of the host state through marriage to the worker/self-employed person.

In *Givane*[306] the Court showed that it will interpret these requirements strictly. Givane, a Portuguese national, worked in the UK as a chef for three years before going to India for 10 months. He then returned to the UK with his Indian wife and three children but died less than two years later. The Court upheld the British authorities' decision refusing Givane's family indefinite leave to remain on the grounds that Givane had not satisfied the requirements of what is now Article 17(4) of Regulation 1251/70 which required him to have resided in the UK for the two years immediately preceding his death.[307] Such a literal reading of the requirement stands in stark contrast to the generous approach to the interpretation of Regulation 1612/68 based on the right to family life in cases such as *Baumbast*.[308] More striking still is the fact that the Court uses the integration argument to justify *excluding* Givane's family from the UK. It said that the two-year requirement was intended to establish a significant

---

[295] Art. 16(3).
[296] Art. 21.
[297] Art. 16(4).
[298] [1970] OJ SE L142/24, 402.
[299] Commission Reg. 635/2006 (OJ [2006] L112/9). Xxx 75/34
[300] If the law of the host state does not grant the right to an old age pension to certain categories of self-employed persons, the age condition is deemed to have been met once the person has reached the age of 60.
[301] Periods of involuntary unemployment duly recorded by the relevant employment office, periods not worked for reasons not of the person's own making and absences from work or cessation of work due to illness or accident are to be regarded as periods of employment: Art. 17(1), para. 3.
[302] If the incapacity is due to an occupational accident or disease entitling the worker to a pension for which an institution of the state is entirely or partially responsible, then no condition to length of residence is imposed.
[303] Partner as defined in Art. 2(2)(b) CRD.
[304] Art. 2(2).
[305] Art. 17(3).
[306] Case C-257/00 *Givane and others* v. *Secretary of State for the Home Department* [2003] ECR I-345.
[307] Para. 46.
[308] See also Case C-60/00 *Mary Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I-6279, para. 38; Case C-459/99 *MRAX* [2002] ECR I-6591, paras. 53–61.

connection between the Member State and the worker and his family and 'to ensure a certain level of their integration in the society of that state'.[309]

In the case of those family members faced with the death or departure of the Union citizen in circumstances not covered by Article 17, and in the case of those family members faced with divorce or equivalent, they can acquire permanent residence only if they meet the requirements laid down in Article 7(1) (ie they must be workers/self employed/persons of independent means/student[310]/family member[311]) and have resided legally for a period of five consecutive years in the territory of the host state.[312]

Administrative Formalities

Proof of permanent residence is given by the Member State issuing, as soon as possible, a 'document certifying permanent residence', having verified the Union citizen's duration of residence.[313] Article 21 provides that continuity of residence is attested by any means of proof in use in the host Member State. In respect of the family members who are not nationals of a Member State, the host state must issue a permanent residence card, renewable automatically every ten years,[314] within six months of the submission of the application.[315] Interruption in residence not exceeding two consecutive years will not affect the validity of the permanent residence card.

The Right to Equal Treatment

(a) Introduction

The cornerstone of the CRD is Article 24(1) laying down a general right of equal treatment 'within the scope of the Treaty' for all Union citizens residing on the basis of the Directive in the territory of the host state. The Article continues that the benefit of this right is to be extended to family members who are not nationals of a Member State but who have the right of residence or permanent residence. However, Article 24(1) expressly makes the principle of equal treatment '[s]ubject to such specific provisions as are expressly provided for in the Treaty and secondary law'. Therefore, it is possible to derogate from the principle of equal treatment on the grounds, *inter alia* of public policy, public security, public health and employment in the public service as well as the in respect of the conditions as to sufficient resources and medical insurance found in the original 1990 Residence Directives, now replicated in the CRD (see chapter 16).

As we saw in the Workers' Reguation 1612/68, the principle of equal treatment will apply in respect of both initial access to a job as well as the exercise of that position. It will also apply in respect of access to social advantages. However, here Article 24(2) contains an important limitation (see fig 15.2). In respect of *social assistance*, the host state is not obliged to confer entitlement to it during the first three months of residence or, in the case of a work seeker, the period during which Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.[316] Therefore, students and persons of independent means can call on social assistance only after the first three months of residence. If they do have recourse to social assistance, 'An expulsion measure shall not be the automatic consequence' of their calling on the social assistance system of the host state.[317] By contrast, an expulsion measure may in no case be adopted against Union citizens or their family members if the Union citizens are workers/self-employed/work seekers with a genuine chance of being engaged.[318] In respect of *maintenance aid* for studies, including vocational training, the host state is not obliged to give grants or student loans to Union citizens or their family members until they have acquired permanent residence.

(b) The Non-discrimination Model

Direct and discrimination

---

[309] Para. 46.

[310] This does not apply to TCN family members: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[311] With the added condition in the case of TCN family members that they are members of the family already constituted in the host Member States, of a person satisfying those requirements: Art. 12(2), para. 2 concerning death or departure; Art. 13(2), para. 2 concerning divorce or equivalent.

[312] Art. 18 referring to Art. 12(2) concerning death or departure; Art. 13(2) concerning divorce or equivalent.

[313] Art. 19.

[314] Details of the re-application process are found in Art. 20(2).

[315] Art. 20(1).

[316] Art. 14(4)(b).

[317] Art. 14(3). If they are expelled, the procedural protection provided in Arts. 30 (notification) and 31 (judicial/administrative redress) apply to any such decision: Art. 15(1).

[318] Art. 14(4).

What is meant by the principle of equal treatment? As yet, there is no case law under the CRD, although there are many decisions under Regulation 1612/68 which were discussed in chapter 12. There are, however, a number of cases decided under Article 18(1) in respect of social advantages for citizens lawfully resident[319] in the host state and it is these cases that we shall consider in determing the meaning of equal treatment. The first case is *Martínez Sala*.[320] She was a Spanish national who had been living in Germany since 1968 when she was 12. She had various jobs and various residence permits in that time. When she gave birth in 1993 she did not have a residence permit but she did have a certificate saying that an extension of the permit had been applied for. The German authorities refused to give her a child-raising allowance on the ground that she neither was a German national nor had a residence permit. If she had been a worker she would have been entitled to the benefit as a social advantage under Article 7(2) of Regulation 1612/68. Given her background, it was unlikely that she was a worker (or an employed person within the meaning of Regulation 1408/71).[321] The Court therefore considered her situation under the citizenship provisions.

It said that, as a national of a Member State lawfully residing in the territory of another Member State,[322] Martínez Sala came within the personal scope of the citizenship provisions.[323] She therefore enjoyed the rights laid down by Article 17(2) which included the right not to suffer discrimination on grounds of nationality under Article 12 in respect of all situations falling within the material scope of the Treaty.[324] This included the situation where a Member State delayed or refused to grant a benefit provided to all persons lawfully resident in the territory of that State on the ground that the claimant did not have a document (a residence permit) which nationals were not obliged to have.[325] On this basis the Court concluded that Martínez Sala was suffering from direct discrimination on the ground of nationality contrary to Article 12[326] and, since it was direct discrimination, it could not be objectively justified (see fig. 15.3).[327]

The Court fudged the issue of what was meant by 'all situations' falling within the material scope of Community law.[328] It seems that the Court thought that because the child-raising allowance constituted a social advantage within the meaning of Article 7(2) of Regulation 1612/68[329] it fell within the material scope of Community law, even though the judgment was premised on the fact that Martínez Sala was not a worker. The Court also did not make clear on what basis Martínez Sala was lawfully resident in Germany. Although the Court of Justice left it to the national court to decide whether Martínez Sala was a worker or an employed person, she did not appear to be economically active, nor did she seem to fulfil the conditions of Directive 90/364 on persons of independent means. As a result, she did not appear to be lawfully resident under Community law. Her residence may have derived from national law, and specifically from the fact that the German authorities had not requested her to leave.[330] This view is supported by *Trojani.*[331]

Trojani was a French national who had been living in a Salvation Army hostel in Belgium where, in return for board and lodging and some pocket money, he did various jobs for about 30 hours a week. He was denied the minimex on the grounds that he was neither Belgian, nor a worker under Regulation 1612/68. In respect of his rights as a citizen, the Court said that while Trojani did not derive from Article 18 the right to reside in Belgium due to his lack of resources,[332] since he was lawfully resident in Belgium, as was shown by the residence permit which the Belgian authorities had issued to him, he could benefit from the fundamental principle of equal treatment laid down in Article 12.[333] This is the significant feature of *Trojani*:[334] As the Court pointed out in paragraph 43 of *Trojani*,[335] and subsequently confirmed in *Bidar*,[336] 'a citizen of the Union who is not economically active may rely on

---

319 See generally, A.P. van der Mei, *Free Movement of Persons within the European Community: Cross-border Access to Public Benefits* (Oxford, Hart, 2003).
320 Case C–85/96 [1998] ECR I–2691.
321 It was for the national court to make the final decision.
322 This was merely probative and not constitutive of the right to residence: see further Ch. 11.
323 Para. 61.
324 Para. 62.
325 Ibid.
326 Para. 64.
327 Ibid.
328 Para. 63.
329 See further Ch. 12.
330 See also Art. 6(a) of the Council of Europe Convention on Social and Medical Assistance 1953 which provides that the Contracting Parties shall abstain from expelling an alien lawfully resident 'on the sole ground that he is in need of assistance'.
331 Case C-456/02 *Trojani v. CPAS* [2004] ECR I-000.
332 Para. 36.
333 Paras. 37 and 40.
334 Para. 43.
335 Para. 37.
336 Case C-209/03 *R (on the application of Danny Bidar)* v. *London Borough of Ealing, Secretary of State for Education and*

Article 12 EC where he has been lawfully resident in the host state for a certain period of time *or* possesses a residence permit'.[337] Thus, legal residence can come about in one of two ways: by having a residence permit or actual presence in the host state for a certain period of time. *Trojani* itself concerned a residence permit; the subsequent case of *Bidar* concerned lawful residence from actual presence.[338]

Grzelczyk[339] also concerned direct discrimination. Grzelczyk, a French national studying at a Belgian university, supported himself financially for the first three years of his studies but then applied for the minimex (the Belgium minimum income guarantee) at the start of his fourth and final year. While Belgian students could receive the benefit, migrant students could not,[340] and so Grzelczyk suffered (direct) discrimination contrary to Article 12.[341] The question was whether Article 12 applied to his case. Referring to *Martínez Sala*, the Court said that because Grzelczyk, a citizen of the Union, was lawfully resident in Belgium he could rely on Article 12 in respect of those situations which fell within the material scope of the Treaty,[342] which included those situations involving 'the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article [18(1)] of the Treaty'.[343] Therefore, in *Grzelczyk* the Court defined the material scope of Community law, not by reference to the fact that the benefit fell within the scope of Regulation 1612/68 as it had suggested in *Martínez Sala*,[344] but by reference to the fact that Grzelczyk had actually moved.[345]

A question was raised whether the fact that he had applied for the minimex meant that he no longer satisfied the requirements in the Students' Directive 93/96 of having sufficient resources.[346] The Court said that the Belgian authorities had to provide some temporary support to the migrant citizen, as they would to nationals, given that there exists 'a certain degree of financial solidarity' between nationals of a host Member State and nationals of other Member States,[347] but only for so long as they do not become an unreasonable burden on public finances. As Dougan and Spaventa point out, the *Grzelczyk* reasoning presents migrants with a dilemma: lawful residency entitles the migrant to equal treatment within the host State; but exercise of that right to equal treatment might enable the host State to consider that the claimant has become an unreasonable financial burden.[348]

Student finance was also at issue in *Bidar,*[349] this time in a case concerning indirect discrimination. It will be recalled from chapter 12 that Bidar, a French national, had lived in the UK with his grandmother after his mother's death. He subsequently went to university but was turned down for financial assistance to cover his *maintenance* costs, in the form of a student loan, was refused on the grounds that he did not satisfy the criteria of being settled in the UK or the residence requirements. The Court found these conditions to be indirectly discriminatory since they risked placing nationals of other Member States at a disadvantage. However, the Court also accepted that while, in the organisation and application of their social assistance schemes Member States had to show a certain degree of financial solidarity with nationals of other Member States, it was legitimate for a Member State to grant assistance only to students who had demonstrated a certain degree of integration into the society of that State. This integration could be shown through a period of residence. The Court suggested that a three year residence requirement was compatible with Community law but that the requirement to be settled was not since it was impossible for a student from another Member State ever to obtain settled status.[350]

In reaching this conclusion, the Court relied on *D'Hoop*[351] which concerned a Belgian national who

---

Skills [2005] ECR I-2119.

[337] Para. 43. Emphasis added.

[338] As did Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

339 Case C–184/99 [2001] ECR I–6193. See further Ch. 14.

340 Para. 29.

341 Para. 30.

342 Para. 32.

343 Para. 33, citing Case C–274/96 *Bickel and Franz* [1998] ECR I–7637.

344 Although it had already established that the minimex was a social advantage (paras. 27–29): Case 249/83 *Hoeckx* [1985] ECR 973.

345 There must be actual—as opposed to hypothetical—movement: Case C–299/95 *Kremzow* v. *Republik Österreich* [1997] ECR I–2629. See also Joined Cases C–64/96 and C–65/96 *Uecker and Jacquet* [1997] ECR I–3171, para. 23 considered further in Ch. 11.

[346] This question is considered further in Ch. 16.

347 Ibid.

348 M. Dougan and E. Spaventa, 'Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC' (2003) 28 *ELRev*. 697.

[349] Case C-209/03 *R (on the application of Danny Bidar)* v. *London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.

[350] See generally K.Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *CMLRev*. 1245.

351 C–224/98 *D'Hoop* v. *Office national de l'emploi* [2002] ECR I–6191.

completed her secondary education in France where she obtained the *baccalauréat* in 1991.[352] She then returned to Belgium for her university education. At the end of her university studies she applied to the Belgian authorities for a tideover allowance—a type of unemployment benefit granted to young people who have just completed their studies and are seeking their first job. Her application was rejected on the ground that she had not received her secondary education in Belgium.

The Court said that, as a Belgian national, she fell within the personal scope of the citizenship provisions,[353] and that as a free mover she fell within the material scope of the Treaty provisions. The Court said that she could rely on the principle of equal treatment even against her own State after having studied abroad.[354]

So D'Hoop could rely on the principle of non-discrimination against her own State, Belgium. But what discrimination had she suffered?[355] It could be argued that the national rule was indirectly discriminatory: in order to obtain a tideover allowance individuals had to receive their secondary education in Belgium. This had a disparate impact on non-nationals (as well as some nationals like D'Hoop) and so breached Article 18 unless objectively justified.[356] Alternatively, the Belgian rule could be seen as discriminatory, not on the ground of nationality but on the ground of D'Hoop having exercised her rights of free movement. Both the Advocate General and the Court seemed to support this interpretation. Advocate General Geelhoed said that Ms D'Hoop had been 'placed at a disadvantage by discriminatory provisions of the Member States of which they are nationals, which penalise them retrospectively for a period of residence in another Member State'.[357] The Court agreed:[358]

By linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus *places at a disadvantage certain of its nationals simply because they have exercised their freedom to move* in order to pursue education in another Member State.

The Court continued that '[s]uch inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move'.[359] The national rule therefore breached Article 18(1) unless it could be objectively justified.

The Court examined the question of justification in *D'Hoop* even though no evidence had been submitted to it on this point. The Court itself suggested various justifications for the national rule and then considered the question of proportionality. It said that since the tideover allowance aimed at facilitating the transition from education to the employment market it was legitimate for the national legislature to ensure that a 'real link' existed between the applicant for that allowance and the geographic employment market concerned.[360] However, the Court found that the condition concerning the place of secondary education was 'too general and exclusive in nature' and that it unduly favoured an element which was not necessarily representative of a real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements. It therefore went beyond what was necessary to attain the objective pursued.[361]

While the Court rejected the proportionality of the measures in *D'Hoop* the Court upheld the proportionality of the measures in *De Cuyper*[362] and in so doing protected the integrity of the complex Social Security Regulation 1408/71 from challenge.[363] The case concerned the compatibility with Articles 17 and 18 EC of a Dutch requirement that entitlement to unemployment allowance was conditional on residing in the territory of the Netherlands, a requirement permitted by Regulation

---

352 The Court said that the provisions on citizenship of the Union were applicable as soon as they entered into force and so they applied to the present discriminatory effects of situations arising prior to the citizenship provisions coming into force (citing Case C–195/98 *Österreichischer Gewerkschaftsbund* v. *Republik Österreich* [2000] ECR I–10497, paras. 54 and 55, and Case C–290/00 *Duchon* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–3567, paras. 43–44).

353 Para. 27.

354 Para. 31.

355 See also A. Iliopoulou and H. Toner, 'A New Approach to Discrimination Against Free Movers' (2003) 28 *ELRev.* 389.

356 Para. 36.

357 Para. 53.

358 Para. 34, emphasis added.

359 Para. 35. Case C–135/99 *Ursula Elsen* v. *Bundesversicherungsanstalt für Angestellte* [2000] ECR I–10409. See also Case C–28/00 *Kauer* v. *Pensionsversicherungsanstalt der Angestellten* [2002] ECR I–1343, para. 44; Case C–302/98 *Sehrer* v. *Bundesknappschaft* [2000] ECR I–4585, para. 32.

360 M. Dougan and E. Spaventa, ('Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC' (2003) 28 *ELRev.* 697) suggest that the requirement of a 'real link' is inspired by the same spirit as the requirement in *Grzelczyk* of an 'unreasonable financial burden', recognizing that there are limits to solidarity which Community law can superimpose on national welfare States. This requirement may be generously construed in favour of the Member State.

361 Para. 39. See also Case C-258/04 *Office national de l'empoli v Ioannidis* [2005] ECR I-8275, paras 30-33.

362 Case C-406/04 *De Cuyper* v. *Office national de l'emploi* [2006] ECR I-000.

363 As AG Geelhoed noted in para. 116. Although cf Joined Cases C-502/01 and C-31/02 *Gaumain-Cerri* v. *Kaufmännische Krankenkasse-Pflegekasse* [2004] ECR I-6483, para. 36.

1408/71. While recognising that the rule, like the one in *D'Hoop*, constituted a restriction on the freedom conferred by Article 18,[364] the Court said it could be justified by the need to monitor the employment and family situation of the unemployed[365] and that no less restrictive monitoring measures existed to achieve the objective of allowing inspectors to check whether the situation of, for example, a person who has declared that they are living alone and unemployed has undergone changes which might have an effect on the benefit granted.[366]

De Cuyper is one of a number of more recent cases where the Court has not upheld claims based on citizenship. The tax cases *Lindfors*[367] and *Schempp*[368] provide other examples. In these cases the Court made clear that mere difference between the tax regime of one Member States and another was not sufficient to trigger Article 18; the migrant citizen had to show that they had suffered disadvantage in comparison with nationals. *Schempp* also emphasised that, in the case of non-discrimination, the claimant and the comparator had to be similarly situated which was not the case in *Schempp.* The Court ruled that the situation of Mr Schempp, a German national, who made maintenance payments to his former spouse now resident in Austria which were not tax deductable, was not comparable with the situation of a German national who made equivalent payments to a former spouse resident in Germany which were tax deductible. There was therefore no breach of the principle of non-discrimination.

Most non-discrimination cases concern different treatment of similarly situated groups. *Garcia Avello*[369] concerns the opposite: the discrimination arises from the fact that differently situated groups are being treated similarly. Carlos Garcia Avello, a Spanish national, married Isabelle Weber, a Belgian national, and they lived together in Belgium. They had two children, dual nationals, who were given their father's surname (Garcia Avello). He then applied to the Belgian authorities to have the children's surnames changed to Garcia Weber, reflecting the Spanish pattern for surnames which comprise the first element of the father's surname (Garcia) followed by the mother's maiden name (Weber). While Belgian law did permit a change of surname when serious grounds were given, the Belgian authorities did not apply this exception to Garcia Avello because usually 'children bear their father's surname'.

The Court confirmed that the citizenship provisions applied to this case. It noted that since Mr Garcia Avello's children held the nationality of two Member States they enjoyed the status of citizen of the Union.[370] This meant that they enjoyed equal treatment with nationals of the host State in respect of situations falling within the material scope of the Treaty, in particular those involving the freedom to move and reside in the territory of the Member States.[371] Therefore the children could not suffer discrimination on the grounds of nationality in respect of their surname. Because the Garcia Avello children, holding both Spanish and Belgian nationality, were in a different situation from Belgian nationals holding just one (Belgian) nationality,[372] they had a 'right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds'.[373] Since the Court rejected the justifications put forward by the Belgian government (the immutability of surnames as a founding principle of the social order and integration of nationals from other Member States) the Court concluded that Articles 12 EC and 17 EC precluded the Belgian authorities from refusing a name change to the Garcia Avello children.[374]

Assessment

The Article 18(1) cases considered so far might suggest that migrant citizens who are not economically active now have the right to claim all benefits available in the host State on the same terms as nationals, unless the benefits are expressly excluded by Community law or there are objectively justified reasons why not. If this analysis is correct, then the creation of citizenship of the Union leads to what Iliopoulou and Toner describe as the 'perfect assimilation' approach, where the treatment of Community migrants is placed on a completely equal footing with that of nationals of the host Member State unless Community law specifically provides otherwise.[375] This is what Advocate General Léger had in mind in *Boukhalfa*[376] where he said:

---

364 Para. 39.
365 Para. 41.
366 Paras. 43-44.
367 Case C-365/02 *Lindfors* [2004] ECR I-7183, para. 34.
368 Case C-403/33 *Schempp* v. *Finanzamt München* [2005] ECR I-6421, para. 45.
369 Case C–148/02 *Carlos Garcia Avello* v. *Etat Belge* [2003] ECR I-11613. In Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561 the ECJ was going to have to consider similar issues but the Court declared the reference inadmissible.
370 Para. 21.
371 Para. 24.
372 Paras. 34 and 37.
373 Para. 34.
374 Para. 44.
375 A. Iliopoulou and H. Toner (2002) 39 *CMLRev.* 609, 616.
376 Case C–214/94 *Ingrid Boukhalfa* v. *Bundesrepublik Deutschland* [1996] ECR I–2253, para. 63 and S. Friess and J. Shaw,

If all the conclusions inherent in that concept [Union citizenship] are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State.

But, when looked at carefully, the cases do not support the full assimilationist approach and actually suggest an incremental approach to residence and equality—the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals.

But on what basis are non-economically active migrants entitled to (financially expensive) maintenance in principle on equal terms with nationals? Unlike migrant workers, it cannot be argued that they have contributed to the economy of the host state[377] through taxation.[378] Instead, the answer appears to lie in the degree to which the migrant is integrated into the community of the host state combined with a notion of social solidarity between members of that community.[379] At national level welfare states are legitimised at least in part by a diffuse sense of solidarity: national taxpayers pay their taxes to help look after their fellow citizens in need. This sense of solidarity is founded on some sense of shared interests which in turn is based on a shared nationality[380] and/or a shared sense of identity. Thus *national* citizenship leads to the evolution of a sense of *national* solidarity. The striking feature of both *Grzelczyk* and *Bidar* is that the Court has taken the concept of *European Union* citizenship, the 'fundamental status of nationals of the Member States',[381] to justify the creation of a sense of *transnational* solidarity between (taxpaying) nationals of a host Member State and (impoverished migrant) nationals of other Member States, with the result that the migrant needs to be treated in the same way as nationals.

However, the reference in *Grzelczyk* and *Bidar* to merely 'a *certain degree* of financial solidarity'[382] indicates that the notion of solidarity is limited. *Grzelczyk* suggests that the limits to the solidarity - and thus the equality - principle are related to the degree to which the migrant is integrated into the society of the host state. *Bidar* makes this point expressly. Having referred in paragraph 56 to the need for Member States to show 'a certain degree of financial solidarity with nationals of other Member States' in the organisation and application of their social assistance systems, the Court continued that 'In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.' [383] And length of residence is a key indicator of integration: '… the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host state for a certain length of time'. [384]

Thus, the Court seems to be adopting a 'quantitative' approach to equality:[385] the longer migrants reside in the Member State, the more integrated they are in that state and the greater the number of benefits they receive on equal terms with nationals.[386] So, the cases appear to span a spectrum: at one end is *Martínez Sala*, a long-term resident (she had lived in Germany for 25 years and had had two

---

'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *EPL* 533.

[377] Although the Court's case law on the definition workers, to include migrants who received only limited wages and work a small number of hours (eg Case 139/85 *Kempf* [1986] ECR 1741 and Case C-357/89 *Raulin* [1992] ECR I-1027), rather undermines the substance of this rationale.

[378] For a criticism of such arguments see Geelhoed AG's Opinion in *Bidar* at para. 65.

[379] In his opinion in Case C- 70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl* v. *Regione Lombardia* [1997] ECR I-3395, para. 29 Fennelly AG defined solidarity as the 'inherently uncommercial act of involuntary subsidization of one social group by another'. The meaning of solidarity in the EU context is considered further in C.Barnard, 'Solidarity as a Tool of New Governance' in De Burca and Scott (eds), *New Governance and Constitutionalism in Europe and the US* (Oxford, Hart, 2006).

[380] See D.Miller. 'In Defence of Nationality' in D.Miller, *Citizenship and National Identity* (Cambridge, Polity Press), 2000, cited in N.Barber, 'Citizenship, nationalism and the European Union' (2002) 27 *ELRev*. 241, 250 who notes that it is an observable fact that nationality is the principle source of solidarity.

[381] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paras. 30 and 31; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paras. 22 and 23 and Case C-209/03 *Bidar* [2005] ECR I-2119, para. 31.

[382] Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 44; *Bidar*, para. 56 (emphasis added). Case C-413/99 *Baumbast* [2002] ECR I-7091, a case decided under Directive 90/364, can also be explained in terms of solidarity, as Advocate General Geelhoed noted in Bidar, para. 31: 'The notion of 'unreasonable burden' is apparently flexible and, according to the Court, implies that Directive 93/96 accepts a degree of financial solidarity between the Member States in assisting each other's nationals residing lawfully in their territory. As the same principle is at the basis of the conditions imposed by Directive 90/354, there is no reason to presume that this same financial solidarity does not apply in that context too.'

[383] Para. 57.

[384] Para. 59. See also Geelhoed AG's remarks in Case C-413/01 *Ninni-Orasche* v. *Bundesminister für Wissenschaft* [2003] ECR I-13187, paras. 90-91. For an emphasis on the contextual approach which takes account of length of residence and degree of integration, see Ruiz-Jarabo Colomer AG's opinion, in Case C-138/02 *Collins* v. *Secretary of State for Work and Pensions* [2003] ECR I-2703, paras. 65-67.

[385] This is sometimes referred to as the 'affiliation model': see Golynker, above n. X, 118-119.

[386] AG Kokott, 'EU citizenship – citoyens sans frontiers, *Durham European Law Institute European Law Lecture* 2005, 13.

children there), fully integrated into the host state. She enjoyed full equal treatment (the payment of the child benefit on exactly the same terms as nationals). Having spent most of her life in Germany, she benefited from the principle of solidarity, possibly even national solidarity, and thus enjoyed full equal treatment on the same terms as nationals.

At the other end of the spectrum are those migrant citizens who have just arrived in the host state. While Article 18(1) gives them the right to move and reside freely in the host state,[387] they are not entitled to equal treatment in respect of social welfare benefits (eg the minimex) because they are not yet integrated into the host state's community and thus no solidarity exists (of either the national or transnational variety), although they might receive some social advantages on a non-discriminatory basis. [388] This reasoning underpinned Advocate General Ruiz-Jarabo Colomer's Opinion in *Collins*.[389] Collins, who was Irish, arrived in the United Kingdom and promptly applied for Job-seeker's Allowance which was refused on the grounds that he was not habitually resident in the UK. The Advocate General distinguished *Collins* from *Grzelczyk*.[390] He noted that the 'broad statement' in *Grzelczyk*, that those migrants who were legally resident were entitled to a non-contributory social security benefit, did 'not mean that, from then on, any Community nationals could settle in Belgium and, without further ado, obtain the benefit'.[391] He concluded that Community law did not require the benefit to be provided to a citizen of the Union who entered the territory of a Member State with the purpose of seeking employment while lacking any connection with the state or link with the domestic employment market.[392]

In the middle of this spectrum lies Grzelczyk who was only partially integrated into the society of the host state and so enjoyed only limited equal treatment (he received the minimex on the same terms as nationals but only until he became an unreasonable burden on public funds when his right of residence could be terminated).[393] *Bidar* probably falls somewhere between *Martínez Sala* and *Grzelczyk* on the spectrum. Although, like Grzelczyk, Bidar had been resident in the UK for three years, as a proportion of Bidar's life, that three years was substantial.[394] Furthermore, even though the Court did not expressly refer to this, his integration was qualitative as well as quantitative: his surviving family lived in the UK, he had attended a British school and he was about to go to a British university. His life was in the UK, just as Martinez Sala's was in Germany. When viewed in this light, the decision in *Bidar* that he should enjoy access to maintenance grants and loans on the same terms as nationals seems fair and right.

The 'quantitative' approach to equality is reflected in the Citizens' Rights Directive 2004/38 which, as we have seen, envisages three groups of migrants (fig. 15.2). The first group are those wishing to enter the host state for up to three months.[395] They enjoy a general right to equal treatment[396] but not in respect of social assistance.[397] The second group - those residing in the host state for more than three months but less than five years - enjoys not only the general right to equal treatment but also equal treatment in respect of social assistance.[398] However, Member States are not obliged to provide them with maintenance grants unless they are economically active or assimilated thereto.[399] The third group - those legally residing in the host state for a continuous period of more than five years - enjoy the right to equal treatment[400] but, in addition, Article 24(2) provides that they can enjoy student maintenance in the form of grants or loans.

The qualitative approach to integration can also be found in the Directive, albeit not in the context of establishing rights to equal treatment in respect of length of residence. Article 28 provides that before taking an expulsion decision on grounds of public policy or public security, the host State must take account of considerations such as 'how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host

---

[387] See also Geelhoed AG Case C-413/01 *Ninni-Orasche* v. *Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.
[388] Eg Case C-274/96 *Bickel and Franz* [1998] ECR I-7637 translation services for a court hearing.
[389] Case C-138/02 *Collins* [2003] ECR I-2703, especially para. 69.
[390] Para.66.
[391] Para. 67.
[392] Para.76.
[393] See also Case C-413/99 *Baumbast and R* [2002] ECR I-7091.
[394] Para. 62.
[395] Art. 6.
[396] Art. 24(1).
[397] Art. 24(2).
[398] Art. 24(1).
[399] Art. 24(2). The Dir. draws no distinction between those coming to the host state Qua student and those not coming in this capacity.
[400] Art. 24(1).

Member State and the extent of his/her links with the country of origin'.[401]

(c) Beyond Non-discrimination

So far we have concentrated on the non-discrimination model. However, in *Pusa*[402] Advocate General Jacobs shifted more decisively away from the discrimination model, arguing that 'discrimination on grounds of nationality, whether direct or indirect, is not necessary in order for Article 18 to apply'.[403] He noted that although freedom of movement was originally guaranteed by a prohibition of discrimination on grounds of nationality, 'there has been a progressive extension of that freedom in the Court's case-law so that non-discriminatory restrictions are also precluded'.[404] He noted that the wording of Article 18 was not limited to a prohibition of discrimination,[405] concluding that:[406]

subject to the limits set out in Article 18 itself, no unjustified burden may be imposed on any citizen of the European Union seeking to exercise the right to freedom of movement or residence. Provided that such a burden can be shown, it is immaterial whether the burden affects nationals of other Member States more significantly than those of the State imposing it.[407]

Following the lead of its Advocate General, the Court in *Pusa*[408] moved towards the restrictions/obstacle approach to Article 18. At paragraph 19 the Court said:

Those opportunities [of freedom of movement] could not be fully effective if a national of a Member State could be deterred from availing himself of them by *obstacles* raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them.

Yet, at paragraph 20 it appeared to revert to the non-discrimination model:

National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to *inequality of treatment*, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move.

However, *Tas-Hagen*[409] confirmed the restriction based approach when the Court replaced the reference to inequality in paragraph 20 with creates a 'restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union'[410] (see fig 15.3). The rule therefore breaches Article 18 unless it can be justified and the steps taken are proportionate. Given the subject matter – citizenship – the language of restrictions sits more comfortably in this area than the language of market access which is more prevalent in the commercial domain such as goods and services.

Fig 15.3 The Restrictions based Approach

Pusa concerned a Finnish pensioner living in Spain who owed money in Finland and an attachment order was made against his pension for the purpose of recovering a debt. Had he resided in Finland, the income tax he owed would have been deducted first in order to calculate what was left of his monthly pension to which an attachment order could have been made. However, since he resided in Spain, no such deduction was made. The Court ruled that the difference in treatment unjustifiably resulted in Mr Pusa being 'placed at a disadvantage by virtue of exercising his right to move and reside freely'[411] contrary to Article 18(1) EC. Similarly, *Tas Hagen* concerned a Dutch law that made payment of a benefit to civilian war victims conditional on the fact that the applicants were resident in the Netherlands at the time that they made their application. This law, said the Court, was liable to dissuade Dutch nationals such as Mrs Tas-Hagen from exercising her freedom to move and reside outside the Netherlands.[412] The Court recognised that the Dutch law could be justified on the grounds of solidarity with the population of the Netherlands both before, and after, the war but thought the requirement of residence to be disproportionate. While acknowledging that, in respect of benefits not

---

401 See also Joined Cases C-482/01 and C-493/01 Orfanopoulos v. Land Baden-Württemberg [2004] ECR I-000, para. 99 'To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.'

402 Case C–224/02 *Heikki Antero Pusa* v. *Osuuspankkien Keskinäinen Vakuutusyhtiö*, [2004] ECR I-5763..

403 Para. 18.

404 Para. 20.

405 Ibid.

406 Para. 22.

407 See also Jacobs AG's views in Case C-96/04 *Niebüll* [2006] ECR I-3561, para. 54: 'While the practical difficulties which he is likely to encounter may not stem from discrimination on the grounds of nationality, they constitute a clear obstacle to his right as a citizen to move and reside freely'.

408 Case C-224/02 *Pusa* [2004] ECR I-5763, emphasis added.

409 Case C-192/05 *Tas-Hagen* v. *Raadskamer WUBO van de Pensioen- en Uitkeringsrad* [2006] ECR I-000, paras. 30-31.

410 See also Case C-345/05 *Commission v. Portugal (transfer of property)* [2006] ECR I-000, para. 24.

411 Para. 31.

412 Para. 32.

covered by Community law, Member States enjoyed a wide margin of appreciation in deciding what criteria are to be used in assessing connection to society,[413] a residence criterion was not a satisfactory indicator of the degree of connection of civilian war victims to the Netherlands when it was liable to lead to different results for individuals resident abroad whose integration into Dutch society was in all respect comparable.[414] Similarly, in *Turpeinen*[415] the Court found that a Finnish law on income tax which disadvantaged retired people living in another Member State when compared to those (similarly situated) pensioners who continued to live in Finland breached Article 18(1) and could not, on the facts, be justified.

……..

The Relationship between the CRD and the Treaty

It is clear that Directive 2004/38 lays down some significant rights for migrants and their families. However, the relationship between the CRD, the relevant Treaty provisions and the case law is by no means clear, especially in the field of services. Of course, any interpretation of the Treaty – the principal source of rights - will prevail over the Directive but, as we saw in chapter 14, in the field of healthcare services the Court may try to steer its interpretation of the Treaty so as to bring it in line with the requirements of the Directive in any cases where there is an apparent divergence between the Treaty and the secondary legislation. Alternatively, the Court might say, as it has on several occasions in respect of, for example Regulation 1612/68 on workers,[416] that the Directive merely makes explicit the principles formulated by the Treaty. In principle, both the Treaty and the secondary law should be considered, as fig 15.4 demonstrates.

Fig 15.4 Summary of the Sources of Legal Rights for Individuals who Move to another Member State

Figure 15.4 shows how the various Treaty provisions and the Directive might interact:

If a worker's case is at issue, Article 39 is the relevant Treaty provision, supplemented by Regulation 1612/68 and, to a certain extent, the CRD.

If an establishment case is at issue, Article 43 is the relevant Treaty provision, supplemented by the CRD.

If a services case is at issue, Article 49 is the relevant Treaty provision. The CRD has no direct relevance in the field of services. However, for service providers/recipients migrating to another Member State for less than 3 months, their position is indistinguishable from any other migrant citizen who can rely on Article 6 CRD.[417]

If the migrant is a person of independent means or a student then they will enjoy rights under Article 18(1) EC and Artice 7 CRD provided that they satisfy the conditions laid down.

A non-economically active migrant continues to be in the most precarious position. For the first three months of their stay they will enjoy the rights laid down by Article 6 CRD, albeit with limits on the rights to equality that they will enjoy (see fig. 15.3). Over and above three months, but less than five years they will be dependent on any rights given by Article 18(1) EC.

This analysis suggests that the CRD fills in some of the interstices between the Treaty provisions but its coverage is far from complete. For this reason, litigants will inevitably invoke Article 18(1) in the hope that it may offer greater protection than the Directive. As we have already seen, the Court has in the past been prepared to make creative use of the concept of Union citizenship to ensure that it is 'not merely a hollow or symbolic concept.[418] In particular, it has used the advent of Union citizenship to require a rethink of the orthodox case law on the *Community* provisions on free movement of persons[419] as well to strike down national rules which distinguish between nationals and migrants[420]

---

[413] Para. 36.

[414] Para. 38.

[415] Case C-520/04 *Turpeinen* [2006] ECR I-000.

[416] See, e.g., Case C-278/03 *Commission* v. *Italy* [2005] ECR I-3747, para. 15; Case C-465/01 *Commission* v. *Austria* [2001] ECR I-8291, para. 25.

[417] This is the view the Court appears to take in Case C-215/03 *Oulane*v. *Mininster voor Vreemdelingenzaken en Integratie* [2005] ECR I-000, paras. 19-20.

[418] Per Advocate General Geelhoed in *Bidar*, para. 28.

[419] Case C-138/02 *Collins* [2003] ECR I-000, para. 63the Court said that, as a work seeker, the rights Collins enjoyed under Article 39 and Regulation 1612/68 were limited to equal treatment in respect of access to employment; he did not enjoy equal treatment in respect of social (financial) advantages. However, the Court then said that 'in view of the establishment of citizenship of the Union', it was no longer possible to exclude from the scope of Article 39 benefits of a 'financial nature intended to facilitate access to employment in the labour market of a Member State'. Therefore, while the orthodox case law would deny Collins even the chance of claiming a benefit, the orthodox case law, as interpreted through the lens of citizenship would not. O. Golynker, 'Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity' (2005) 30 *ELRev*. 111, 115 '*Collins* proved that the Court of Justice is determined to ensure that Art. 17 is destined to be a genuine constitutional tool of interpretation of all Community provisions concerning the right to free movement of persons and residence'.

[420] Case C-456/02 *Trojani* v. *CPAS* [2004] ECR I-000.

and nationals who have migrated and those who have not.[421] It has also used citizenship to justify limiting the limits to the Residence Directives by applying the principle of proportionality in a rigorous fashion.[422]

That said, if experience todate is anything to go by, the Court will decide cases, as far as possible, on the basis of Articles 39, 43, and 49;[423] only where this proves impossible will it resort to Articles 17 and 18 (eg *Martínez Sala*, *Grzelczyk*, *Baumbast* and, more recently, *Turpeinen*).[424] Yet even where the case is decided on the basis of Articles 39, 43, and 49 the Court may take into account citizenship-type principles. For example, its decision in *Carpenter*[425] (concerning the position of the Filipino wife of a British service provider), handed down shortly before *Baumbast*, and *Akrich*[426] (concerning the British woman married to the Moroccan illegal immigrant) can probably best be seen as citizenship cases, with their strong overlay of human rights protection.

……..

PARTICIPATION

An important way of fostering a sense of belonging comes through participation in the life of the community. This is the third strand in Held's matrix of citizenship. In the Greek city state (polis) all citizens (for which read free men with property) actively participated in the legislative process. This is the fullest, richest, and most active kind of citizenship, underpinned by ideas of equality (at least among those allowed to participate). Viewed in this light, citizenship is a status, different from nationality, which requires active involvement by the citizen in shaping the polity. In the modern state the concept of democracy has evolved from participative democracy in the republican style (with all men participating) to representative democracy (where the people elect their representatives). Now the only active participation expected of citizens is to vote and possibly to stand as a candidate in elections.

……

CONCLUSION

As Preuß put it, Union citizenship began as a terminological pooling of the few rights which the individual enjoyed in other Member States. It neither generated an inner bond between the Community and the individual nor did it presuppose such an inner connection as a precondition for acquiring it.[427] The recent developments, both legislative and judicial, suggest that the time may have come to reconsider this initial assessment. While it cannot be said that these developments have generated a 'European citizenry' which could 'pave the way for the transition to a European Federal State' they have certainly enriched the status of citizenship, by creating some bonds between individuals and the Union different from (but not stronger than) those which exist within each Member State.[428] European citizenship does allow individuals a multiplicity of associative relations based on manifold economic, social, cultural, scholarly, and even political activities, irrespective of the traditional territorial boundaries of the European nation States, without binding individuals to a particular nationality.[429]

The principle of solidarity has been particularly influential in that regard and here we can see a process of boot-strapping taking place – citizenship (imposed from above) is used to justify taking limited steps in the name of solidarity and solidarity is being used from the bottom up to foster a growing sense of citizenship. However, the Court has shown some awareness of the sensitivities of the issue, in particular concerns about 'benefit tourism'.[430] As a result, it has allowed Member States to insist on a demonstrable link with the host state's territory before an individual becomes entitled to benefits, whether it is through a period of residence as in *Bidar* or a genuine link with the employment market of the host state as in *D'Hoop*. If it were otherwise then any enforced equality would have the potential to

---

[421] Case C-224/98 *D'Hoop* [2002] ECR I-6191.

[422]See also Case C-413/99 *Baumbast* [2002] ECR I-7091 and Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen* v. *Secretary of State for the Home Department* [2004] ECR I-000. See also M.Dougan and E.Spaventa, 'Educating Rudy and the (Non-) English Patient: A Double Bill on Residency Rights under Article 18 EC' (2003) 28 *ELRev*. 699

[423] Case C–100/01 *Olazabal* [2002] ECR I–10981, considered further in Ch. 16 where the Court noted that Article 18 'finds specific expression in Article 39 of the Treaty' in relation to the free movement of workers, the Court said that since the facts of the case fell within the scope of Article 39, it was not necessary to rule on the interpretation of Article 18.. See also Case C–348/96 *Calfa* [1999] ECR I–11, para. 30.

424 Although cf. Case C–274/96 *Bickel and Franz* [1998] ECR I–7637; Case C–135/99 *Elsen* [2000] ECR I–10409. See N. Reich and S. Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons' (2003) 40 *CMLRev.* 615, 627.

425 Case C–60/00 *Mary Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I–6279, paras. 40–1, considered further in Ch. 14. See, in a similar vein, Case C-117/01 *KB* v. *National Health Service Pensions Agency* [2004] ECR I-000 discussed by Cantor (2004) 41 *CMLRev*. 1113.

[426] Case C-109/01 [2003] ECR I-9607, paras 58 and 59 (where *Carpenter* was cited).

427 U. Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 *ELJ* 267.

428 Ibid., 268.

429 Ibid.

[430] That is 'moving to a Member State with a more congenial social security environment': Case C-456/02 *Trojani* [2004] ECR I-7573, Geelhoed AG's Opinion, para. 13 (and see para. 18). See also his Opinion in *Bidar* in para. 66.

generate such hostility and anti-migrant feeling among host state nationals that, far from fostering a sense of Union citizenship, it could do the reverse. There is a risk that this is already happening in the field of education.[431]

There are already signs of this alienation which citizens have expressed in various referenda, in particular the French and Danish votes on the Maastricht Treaty, the initial Irish 'no' to the Nice Treaty and the French and Dutch 'no' votes to the Constitutional Treaty. Weiler puts this point succinctly, 'as the Community has grown in size, in scope, in reach and despite a high rhetoric including the very creation of "European citizenship" there has been a distinct disempowerment of the individual European citizen, the specific gravity of whom continues to decline as the Union grows'.[432] Is there a way forward? Weiler advocates that EU citizenship should be understood as a supra-national construct grounded in belonging simultaneously to two different *demoi* based on different subjective factors of identification.[433] At one and the same time, he argues, individuals can be British nationals, based on a strong sense of cultural identification and belonging, and also European citizens, based on, first, an acceptance of the legitimacy and authority of decisions made by fellow European citizens (underpinned by the 'social contract' of the common Treaties) and, secondly, shared values which transcend ethno-national diversity. These shared values include a commitment to principles of solidarity expressed through the welfare State, the European Social Model,[434] and human rights as embodied in the ECHR and now the Charter. Yet his suggestions have themselves been criticized for being too assimilationist, excluding those who do not share these values.[435]

Others have argued that the EU should aim at decoupling the concepts of State, nation, national identity, and nationality in favour of a form of postnational membership radically different from a (nation) statist concept of citizenship.[436] Underpinning this idea is active participation, as well as the more traditional passive conferral of rights, and it is here that the EU is engaged in some of its most elaborate citizenship-building. The advantage of such an understanding of citizenship is that nationality becomes increasingly unimportant. In this interpretation of citizenship there should be a place for legally resident TCNs. The legal position of TCNs is the subject of the next chapter.

---

[431] There is a risk that this is already happening in the field of higher education: C.Barnard, 'EU Citizenship and the Principle of Solidarity' in Dougan and Spaventa (eds) *Social Welfare and EU Law* (Oxford, Hart, 2005).

432 J.H.H. Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals' (1997) 22 *ELRev.* 150.

433 J.H.H. Weiler, 'To be a European Citizen—Eros and Civilization' (1997) 4 *JEPP* 495.

434 The Nice European Council offered a definition of the European social model (Annex I, para. 11): 'The European Social Model, characterised in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based . . . on a common core of values'. These values are outlined in para.11, 'solidarity and justice as enshrined in the Charter of Fundamental Rights' and para.23, 'Social cohesion, the rejection of any form of exclusion or discrimination and gender equality'.

435 N. Barber, 'Citizenship, Nationalism and the European Union' (2002) 27 *ELRev.* 241.

436 Shaw, above n. 4, 47.

In Case C-212/04,
REFERENCE for a preliminary ruling under Article 234 EC from the Monomeles Protodikio Thessalonikis (Greece), made by decision of 8 April 2004, received at the Court on 17 May 2004, in the proceedings

Konstantinos Adeneler, and othrs v Ellinikos Organismos Galaktos (ELOG),

THE COURT (Grand Chamber),
……..
after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,
gives the following
Judgment
Grounds

1. This reference for a preliminary ruling concerns the interpretation of clauses 1 and 5 of the framework agreement on fixed-term work concluded on 18 March 1999 ('the Framework Agreement'), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43; corrigendum at OJ 1999 L 244, p. 64), and the extent of the obligation on the courts of the Member States to interpret national law in conformity with Community law.
2. The reference was made in proceedings brought by Mr Adeneler and 17 other employees against their employer, Ellinikos Organismos Galaktos (Greek Milk Organisation; 'ELOG'), concerning ELOG's failure to renew their fixed-term employment contracts.
Legal context
……..

…'
The main proceedings and the questions referred for a preliminary ruling
24. It is apparent from the documents in the case which have been forwarded by the referring court that, from May 2001 and before the final date by which Directive 1999/70 should have been transposed into Greek law, that is to say 10 July 2002, the claimants in the main proceedings, who pursue the professions of sampler, secretary, technician or vet, concluded with ELOG, a legal person governed by private law which falls within the public sector and is established in Thessaloniki, a number of successive fixed-term employment contracts the last of which came to an end between June and September 2003 without being renewed ('the contracts at issue'). Each of those contracts, that is to say both the initial contract and the following successive contracts, was concluded for a period of eight months and the various contracts were separated by a period of time ranging from a minimum of 22 days to a maximum of 10 months and 26 days. The claimants in the main proceedings were on each occasion reappointed to the same post as that in respect of which the initial contract had been concluded. All the workers concerned had a fixed-term contract of that kind on the date upon which Presidential Decree No 81/2003 entered into force.
25. Since the failure to renew their employment contracts, the persons concerned have been either unemployed or employed by ELOG on a provisional basis following judicial decisions granting interim relief.
26. The claimants brought proceedings before the Monomeles Protodikio Thessalonikis (Court of First Instance (Single Judge), Thessaloniki) for a declaration that the contracts at issue had to be regarded as employment contracts of indefinite duration, in accordance with the Framework Agreement. To this end, they submitted that they carried out for ELOG regular work corresponding to 'fixed and permanent needs' within the meaning of the national legislation, so that the conclusion of successive fixed-term employment contracts with their employer was an abuse, and no objective reason justified the prohibition, laid down in Article 21(2) of Law No 2190/1994, on converting the employment relationships at issue into employment contracts of indefinite duration.
27. According to the referring court, such reclassification of the contracts at issue is a necessary prerequisite for other claims made by the claimants in the main proceedings, such as their reinstatement and payment of their outstanding earnings.
28. Taking the view that clause 5 of the Framework Agreement confers on the Member States a wide margin of appreciation as regards its transposition into their domestic law and is not sufficiently precise and unconditional to have direct effect, the referring court is uncertain, first of all, as to the date from which national law must be interpreted in conformity with Directive 1999/70 in the event of its being

transposed belatedly. It envisages a number of dates, namely the date on which that directive was published in the Official Journal of the European Communities and which corresponds to the date on which it entered into force, the date on which the time-limit for transposing the directive passed and the date on which Presidential Decree No 81/2003 entered into force.
29. It then raises the question of the scope of the concept of 'objective reasons', within the meaning of clause 5(1)(a) of the Framework Agreement, capable of justifying the renewal of fixed-term employment contracts or relationships, in the light of Article 5(1)(a) of Presidential Decree No 81/2003 which permits the unlimited renewal of fixed-term employment contracts inter alia when a fixed-term contract is required by a provision of statute or secondary legislation.
30. The referring court is also uncertain whether the conditions governing the renewal of fixed-term employment contracts, as resulting from Article 5(3), read in conjunction with Article 5(4), of Presidential Decree No 81/2003, are consistent with the principle of proportionality and with the requirement for Directive 1999/70 to have practical effect.
31. Finally, after finding that the recourse in practice to Article 21 of Law No 2190/94 as a basis for the conclusion of fixed-term employment contracts governed by private law, when those contracts are intended to cover 'fixed and permanent needs', constitutes an abuse, the referring court is uncertain whether in such a situation the prohibition, set out in the final sentence of Article 21(2), on converting contracts concluded for a fixed term into contracts of indefinite duration impairs the effectiveness of Community law and whether it is consistent with the objective set out in clause 1(b) of the Framework Agreement of preventing abuse arising from the use of a succession of fixed-term employment contracts.
32. In those circumstances, the Monomeles Protodikio Thessalonikis decided to stay proceedings and to refer the following questions, as rectified by its decision of 5 July 2004, to the Court for a preliminary ruling:
'1. Must a national court – as far as possible – interpret its domestic law in conformity with a directive which was transposed belatedly into national law from:
(a) the time when the directive entered into force, or
(b) the time when the time-limit for transposing it into national law passed without transposition being effected, or
(c) the time when the national measure implementing it entered into force?

2. Does clause 5(1)(a) of the Framework Agreement … mean that, in addition to reasons connected with the nature, type or characteristics of the work performed or other similar reasons, the fact solely and simply that the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation may constitute an objective reason for continually renewing or concluding successive fixed-term employment contracts?

…?'
Admissibility of the reference for a preliminary ruling

Findings of the Court
39. Pursuant to Article 234 EC, where a question on the interpretation of the EC Treaty or of subordinate acts of the institutions of the Community is raised before any court or tribunal of a Member State, that court or tribunal may or, as the case may be, must, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon (see, inter alia, Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 22, and Case C-144/04 Ma ngold [2005] ECR I-9981, paragraph 33).
40. As is apparent from settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as they need to give judgment in cases upon which they are called to adjudicate (see, inter alia, Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 30, and the case-law cited).
41. In the context of that cooperation, the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, is, having regard to the particular circumstances of the case, in the best position to assess both the need for a preliminary ruling in order to enable it to give judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Schmidberger , paragraph 31, and Mangold , paragraphs 34 and 35).
……

Question 1

106. Having regard to the answers given to the final three questions submitted by the referring court, from which it follows that, in circumstances such as those of the main proceedings, that court may, where relevant, be led to examine whether certain provisions of the pertinent national legislation are in conformity with the requirements of Directive 1999/70 and the Framework Agreement, a ruling should also be given on the first question.

107. As is apparent from the grounds of the order for reference, this question is essentially designed to determine – where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect – the time from which the national courts are required to interpret rules of domestic law in conformity with those provisions. Specifically, the referring court is unsure whether the relevant point in time is the date on which the directive in question was published in the Official Journal of the European Communities and which corresponds to the date on which it entered into force for the Member States to which it was addressed, the date on which the period for transposing the directive expired or the date on which the national provisions implementing it entered into force.

108. When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see, inter alia, Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, paragraph 113, and the case-law cited). This obligation to interpret national law in conformity with Community law concerns all provisions of national law, whether adopted before or after the directive in question (see, inter alia, Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Pfeiffer and Others , paragraph 115).

109. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them (see, inter alia, Pfeiffer and Others , paragraph 114).

110. It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem (see, by analogy, Case C-105/03 Pupino [2005] ECR I-5285, paragraphs 44 and 47).

111. Nevertheless, the principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see Pfeiffer and Others , paragraphs 115, 116, 118 and 119).

112. In addition, if the result prescribed by a directive cannot be achieved by way of interpretation, it should also be borne in mind that, in accordance with the judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, at paragraph 39, Community law requires the Member States to make good damage caused to individuals through failure to transpose that directive, provided that three conditions are fulfilled. First, the purpose of the directive in question must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State's obligation and the damage suffered (see, to this effect, Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 27).

113. With a view, more specifically, to determining the date from which national courts are to apply the principle that national law must be interpreted in conformity with Community law, it should be noted that that obligation, arising from the second paragraph of Article 10 EC, the third paragraph of Article 249 EC and the directive in question itself, has been imposed in particular where a provision of a directive lacks direct effect, be it that the relevant provision is not sufficiently clear, precise and unconditional to produce direct effect or that the dispute is exclusively between individuals.

114. Also, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law (see Case C-129/96 Inter-Environnement Wallonie [1997] ECR I-7411, paragraph 43).

115. Accordingly, where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.

116. It necessarily follows from the foregoing that, where a directive is transposed belatedly, the date – envisaged by the referring court in Question 1(c) – on which the national implementing measures

actually enter into force in the Member State concerned does not constitute the relevant point in time. Such a solution would be liable seriously to jeopardise the full effectiveness of Community law and its uniform application by means, in particular, of directives.

117. In addition, in light of the date envisaged in Question 1(a) and with a view to giving a complete ruling on the present question, it should be pointed out that it is already clear from the Court's case-law that the obligation on Member States, under the second paragraph of Article 10 EC, the third paragraph of Article 249 EC and the directive in question itself, to take all the measures necessary to achieve the result prescribed by the directive is binding on all national authorities, including, for matters within their jurisdiction, the courts (see, inter alia, Inter-Environnement Wallonie , paragraph 40, and Pfeiffer and Other s, paragraph 110, and the case-law cited).

118. Also, directives are either (i) published in the Official Journal of the European Communities in accordance with Article 254(1) EC and, in that case, enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication, or (ii) notified to those to whom they are addressed, in which case they take effect upon such notification, in accordance with Article 254(3) EC.

119. It follows that a directive produces legal effects for a Member State to which it is addressed – and, therefore, for all the national authorities – following its publication or from the date of its notification, as the case may be.

120. In the present instance, Directive 1999/70 states, in Article 3, that it was to enter into force on the day of its publication in the Official Journal of the European Communities , namely 10 July 1999.

121. In accordance with the Court's settled case-law, it follows from the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC and the directive in question itself that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it (Inter-Environnement Wallonie , paragraph 45; Case C-14/02 ATRAL [2003] ECR I-4431, paragraph 58; and Mangold , paragraph 67). In this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive (ATRAL , paragraph 59 and Mangold , paragraph 68).

122. Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect (see Francovich and Others , paragraph 32; Case C-453/00 Kühne & Heitz [2004] ECR I-837, paragraph 20; and Pfeiffer and Others , paragraph 111), the obligation to refrain from taking measures, as set out in the previous paragraph, applies just as much to national courts.

123. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

124. In light of the foregoing reasoning, the answer to the first question must be that, where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive.

……

On those grounds, the Court (Grand Chamber) hereby rules:

…….

4. Where a directive is transposed belatedly into a Member State's domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive.

Reference for a preliminary ruling from the Bundesarbetitsgericht (Germany) lodged on 18 October 2006 — Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH
(Case C-427/06)
(2006/C 326/61)
Language of the case: German

Referring court
BundesarbeitsgerichtParties to the main proceedings
Applicant: Birgit Bartsch
Defendants: Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH

Questions referred
1. a) Does the primary legislation of the European Communities contain a prohibition of discrimination on grounds of age the protection by which must be guaranteed by the Member States even if the possibly discriminatory treatment is not connected to Community law?
b) In the event that question a) is answered in the negative:
Does such a connection to Community law arise from Article 13 EC or — even before the time-limit for transposition has expired — from Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ([1])?

2. Is any prohibition of discrimination on grounds of age arising from the answer to question 1 also applicable between private employers on the one hand and their employees or pensioners and their survivors on the other hand?

3. If question 2 is answered in the affirmative:
Is a provision of an occupational pension scheme, which provides that a survivor's pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, within the scope of the prohibition of discrimination on grounds of age?
If question a) above is answered in the affirmative:
Can such a provision be justified by the fact that the employer has an interest in limiting the risks arising from the occupational pension scheme?
c) In the event that question 3 b) is answered in the negative:
Does the possible prohibition of discrimination on grounds of age have unlimited retroactive effect as regards the law relating to occupational pension schemes or is it limited as regards the past, and if so in what way?

Judgment of the Court (Full Court) of 23 March 2004.
Brian Francis Collins v Secretary of State for Work and Pensions.
Reference for a preliminary ruling: Social Security Commissioner - United Kingdom.
Case C-138/02.

REFERENCE to the Court under Article 234 EC by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before the Commissioner between
Brian Francis Collins
and
Secretary of State for Work and Pensions,
on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1), and 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 (OJ, English Special Edition 1968 (II), p. 485),
THE COURT (Full Court),
after hearing the Opinion of the Advocate General at the sitting on 10 July 2003,
gives the following Judgment
Grounds

1. By ruling of 28 March 2002, received at the Court on 12 April 2002, the Social Security Commissioner referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 45, p. 1) ('Regulation No 1612/68'), and 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 (OJ, English Special Edition 1968 (II), p. 485).
2. Those questions were raised in proceedings between Mr Collins and the Secretary of State for Work and Pensions concerning the latter's refusal to grant Mr Collins the jobseeker's allowance provided for by legislation of the United Kingdom of Great Britain and Northern Ireland.
Relevant provisions

Community legislation
3. The first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC) provides:
'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'
4. Article 8 of the EC Treaty (now, after amendment, Article 17 EC) states:
'1. Citizenship of the Union is hereby established.
Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'
5. Article 8a(1) of the EC Treaty (now, after amendment, Article 18(1) EC) provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.
6. As provided by Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC), freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
7. In accordance with Article 48(3) of the Treaty, freedom of movement for workers '[entails] the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
…'

8. Article 2 of Regulation No 1612/68 states:
'Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.'
9. Article 5 of Regulation No 1612/68 provides that 'a national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment'.
10. In accordance with Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers.
11. Article 1 of Directive 68/360 provides:
'Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.'
12. Article 4(1) of Directive 68/360 provides that Member States are to grant the right of residence in their territory to the persons referred to in Article 1 thereof who are able to produce the documents listed in Article 4(3).
13. Under the first indent of Article 4(3) of the directive, those documents are, for a worker:
'(a) the document with which he entered their territory;
(b) a confirmation of engagement from the employer or a certificate of employment'.
14. In accordance with Article 8(1) of Directive 68/360, Member States are to recognise, without issuing a residence permit, the right of residence in their territory (a) of workers pursuing an activity as an employed person where the activity is not expected to last for more than three months, (b) of frontier workers and (c) of seasonal workers.
National legislation
15. Jobseeker's allowance is a social security benefit provided under the Jobseekers Act 1995 ('the 1995 Act'), section 1(2)(i) of which requires the claimant to be in Great Britain.
16. Regulations made under the 1995 Act, namely the Jobseeker's Allowance Regulations 1996 ('the 1996 Regulations') lay down the conditions to be met in order to be eligible for jobseeker's allowance and the amounts that may be claimed by the various categories of claimant. Paragraph 14(a) of Schedule 5 to the 1996 Regulations prescribes an amount of nil for the category of 'persons from abroad' who are without family to support.
17. Regulation 85(4) of the 1996 Regulations defines 'person from abroad' as follows:
'… a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is –
(a) a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No 68/360/EEC or No 73/148/EEC;
…'
The main proceedings and the questions referred for a preliminary ruling
18. Mr Collins was born in the United States and possesses dual Irish and American nationality. As part of his college studies, he spent one semester in the United Kingdom in 1978. In 1980 and 1981 he returned there for a stay of approximately 10 months, during which he did part-time and casual work in pubs and bars and in sales. He went back to the United States in 1981. He subsequently worked in the United States and in Africa.
19. Mr Collins returned to the United Kingdom on 31 May 1998 in order to find work there in the social services sector. On 8 June 1998 he claimed jobseeker's allowance, which was refused by decision of an adjudication officer of 1 July 1998, on the ground that he was not habitually resident in the United Kingdom. Mr Collins appealed to a Social Security Appeal Tribunal, which upheld the refusal, stating that he could not be regarded as habitually resident in the United Kingdom since (i) he had not been resident for an appreciable time and (ii) he was not a worker for the purposes of Regulation No 1612/68, nor did he have a right to reside in the United Kingdom pursuant to Directive 68/360.
20. Mr Collins then appealed to the Social Security Commissioner, who decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
'(1) Is a person in the circumstances of the claimant in the present case a worker for the purposes of Regulation No 1612/68 of the Council of 15 October 1968?
(2) If the answer to question 1 is not in the affirmative, does a person in the circumstances of the

claimant in the present case have a right to reside in the United Kingdom pursuant to Directive No 68/360 of the Council of 15 October 1968?
(3) If the answers to both questions 1 and 2 are not in the affirmative, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case?'

Question 1
Observations submitted to the Court
21. Mr Collins contends that, as Community law currently stands, his position in the United Kingdom as a person genuinely seeking work gives him the status of a 'worker' for the purposes of Regulation No 1612/68 and brings him within the scope of Article 7(2) of that regulation. At paragraph 32 of its judgment in Case C-85/96 Martínez Sala [1998] ECR I-2691, the Court deliberately laid down the rule that persons seeking work are to be considered to be workers for the purposes of Regulation No 1612/68 if the national court is satisfied that the person concerned was genuinely seeking work at the appropriate time.
22. The United Kingdom Government, the German Government and the Commission of the European Communities, on the other hand, submit that a person in Mr Collins' position is not a worker for the purposes of Regulation No 1612/68.
23. The United Kingdom Government and the Commission argue that Mr Collins cannot claim to be a 'former' migrant worker who is now merely seeking a benefit under Article 7(2) of Regulation No 1612/68, because there is no relationship between the work which he did in the course of 1980 and 1981 and the type of work which he says he wished to find in 1998.
24. In Case 316/85 Lebon [1987] ECR 2811, the Court held that equal treatment with regard to social and tax advantages, which is laid down by Article 7(2) of Regulation No 1612/68, applies only to workers, and that those who move in search of employment qualify for such equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of that regulation.
25. The German Government draws attention to the specific circumstances in Martínez Sala , cited above, which were characterised by very close connections of long duration between the plaintiff and the host Member State, whereas in the main proceedings there is clearly no link between the earlier work carried out by Mr Collins and the work sought by him.

The Court's answer
26. In accordance with the Court's case-law, the concept of 'worker', within the meaning of Article 48 of the Treaty and of Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, Martínez Sala , paragraph 32, and Case C-337/97 Meeusen [1999] ECR I-3289, paragraph 13).
27. The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (Case C-35/97 Commission v France [1998] ECR I-5325, paragraph 41, and Case C-413/01 Ninni-Orasche [2003] ECR I-0000, paragraph 34).
28. As is apparent from the documents sent to the Court by the Social Security Commissioner, Mr Collins performed casual work in the United Kingdom, in pubs and bars and in sales, during a 10-month stay there in 1981. However, even if such occupational activity satisfies the conditions as set out in paragraph 26 of this judgment for it to be accepted that during that stay the appellant in the main proceedings had the status of a worker, no link can be established between that activity and the search for another job more than 17 years after it came to an end.
29. In the absence of a sufficiently close connection with the United Kingdom employment market, Mr Collins' position in 1998 must therefore be compared with that of any national of a Member State looking for his first job in another Member State.
30. In this connection, it is to be remembered that the Court's case-law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be

workers (see Case 39/86 Lair [1988] ECR 3161, paragraphs 32 and 33).
31. While Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers (see in particular, Lebon , cited above, paragraph 26, and Case C-278/94 Commission v Belgium [1996] ECR I-4307, paragraphs 39 and 40).
32. The concept of 'worker' is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the regulation this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of 'worker' must be understood in a broader sense.
33. Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term 'worker' as referred to by the national legislation at issue is to be understood in that sense.

Question 2
Observations submitted to the Court
34. Mr Collins submits that Directive 68/360 grants a right of residence for a period of three months to persons seeking work.
35. The United Kingdom Government, the German Government and the Commission contend that it is on the basis of Article 48 of the Treaty directly, and not of the provisions of Directive 68/360, which are applicable exclusively to persons who have found work, that Mr Collins would be entitled to go to the United Kingdom to seek work and to stay there as a person looking for work for a reasonable period.

The Court's answer
36. In the context of freedom of movement for workers, Article 48 of the Treaty grants nationals of the Member States a right of residence in the territory of other Member States in order to pursue or to seek paid employment (Case C-171/91 Tsiotras [1993] ECR I-2925, paragraph 8).
37. The right of residence which persons seeking employment derive from Article 48 of the Treaty may be limited in time. In the absence of Community provisions prescribing a period during which Community nationals who are seeking employment may stay in their territory, the Member States are entitled to lay down a reasonable period for this purpose. However, if after expiry of that period, the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State (see Case C-292/89 Antonissen [1991] ECR I-745, paragraph 21, and Case C-344/95 Commission v Belgium [1997] ECR I-1035, paragraph 17).
38. Directive 68/360 seeks to abolish, within the Community, restrictions concerning the movement and residence of Member State nationals and of members of their families to whom Regulation No 1612/68 applies.
39. So far as concerns restrictions on movement, first, Article 2(1) of Directive 68/360 requires Member States to grant the right to leave their territory to Community nationals intending to go to another Member State to seek employment there. Second, in accordance with Article 3(1) of the directive, Member States are to allow those nationals to enter their territory simply on production of a valid identity card or passport.
40. In addition, given that the right of residence is a right conferred directly by the Treaty (see, in particular, Case C-363/89 Roux [1991] ECR I-273, paragraph 9), issue of a residence permit to a national of a Member State, as provided for by Directive 68/360, is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law (Case C-459/99 MRAX [2002] ECR I-6591, paragraph 74).
41. Under Article 4 of Directive 68/360, Member States are to grant the right of residence in their territory only to workers who are able to produce, in addition to the document with which they entered the Member State's territory, a confirmation of engagement from the employer or a certificate of employment.
42. Article 8 of the directive sets out an exhaustive list of the circumstances in which certain categories of workers may have their right of residence recognised without issue of a residence permit to them.
43. It follows that the right of residence in a Member State referred to in Articles 4 and 8 of Directive 68/360 is accorded only to nationals of a Member State who are already in employment in the first Member State. Persons seeking employment are excluded. They can rely solely on the provisions of

that directive concerning their movement within the Community.
44. The answer to the second question must therefore be that a person in the circumstances of the appellant in the main proceedings does not have a right to reside in the United Kingdom solely on the basis of Directive 68/360.

Question 3
Observations submitted to the Court
45. In Mr Collins' submission, there is no doubt that he is a national of another Member State who was lawfully in the United Kingdom and that jobseeker's allowance is within the scope of the Treaty. The result, as the Court held in Case C-184/99 Grzelczyk [2001] ECR I-6193, is that the payment of a non-contributory means-tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr Collins acknowledges that the habitual residence test is applied to United Kingdom nationals as well. However, it is well established that a provision of national law is to be regarded as discriminatory for the purposes of Community law if it is inherently more likely to be satisfied by nationals of the Member State concerned.
46. The United Kingdom Government and the German Government argue that there is no provision or principle of Community law which requires that a benefit such as the jobseeker's allowance be paid to a person in the circumstances of Mr Collins.
47. With regard to the possible existence of indirect discrimination, the United Kingdom Government submits that there are relevant objective justifications for not making income-based jobseeker's allowance available to persons in the situation of Mr Collins. Unlike the position in Case C-224/98 D'Hoop [2002] ECR I-6191, the eligibility criteria adopted for the allowance at issue here do not go beyond what is necessary to attain the objective pursued. They represent a proportionate and hence permissible method of ensuring that there is a real link between the claimant and the geographic employment market. In the absence of such criteria, persons who have little or no link with the United Kingdom employment market, as in the case of Mr Collins, would then be able to claim that allowance.
48. According to the Commission, it is not disputed that Mr Collins was genuinely seeking work in the United Kingdom during the two months following his arrival in that Member State and that he was lawfully resident there in his capacity as a person seeking work. As a citizen of the Union lawfully residing in the United Kingdom, he was clearly entitled to the protection conferred by Article 6 of the Treaty against discrimination on grounds of nationality in any situation falling within the material scope of Community law. That is precisely the case with regard to jobseeker's allowance, which should be considered to be a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.
49. The Commisson also observes that it is clear that the right to stay in another Member State to seek work there can be limited to a reasonable period and that Mr Collins' right to rely on Articles 6 and 8 of the Treaty in order to claim the allowance, on the same basis as United Kingdom nationals, is therefore similarly restricted to that period of lawful residence.
50. None the less, the Commission submits that a requirement of habitual residence may be indirectly discriminatory because it can be more easily met by nationals of the host Member State than by those of other Member States. Whilst such a requirement may be justified on objective grounds necessarily intended to avoid 'benefit tourism' and thus the possibility of abuse by work-seekers who are not genuine, the Commission notes that in the case of Mr Collins the genuine nature of the search for work is not in dispute. Indeed, it appears that he has remained continuously employed in the United Kingdom ever since first finding work there shortly after his arrival.

The Court's answer
51. By the third question, the Social Security Commissioner asks essentially whether there is a provision or principle of Community law on the basis of which a national of a Member State who is genuinely seeking employment in another Member State may claim there a jobseeker's allowance such as that provided for by the 1995 Act.
52. First of all, without there being any need to consider whether a person such as the appellant in the main proceedings falls within the scope ratione personae of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), it is clear from the order for reference that the person concerned never resided in another Member State before seeking employment in the United Kingdom, so that the aggregation rule contained in Article 10a of Regulation No 1408/71 is inapplicable in the main proceedings.
53. Under the 1996 Regulations, nationals of other Member States seeking employment who are not

workers for the purposes of Regulation No 1612/68 and do not derive a right of residence from Directive 68/360 can claim the allowance only if they are habitually resident in the United Kingdom.
54. It must therefore be determined whether the principle of equal treatment precludes national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement.
55. In accordance with the first paragraph of Article 6 of the Treaty, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty, without prejudice to any special provisions contained therein. Since Article 48(2) of the Treaty is such a special provision, it is appropriate to consider first the 1996 Regulations in the light of that article.
56. Among the rights which Article 48 of the Treaty confers on nationals of the Member States is the right to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment (Antonissen , cited above, paragraph 13).
57. Nationals of a Member State seeking employment in another Member State thus fall within the scope of Article 48 of the Treaty and, therefore, enjoy the right laid down in Article 48(2) to equal treatment.
58. As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation (Lebon , paragraph 26, and Case C-278/94 Commission v Belgium , cited above, paragraphs 39 and 40).
59. Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment, while Article 5 of the regulation relates to the assistance afforded by employment offices.
60. It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty.
61. As the Court has held on a number of occasions, citizens of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, Grzelczyk , cited above, paragraphs 31 and 32, and Case C-148/02 Garcia Avello [2003] ECR I-0000, paragraphs 22 and 23).
62. It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance ('minimex'), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (Grzelczyk , paragraph 46).
63. In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.
64. The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon and in Case C-278/94 Commission v Belgium .
65. The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State's own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 O'Flynn [1996] ECR I-2617, paragraph 18, and Case C-388/01 Commission v Italy [2003] ECR I-721, paragraphs 13 and 14).
66. A residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraph 27).
67. The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applica nt for an allowance in the nature of a social advantage within

the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question (see, in the context of the grant of tideover allowances to young persons seeking their first job, D'Hoop , cited above, paragraph 38).
68. The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.
69. It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.
70. The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.
71. The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.
72. However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.
73. The answer to the third question must therefore be that the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.
…….
Operative part

On those grounds,
THE COURT
in answer to the questions referred to it by the Social Security Commissioner by ruling of 28 March 2002, hereby rules:
1. A person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992. It is, however, for the national court or tribunal to establish whether the term 'worker' as referred to by the national legislation at issue is to be understood in that sense.
2. A person in the circumstances of the appellant in the main proceedings does not have a right to reside in the United Kingdom solely on the basis 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.
3. The right to equal treatment laid down in Article 48(2) of the EC Treaty (now, after amendment, Article 39(2) EC), read in conjunction with Articles 6 and 8 of the EC Treaty (now, after amendment, Articles 12 EC and 17 EC), does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

OPINION OF ADVOCATE GENERAL JACOBS
delivered on 20 January 2005 (1)
Case C-147/03
Commission of the European Communities
v
Republic of Austria

1. In this action brought under Article 226 EC the Commission claims in essence that the Austrian provisions governing access to higher education are discriminatory in that they impose on holders of secondary education diplomas obtained in other Member States conditions which are different from those applicable to holders of Austrian diplomas. Austria is therefore in breach of its obligations under Article 12, read in conjunction with Articles 149 and 150, EC.
2. The main issue raised by this action concerns the grounds for possible justification of such differential treatment.

Relevant provisions of Community law
3. The action by the Commission is based on the following provisions of the EC Treaty:
Article 12 EC:
'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

Article 149 EC:
'1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
2. Community action shall be aimed at:
– encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
3. The Community and the MemberStates shall foster cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe.

Article 150 EC:
'1. The Community shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
2. Community action shall aim to:
– facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,
3. The Community and the MemberStates shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

National law provisions
4. The provision contested by the Commission is paragraph 36 of the Universitäts-Studiengesetz (the 'Law on University Studies'), entitled university entrance qualification, which reads:
'(1) In addition to possession of a general university entrance qualification, students must demonstrate that they meet the specific entrance requirements for the relevant course of study, including entitlement to immediate admission, applicable in the State which issued the general qualification.
(2) Where the university entrance qualification was issued in Austria, that means passes in the additional papers prescribed for admission to the relevant course of study in the Universitätsberechtigungsverordnung [University Entrance Regulation].
(3) If the course of study for which the student is applying in Austria is not offered in the State which issued the qualification, he or she must meet the entrance requirements for a course of study which is offered in that State and which is as closely related as possible to the course applied for in Austria.

(4) The Federal Minister may by regulation designate groups of persons whose university entrance qualification is to be regarded, by reason of their close personal ties with Austria or their activity on behalf of the Republic of Austria, as issued in Austria for the purposes of establishing possession of the specific university entrance requirements.
(5) On the basis of the certificate produced in order to demonstrate possession of a general university entrance qualification, the principal of the university shall determine whether the student meets the specific entrance requirements for the course of study chosen.'
5. It appears to be common ground that those provisions have the effect of allowing very broad access to university education by holders of Austrian school-leaving certificates, but subjecting those whose comparable certificates are from other Member States to the often more stringent requirements applicable in those States.
6. The Commission therefore asks the Court to declare that by not adopting the necessary measures to ensure that the holders of secondary education diplomas obtained in other Member States can have access to higher and university education organised by it under the same conditions as the holders of secondary education diplomas obtained in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12, 149 and 150 EC. The Republic of Finland has intervened in support of the Commission.

Admissibility …….
……
14. In view of the foregoing, I conclude that the Commission has not altered or extended the subject-matter of the dispute in its application before the Court and that the action is therefore admissible.

Substance
The scope of the Treaty
15. The first issue that needs to be determined is whether the contested national provision falls within the realm of the recognition of diplomas, as the Republic of Austria claims, or whether it concerns access to higher or university education, as the Commission and the Republic of Finland argue. In the former case, since Community legislation in this field is limited to the area of mutual recognition of professional qualifications, (6) it would remain within the sphere of national competence, whereas in the latter case it would fall within the scope of the EC Treaty.
16. After the present action was brought by the Commission, the Court delivered its judgment in *Commission* v*Belgium*. (7) In that case, the Commission challenged certain provisions of Belgian law pursuant to which holders of diplomas and qualifications awarded on successful completion of secondary studies in other Member States who wished to gain access to higher education in Belgium's French Community were obliged to pass an aptitude test if they were unable to prove that they would have qualified for admission in their Member State of origin to a university course with no entry examination or other conditions of access. The Commission, as in the instant case, maintained that that additional requirement infringed Articles 12, 149 and 150 EC in that, in so far as it applied exclusively to holders of diplomas awarded in another MemberState, it was liable to have a greater effect on nationals of those other Member States than on Belgian nationals.
17. In *Commission* v *Belgium* the Court considered, rightly in my view, that the national provisions in question concerned conditions of access to higher education and, referring to its decision in *Gravier* (8) and the earlier cases there cited, it held that such conditions fell within the scope of the Treaty. The Court also referred to Article 149(2) EC, second indent, which expressly provides that Community action is to be aimed at encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study, and to Article 150(2) EC, third indent, which provides that Community action is to aim to facilitate access to vocational training and encourage mobility of instructors, trainees and, particularly, young people. (9)
18. In view of that judgment of the Court, I must conclude that the contested national provision in the present case concerns the conditions under which students holding non-Austrian secondary education diplomas may gain access to Austrian universities and higher education. The disputed national provision therefore falls within the scope of the EC Treaty and is to be considered, in particular, with reference to the principle of non-discrimination on grounds of nationality enshrined in Article 12 EC.
19. I would nonetheless stress that even if the contested national provision were, as the Republic of Austria claims, to fall within the sphere of competences retained by Member States in the field of education, Member States are still bound to exercise their retained powers in a manner consistent with Community law, which includes respect for the principle of equal treatment. (10)
Compatibility of the contested national provision with Article 12 EC, read in conjunction with Articles 149 and 150 EC

20. It is settled case-law that the principle of equal treatment, of which the prohibition of any discrimination on grounds of nationality in the first paragraph of Article 12 EC is a specific instance, prohibits not only overt or direct discrimination by reason of nationality but also indirect discrimination, that is, covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. (11) A rule is indirectly discriminatory if it works to the particular disadvantage of a group comprising mainly nationals of other Member States and cannot be justified by objective considerations independent of the nationality of the persons concerned or is not proportionate to the legitimate aim pursued by the national measure. (12)

21. In *Commission* v *Belgium*, relying on that case-law, the Court ruled that 'the legislation in question places holders of secondary education diplomas awarded in a Member State other than Belgium at a disadvantage, since they cannot gain access to higher education organised by the French Community under the same conditions as holders of the [Belgian certificate of higher secondary education] ... The criterion of differentiation applied works primarily to the detriment of nationals of other Member States'. (13) Thus, the Court explicitly noted the indirectly discriminatory character of the contested national provision. It did not, however, embark upon the examination of any possible justification since Belgium had not put forward any arguments to that effect. (14) The Court consequently held that Belgium had failed to fulfil its obligations under Article 12 EC, in conjunction with Articles 149 EC and 150 EC.

22. It is in my view apparent that, as the Commission and the Republic of Finland argue, the contested national provision in the present case is liable to affect nationals from other Member States more than Austrian nationals and that there is a consequent likelihood that it will place the former at a particular disadvantage. The contested national provision therefore gives rise to indirect discrimination unless it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.

Justification

23. In the context of the free movement of persons, two categories of grounds may be relied on in order to justify measures which would otherwise be discriminatory. The first category comprises the derogations explicitly provided for in the EC Treaty, namely public policy, public security and public health. (15) A second non-exhaustive category comprises justifications relating to the protection of legitimate national interests which have been added by the case-law of the Court. It generally follows from the case-law that directly discriminatory measures may be justified only on the grounds explicitly provided for in the Treaty. On the other hand, either category may provide a justification for indirectly discriminatory measures. (16) As derogations from the fundamental principle of free movement, both categories of possible justification must be interpreted restrictively and must meet the proportionality test.

24. In its written pleadings the Commission argued that the contested national provision could be justified only on the basis of the limited grounds explicitly provided for in the Treaty. The Commission thus appeared to consider that measures such as the one in issue in the instant case, which formally apply regardless of nationality but which affect almost exclusively nationals of other Member States, are to be equated with overtly discriminatory measures and, as a consequence, treated restrictively as regards the possible grounds for their justification. The Commission did not however support its position with reference to any particular case-law and did not pursue this argument at the hearing, where it placed the emphasis on the failure of the contested national provision to meet the proportionality test.

25. Austria argues that the contested national provision is justified on two grounds. First, it safeguards the homogeneity of the Austrian education system and, in particular, the policy aim of unrestricted public access to higher education in Austria. Secondly, it responds to the need to prevent abuses of Community law by individuals exercising their free movement rights under the Treaty.

26. As regards the first alleged justification, from Austria's statements and submissions at the hearing it appears that the central aim of the Austrian education policy is to grant unrestricted access to all levels of studies. That policy choice is meant to improve the percentage of Austrian citizens with a higher education qualification, which, according to Austria, is currently amongst the lowest in the EU and the Organisation for Economic Co-operation and Development ('OECD'). Bearing that objective in mind, if the conditions of access to higher education applicable in other Member States are not taken into consideration, there is risk of the more liberal Austrian system being flooded by applications from students not admitted to higher education in more restrictive Member States. That influx would entail serious financial, structural and staffing problems and pose a risk to the financial equilibrium of the Austrian education system and, consequently, to its very existence.

27. According to Austria, the risk is mainly posed by German applicants who have failed to fulfil the required conditions to access certain university studies in Germany. Austria produced – but only at the

hearing – estimates for the particular case of medical studies. According to those estimates, the expected number of applications from foreign, mainly German, secondary education diploma holders would exceed fivefold the places available. The Austrian representatives also referred to the fact that since higher education in Austria was financed by tax-payers via the national budget, some measures to control the expected flood of applications were required if the system was to retain its unrestricted public access nature.

28. In support of its case, the Republic of Austria refers to the judgments in *Kohll* and *Vanbraekel*, where the Court recognised that 'it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind'. (17)

29. I am not convinced by the Austrian arguments.

30. First, it is not clear what is meant by the aim of preserving 'the homogeneity' of the Austrian higher education system. From the overall tenor of Austria's arguments and the facts of the case, it seems that 'homogeneity' is tantamount to 'privileged access for Austrian citizens'. It is not disputed that Austrian universities are a realistic alternative mainly for German-speaking students. That group is likely to consist of, obviously, German students and also Italian students coming from the German-speaking part of Italy, along the border with Austria. Given the stringent conditions applicable both in Germany and in Italy as regards certain university courses such as medical studies, the effect in practice of the contested national provision, even if couched in general terms and applicable to students from any Member State, is to hinder the access of those students to the Austrian system. It appears that it is the risk posed by those students that the contested national provision is intended to avert. In other words, the practical, or even the intended, effect of the contested national provision is to preserve unrestricted access to university education mainly for holders of Austrian secondary diplomas, while making it more difficult for those foreign students for whom the Austrian system constitutes a natural alternative. Such an aim, which is discriminatory in essence, is not consistent with the objectives of the Treaty.

31. Secondly, at the present stage of development of Community law, I have some reservations about the application to the field of higher education of the statements made by the Court in *Kohll* and *Vanbraekel* as regards national social security systems. As a preliminary remark it must be noted that, by accepting aims of a purely economic nature as possible justifications, *Kohll* and *Vanbraekel* represent a departure from the orthodox approach of the Court that such aims may not justify a restriction of the fundamental freedoms guaranteed by the Treaty. (18) In fact, they provide for a double derogation, first from the fundamental principles of free movement and second from the accepted grounds on which those derogations can be justified. In view of this, any justification argued on their basis, especially by analogy, needs to be treated with circumspection. (19)

32. It is true that the Treaty provisions governing Community action in the fields of public health (Article 152 EC), education (Article 149 EC) and vocational training (Article 150 EC) are all worded in very similar terms and that they all reflect the same philosophy of the complementary nature of the Community action. (20) It is also true that, from an economic point of view, health and education systems are, together with defence, amongst the most important items of public expenditure in the EU. (21)

33. Despite those similarities, disparities remain which cannot be ignored. The most obvious difference under Community law is that the Court has held that publicly financed health-care services fall within the scope of the Treaty provisions on the freedom to provide services. (22) As a result, any benefits awarded by a MemberState to its own nationals must, in principle, be extended to recipients of services who are nationals of other Member States. Given the economic and financial implications of that legal finding and the sensitive nature of the public health sector and its financing, (23) it is perhaps not surprising that the Court decided in *Kohll* and *Vanbraekel* to admit, contrary to its settled case-law, the possibility of derogation on economic grounds for services provided in the framework of public health-care systems.

34. In contrast, higher education financed essentially out of public funds has been considered not to constitute a service within the meaning of Article 49 EC. (24) Rights to equal treatment that students enjoy under the Treaty as regards free movement have, so far, been recognised only to a limited extent both by the case-law and by Community legislation. Maintenance grants are, at the present stage of development of Community law, not within the scope of the Treaty. (25) At the legislative level, by providing that students coming from other Member States must not become an 'unreasonable burden' on the public finances of the host Member State, must show sufficient means to support themselves and are not entitled to claim maintenance grants, Directive 93/96 on the right of residence of students (26)gives Member States specific means to minimise the potential burden on their national budgets of the free movement of students. (27)

35. Other substantial differences between public education and public health can also be identified. Patients move across borders more as a matter of necessity, students do so more as a matter of choice. Also, as a general rule, patients move to receive specific medical treatment after which they return to their home State. Students on the other hand stay for the whole period of their studies, participate in the local social and cultural life and, in many cases, will tend to integrate in the host MemberState. In brief, the characteristics of students exercising their freedom of movement are not equivalent to those of recipients of medical services exercising theirs.
36. The 'free rider' argument applied to foreign students is not new and, as Advocate General Slynn pointed out in his Opinion in *Gravier,* may carry some weight. (28) According to that argument students moving abroad to study reap the benefits from publicly funded education provided in other Member States but do not contribute to its financing via national taxes nor do they necessarily 'pay back' by staying to exercise their professional life in the host State. (29)
37. In its case-law concerning the conditions of access to vocational training, which includes higher education, the Court has not deemed it necessary to discuss the merits of this argument, let alone accepted it as a valid reason for a derogation. (30) As noted above, the Court has implicitly dealt with the possible financial implications for national budgets arising from the rights recognised under the Treaty to students by excluding students' rights to maintenance grants.
38. It may be useful nevertheless to reflect briefly upon this issue, which is of concern to many Member States. Bearing in mind that it is only to the extent that the chosen courses prepare the students to enter the employment market that they come within the scope of the Treaty, (31) two types of student mobility can be distinguished in the EU.
39. First, there are students who, regardless of linguistic barriers, move because of the excellence of the studies offered in other Member States and/or because those studies abroad are better adapted to their professional ambitions or talents. Once they have completed their studies, their potential formobility within the EU is substantially improved and it is far more likely that they will spend part or all of their professional lives in a country other than their country of origin, with all the economic, social and cultural consequences which that entails. They thus become crucial actors in disseminating and spreading their acquired knowledge throughout the EU, in contributing to the integration of the European employment market and, ultimately, when assessed in the light of the goals inspiring the EC Treaty, in promoting the 'ever closer union'. In view of the overall benefits to the EU that they produce, the public investment made in the education of those foreign students will provide a return to the host State, either directly, because the students subsequently enter its employment market, or indirectly, because of the benefits arising to the EU as a whole.
40. Second, there are students who seek access to more liberal neighbouring education systems in order to escape restrictions in their MemberState of origin. Their intention, at least at the outset, is to return to their MemberState of origin to work once they have finished their studies. The students who Austria fears might flood their system may fall within this category. In most of these cases linguistic barriers are irrelevant since the courses are usually given in a language which is well-known to, if not the same as, that spoken by the migrating students. The proximity of the university location to the place of origin of foreign students may also reduce other obstacles to student mobility. Although the mobility of this second category of students also promotes integration in similar ways to that of the first category, it does so to a lesser extent. It is with respect to students in the second category that the free-riding objection is generally more persuasive.
41. The question is whether these two situations should – or can – be treated differently in law. In my view the answer must be negative. There is no basis on which to do so in the case-law as it stands. Both types of students are enjoying, albeit for different reasons, individual rights accorded to them by the Treaty and I am not convinced that the motives underlying the choice of one university or another should have any effect on the extent of their rights under the Treaty, (32) provided of course that no abuses are committed, an issue with which I deal below in the context of the second justification invoked by Austria.
42. For all the above reasons, I am not convinced that as Community law currently stands, an automatic analogy can be drawn between the fields of public health and education. Thus, the application of the justifications developed in *Kohll* and *Vanbraekel* to the field of publicly funded higher education, as claimed by Austria, is in my view not necessarily appropriate.
43. That conclusion might however be different were the Court to confirm that students may be entitled to claim maintenance grants, in whatever form they are provided, on the basis of the rights they derive from their status as EU citizens. In that case, their Community law rights, and the corresponding obligations of Member States, would be practically identical to those of recipients of services. In those circumstances, the financial burden of the free movement of students on State resources would become significant, which would in my view give good reason for economic grounds

to be used as possible justifications.
44. Indeed, in its more recent case-law involving benefit claims by students, *Grzelczyk* (33)and *D'Hoop,* (34) the Court has accepted that EU citizens who have exercised their rights to move under the Treaty as students may claim social advantages qua EU citizens pursuant to Articles 17 and 18 EC. The Court held that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy within the scope ratione materiae of the Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. (35) Even though the applicants did not qualify as workers (or as falling within assimilated categories such as family members) for the purposes of Community law, the fact that they had exercised the rights to move and reside within the territory of the Member States as students brought them within the scope of the Treaty and entitled them to claim equal treatment as regards social advantages available to nationals of the host Member State on the basis of their status as EU citizens.
45. In *Grzelczyk*, after referring to its statements in *Brown* to the effect that assistance given to students for maintenance and training fell in principle outside the scope of the Treaty, the Court none the less proceeded to hold that in view of, inter alia, the new provisions on education introduced in the Treaty since *Brown*,that finding did not prevent the applicant from claiming by reason of his status as an EU citizen the minimum subsistence allowance available to nationals of the host Member State in the same situation. In *D'Hoop* the Court linked the evolving concept of Union citizenship with the field of education. It held that the opportunities offered by the Treaty in relation to freedom of movement could not be fully effective if a person were penalised for using them and that that consideration was particularly important in the field of education in view of the aims pursued by Article 3(1)(q) EC, and the second indent of Article 149(2) EC, namely encouraging mobility of students and teachers. (36)
46. It is true that the Court may, in those cases, have paved the way for extending the actual scope of student entitlement to financial assistance beyond tuition and registration fees. (37) Should the Court confirm that approach, the range of possible justifications available to Member States should in my view be equally extended in line with the case-law on recipients of public health-care services. In this vein it must be noted that the Court couched its judgments in *Grzelczyk* and *D'Hoop* in cautious terms and in *D'Hoop* it emphasised that the applicant may be required to show the existence of a real link between him and the geographic employment market concerned in order to be entitled to the social a advantage in question. (38)

The proportionality test
47. Be that as it may, even if the aims relied on byAustria were considered to be legitimate under the Treaty, the contested national provision would in my view still fail the proportionality test. Given the fact that the actual effect, or even intention, of the contested national provision is to dissuade applications by German-speaking students from other Member States, and the reliance on *Kohll* and *Valbraekel* to justifythat effect, compliance with the proportionality test should in my view be assessed with particular thoroughness.
48. At the hearing Austria reviewed five possible alternatives to the current system and concluded that the contested national provision provided the least restrictive means to achieve the aim pursued. First, the opening of Austrian higher education to holders of foreign secondary education diplomas without any restriction was not considered a viable option given the financial and structural difficulties it would cause. Second, the establishment of quotas for foreign students would be more restrictive than the system imposed by the contested national provision. Third, the verification on a case by case basis of the qualifications of applicants holding non-Austrian diplomas, with the possible introduction of an examination to check equivalence, would pose too many practical difficulties and create further obstacles to free movement. Fourth, the establishment of an entry examination equally applicable to holders of Austrian and non-Austrian diplomas would defeat the legitimate policy choice of ensuring unrestricted public access to Austrian higher education. Furthermore, in view of the expected overwhelming number of applications from non-Austrian candidates, the objective of increasing the percentage of Austrian nationals with university education would also be jeopardised. The same would apply to the fifth alternative, namely the introduction of a requirement of a minimum average grade in secondary education in order to enter university education.
49. As the Court has stated, it is for the national authorities which invoke a derogation from the fundamental principle of free movement to show in each case that their rules are necessary and proportionate to attain the aim pursued. (39) As regards in particular the public health derogation in Article 30 EC, the Court has required a detailed assessment of the risk alleged by the MemberState when invoking that derogation. (40) These are principles of general application which, for the reasons

noted in paragraph 47 above, are of particular importance to the present case.
50. Austria has in my view failed to show adequately that the financial equilibrium of its education system could be upset by the repeal of the contested national provisions. The figures submitted to the Court at the hearing referred only to the case of medical studies and the potential influx of German-speaking applicants to those courses. Estimates with respect to other university studies were not given. I am not convinced that the existence of a serious risk to the survival of the whole Austrian system of higher education can be inferred from this partial evidence.
51. Moreover the Austrian representatives accepted, in response to questions from the Court, that the purpose of the contested national provision was essentially preventive. In those circumstances, where the contested national provision involves general discriminatory treatment with an essentially preventive purpose and where insufficient evidence to justify it has been presented, the proportionality test cannot in my view be held to be satisfied.
52. In any event, whatever means Austria adopts to tackle a risk to the financial equilibrium of its higher education system must comply with Treaty requirements, in particular the principle of equal treatment. Excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or a minimum grade, thus respecting the requirements of Article 12 EC. Also, for the purposes of compliance with Community law, a more appropriate means to achieve homogeneity, if by this we understand ensuring the equivalence in qualifications of students entering Austrian universities, would in my view be to check the correspondence of the foreign qualifications with those required from holders of Austrian diplomas. The fact that the implementation of such measures would entail practical or even financial difficulties does not constitute a valid excuse. (41)
53. Clearly the adoption of these less discriminatory measures would require changes to the current system of unrestricted public access. In the absence of Community measures regulating the flow of students across borders, such changes would reflect the need to comply with the obligations arising from the principle of equal treatment under the Treaty. The risks alleged by Austria are not exclusive to its system but are and have been equally, if not more intensely, suffered by other Member States whose higher education systems appeal to a larger market of students. (42) Those Member States include Belgium, whose similar restrictions have, as already discussed, been held unlawful. Other Member States have introduced the necessary modifications to their national education systems to cope with such demand while respecting their obligations under Community law. To accept the justifications relied on by Austria would amount to allowing Member States to compartmentalise their higher education systems. In this context, reference must be made to the judgment in *Grzelczyk* where the Court recognised that Directive 93/96 on the right of residence of students 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States', which Austria is also required to bear. (43)
54. As regards the second justification put forward by Austria concerning abuse of Community law, it is true that the Court admitted in *Knoors* (44) and *Bouchoucha* (45) that a Member State may have a legitimate interest in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting wrongly to evade the application of its national legislation as regards training for a trade or profession. I am not convinced however that those cases provide any support to Austria.
55. First, both those cases concerned measures adopted by Member States against abuses committed by their own nationals who by relying on the Treaty provisions on the right of establishment tried to circumvent stricter national rules on professional qualifications. As the Commission points out, it is difficult to accept that by trying to enter the Austrian higher education system under the same terms and conditions as holders of equivalent Austrian qualifications, nationals of other Member States can be accused of abusing the provisions of the Treaty on free movement of persons. On the contrary, that is precisely the aim of those provisions. (46)
56. Moreover, it is also settled case-law that the question of abuse of Community law can be established only on a case-by-case basis, taking due consideration of the particular circumstances of the individual case and on the basis of evidence. (47) A general and unspecified regime, applicable automatically to all holders of foreign secondary education diplomas without distinction, such as that enshrined in the disputed national provision, hardly meets those criteria and, for the same reasons, would fail also on grounds of proportionality.

The arguments based on international conventions
57. Austria puts forward a final argument to contest the Commission's action, contending that the disputed national provision are in conformity with two Conventions drawn up by the Council of Europe, the Convention of 11 December 1953 on the equivalence of diplomas leading to admission to universities and the Convention of 11 April 1997 on the recognition of qualification concerning higher

education in the European Region. That argument can be dealt with summarily.
58. As regards the cited Council of Europe Conventions, it suffices to note, as the Commission points out, that it is settled case-law that 'whilst the first paragraph of [Article 307] of the Treaty allows Member States to honour obligations owed to non-member States under international agreements preceding the Treaty, it does not authorise them to exercise rights under such agreements in intra-Community relations'. (48) Austria cannot therefore rely on the provisions of the 1953 Convention in order to avoid its Community law obligations.
59. As regards the 1997 Convention, Austria is obliged under Article 10 EC not to enter into any international commitment which could hinder the Community in carrying out the tasks entrusted to it. (49) Such an obligation under Article 10 EC would extend to any national measures implementing the 1997 Convention provisions which had such an effect.

Conclusion
60. For the above reasons I am of the opinion that the Court should:
(1) declare that by not adopting the necessary measures to ensure that the holders of secondary education diplomas obtained in other Member States can have access to higher and university education organised by it under the same conditions as the holders of secondary education diplomas obtained in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12, 149 and 150 EC;
(2) order the Republic of Austria to pay the costs, with the exception of those incurred by the Republic of Finland, which as intervener must bear its own costs.

24 – See Case 263/86 *Humbel* [1988] ECR 5365, at paragraphs 17, 18 and 19 of the judgment, and more recently, Case C-109/92 *Wirth* [1993] ECR I-6447, at paragraphs 15 to 19. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in *Peerbooms*, cited in note 23, in which, relying on the findings made by the Court in *Humbel* in relation to public education, he argued that health-care services provided free by the State did not qualify as services for lack of remuneration. That line of reasoning was however rejected by the Court.

25 – Case 197/86 *Brown* [1988] ECR 3205, at paragraph 18 of the judgment. See however, Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and *D'Hoop*, cited in note 12, discussed below at paragraphs 44 to 46, and the Opinion of Advocate General Geelhoed in Case C-209/03 *Bidar*, not yet decided, delivered on 11 November 2004.

27 – In this context Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 (OJ 2004 L 158, p. 77), which will repeal, inter alia, Directive 93/96 once the implementation measures are adopted at national level by April 2006, reinforces this approach by excluding students who have not legally resided in their territory for a continuous period of five years from being entitled to maintenance aid for studies consisting in student grants or student loans.

28 – Opinion of Advocate General Slynn in *Gravier*, cited in note 8 above, at p. 604. See generally J.-C. Scholsem, 'A propos de la circulation des étudiants: vers un fédéralisme financier européen?', *Cahiers de Droit Européen* (1989), No 3/4, pp. 306 to 324, and A.P. Van der Mei, *Free Movement of Persons Within the EC – Cross-border Access to Public Benefits*, Hart, Oxford (2003), p. 422 et seq.

29 – I would note that, even though students may not contribute directly to the tax system of the State in which they pursue their university studies, they are a source of income for local economies where the university is located, and also, to a limited extent, for the national treasuries via indirect taxes. As to the relevance to be given to the contributions made by tax payers in order to benefit from State budget financed benefits, see the points made by Advocate General Geelhoed in his Opinion in *Bidar*, cited in note 25, at paragraph 65. He considers that that argument, if taken to its logical conclusion, would exclude from any State benefit those nationals who have not contributed or have only done so modestly.

30 – See the arguments of the Belgian Government in *Gravier*, at paragraph 12 of the judgment. See also the observations of the United Kingdom in Case 39/86 *Lair* [1988] ECR 3161, summarised at pp 3169 and 3170, and in *Bidar*, cited in note 25. The latter are summarised by Advocate General Geelhoed at paragraph 65 of his Opinion in the same case.

31 – *Gravier*, cited in note8; and Case 24/86 *Blaizot* [1988] ECR 379.

32 – In the context of the free movement of workers the Court has held that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity: Case 53/81 *Levin* [1982] ECR 1035, at paragraph 23 of the judgment; and Case C-109/01 *Akrich* [2003] ECR I-9607 at paragraph 55.

37 – See also the Opinion of Advocate General Geelhoed in *Bidar*, cited in note 25, in which, on the basis of this case-law on the Treaty provisions on EU citizenship, he argues that assistance with maintenance costs for students attending university courses no longer falls outside the scope of application of the Treaty for the purposes of Article 12 EC.

38 – *D'Hoop*, cited in note 12, at paragraph 38 of the judgment. That restriction was confirmed in Case C-138/02 *Collins*, judgment of 23 March 2004, not yet reported, although that case did not refer to the field of public education.

OPINION OF ADVOCATE GENERAL
SHARPSTON

delivered on 28 June 2007 (1)
Case C-212/06
Government of the French Community and Walloon Government
v
Flemish Government
(Freedom of movement for persons – Care insurance established by the Flemish Community of Belgium – Exclusion of persons residing in another part of the national territory – Articles 18, 39, and 43 EC – Council Regulation (EEC) No 1408/71 – Purely internal situation – Member State with a decentralised structure)

1. The present reference from the Cour d'arbitrage (Court of Arbitration), (2) now Cour constitutionnelle (Constitutional Court), of Belgium (3) concerns the compatibility of a scheme of care insurance benefits, such as the one established by the Flemish Community, with various provisions of Council Regulation (EEC) No 1408/71 (4) and with Articles 18, 39 and 43 EC.
2. A broader issue is whether Community law prevents an autonomous entity of a Member State from making the grant of social security benefits conditional on residence in the territory of the autonomous entity concerned or in the territory of another Member State, thereby excluding persons working in the autonomous entity in question who are resident in another part of the national territory.
3. Still more broadly, what is the impact of Community law on the federal or decentralised structure of a Member State and on what is deemed to be a 'purely internal situation' outside the scope of Community law?

Prologue – the Kingdom of Belgium as a federal State
4. The Belgian federal system, rather like a devolutionary cousin of the Community, (5) did not come about as a result of a single plan. (6) It is the result of incremental changes, originally driven by the Flemish desire to gain cultural autonomy, which took form in the Communities, and the Walloon desire for economic autonomy, which was achieved through the Regions. (7)
5. Belgium now consists of three Communities (the Flemish Community, the French Community and the German-speaking Community), (8) three Regions (the Walloon Region, the Flemish Region and the Brussels Region) (9) and four linguistic regions (the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region). (10)
6. Both the Communities and the Regions have been granted mutually exclusive spheres of competence for certain matters. (11) Both the Communities and the Regions thus act as autonomous legislators with regard to their own competences.
7. Decrees are the legal instruments by which the three Communities, as well as the Flemish and the Walloon Regions, exercise their legislative competences. These Decrees have the same force of law as federal laws. (12)

Legal framework
Relevant Community law
8. Article 17 EC provides:
'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'
9. Article 18 EC provides:
'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
…'
10. Article 39 EC provides:
'1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of

work and employment.
…'
11. Article 43 EC provides:
'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited …
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings … under the conditions laid down for its own nationals by the law of the country where such establishment is effected …'
12. The following recitals of Regulation No 1408/71 (13) are relevant:
'…
[10] … with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment of self-employment; (14)
[11] … in certain situations which justify other criteria of applicability, it is possible to derogate from this general rule.
…'
13. Article 2 of Regulation No 1408/71 lists those covered by the Regulation:
'1. This Regulation shall apply to employed or self-employed persons and to students who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors …'
14. Article 3 of Regulation No 1408/71 enshrines the principle of equal treatment:
'1. Subject to the special provisions of this Regulation, persons to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State. …'
15. Article 4 sets out the material scope of Regulation No 1408/71:
'1. This Regulation shall apply to all legislation concerning the following branches of social security:
(a) sickness and maternity benefits; …
2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.
2a. This Regulation shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in paragraph 1 and of social assistance. "Special non-contributory cash benefits" means those:
(a) which are intended to provide either:
(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;
or
(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,
and
(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone;
and
(c) which are listed in Annex IIa. [(15)]
2b. This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory [(16)]
…'

16. Subject to certain exceptions not relevant to the present case, Article 13 determines the legislation applicable to migrant workers:
'1. … [P]ersons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.
2. …

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;
(b) a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State; …'
17. Article 19 contains the general rules, in the context of sickness and maternity benefits, in case of residence in a Member State other than the competent state:
'1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, [(17)] shall receive in the State in which he is resident:
(a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;
(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State. …'
18. Article 21 contains the rules, in the context of sickness and maternity benefits, applicable in case of stay in, or transfer of residence to, the competent State:
'1. The employed or self-employed person referred to in Article 19(1) who is staying in the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State as though he were resident there, even if he has already received benefits for the same case of sickness or maternity before his stay.
…
4. An employed or self-employed person and members of his family referred to in Article 19 who transfer their residence to the territory of the competent State shall receive benefits in accordance with the provisions of the legislation of that State even if they have already received benefits for the same case of sickness or maternity before transferring their residence.'

Relevant national legislation
19. By Decree of 30 March 1999 (18) ('the 1999 Decree'), the Flemish Community established a 'care insurance' (zorgverzekering) covering, up to a monthly maximum, non-medical assistance and services for persons unable to perform daily tasks necessary for their basic needs or other related activities. (19)
20. The Flemish care insurance was established in order to meet the needs of the ageing population of Flanders. (20) In particular, it aims to provide financial assistance for help with daily tasks for the growing population of elderly, and more generally for those in need of such help regardless of age. (21)
21. The French-speaking and German-speaking communities have not established similar care insurance schemes.
22. Article 2(1) of the 1999 Decree defines non-medical assistance and services as 'assistance and services provided by third persons to a person with a reduced capacity for self-care in a residential, semi-residential or ambulant context.'
23. The 1999 Decree has been amended on numerous occasions. (22) Most importantly for present purposes, the Decree of 30 April 2004 (23) ('the 2004 Decree') amended the 1999 Decree in response to a letter of formal notice from the Commission of 17 December 2002, requesting that the Flemish Community comply with Regulation No 1408/71. In particular, the Commission considered that the 1999 Decree as it originally stood infringed, inter alia, Articles 2, 13, 18, 19, 20, 25, and 28 of Regulation No 1408/71 (24) and Articles 39 and 43 EC by making affiliation to the care insurance scheme and the payment of benefits conditional, without exception, upon residence in the Dutch-speaking region or the bilingual region of Brussels-Capital.
24. The 2004 Decree amended the care insurance scheme by excluding from its scope persons to whom the social security scheme of another Member State of the European Union or a State party to the European Economic Area applies by virtue of Regulation No 1408/71, and by extending its scope to persons residing in another Member State but working in the Dutch-speaking region or the bilingual region of Brussels-Capital.
25. Article 4 of the 1999 Decree, as amended by the 2004 Decree, now reads as follows:
'§ 1. Any person residing within the Dutch-speaking region must join a care insurance scheme approved by this Decree. …

§ 2. Any person residing within the bilingual region of Brussels-Capital may join a care insurance scheme approved by this Decree on a voluntary basis.
§ 2*bis*. Any person referred to in paragraphs 1 and 2 to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme of another Member State of the European Union or of another State party to the European Economic Area applies as of right shall not fall within the scope of this decree.
§ 2*ter*. Any person not residing in Belgium to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme in Belgium applies as of right because of his employment in the Dutch-speaking region must join a care insurance scheme approved by this decree. The provisions of this decree concerning persons referred to in paragraph 1 shall apply by analogy.
Any person not residing in Belgium to whom, on the basis of the rules governing the applicable law under Regulation (EEC) No 1408/71, the social security scheme in Belgium applies as of right because of his employment in the bilingual region of Brussels-Capital may elect to join a care insurance scheme approved by this decree. The provisions of this decree concerning persons referred to in paragraph 2 shall apply by analogy.'
26. Article 5 of the 1999 Decree, as last amended by the Decree of 25 November 2005, (25) lays down the conditions for reimbursement under the care insurance scheme:
'The user must fulfil the following conditions in order to be able to claim reimbursement of the costs of non-medical assistance and services by a care insurance scheme: …
3. at the time of reimbursement, he must be legally resident in a Member State of the European Union or a State party to the European Economic Area; …
5. for at least five years prior to reimbursement, he must have resided without interruption either in the Dutch-speaking region or the bilingual region of Brussels-Capital or, as a person covered by a social insurance scheme, in a Member State of the European Union or a State party to the European Economic Area; …'.

The main proceedings and the questions referred

27. The main proceedings are the third action for annulment of the 1999 Decree brought before the Court of Arbitration. The Government of the French Community brought an action for annulment against the original version of the 1999 Decree ('the first action'). The College of the Commission of the French Community (26) brought an action for annulment against an intermediate version of the 1999 Decree, namely the version of 18 May 2001 (27) ('the second action').
28. For the most part, the Court of Arbitration dismissed the first action. (28) It held that, under the Belgian federal system, the care insurance was to be regarded as 'aid to persons', which is a matter for the Flemish, French and German-speaking Communities within their respective spheres of competence. The Flemish care insurance therefore did not trespass upon the competences of the Federal State with regard to social security.
29. The Court of Arbitration dismissed the second action in its entirety. (29)
30. The main proceedings in this third action concern two separate actions for annulment, both brought on 9 December 2004, which were joined before the Court of Arbitration. In the first, the Government of the French Community seeks annulment of Article 4, paragraph 2*ter* of the 1999 Decree as amended by the 2004 Decree. It alleges, inter alia, that that provision breaches the principles of equality and non-discrimination and constitutes an impediment to freedom of movement for persons and workers. In the second, the Walloon Government seeks annulment of the 2004 Decree in its entirety. It alleges that the 2004 Decree breaches rules governing national competences and the principles of equality and non-discrimination.
31. The Court of Arbitration dismissed the pleas alleging that the Flemish Community lacked the competence to establish the care insurance. It considered, however, that the pleas based on Community law could not safely be answered by reference to the wording of the Treaty or of Regulation No 1408/71, nor to the existing case-law of the Court of Justice. The Court of Arbitration therefore referred the following questions for a preliminary ruling:
'(1) Does a care insurance scheme – which (a) has been established by an autonomous Community of a federal Member State of the European Community, (b) applies to persons who are resident in the part of the territory of that federal State for which that autonomous Community is competent, (c) provides for reimbursement, under that scheme, of the costs incurred for non-medical assistance and service to persons with serious, long-term reduced autonomy, affiliated to the scheme, in the form of a fixed contribution to the related costs and (d) is financed by members' annual contributions and by a grant paid out of the budget for expenditure of the autonomous Community concerned – constitute a scheme falling within the scope *ratione materiae* of the Council Regulation (EEC) No 1408/71 of 14

June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as defined in Article 4 thereof?
(2) If the first question referred for a preliminary ruling is to be answered in the affirmative: must the regulation cited above, in particular Articles 2, 3 and 13 thereof and, in so far as they are applicable, Articles 18, 19, 20, 25 and 28 be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in the territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?
(3) Must Articles 18 EC, 39 EC and 43 EC be interpreted as precluding an autonomous Community of a federal Member State of the European Community from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent and, in relation to citizens of the European Union, persons employed in that territory and who are resident in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the federal State for which another autonomous Community is competent?
(4) Must Articles 18 EC, 39 EC and 43 EC be interpreted as not permitting the scope of such a system to be limited to persons who are resident in the territorial components of a federal Member State of the European Community which are covered by that system?'
32. Written observations have been submitted by the Government of the French Community and the Walloon Government, by the Flemish Government, by the Netherlands Government and by the Commission.
33. All parties except the Netherlands Government attended the hearing on 27 March 2007 and presented oral argument.

First question
34. By its first question, the referring Court wishes to know whether a care insurance scheme such as the one established by the Flemish Community falls within the scope *ratione materiae* of Regulation No 1408/71, as defined in Article 4 thereof.
35. All parties are in agreement that this question should be answered in the affirmative. They consider that the benefits provided by the Flemish care insurance are properly to be categorised as social security benefits within the meaning of Regulation No 1408/71.
36. As the Court has stated on numerous occasions, a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71. (30)
37. Benefits that are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care have the essential purpose of supplementing sickness insurance benefits, and must therefore be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71. (31) The Flemish care insurance appears to fit squarely within that definition. It should therefore be classified as a 'sickness benefit' within the meaning of Article 4(1)(a) of Regulation No 1408/71.
38. The Walloon Government correctly points out that the Flemish care insurance cannot be excluded from the scope of Regulation No 1408/71 by Article 4(2b). (32) First, it is not listed in Annex II, Section III of the regulation. Second, it appears to be a contributory benefit, (33) inasmuch as it is financed, at least partially, (34) by payment of contributions by those affiliated. (35)

Second and third questions
39. The Flemish care insurance excludes from its scope persons working in the Dutch-speaking region or in the bilingual region of Brussels-Capital, but living in one of Belgium's other linguistic regions. Do Regulation No 1408/71 and/or the provisions of the Treaty on freedom of movement for persons and on citizenship of the Union preclude such an arrangement?

Admissibility
40. The Flemish Government's principal argument is that the second and third questions are inadmissible, because an answer would be neither useful nor necessary to the determination of the main

proceedings. Before the national court, the applicants have opposed the *establishment* of the care insurance scheme, arguing that the Flemish Community lacked the necessary competence. The interpretation of Community law suggested by the applicants would, perversely, result in the *extension* of the scheme to persons living in the French-speaking region.

41. The Flemish Government also claims that the referring court has itself answered the third question, by establishing that the Flemish care insurance scheme does not endanger the competence of the federal legislator regarding the economic union within Belgium, because of the limited sums of money at stake and the limited effects of the benefits in question. (36) The same could be said of any effect on freedom of movement within the Community.

42. I am not convinced by these arguments.

43. The Court has held on numerous occasions that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides national courts with the points of interpretation of Community law which they need in order to decide disputes before them. (37)

44. In the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (38)

45. It is true that in exceptional circumstances the Court will examine the conditions in which the case was referred by the national court, in order to assess whether it has jurisdiction. However, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (39)

46. In the present case, even if (as the Flemish Government submits) the Court's answer to Questions 2 and 3 may lead to the extension of the scope of the Flemish care insurance rather than its abolition, it cannot be said that the reply to those questions will not be of assistance in enabling the national court to determine whether the Flemish care insurance as it stands is compatible with Community law.

47. Moreover, the fact that the referring court may have answered, under national law, a question that is similar to the third question referred does not mean that the answer may be transposed automatically to the situation under Community law.

48. It follows that the second and third questions are admissible.

Substance

Preliminary remark

49. In its written observations, the Commission distinguishes between two categories of persons: (i) citizens of other Member States and Belgian citizens who have made use of their freedom of movement rights; (ii) Belgian citizens who have not made use of their freedom of movement rights. The distinction seems a useful one and I shall adopt it.

Citizens of other Member States and Belgian citizens who have made use of their freedom of movement rights

– Does the situation of this group of persons fall within the scope of Regulation No 1408/71 and/or the provisions of the Treaty on the freedom of movement for persons?

50. Citizens of other Member States who work in the Dutch-speaking region or in the bilingual region of Brussels-Capital but live in another linguistic region come within the scope of Article 39 or 43 EC (depending on whether they are, respectively, employed or self-employed). They also come within the scope of Regulation No 1408/71, by virtue of Article 2 thereof. Belgian citizens who have made use of their freedom of movement rights are in an analogous situation.

51. More generally, any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article 39 EC. (40)

52. Moreover, even if, according to their wording, the rules on freedom of movement for workers are intended, in particular, to secure the benefit of national treatment in the *host* State, they also preclude the *State of origin* from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State. (41)

53. Community law does not of course detract from the power of the Member States to organise their social security systems – in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted. (42) When exercising that power, the Member States must nevertheless comply with Community law. (43)

– Does the residence requirement attached to the Flemish care insurance constitute an obstacle to freedom of movement for workers?

54. It is well established that the EC Treaty provisions relating to freedom of movement for workers are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community and that they preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. (44)

55. Provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement are potentially capable of constituting an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned. (45) In other words, a national measure can potentially constitute a prohibited obstacle even if it is non-discriminatory.

56. However, in order actually to constitute an obstacle, such provisions must affect access of workers to the labour market and their effect on freedom of movement must not be too indirect and uncertain. (46)

57. At this stage, let us examine the practical effect of the Flemish care insurance rules. Imagine a French national who wishes to take up employment in Hoegaarden (situated in the Dutch-speaking region of Belgium) and who currently lives in Givet in the Champagne-Ardenne region in France (about 95 kilometres south of Hoegaarden). Not implausibly, he might prefer to live in a region where his mother tongue is the official language and where his children can easily go to a local school in that same language. He might therefore decide to move to Jodoigne (situated in the French-speaking region of Belgium) about seven kilometres south of Hoegaarden. If he does so, he will not be able to join the Flemish care insurance. If he wanted to sign up to that scheme and still live in a region where French is an official language, he would have to choose between settling in the bilingual region of Brussels-Capital (for example in Woluwe-Saint-Lambert/Sint-Lambrechts-Woluwe, about 44 kilometres to the west of Hoegaarden) or keeping his residence in France. (47)

58. The prospect of daily commuting on overcrowded highways, and indeed the environmental impact of such commuting, might dissuade him from taking up the employment in question, and hence from exercising his right to freedom of movement. Since the French Community and the German-speaking Community have not established similar care insurance schemes, he could not solve the problem by seeking affiliation to a care insurance scheme at a place of residence within Belgium outside the Dutch-speaking region or the bilingual region of Brussels-Capital.

59. Thus, it is clear that the residence requirement may in certain circumstances be an obstacle to freedom of movement for persons.

– Is the effect of the residence requirement on freedom of movement too indirect and uncertain?

60. The Commission suggests that this assessment should be left to the national judge.

61. I disagree.

62. I find it difficult to see precisely what criteria the referring court, without guidance from this Court, would apply in order to evaluate remoteness and uncertainty. It seems to me that the Court has sufficient material to resolve the point as a question of principle.

63. The Flemish Government estimates that the number of people affected will be relatively small and that the possibility of affiliation to the care insurance is likely to have only a marginal influence on individuals' choice as to whether to exercise their freedom of movement rights. It therefore relies on *Graf*, in which the Court held that in order to constitute an obstacle, national provisions must affect access of workers to the labour market and their effect on the freedom of movement must not be too indirect and uncertain. (48)

64. In *Graf*, the Court was concerned with a future and purely hypothetical event. By contrast, it is clear in the present case that *any* migrant worker considering taking up employment in the Dutch-speaking region will potentially be affected by the residence requirements governing affiliation to the Flemish care insurance. This is not a hypothetical situation.

65. I do not think that the Court should try to evaluate the precise extent to which such a measure affects the individual worker's decision. Otherwise, the fact that some workers may not be daunted by

a particular measure could always be used as a reason for holding that that measure's effect on access to the labour market was potentially too uncertain and indirect. Moreover, it is difficult to see how the Court would go about conducting such an evaluation. It seems to me that, for a measure to constitute an obstacle, it is sufficient that it should be reasonably likely to have that effect on migrant workers.

66. I accept that it is difficult to estimate how many people will in fact be affected by the residence requirement in the Flemish care insurance. However, it is clear that many people may potentially be affected, especially in a country such as Belgium, where many non-Belgian EU citizens work.

67. The effects of the residence requirement are therefore not too indirect and uncertain.

68. The Flemish Government also submits that affiliation to the care insurance is a dubious 'advantage', given the compulsory nature of the contributions to be paid.

69. I do not accept this argument.

70. It is to be assumed that the Flemish Government, in establishing the care insurance scheme, thought it was providing its citizens with a benefit rather than placing them under a burden. On the Flemish Government's argument, paying for unemployment benefits would likewise be regarded as disadvantageous. Any particular individual may pay contributions throughout his working life without ever drawing unemployment benefit – indeed, he may hope that he will never need to do so. The whole point of such social security schemes is, however, not that everyone benefits directly, but that everyone benefits potentially, to the advantage of society as a whole.

– Is the residence requirement also indirectly discriminatory?

71. As I have already indicated, (49) a national measure that constitutes an obstacle to freedom of movement for persons cannot stand, even if it is non-discriminatory. However, since the question of discrimination was raised to a greater or lesser extent by most of the parties in their written observations and also at the hearing, I shall deal with it here.

72. It is well established that the principle of equal treatment, as laid down in Article 39(2) EC and implemented, as far as concerns social security for migrant workers, by Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result. (50)

73. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of the latter. (51)

74. A provision of national law must thus be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage. Such a provision is then permissible only if it is objectively justified and proportionate. (52)

75. The Flemish Government submits that migrant workers are treated exactly like Belgian workers in a similar situation.

76. The difficulty, however, is to determine the correct comparator, i.e. who are the Belgian nationals who are in a 'similar situation'.

77. The second and fourth recitals in the preamble to Regulation No 1408/71 indicate that its objective is to ensure freedom of movement for employed and self-employed persons within the Community, while respecting the special characteristics of national social security legislation. To that end, as is clear from the 5th, 6th and 10th recitals, Regulation No 1408/71 seeks to guarantee equal treatment for all workers occupied on the territory of a Member State as effectively as possible and to avoid penalising workers who exercise their right to free movement. (53) Article 13(2)(a) provides that, as a general rule, the applicable legislation is to be the *lex loci laboris*.

78. The Member State in whose territory equality is to be achieved will therefore normally be the State where the place of work is situated.

79. As the Commission suggested at the hearing, the correct starting point for the comparison is therefore not the place of residence, but the place of work. What happens when we compare two groups whose members all work in the Dutch-speaking region or the bilingual region of Brussels-Capital but who live, respectively, in the Dutch-speaking region or the bilingual region of Brussels-Capital on the one hand and in the French-speaking or German-speaking regions of Belgium on the other hand?

80. Suppose there are two employees of the same company located in Hoegaarden. Both wish to live as close as possible to their place of work. Worker A is a Dutch-speaking Belgian. He decides to live in Hoegaarden itself. Worker B is French. For the reasons suggested earlier, he decides to live in

Jodoigne. They work in the same Member State, in the same region, in the same city and for the same company. Their houses are 7 kilometres apart. Worker A can – indeed, must – join the Flemish care insurance and will be able to access its benefits. Worker B cannot. It is evident that, in this example, there is no equality of treatment.

81. It is unnecessary to establish that the provision in question in practice affects a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. (54)

82. It is also immaterial whether the contested measure affects, in some circumstances, nationals of the State in question resident in other parts of the national territory as well as nationals of other Member States. In order for a measure to be discriminatory, it is not necessary for it to put at an advantage all the nationals of the State in question or to put at a disadvantage only nationals of other Member States, but not nationals of the State in question. (55)

83. A scheme such as that at issue in the main proceedings therefore imposes a difference in treatment to the detriment of migrant workers.

– The application of the *lex loci laboris* to denote the competent part of the competent State

84. At the hearing, the Commission also suggested that, in application of Article 13 of Regulation No 1408/71, the *lex loci laboris* should be used as the sole connecting factor, to denote both the Member State and the decentralised authority of that Member State whose legislation is applicable. Otherwise, by virtue of national legislation, a migrant worker may lose a benefit that he had been granted by virtue of Community law. This would endanger the coordination regime established by Regulation No 1408/71.

85. I agree with the Commission.

86. To pursue my earlier illustration: suppose that the same French national who took up a job in Hoegaarden initially decides to commute between his work and his home in Givet. He does this for a number of years. Then he decides that life would be easier for all the family if they moved closer to his place of work and settled in Jodoigne. Upon moving his residence from France to the French-speaking region of Belgium, whilst continuing to work in the Dutch-speaking region, he will lose the benefits of the Flemish care insurance. It is apparent that this may dissuade him from exercising his right to freedom of movement and residence.

87. When taken at face value, the situation I have just described appears to be the one envisaged in Article 21(4) of Regulation No 1408/71: a worker who was previously not resident in the competent State transfers his residence to the competent State, in casu Belgium.

88. Article 21(4) of Regulation No 1408/71 provides that the migrant worker should receive or continue to receive benefits in accordance with the legislation of the competent State. Prima facie the situation under the Flemish care insurance seems to comply with this requirement inasmuch as the French migrant is treated in accordance with the legislation of the competent State, in casu Flemish legislation.

89. There are however two flaws in this reasoning.

90. First, the prima facie conclusion that there is no inequality of treatment is dependent upon comparing a French national moving to the French-speaking part of Belgium with a Belgian national living in the French-speaking part of Belgium.

91. As I have indicated earlier, this is the wrong comparison to make.

92. Second, as the Commission correctly observed at the hearing, the coordination system of Regulation No 1408/71 is based on the idea that social security regimes are organised on a Member State basis.

93. When Article 13 renders the *lex loci laboris* applicable, it assumes both that the territorial entity where the place of work is situated is competent to grant the relevant benefits, and that it is competent to do so on an equal basis for everyone working within that territory.

94. Similarly, when Article 21(4) of Regulation No 1408/71 determines that a migrant worker upon moving to the competent State shall receive or continue to receive benefits in accordance with the legislation of the competent State, it assumes that the competent State is indeed *competent* to grant the migrant worker whichever benefits it grants to its own citizens. However, in the present case the competent authority of the competent State is, in fact, competent in respect of only part of the territory of that State.

95. In order for the French worker in my example to be granted the benefits, he has either to go on living in France or to move, not just to the competent State (Belgium), but to the part of the competent State where the competent authority is competent (the Dutch-speaking region or the bilingual region of Brussels-Capital).

96. The solution is to use the *lex loci laboris* to denote the applicable social security regime, both with regard to the Member State (Belgium) and with regard to the decentralised authority of the

Member State whose legislation is applicable (Flemish Community). The situation described in my example would then effectively be equated with the one envisaged in Article 19(1) of Regulation No 1408/71, which provides for a person to enjoy his benefits even if he resides 'in a Member State other than the competent State', i.e. in casu anywhere outside the Dutch-speaking region or the bilingual region of Brussels-Capital.
97. Such a solution also provides consistency in the use of the term 'State' within Regulation No 1408/71. If the place of work determines the competent State, then references to the competent State in Regulation No 1408/71 are also to be read (where necessary) as references to the competent entity within the competent Member State.

– If the residence requirement is properly to be characterised as an obstacle to freedom of movement and/or as indirect discrimination that operates to the detriment of migrant workers, is it objectively justified?
98. Is the obstacle or differential treatment at issue based on objective considerations which are independent of the nationality of the persons concerned and proportionate to the aim legitimately pursued by the national law? (56)
99. The Flemish Government submits that the residence requirement is inherent in the division of competences within the Belgian Federal State. The difference in treatment results not from discrimination, but from the fact that the Flemish Community has no competence with respect to persons residing in one of the other linguistic regions of Belgium. According to Belgian constitutional law, such persons come within the competence of the French or German-speaking Communities. Those communities have chosen not to establish a care insurance scheme similar to the one in Flanders. To assimilate such differences of treatment to discrimination is to deny Member States the right to opt for a federal structure composed of autonomous federated entities that adopt rules applicable only to that part of the national territory for which they are competent.
100. I do not accept this argument.
101. It is well established that a Member State may not plead provisions, practices or situations in its internal legal order, including those resulting from its federal organisation, in order to justify a failure to comply with the obligations and time-limits laid down in a directive. (57) A Member State may indeed allocate internal legislative powers freely as it sees fit. However, it alone remains responsible under Article 226 EC for complying with its obligations under Community law. (58) The Court has also made it clear that the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to the principles of a national constitutional structure. (59)
102. The same must apply *a fortiori* to breaches of Treaty provisions (60) and of directly applicable law derived from a regulation.
103. Therefore, whilst the argument that the Flemish Community lacked the requisite competence to legislate with regard to persons not living in the Dutch-speaking region or the bilingual region of Brussels-Capital is understandable from a domestic perspective, it has no bearing on the question whether the residence requirement does or does not comply with Community law.
104. The Flemish Government argues that such an analysis would make it de facto impossible for Member States to adopt a federal structure. I do not accept that contention.
105. Belgium is not the only Member State to have chosen a federal or otherwise decentralised structure. Community law has not made it impossible for other federal Member States, and/or their decentralised authorities, to exercise their competences as defined by national law. However, a Member State cannot use its decentralised structure as a cloak in order to justify a failure to comply with its obligations under Community law.
106. It might be said that, if so, decentralised authorities of Member States need some mechanism by which to participate in the elaboration of EU law, especially when the Member State itself is not competent. (I add in passing that analogous arguments arise in respect of locus standi in direct actions before the Court under Article 230 EC. (61))
107. That is a fair point. Appropriate institutional arrangements can, however, be set up to ensure such participation in the Community legislative process. This can be achieved, for example, through the first paragraph of Article 203 EC, which implicitly allows regional ministers to represent their Member State in the Council. I note that such arrangements have, indeed, been made within the Belgian constitutional structure. (62)
108. The Flemish Community's presumed lack of competence to legislate with regard to persons not living in the Dutch-speaking region or the bilingual region of Brussels-Capital cannot therefore be invoked by way of objective justification.
109. The Flemish Government further argues that persons working in the Dutch-speaking region but

living in the French-speaking region can always apply to the care system of the French Community. (63) However, neither the French Community nor the German-speaking Community has apparently established an equivalent care insurance. That argument therefore falls away.
110. In so far as nationals of other Member States working in Belgium and Belgian nationals who have exercised rights of freedom of movement are concerned, the second and third questions referred should therefore be answered to the effect that Articles 39 and 43 EC and Article 3 of Regulation No 1408/71 preclude an autonomous Community of a federal Member State from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent or in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the same federal State for which another autonomous Community is competent.
111. Having reached this conclusion, it is unnecessary to examine whether such persons may also claim rights under Article 18 EC, which confers a general right on every citizen of the Union to move and reside freely within the territory of the Member States, subject to certain limitations. In relation to freedom of movement for workers, that provision finds specific expression in Article 39 EC. In respect of persons who have exercised classic economic rights of freedom of movement, it is accordingly unnecessary to rule separately on the interpretation of Article 18 EC. (64)

Belgian citizens who have not made use of their freedom of movement rights
112. Is this group to be regarded as being in a 'purely internal situation' that falls outside the scope of Community law?
113. The Court has held on numerous occasions that the Treaty rules governing freedom of movement for persons and measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State. (65)
114. More specifically, in *Petit* the Court held that Regulation No 1408/71 does not apply to situations which are confined in all respects within a single Member State. (66) The applicant in those proceedings was a Belgian national, had always resided in Belgium and had worked only in the territory of that Member State.
115. When analysed in terms of the classic economic freedoms, the situation of Belgians who have never exercised a right of freedom of movement appears to be purely internal. Does that mean that it remains wholly unaffected by the application of EC law?
116. I must confess to finding something deeply paradoxical about the proposition that, although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States. One might ask rhetorically, what sort of a European Union is it if freedom of movement is guaranteed between Dunkirk (France) and De Panne (Belgium), but not between Jodoigne and Hoegaarden?
117. From what I have said earlier regarding the application of the concepts of *lex loci laboris* and competent State, it may be that the entities between which barriers actually need to be abolished are not necessarily always the Member States, but the entities that have the *relevant regulatory authority* (be these Member States or decentralised authorities within a single Member State). (67)
118. The beneficial effects of dismantling barriers to freedom of movement between Member States can easily be undermined if decentralised authorities of Member States have the relevant competences and are free to establish such barriers between themselves. In the light of trends towards regional devolution in several Member States, this may be a serious issue. However beneficial devolution may be from the perspective of subsidiarity (68) and democratic accountability, it must not come at the cost of (de facto) endangering the area of freedom of movement or the *effet utile* of Community law.
119. Moreover, the situation that arises in the present case is a rather curious version of a 'purely internal situation'.
120. Since the Belgian Communities and Regions act as autonomous legislators within their spheres of competence, their position is, in that respect, equivalent to that of a Member State. Were Flanders an independent Member State of the Union, the impossibility for those living in Wallonia but working in Flanders to affiliate to the Flemish care insurance scheme would clearly fall foul of the Treaty.
121. This case therefore presents an occasion for the Court to reflect on the nature and rationale behind its doctrine in respect of purely internal situations.
122. The Government of the French Community and the Walloon Government argue that freedom of movement for persons should be aligned, so far as possible, with free movement of goods. In that context, they refer to the Court's judgments in *Legros*, (69)*Lancry*, (70) and *Simitzi*, (71) which are

said to have extended the prohibition on tariff barriers to a similar prohibition on regional borders inside a Member State. By analogy, the Flemish care insurance should be regarded as equivalent to an internal tariff barrier with regard to freedom of movement for persons.
123. In order to evaluate that argument, it is necessary to examine the reasoning behind extending the prohibition on tariff barriers affecting free movement of goods to internal situations. In that regard, the Court's case-law invokes both practical and conceptual considerations.
124. In *Lancry*, the Court pointed out that charges such as those at issue in that case were imposed on all goods alike. It would be virtually impossible in practice to distinguish between products of domestic origin and those from other Member States. Verifying in every case whether a particular product in fact originated in another Member State would give rise to administrative procedures and further delays that would themselves constitute obstacles to the free movement of goods. (72)
125. This pragmatic justification for prohibiting internal tariff barriers affecting free movement of goods cannot however be transposed to freedom of movement for persons. The provisions on freedom of movement for persons do not contain a prohibition equivalent to that on tariff barriers in Article 25 EC.
126. The Court has, however, also provided a conceptual explanation for its case-law on internal tariff barriers.
127. In *Carbonati*, the Court recalled that the justification for prohibiting customs duties and charges having equivalent effect is that any pecuniary charges imposed on goods by reason of the fact that they cross a frontier constitute an obstacle to free movement. (73) It went on to hold, more broadly, that the very principle of a customs union, as provided for by Article 23 EC, requires free movement of goods to be ensured throughout the territory of the customs union. If Articles 23 and 25 EC refer expressly only to trade between Member States, that is because the framers of the Treaty took it for granted that no charges exhibiting the features of a customs duty were in existence within individual Member States.
128. The Court then concluded its reasoning with a more general statement. It pointed out that Article 14(2) EC, in defining the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured', draws no distinction between inter-State frontiers and frontiers within a single State. Article 23 EC should be read together with Article 14(2) EC. It follows that the absence of charges between or within Member States is essential to realising the customs union and free movement of goods. (74)
129. It seems to me that, potentially at least, the same reasoning can be applied by analogy to freedom of movement for persons. Why should the provisions on freedom of movement for persons not likewise be read together with Article 14(2) EC? Indeed, unlike Article 25 EC, Article 39 EC does not explicitly refer only to cross-border situations. Rather, it stipulates that freedom of movement shall entail the right to move freely within the territory of Member States for the purpose of accepting offers of employment actually made. Advocate General Warner noted as much in *Saunders*, (75) where he argued that the right flowing from Article 39 EC is '*prima facie* one of access to every part of every territory. That is as one would expect, since the free movement of persons has as its object to contribute to the establishment of a common market in which the nationals of all Member States may take part in economic activity anywhere on the territory of the Community …'
130. Just as with Articles 23 and 25 EC, the Treaty draftsmen may well have taken it for granted when envisaging freedom of movement for persons within the Community that internal obstacles within a single Member State such as the one at issue in the present case would have been abolished. (76)
131. In his Opinion in *Lancry*, Advocate General Tesauro noted the 'paradox of a single market in which barriers to trade between Portugal and Denmark are prohibited, whilst barriers to trade between Naples and Capri are immaterial'. (77) He concluded that it was not for the Court to resolve this paradox, (78) warning that if it did so in respect of internal tariff barriers, that would call into question the settled case-law on purely internal situations, not only regarding goods, but also regarding services and persons generally.
132. Whilst the Court did not follow Advocate General Tesauro in that respect, it has not yet fully grappled with the implications, for freedom of movement for persons, of the conceptual justification it has advanced for the abolition of internal tariff barriers affecting free movement of goods.
133. An additional impetus for so doing may perhaps be found in the articles of the Treaty on citizenship of the Union.
134. True, the Court has held that citizenship of the Union, as established by Article 17 EC, is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law. (79)
135. However, that statement requires one to solve the logically prior question of which situations, internal or not, are deemed to have no link with Community law.

136. The answer cannot be that all so-called 'internal situations' are automatically deprived of any link to Community law. (80) Article 141 EC on equal pay for men and women provides a clear example of a provision applicable to situations that are normally wholly internal to a Member State. The question whether the situation is internal is therefore conceptually distinct from the question whether there is a link with Community law. Both questions must be answered in the light of the goals of the relevant Treaty provisions.
137. It is true that in *Uecker and Jacquet* the Court explained its conclusion that Article 17 EC does not affect internal situations that have no link with Community law by recalling that Article 47 EU 'provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties'. (81) The Court decided that '[a]ny discrimination which nationals of a Member State may suffer under the law of that State fall[s] within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State'. (82)
138. With all respect, I am not convinced that Article 47 EU provides a conclusive answer on this point. A different and plausible reading of that provision is that its primary purpose is to protect the *acquis communautaire* from being affected by the provisions of, and decisions taken under, Title V and Title VI of the EU Treaty. (83) I find it difficult to conceive that Article 47 EU was intended to protect certain parts of the existing EC Treaty from other parts, such as the articles on citizenship, that were *inserted by amendment into that same Treaty* by the Maastricht Treaty. If that were the case, logic would dictate that all provisions inserted into the EC Treaty by the Maastricht Treaty are to be regarded as a separate genus of Community law that cannot interact with or affect the rest of Community law. That seems clearly wrong.
139. As the Court first held in *Grzelczyk* (84) and confirmed most recently in *Commission* v *Netherlands*, (85) citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality. (86)
140. The Court has recently shown its willingness to draw the appropriate consequences in cases such as *Tas-Hagen* (87) and *Turpeinen* (88) and *Commission* v *Netherlands*. (89) It seems to me that, at least potentially, the provisions on citizenship likewise challenge the sustainability in its present form of the doctrine on purely internal situations. (90)
141. The present case comes as close to a classic cross-border situation as a supposedly internal situation can. It thereby highlights the arbitrariness of attaching so much importance to crossing a national border. (91)
142. The group of persons concerned (Belgian citizens who have not exercised classic economic rights of freedom of movement), as well as being Belgian citizens, are also (and for that very reason) citizens of the Union (Article 17 EC). (92) There is no issue about the type of nationality that they hold, or whether it qualifies them to claim Union citizenship (unlike the situation in *Kaur*). (93) They fall squarely within the scope of the Treaty *ratione personae*.
143. By virtue of that citizenship, they have under EC law a right not only to move but also to reside anywhere within the territory of the Union (Article 18 EC). The previous Article 18 case-law has focused on moving. But that article also speaks of a right of residence.
144. If it were to pursue this line of analysis, the Court would therefore have to decide whether on a proper construction, the 'right to move and reside freely within the territory of the Member States' (94) in Article 18 EC means 'freedom to move and *then* reside' (i.e., freedom to reside derives from/flows from prior exercise of the freedom to move) or whether it means 'freedom *both* to move *and* to reside' (so that it is possible to exercise the freedom to reside/go on residing without first exercising the freedom to move between Member States).
145. The benefit to which the persons concerned wish to have access is one that, as I have indicated, falls equally squarely within Regulation No 1408/71. It is therefore clearly within the scope of the Treaty *ratione materiae*. Even if it were not, I recall that the Court was prepared to hold in *Tas-Hagen* that Article 18 might give access to a benefit through Member States' obligation to exercise powers that are within their competence in a way that is consistent with Community law. (95)
146. Conceptually, it seems unfortunate that a benefit which is, in my view, clearly part of 'mainstream' social security and which is available both to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital and live within those particular parts of the national territory and to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital and have exercised 'classic' economic rights of freedom of movement should *by definition* be unavailable to those who work in the Dutch-speaking region or the bilingual region of Brussels-Capital but who live in the French-speaking or German-speaking regions.
147. Article 12 EC contains a broadly-drafted prohibition on discrimination in respect of what is

covered by the Treaty. A further manifestation can be found in Article 3(1) of Regulation No 1408/71. Non-discrimination is also, of course, one of the fundamental principles of EC law. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. (96) The importance of non-discrimination is underscored by the Charter of fundamental rights of the European Union (97) (Article 21) and by the legislative initiative of the Council in enacting two major directives, based on Article 13 EC, prohibiting various specific forms of discrimination. (98) Non-discrimination is also (of course) enshrined in the Treaty establishing a Constitution for Europe (Article I-4, Article II-81, and Article III-123). Discrimination is thus generally perceived to be repugnant and something that should be prohibited.

148. In its judgment in *Kenny*, (99) the Court seems already to have suggested that, within the field of social security law, the principle of non-discrimination may also prevent reverse discrimination. (100)

149. More generally, the Court made it clear in *Eman* that discrimination by a Member State against its own nationals can be caught by Community law under certain circumstances. There, a Netherlands national resident in a non-member country had the right to vote and to stand as a candidate in elections to the European Parliament held in the Netherlands whereas a Netherlands national residing in the Netherlands Antilles or Aruba had no such right. The Court held that whilst, in the current state of Community law, Member States could define the conditions for exercising the right to vote and to stand as a candidate in elections to the European Parliament by reference to residence in the territory in which the elections were held, the principle of equal treatment prevented the criteria chosen from resulting in different treatment of nationals who were in comparable situations, unless that difference in treatment was objectively justified. The Court held that it was not. (101)

150. If the analysis that I have set out earlier is correct, application of EC law will result in the Flemish care benefit, which is already available to all living within the Dutch-speaking region or the bilingual region of Brussels-Capital, having also to be made available (a) to 'classic' EC migrant workers (nationals of other Member States working in the Dutch-speaking region or the bilingual region of Brussels-Capital of Belgium but residing in the French-speaking or German-speaking regions or in their home Member State) (b) to Belgians who have already exercised a right of freedom of movement, to avoid a 'chilling' effect on the exercise of those rights. (102)

151. Thus, the *combination* of the application of national law and the application of EC law produces a situation in which the only category of persons residing in the French-speaking or German-speaking region who are not able to access the Flemish care benefit are Belgians who have not exercised a traditional right of freedom of movement, but who have exercised (and continue to exercise) a right to reside in a particular part of Belgium. Furthermore, the difference in treatment between such persons on the one hand, and nationals of other Member States and Belgians who have exercised classic economic rights of freedom of movement, on the other hand, *arises precisely* because EC law intervenes to prevent adverse treatment of the latter group. (103) If one then applies the test that is familiar from the discrimination case-law, it appears that 'but for' their decision to reside in the French-speaking region although they work in the Dutch-speaking region, the former group would also be able to access the benefit.

152. The Government of the French Community raises an interesting tangential argument based on the Agreement between the European Community and its Member States and Switzerland on the freedom of movement for persons ('the EC-Switzerland Agreement'). (104) Article 7(b) of that Agreement requires the Contracting Parties to make provision for 'the right to occupational and geographical mobility which enables nationals of the Contracting Parties to move freely within the territory of the host State and to pursue the occupation of their choice'. That provision would indeed appear expressly to grant Swiss citizens the right to move freely, not only between Switzerland and the various Member States, but also between different parts of the territory of an individual Member State.

153. If so, the paradoxical result would be that a Swiss citizen (like a national of another Member State) would be entitled to freedom of movement throughout Belgium, whilst a Belgian national would merely enjoy such freedom of movement rights within Belgium as he could derive from national law. To that extent, the EC-Switzerland Agreement throws into even sharper relief the fact that, if the traditional 'purely internal situation' argument is accepted, Belgian nationals who have not exercised classic economic rights of freedom of movement are, *by the very operation of EC law* (in combination with national law), the only class of persons residing or moving within the Union against whom the conditions for entitlement to the Flemish care insurance may discriminate with impunity.

154. In such circumstances, a prima facie case can, it seems to me, be made for saying that the group of Belgian nationals who have not exercised classic economic rights of freedom of movement *nevertheless* falls in principle within the scope of EC law and/or is sufficiently affected by its application that they ought also to be able to invoke EC law. (105)

155. Any discrimination against that group would, of course, be indirect rather than direct. For that reason, it would be open to Member States to raise arguments of objective justification. It is not difficult to foresee circumstances in which such objective justification could potentially be made out. One can readily imagine (for example) that, in order to promote a less-developed region within its territory, or to deal with a problem that is endemic to one region but does not affect the rest of its territory, a Member State might wish to make certain advantages available only to those living within a particular region. Well-founded objective justification would leave Member States ample scope to apply differentiated rules in situations that, objectively, merited such treatment, whilst safeguarding citizens of the Union against arbitrary discrimination that could not be so justified.
156. It goes without saying that counter-arguments to the analysis that I have set out above on the impact of citizenship of the Union on purely internal situations, based upon continuing competences of the Member States, (106) could be put forward. Given that purely internal situations have traditionally been viewed as falling outside the scope of EC law, it is likely that Member States would indeed wish to present such arguments to the Court; and their arguments would need to be considered carefully. I am fully conscious of the fact that, in the present case, only one Member State (the Netherlands) has intervened. It would seem desirable for a proper exploration of the elements that I have canvassed above to take place against the background of fuller participation from the Member States and (as a corollary) a more developed presentation by the Commission. It might be that, on more detailed examination, the prima facie case that I have outlined above is refuted.
157. The Court would not, I suspect, wish to decide such a fundamental point in the present case (unless, of course, it decides to reopen the oral procedure and invite Member States to make their views on this issue known); and I do not see an overriding need for it to do so. There does nevertheless appear to me to be a possible argument – and one that is prima facie attractive because it would help to eradicate arbitrary discrimination – that citizens of the Union may rely upon that citizenship, in combination with the principle of non-discrimination, as against a decentralised authority that unquestionably exercises the *auctoritas* of the State, in order to access a benefit that Community law clearly intends should be available widely to all workers and that groups of fellow-workers can indeed access through the intervention of Community law.

On the potential applicability of Regulation (EEC) No 1612/68 of the Council (107)

158. At the hearing, the question was raised as to whether Regulation No 1612/68 might be applicable to the proceedings.
159. That regulation applies in general to freedom of movement for workers. It may therefore apply to social advantages which, at the same time, come within the specific scope of Regulation No 1408/71. (108) The two Regulations do not have the same scope *ratione personae*. (109) The notion of social advantage in Article 7(2) of Regulation No 1612/68 may also be broader than the notion of social security benefit under Regulation No 1408/71. (110)
160. Where there is a potential overlap between Regulation No 1408/71 and Regulation No 1612/68, the Court often first examines whether Regulation No 1408/71 is applicable. It goes on to examine the case on the basis of Regulation No 1612/68 on the occasions where Regulation No 1408/71 is found to be inapplicable, or where the alleged infringements of that regulation are not made out. (111) Given that the scope of Regulation No 1408/71 is the more specific, this seems to me a sensible approach.
161. In the present case, I consider that Regulation No 1408/71 is applicable and that Article 3(1) thereof precludes citizens of other Member States and Belgian citizens who have made use of their right to freedom of movement being denied access to the Flemish care benefit. Persons in that situation are therefore sufficiently protected by Regulation No 1408/71 and there is no need to consider the position under Regulation No 1612/68.
162. If the Court is minded to treat Belgian citizens who have *not* made use of a classic economic right to freedom of movement as entitled nevertheless to protection under Community law, it would likewise be unnecessary to examine their position from the perspective of Regulation No 1612/68. Should the Court hold that such persons are in a purely internal situation with no link with Community law, neither Regulation No 1408/71 nor Regulation No 1612/68 can apply.

Fourth question

163. By its fourth question, the referring court wishes to know what would happen if the current (2004) version of the 1999 Decree were inconsistent with Community law. More particularly, the question arises whether Community law would preclude reversion to the system in force before the adoption of the 2004 Decree, i.e. a system where access to benefits under the Flemish care insurance was unequivocally dependent on residence in the Dutch-speaking region or the bilingual region of Brussels-Capital, irrespective of the category of claimant ('the 2001 version of the Decree').

164. The Flemish Government submits that a reply to the fourth question is necessary only if the present version of the Decree is inconsistent with Community law, which, in its submission, is not the case.
165. If the Court shares my view on the answers to be given to the first three questions, it is indeed necessary to answer the fourth question.
166. By a letter of formal notice of 17 December 2002, the Commission informed the Belgian Government that in its view the 2001 version of the Decree infringed Articles 39 and 43 EC as well as Regulation No 1408/71. The Commission specifically took issue with the residence requirement, under which only persons living in the Flemish region or in the bilingual region of Brussels-Capital could be affiliated to the Flemish care insurance.
167. The Flemish Parliament took the Commission's complaints into account and modified the Decree with the specific intention of making it compatible with Community law. (112)
168. The Flemish Government argues that the applicants in the main proceedings are not interested in promoting freedom of movement for migrant workers, but only in protecting the inhabitants of the French-speaking region. The situation is therefore purely internal. It also repeats its earlier argument that, since the Belgian constitutional structure prevents the Decree (in any of its versions) from being applied to inhabitants of the French-speaking or German-speaking regions, there is no infringement of Community law.
169. I do not find either argument convincing.
170. As to the first, it is self-evident that the applicants are entitled to defend the interests of the constituency they represent. It is however quite unclear why that fact of itself makes the whole situation a purely internal one.
171. As to the second, I have already recalled that according to the Court's consistent case-law, the internal constitutional structure of a Member State cannot excuse an infringement of Community law.
172. If, for the reasons set out above, the current (2004) version of the Decree is inconsistent with Community law, the same must *a fortiori* be true of the 2001 version of the Decree.

Conclusion

173. For the reasons given above, I consider that the questions referred by the Cour d'arbitrage (Court of Arbitration), now Cour constitutionnelle (Constitutional Court), of Belgium should be answered as follows:

– ***A care insurance scheme such as the one established by the Flemish Community falls within the scope ratione materiae of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as defined in Article 4 thereof.***

– ***In so far as nationals of other Member States working in Belgium and Belgian nationals who have exercised rights of freedom of movement are concerned, Articles 39 and 43 EC and Article 3 of Regulation No 1408/71 preclude an autonomous Community of a federal Member State from adopting provisions which, in the exercise of its powers, allow only persons residing in the territory for which that autonomous Community is competent or in another Member State to be insured under and covered by a social security scheme within the meaning of that regulation, to the exclusion of persons, whatever their nationality, who reside in a part of the territory of the same federal State for which another autonomous Community is competent.***

– ***Community law would preclude a system where access to benefits under the Flemish care insurance is unequivocally dependent on residence in the Dutch-speaking region or the bilingual region of Brussels-Capital, irrespective of the category of claimant.***

---

98 – Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

In Case C-319/97,
REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landskrona Tingsrätt, Sweden, for a preliminary ruling in the criminal proceedings before that court against

Antoine Kortas
on the interpretation of Article 100a(4) of the EC Treaty (now, after amendment, Article 95(4) to (9) EC) and European Parliament and Council Directive 94/36/EC of 30 June 1994 on colours for use in foodstuffs (OJ 1994 L 237, p. 13),

THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 28 January 1999,
gives the following
Judgment

1 By order of 6 August 1997, received at the Court on 16 September 1997, the Landskrona Tingsrätt (District Court, Landskrona) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 100a(4) of the EC Treaty (now, after amendment, Article 95(4) to (9) EC), and European Parliament and Council Directive 94/36/EC of 30 June 1994 on colours for use in foodstuffs (OJ 1994 L 237, p. 13; hereinafter `the Directive').
2 Those questions were raised in criminal proceedings brought by the Swedish Public Prosecutor against Mr Kortas for infringement of provisions concerning the use of additives in the composition of foodstuffs.
3 Mr Kortas is charged with having sold in his shop, until 15 September 1995, confectionery products imported from Germany and containing a colorant called E 124 or `cochineal red'. Under Article 6 of the Livsmedelslag (1971:511) (Swedish Law on foodstuffs), the only substances which may be used as additives are those which have been approved specifically for the food product concerned. For the period between 1 January 1994 and 30 June 1996, approved additives were listed in the annexes to the Statens Livsmedelsverks Kungörelse (1993:33) om Livsmedelstillsatser (Notice on food additives issued by the National Food Administration). For the subsequent period, they were listed in the Statens Livsmedelsverks Kungörelse (1995:31) med Föreskrifter och allmänna Råd om Livsmedelstillsatser (Guidelines on food additives issued by the National Food Administration), which applied from 1 July 1996. According to those guidelines, the use of E 124 as an additive in confectionery is not permitted. Furthermore, pursuant to Article 30 of the Swedish Law on foodstuffs, contravention of that prohibition is a punishable offence.
4 However, E 124 is one of the colorants approved by the Directive for use in confectionery. Under Article 2(1) and (2) of the Directive, the substances listed in Annex I thereto may be used as colorants in foodstuffs under certain conditions, defined in Annexes III to V. E 124 is one of the substances which may be used up to a maximum level of 50 mg/kg or 50 mg/l.
5 Article 9 of the Directive provides that Member States are to bring into force, not later than 31 December 1995, the laws, regulations and administrative provisions necessary to comply with the Directive, which was adopted on the basis of Article 100a of the Treaty.
6 Article 100a(4) provides:
`If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.
The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.
By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.'
7 The Kingdom of Sweden joined the Community by virtue of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1; hereinafter `the Act of Accession'), signed on 24 June 1994 with effect from 1 January 1995.

8 Under Article 151 of the Act of Accession, the new Member States may request certain temporary derogations from acts of the institutions adopted between 1 January 1994 and the date of signature of the Accession Treaty. Article 151(2) provides:
`At the duly substantiated request of one of the new Member States, the Council, acting unanimously on a proposal from the Commission, may, before 1 January 1995, take measures consisting of temporary derogations from acts of the institutions adopted between 1 January 1994 and the date of signature of the Accession Treaty.'
9 In accordance with Article 151 of the Act of Accession, the Kingdom of Sweden submitted a request to the Commission on 26 July 1994 seeking permission to maintain the prohibition on the use of E 124 in foodstuffs. Apparently, discussions were held between the Swedish Government and the Commission, but the Kingdom of Sweden was not successful in obtaining the derogation.
10 On 5 November 1995 the Swedish Government notified to the Commission a request for derogation pursuant to Article 100a(4) of the Treaty, and advised the Commission of its intention to maintain in force the provisions of national law concerning E 124. In support of its request, it argued that in Sweden the use of certain colorants approved by the Directive could pose health risks. It is known that on occasion these substances cause allergic reactions in humans, such as urticaria and asthma, which is why Sweden adopts such a cautious approach in their regard.
11 The Commission did not reply to the Swedish Government's notification. In response to a question from the Court, it indicated by letter of 16 July 1998 that a decision would shortly be adopted.
12 Relying on Article 2(1) and (2) of the Directive, which authorise the use in certain circumstances of E 124 in confectionery, Mr Kortas argued that the proceedings brought against him were based on national legislation which was contrary to Community law and that they should therefore be discontinued. The Public Prosecutor contended, on the other hand, that the Kingdom of Sweden should be deemed to have obtained a derogation from the Directive in so far as the Commission has neglected, over a period of years, to respond to Sweden's notification.
13 The national court, hearing the case at first instance, was uncertain whether in such circumstances the Directive overrides provisions of national law and must be recognised as having direct effect. The events in respect of which Mr Kortas is being prosecuted occurred before the expiry on 31 December 1995 of the deadline for transposition of the Directive into national law, but effect must be given to the criminal law in force at the time of the judgment. Article 5 of the Lag (1964:163) om införande av brottsbalken (Swedish Law implementing the penal code) provides: `Penalties shall be fixed according to the statute in force on the date when the offence was committed. If another statute is in force at the time when judgment is given, whichever statute provides for exemption from punishment or provides for a lesser penalty shall prevail.' In so far as the provisions of the Directive are more favourable to Mr Kortas than those of the national law, it must therefore be determined whether the Directive has direct effect.
14 Those were the circumstances in which the Landskrona Tingsrätt decided to stay the proceedings and refer the following questions to the Court:
`1. Can a directive adopted under Article 100a of the Treaty of Rome have direct effect?
2. If so, can such a directive have direct effect even if the State has made notification under Article 100a(4) of the Treaty of Rome?
3. If Question 2 is answered in the affirmative, how does the notification by the Member State affect the question of direct effect during the following periods:
(a) between notification and reply? (b) from the reply?'

Admissibility
15 The Danish and Dutch Governments maintain that the reply to the questions referred is not necessary for adjudication of the dispute in the main proceedings, since that dispute concerns events which occurred before the expiry of the deadline for transposition of the Directive into national law and Member States cannot assume, vis-à-vis their nationals, obligations under a Directive before the expiry of such a deadline.
16 In that regard it need only be stated that the national court, when called upon to adjudicate in criminal proceedings, must apply those provisions of law which are least harsh at the time when its decision is delivered. In so far as the provisions of the Directive are more favourable to Mr Kortas than the relevant provisions of national law, the questions referred for a preliminary ruling are objectively necessary in order to give judgment.
17 Consequently, the admissibility of the reference for a preliminary ruling cannot be disputed as regards the date of the entry into force of the Directive.
18 The French Government doubts whether the second question is admissible, maintaining that an answer is not necessary to enable the national court to give judgment in the main proceedings. It

observes that the Kingdom of Sweden cannot rely on Article 100(4) of the Treaty because it did not participate in the procedure for adoption of the Directive, not being at that time a Member of the Community.
19 On that point, it need merely be stated that there is nothing in the wording of Article 100a(4) of the Treaty to suggest that a State which has joined the European Union after the adoption of a particular directive may not rely on that provision vis-à-vis that directive.

Question 1
20 By its first question, the national court essentially asks whether a directive can have direct effect even though its legal basis is Article 100a of the Treaty and Article 100a(4) allows Member States to request a derogation from the implementation of that directive.
21 The Court has consistently held (see, inter alia, Case 8/81 Becker [1982] ECR 53, paragraph 25; Case 103/88 Fratelli Costanzo [1989] ECR 1839, paragraph 29; and Joined Cases C-246/94 to C-249/94 Cooperativa Agricola Zootecnica S. Antonio and Others [1996] ECR I-4373, paragraph 17) that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly.
22 It is not decisive, in determining whether or not a directive has direct effect, that its legal basis allows Member States to apply to the Commission for a derogation from its implementation if they consider this necessary. The general potential of a directive to have direct effect is wholly unrelated to its legal basis, depending instead on the intrinsic characteristics referred to in paragraph 21 above.
23 The answer to the first question must therefore be that a directive can have direct effect even though its legal basis is Article 100a of the Treaty and Article 100a(4) allows Member States to request a derogation from the implementation of that directive.

Questions 2 and 3
24 By its second and third questions, which it is appropriate to consider together, the national court essentially asks whether the direct effect of a directive, where the deadline for its transposition into national law has expired, is affected by the notification made by a Member State pursuant to Article 100a(4) of the Treaty, seeking confirmation of provisions of national law derogating from the directive.
25 It should be noted at the outset that where, after the expiry of the deadline for transposition into national law or after the entry into force of a harmonisation measure under Article 100a(1) of the Treaty, Member States intend to continue to apply provisions of national law derogating from that measure, they must notify those provisions to the Commission.
26 Also, the Commission must make sure that all the conditions for a Member State to rely on the exception provided for in Article 100a(4) are satisfied. This means that it must verify that the provisions at issue are justified by major needs, as referred to in Article 100a(4), first paragraph, and are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.
27 The aim of the procedure under that provision is to ensure that no Member State applies national rules derogating from the harmonised legislation without obtaining due confirmation from the Commission.
28 As the Court has consistently held (Case C-41/93 France v Commission [1994] ECR I-1829, paragraphs 29 and 30), measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which are such as to hinder intra-Community trade would be rendered ineffective if Member States retained the right unilaterally to apply national rules derogating from those measures and a Member State is not, therefore, authorised to apply the national provisions notified by it under Article 100a(4) until after it has obtained a decision from the Commission confirming them.
29 The national court asks whether an exception to that principle arises where the Commission does not respond to the notification of measures by a Member State.
30 On that point, the Swedish, Danish, French, Netherlands and Austrian Governments maintain that the principle laid down by the Court in Case C-41/93, cited above, cannot apply when the Commission's reply is not given as quickly as possible or within a reasonable period of time. Since the Kingdom of Sweden notified the Commission in 1995 and to this day has received no reply, the principles of legal certainty and protection of legitimate expectations require that, where so much time has elapsed, confirmation of the national measures by the Commission should be deemed to have been acquired.
31 According to the Swedish and Austrian Governments, the two-month period which the Court considered to be reasonable in relation to the procedure under Article 93 of the EC Treaty (now Article

88 EC) concerning State aid (see Case 84/82 Germany v Commission [1984] ECR 1451, paragraph 11) could provide guidance as to the length of time which should properly be available to the Commission in the present context. The French Government, on the other hand, suggests that, as in the implementation of Council Directive 89/107/EEC of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption (OJ 1989 L 40, p. 27), the Commission must respond without delay.
32 The Dutch Government proposes a six-month time-limit, as provided for in Article 95(6) EC. Under this provision, which amends and replaces Article 100a(4) of the Treaty, if the Commission has not expressed a view within six months of notification of provisions of national law, those provisions shall be deemed to have been approved.
33 It must be noted that Article 100a(4) of the Treaty is silent as to the time within which the Commission must adopt a position with regard to provisions of national law which have been notified. The Commission's freedom from temporal constraints is further substantiated by the fact that the Community legislature found it necessary, in the Treaty of Amsterdam, to limit to six months the time available to the Commission for verification of such provisions. However, it is common ground that no such time-limit was in operation at the time when the Kingdom of Sweden notified to the Commission its request for derogation from the Directive.
34 However, the fact that there was no time-limit could not absolve the Commission from the obligation to act with all due diligence in discharging its responsibilities, particularly as Article 100a(4), first paragraph, of the Treaty concerns provisions of national law which a Member State considers to be justified by major needs referred to in Article 36 of the Treaty or relating to protection of the environment or the working environment.
35 In those circumstances, implementation of the notification scheme provided for in Article 100a(4) requires the Commission and the Member States to cooperate in good faith. It is incumbent on Member States under Article 5 of the EC Treaty (now Article 10 EC) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force. The Commission, for its part, must demonstrate the same degree of diligence and examine as quickly as possible the provisions of national law submitted to it. Clearly, this was not the case with respect to the examination of the notified provisions at issue in the main proceedings.
36 Although failure on the part of the Commission to act with due diligence following a notification effected by a Member State under Article 100a(4) of the Treaty may therefore constitute a failure to fulfil its obligations, it cannot affect full application of the directive concerned.
37 If the Member State considers the Commission to be in breach of its obligations, it may, in accordance with the provisions of the Treaty, in particular Article 175 of the EC Treaty (now Article 232 EC), bring proceedings before the Court for a declaration to that effect and, where appropriate, may apply for interim relief.
38 The answer to the second and third questions must therefore be that the direct effect of a directive, where the deadline for its transposition into national law has expired, is not affected by the notification made by a Member State pursuant to Article 100a(4) of the Treaty seeking confirmation of provisions of national law derogating from the directive, even where the Commission fails to respond to that notification.

Operative part

On those grounds,
THE COURT,
in answer to the questions referred to it by the Landskrona Tingsrätt by order of 6 August 1997, hereby rules:
1. A directive can have direct effect even though its legal basis is Article 100a of the EC Treaty (now, after amendment, Article 95 EC) and Article 100a(4) allows Member States to request a derogation from the implementation of that directive.
2. The direct effect of a directive, where the deadline for its transposition into national law has expired, is not affected by the notification made by a Member State pursuant to Article 100a(4) of the EC Treaty seeking confirmation of provisions of national law derogating from the directive, even where the Commission fails to respond to that notification.

JUDGMENT OF THE COURT (Grand Chamber)
22 November 2005 (*)
(Directive 1999/70/EC – Clauses 2, 5 and 8 of the Framework Agreement on fixed-term work – Directive 2000/78/EC – Article 6 – Equal treatment as regards employment and occupation – Age discrimination)
In Case C-144/04,
REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht München (Germany), made by decision of 26 February 2004, registered at the Court on 17 March 2004, in the proceedings
Werner Mangold
v
Rüdiger Helm,

THE COURT (Grand Chamber),
……
after hearing the Opinion of the Advocate General at the sitting on 30 June 2005,
gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of Clauses 2, 5 and 8 of the Framework Agreement on fixed-term contracts concluded on 18 March 1999 ('the Framework Agreement'), put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), and of Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
2 The reference has been made in the course of proceedings brought by Mr Mangold against Mr Helm concerning a fixed-term contract by which the former was employed by the latter ('the contract').

Legal context
The relevant provisions of Community law
The Framework Agreement
3 According to Clause 1, '[t]he purpose of this Framework Agreement is to:
(a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
(b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.
4 Clause 2(1) of the Framework Agreement provides:
'This agreement applies to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State.'
5 Under Clause 5(1) of the Framework Agreement:
'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
(a) objective reasons justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships.'
6 Clause 8(3) of the Framework Agreement provides that:
'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement.'

Directive 2000/78
7 Directive 2000/78 was adopted on the basis of Article 13 EC. The 1st, 4th, 8th and 25th recitals in the preamble to that directive are worded as follows:
'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…
(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.
…
(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
…
(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'
8 According to Article 1, 'the purpose of … Directive [2000/78] is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.
9 Article 2 of Directive 2000/78, headed 'Concept of discrimination', states in subparagraphs 1 and 2(a) that:
'(1) For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
(2) For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.'
10 Article 3 of Directive 2000/78, headed 'Scope', provides in subparagraph 1:
'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
…
(c) employment and working conditions, including dismissals and pay;
…'.
11 Article 6(1) of Directive 2000/78 provides:
'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'
12 In accordance with the first paragraph of Article 18 of Directive 2000/78, the Member States were to adopt the laws, regulations and administrative provisions necessary to comply with that directive by 2 December 2003 at the latest. However, under the second paragraph of that article:

‘In order to take account of particular conditions, Member States may, if necessary, have an additional period of three years from 2 December 2003, that is to say a total of six years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.’

13 The Federal Republic of Germany having requested such an additional period for the implementation of the directive, so far as that Member State is concerned the period allowed will not expire until 2 December 2006.

The relevant provisions of national law

14 Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to promote employment), as amended by the law of 25 September 1996 (BGBl. 1996 I, p. 1476) (‘the BeschFG 1996’), provided:

‘(1) Fixed-term employment contracts shall be authorised for a maximum term of two years. Within that maximum limit of two years a fixed-term contract may be renewed three times at most.

(2) Fixed-term employment contracts shall be authorised exempt from the condition set out in paragraph 1 if the employee has reached the age of 60 when the fixed-term employment contract begins.

(3) Employment contracts within the meaning of paragraphs 1 and 2 shall not be authorised where there is a close connection with a previous employment contract of indefinite duration or with a previous fixed-term employment contract within the meaning of paragraph 1 concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than four months.

(4) The possibility of limiting the term of employment contracts for other reasons shall remain unaltered.

…’.

15 By virtue of Paragraph 1(6) of the BeschFG 1996, those rules were applicable until 31 December 2000.

16 Directive 1999/70 implementing the Framework Agreement was transposed into German law by the Law on part-time working and fixed-term contracts amending and repealing provisions of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBl. 2000, p. 1966, ‘the TzBfG’). That law entered into force on 1 January 2001.

17 Paragraph 1 of the TzBfG, headed ‘Objective’, provides that:

‘This law is intended to encourage part-time working, to fix the conditions in which fixed-term contracts may be concluded and to prevent discrimination against workers employed part-time and workers employed under a fixed-term contract.’

18 Paragraph 14 of the TzBfG, which regulates fixed-term contracts, provides that:

‘(1) A fixed-term employment contract may be concluded if there are objective grounds for doing so. Objective grounds exist in particular where:

1. the operational manpower requirements are only temporary,
2. the fixed term follows a period of training or study in order to facilitate the employee’s entry into subsequent employment,
3. one employee replaces another,
4. the particular nature of the work justifies the fixed term,
5. the fixed term is a probationary period,
6. reasons relating to the employee personally justify the fixed term,
7. the employee is paid out of budgetary funds provided for fixed-term employment and he is employed on that basis, or
8. the term is fixed by common agreement before a court.

(2) The term of an employment contract may be limited in the absence of objective reasons for a maximum period of two years. Within that maximum period a fixed-term contract may be renewed three times at most. The conclusion of a fixed-term employment contract within the meaning of the first sentence shall not be authorised if that contract is immediately preceded by an employment relationship of fixed or indefinite duration with the same employer. A collective agreement may fix the number or renewals or the maximum duration of the fixed term in derogation from the first sentence.

(3) The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of 58 by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment

contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months.
(4) The limitation of the term of an employment contract must be fixed in writing in order to be enforceable.'
19 Paragraph 14(3) of the TzBfG has been amended by the First Law for the provision of modern services on the labour market of 23 December 2002 (BGBl. 2002 I, p. 14607, 'the Law of 2002'). The new version of that provision, which took effect on 1 January 2003, is henceforth worded as follows: 'A fixed-term employment contract shall not require objective justification if when starting the fixed-term employment relationship the employee has reached the age of 58. It shall not be permissible to set a fixed term where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months. Until 31 December 2006 the first sentence shall be read as referring to the age of 52 instead of 58.'

The main proceedings and the questions referred for a preliminary ruling

20 On 26 June 2003 Mr Mangold, then 56 years old, concluded with Mr Helm, who practises as a lawyer, a contract that took effect on 1 July 2003.
21 Article 5 of that contract provided that:
'1. The employment relationship shall start on 1 July 2003 and last until 28 February 2004.
2. The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers (the provisions of the fourth sentence, in conjunction with those of the fourth sentence, of Paragraph 14(3) of the TzBfG …), since the employee is more than 52 years old.
3. The parties have agreed that there is no reason for the fixed term of this contract other than that set out in paragraph 2 above. All other grounds for limiting the term of employment accepted in principle by the legislature are expressly excluded from this agreement.'
22 According to Mr Mangold, paragraph 5, inasmuch as it limits the term of his contract, is, although such a limitation is in keeping with Paragraph 14(3) of the TzBfG, incompatible with the Framework Agreement and with Directive 2000/78.
23 Mr Helm argues that Clause 5 of the Framework Agreement requires the Member States to introduce measures to prevent abuse arising from the use of successive fixed-term contracts of employment, in particular, by requiring objective reasons justifying the renewal of such contracts, or by fixing the maximum total duration of such fixed-term employment relationships or contracts, or by limiting the number of renewals of such contracts or relationships.
24 He takes the view that even if the fourth sentence of Paragraph 14(3) of the TzBfG does not expressly lay down such restrictions in respect of older workers, there is in fact an objective reason, within the meaning of Clause 5(1)(a) of the Framework Agreement, that justifies the conclusion of a fixed-term contract of employment, which is the difficulty those workers have in finding work having regard to the features of the labour market.
25 The Arbeitsgericht München is doubtful whether the first sentence of Paragraph 14(3) of the TzBfG is compatible with Community law.
26 First, that court considers that that provision is contrary to the prohibition of 'regression' (reduction of protection) laid down in Clause 8(3) of the Framework Agreement in that, on the transposition into national law of Directive 1999/70, that provision lowered from 60 to 58 the age of persons excluded from protection against the use of fixed-term contracts of employment where that use is not justified by an objective reason and, in consequence, the general level of protection enjoyed by that class of workers. Such a provision is also, in its opinion, contrary to Clause 5 of the Framework Agreement which seeks to prevent abuse of such contracts, in that it lays down no restriction on the conclusion of such contracts by many workers falling into a class categorised by age only.
27 Second, the national court is uncertain whether rules such as those contained in Paragraph 14(3) of the TzBfG are compatible with Article 6 of Directive 2000/78, in that the lowering, by the Law of 2002, from 58 to 52 of the age at which it is authorised to conclude fixed-term contracts, with no objective justification, does not guarantee the protection of older persons in work. Nor is the principle of proportionality observed.
28 It is true that the national court finds that, on the date of the conclusion of the contract, namely, 26 June 2003, the period prescribed for transposition of Directive 2000/78 into national law had not yet expired. None the less, it notes that, in accordance with paragraph 45 of the judgment in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, a Member State to which a directive is addressed may not, during the period prescribed for transposition, adopt measures that may seriously compromise the attainment of the result prescribed by the directive.

29 Now, in the case in the main proceedings, the Law of 2002's amendment of Paragraph 14(3) of the TzBfG came into force on 1 January 2003, that is to say, after Directive 2000/78 was published in the *Official Journal of the European Communities,* but before the period allowed by Article 18 of that directive for its transposition had expired.
30 Third, the Arbeitsgericht München raises the question whether the national court is bound, in proceedings between individuals, to set aside rules of domestic law incompatible with Community law. In this respect it considers that the primacy of Community law must lead the court to find that Paragraph 14(3) of the TzBfG is inapplicable in its entirety and that, therefore, it is necessary to apply the fundamental rule laid down in Paragraph 14(1), in accordance with which there must be some objective reason for the conclusion of a fixed-term contract of employment.
31 Those were the circumstances in which the Arbeitsgericht München decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
'1(a) Is Clause 8(3) of the Framework Agreement … to be interpreted, when transposed into domestic law, as prohibiting a reduction of protection following from the lowering of the age limit from 60 to 58?
1(b) Is Clause 5(1) of the Framework Agreement … to be interpreted as precluding a provision of national law which – like the provision at issue in this case – does not contain any of the three restrictions set out in paragraph 1 of that clause?
2. Is Article 6 of … Directive 2000/78 … to be interpreted as precluding a provision of national law which, like the provision at issue in this case, authorises the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 and over, contrary to the principle requiring justification on objective grounds?
3. If one of those three questions is answered in the affirmative: must the national court refuse to apply the provision of domestic law which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?'

Admissibility of the reference for a preliminary ruling
32 At the hearing the admissibility of the reference for a preliminary ruling was challenged by the Federal Republic of Germany, on the grounds that the dispute in the main proceedings was fictitious or contrived. Indeed, in the past Mr Helm has publicly argued a case identical to Mr Mangold's, to the effect that Paragraph 14(3) of the TzBfG is unlawful.
33 It is first of all to be noted in that respect that, pursuant to Article 234 EC, where a question on the interpretation of the Treaty or of subordinate acts of the institutions of the Community is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon (see, inter alia, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 22).
34 In the context of that procedure for making a reference, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment (Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 23; C-146/93 *McLachlan* [1994] ECR I-3229, paragraph 20; Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 10; and C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 43.
35 Consequently, where the question submitted by the national court concerns the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20; *Leclerc-Siplec*, paragraph 11; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 10; and *Inspire Art*, paragraph 44).
36 Nevertheless, the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (Case 149/82 *Robards* [1983] ECR 171, paragraph 19; *Meilicke*, paragraph 25; and *Inspire Art*, paragraph 45).
37 It is in the light of that function that the Court has considered that it has no jurisdiction to give a preliminary ruling on a question raised before a national court where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings.
38 However, in the case in the main proceedings, it hardly seems arguable that the interpretation of Community law sought by the national court does actually respond to an objective need inherent in the

outcome of a case pending before it. In fact, it is common ground that the contract has actually been performed and that its application raises a question of interpretation of Community law. The fact that the parties to the dispute in the main proceedings are at one in their interpretation of Paragraph 14(3) of the TzBfG cannot affect the reality of that dispute.
39 The order for reference must, therefore, be regarded as admissible.

Concerning the questions referred for a preliminary ruling
On Question 1(b)
40 In Question 1(b), which it is appropriate to consider first, the national court asks whether, on a proper construction of Clause 5 of the Framework Agreement, it is contrary to that provision for rules of domestic law such as those at issue in the main proceedings to contain none of the restrictions provided for by that clause in respect of the use of fixed-term contracts of employment.
41 Here it is to be noted that Clause 5(1) of the Framework Agreement is supposed to 'prevent abuse arising from the use of successive fixed-term employment contracts or relationships'.
42 Now, as the parties to the main proceedings confirmed at the hearing, the contract is the one and only contract concluded between them.
43 In those circumstances, interpretation of Clause 5(1) of the Framework Agreement is obviously irrelevant to the outcome of the dispute before the national court and, accordingly, there is no need to answer Question 1(b).

On Question 1(a)
44 By Question 1(a), the national court seeks to ascertain whether on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, on transposing Directive 1999/70, lowered from 60 to 58 the age above which fixed-term contracts of employment may be concluded without restrictions, is contrary to that provision.
45 As a preliminary point, it is to be noted that, in the case in the main proceedings, the contract was concluded on 26 June 2003, that is to say, when the TzBfG, as amended by the Law of 2002 which lowered the age above which it is permissible to conclude fixed-term contracts of employment from 58 to 52, was in force. In the instant case, it is common ground that Mr Mangold was engaged by Mr Helm at the age of 56.
46 Nevertheless, the national court considers that an interpretation of Clause 8(3) would be helpful to it in assessing the validity of the lawfulness of Paragraph 14(3) of the TzBfG, in its original version, in so far as, if that latter provision should not be in keeping with Community law, the result would be that its amendment by the Law of 2002 would be invalid.
47 In any case, it is to be declared that the German legislature had already, when Directive 1999/70 was transposed into domestic law, lowered from 60 to 58 the age at which fixed-term contracts of employment might be concluded.
48 According to Mr Mangold, that reduction of protection, like that under the Law of 2002, is contrary to Clause 8(3) of the Framework Agreement.
49 In contrast, the German Government takes the view that that lowering of the relevant age was offset by giving workers bound by a fixed-term contract new social guarantees, such as the laying down of a general prohibition of discrimination and the extending to small businesses, and to short-term employment relationships, of the restrictions provided for in respect of recourse to that kind of contract.
50 In this connection, it appears from the very wording of Clause 8(3) of the Framework Agreement that implementation of the agreement cannot provide the Member States with valid grounds for reducing the general level of protection for workers previously guaranteed in the domestic legal order in the sphere covered by that agreement.
51 The term 'implementation', used without any further precision in Clause 8(3) of the Framework Agreement, does not refer only to the original transposition of Directive 1999/70 and especially of the Annex thereto containing the Framework Agreement, but must also cover all domestic measures intended to ensure that the objective pursued by the directive may be attained, including those which, after transposition in the strict sense, add to or amend domestic rules previously adopted.
52 In contrast, reduction of the protection which workers are guaranteed in the sphere of fixed-term contracts is not prohibited as such by the Framework Agreement where it is in no way connected to the implementation of that agreement.
53 Now, it is clear from both the order for reference and the observations submitted by the German Government at the hearing that, as the Advocate General has noted in paragraphs 75 to 77 of his Opinion, the successive reductions of the age above which the conclusion of a fixed-term contract is permissible without restrictions are justified, not by the need to put the Framework Agreement into

effect but by the need to encourage the employment of older persons in Germany.
54 In those circumstances, the reply to be given to Question 1(a) is that on a proper construction of Clause 8(3) of the Framework Agreement, domestic legislation such as that at issue in the main proceedings which, for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.

On the second and third questions

55 By its second and third questions, which may appropriately be considered together, the national court seeks in essence to ascertain whether Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. If so, the national court asks what conclusions it must draw from that interpretation.
56 In this regard, it is to be noted that, in accordance with Article 1, the purpose of Directive 2000/78 is to lay down a general framework for combating discrimination on any of the grounds referred to in that article, which include age, as regards employment and occupation.
57 Paragraph 14(3) of the TzBfG, however, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference of treatment on the grounds directly of age.
58 Specifically with regard to differences of treatment on grounds of age, Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment 'shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. According to subparagraph (a) of the second paragraph of Article 6(1), those differences may include inter alia 'the setting of special conditions on access to employment and vocational training, employment and occupation … for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection' and, under subparagraphs (b) and (c), the fixing of conditions of age in certain special circumstances.
59 As is clear from the documents sent to the Court by the national court, the purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work.
60 The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt, as indeed the Commission itself has admitted.
61 An objective of that kind must as a rule, therefore, be regarded as justifying, 'objectively and reasonably', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age laid down by Member States.
62 It still remains to be established whether, according to the actual wording of that provision, the means used to achieve that legitimate objective are 'appropriate and necessary'.
63 In this respect the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.
64 However, as the national court has pointed out, application of national legislation such as that at issue in the main proceedings leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers.
65 In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that

effect, Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78.

66 The fact that, when the contract was concluded, the period prescribed for the transposition into domestic law of Directive 2000/78 had not yet expired cannot call that finding into question.

67 First, the Court has already held that, during the period prescribed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive (*Inter-Environnement Wallonie*, paragraph 45).

68 In this connection it is immaterial whether or not the rule of domestic law in question, adopted after the directive entered into force, is concerned with the transposition of the directive (see, to that effect, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraphs 58 and 59).

69 In the case in the main proceedings the lowering, pursuant to Paragraph 14(3) of the TzBfG, of the age above which it is permissible to conclude fixed-term contracts from 58 to 52 took place in December 2002 and that measure was to apply until 31 December 2006.

70 The mere fact that, in the circumstances of the case, that provision is to expire on 31 December 2006, just a few weeks after the date by which the Member State must have transposed the directive, is not in itself decisive.

71 On the one hand, it is apparent from the very wording of the second subparagraph of Article 18 of Directive 2000/78 that where a Member State, like the Federal Republic of Germany in this case, chooses to have recourse to an additional period of three years from 2 December 2003 in order to transpose the directive, that Member State 'shall report annually to the Commission on the steps it is taking to tackle age … discrimination and on the progress it is making towards implementation'.

72 That provision implies, therefore, that the Member State, which thus exceptionally enjoys an extended period for transposition, is progressively to take concrete measures for the purpose of there and then approximating its legislation to the result prescribed by that directive. Now, that obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for implementation of the directive, to adopt measures incompatible with the objectives pursued by that act.

73 On the other hand, as the Advocate General has observed in point 96 of his Opinion, on 31 December 2006 a significant proportion of the workers covered by the legislation at issue in the main proceedings, including Mr Mangold, will already have reached the age of 58 and will therefore still fall within the specific rules laid down by Paragraph 14(3) of the TzBfG, with the result that that class of persons becomes definitively liable to be excluded from the safeguard of stable employment by the use of a fixed-term contract of employment, regardless of the fact that the age condition fixed at 52 will cease to apply at the end of 2006.

74 In the second place and above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation', the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paragraphs 51 and 64 above), and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 to 32).

76 Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.

77 In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30).

78 Having regard to all the foregoing, the reply to be given to the second and third questions must be that Community law and, more particularly, Article 6(1) of Directive 2000/78, must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.
It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

……

On those grounds, the Court (Grand Chamber) hereby rules:

1. On a proper construction of Clause 8(3) of the Framework Agreement on fixed-term contracts concluded on 18 March 1999, put into effect by Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, domestic legislation such as that at issue in the main proceedings, which for reasons connected with the need to encourage employment and irrespective of the implementation of that agreement, has lowered the age above which fixed-term contracts of employment may be concluded without restrictions, is not contrary to that provision.

2. Community law and, more particularly, Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52.
It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 30 June 2005 [1](1)
Case C-144/04
Werner Mangold
v
Rüdiger Helm
(Reference for a preliminary ruling from the Arbeitsgericht München (Germany))
(Directive 1999/70/EC – Fixed-term contracts – Restrictions – Non-regression clause – Directive 2000/78/EC – Prohibition of discrimination on grounds of age – National legislation authorising fixed-term contracts with older workers – No restrictions – Compatibility – Directives – Time-limit for transposition not expired – Horizontal direct effect – Duty to construe in accordance with Community law)

1. By order of 26 February 2004, the Arbeitsgericht (Labour Court) München ('the Arbeitsgericht') referred to the Court under Article 234 EC three questions on the interpretation of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (2) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (3) (hereinafter referred to as 'Directive 1999/70' and 'Directive 2000/78', or collectively as 'the directives').
2. Essentially, the national court wishes to know whether – in the context of a dispute between private parties – those directives preclude a national rule allowing older people to be employed on fixed-term contracts with no restrictions.

I – Relevant legislation
A – Community law
Directive 1999/70, which gives effect to the framework agreement on fixed-term work entered into by ETUC, UNICE and CEEP
3. On 18 March 1999, having agreed that 'employment contracts of an indefinite duration are the general form of employment relationships', while also acknowledging that 'in certain sectors, occupations and activities' fixed-term employment contracts 'can suit both employers and workers' (general considerations, paragraphs 6 and 8), the Community-level federations of trade unions and employers (ETUC, UNICE and CEEP) entered into a framework agreement on fixed-term work ('the framework agreement'), which was subsequently implemented in accordance with Article 139(2) EC by Directive 1999/70.
4. Of particular relevance for present purposes is Clause 5(1) of the framework agreement, which provides as follows:
'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
(a) objective reasons justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships'.
5. Clause 8(3) is in the following terms:
'Implementation of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.
Directive 2000/78
6. The purpose of Directive 2000/78 is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment' (Article 1).
7. Having defined the concept of discrimination in Article 2(2), the directive provides at Article 6(1) that:

‘Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
…’.
8. According to the first paragraph of Article 18, transposition of the directive had to take place by 2 December 2003. However, the second paragraph provides as follows:
‘In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. …’.
9. Since Germany chose to exercise that option, transposition into German law of the age and disability provisions of Directive 2000/78 must take place by 2 December 2006 at the latest.

B – National law

10. Prior to the transposition of Directive 1999/70, German law placed two curbs on fixed-term contracts of employment, requiring an objective reason justifying the fixed term or, alternatively, imposing limits on the number of contract renewals (a maximum of three) and on total duration (a maximum of two years).
11. Those restrictions did not apply to contracts with older people however. German law permitted fixed-term contracts, even without the above restrictions, if the employee was *aged 60* or over (see Paragraph 1 of the Beschäftigungsförderungsgesetz (Law to Promote Employment), of 26 April 1985, (4) as amended by the Law to Promote Growth and Employment of 25 September 1996). (5)
12. That situation changed partly with the enactment of the Law on Part-Time Working and Fixed-Term Contracts of 21 December 2000, transposing Directive 1999/70 (‘the TzBfG’). (6)
13. Paragraph 14(1) of the TzBfG re-enacted the general rule whereby a fixed-term contract must be based on an objective reason. (7) In the absence of an objective reason, according to Paragraph 14(2), the maximum total duration of the contract is again limited to two years and, subject to that limit, up to three renewals are again permitted.
14. However, according to Paragraph 14(3) of the TzBfG:
‘The conclusion of a fixed-term employment contract shall not require objective justification if the worker has reached the age of *58* by the time the fixed-term employment relationship begins. A fixed term shall not be permitted where there is a close connection with a previous employment contract of indefinite duration concluded with the same employer. Such close connection shall be presumed to exist where the interval between two employment contracts is less than six months’. (8)
15. That provision was amended following a report by a government commission which found that ‘an unemployed person over the age of 55 has about a one-in-four chance of reemployment’. The First Law for the Provision of Modern Services on the Employment Market of 23 December 2002 (known as the ‘Hartz Law’) provides:
‘… For the period to 31 December 2006, the age-limit referred to in the first sentence hereof shall be *52* instead of 58’. (9)

II – Facts and procedure

16. The dispute in the main proceedings is between Mr Mangold and Mr Helm, who is a lawyer.
17. On 26 June 2003, at the age of 56, Mr Mangold was hired by Mr Helm on a fixed-term contract of employment.
18. Clause 5 of the contract of employment reads as follows:
‘Fixed term of employment
1. The term of employment shall be fixed, commencing on 1 July 2003 and ending on 28 February 2004.
2. The fixed term is based on the statutory provision facilitating the fixed-term employment of older workers set out in the fourth sentence, in conjunction with the first sentence, of Paragraph 14(3) of the TzBfG (Law on Part-Time and Fixed-Term Employment), given that the employee is over the age of 52.
3. The parties agree that the reason set out in the preceding paragraph is the sole reason on which

this fixed-term clause is based. The other reasons contemplated by statute and case-law as justifying a fixed term are expressly excluded and form no part of this fixed-term clause'.

19. A few weeks after commencing employment, Mr Mangold brought proceedings against his employer before the Arbeitsgericht claiming that Paragraph 14(3) of the TzBfG was contrary to Directives 1999/70 and 2000/78 and that the clause fixing the term of his employment was therefore void. As the Arbeitsgericht also had doubts as to the interpretation of the directives, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is Clause 8(3) of the Framework Agreement (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) to be interpreted as prohibiting, when transposed into national law, a reduction of protection following from the lowering of the age limit from 60 to 58?

(b) Is Clause 5(1) of the Framework Agreement (Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP) to be interpreted as precluding a provision of national law, such as the provision at issue in this case, which contains none of the three restrictions set out in Clause 5(1)?

(2) Is Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as precluding a provision of national law, such as the provision at issue in this case, which authorises the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 or over, contrary to the principle not requiring justification on objective grounds?

(3) If one of those three questions is answered in the affirmative, must the national court refuse to apply the national provision which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?'

20. In the ensuing proceedings, written observations were submitted by the parties to the main proceedings and by the Commission.

21. On 26 April 2005 the Court held a hearing at which the parties to the main proceedings, the German Government and the Commission were represented.

III – Legal analysis

(1) *The suggestion that the dispute in the main proceedings is contrived*

22. Before entering into the merits of the questions referred by the Arbeitsgericht, I must first address the doubts raised by the German Government as to whether the dispute which gave rise to the main proceedings is 'genuine' or in fact 'contrived', doubts which, if well founded, could call into question the admissibility of the reference. I would add, for the sake of completeness, that two objections to admissibility were also raised by the Commission, but since they relate to very specific points, I will deal with them when I come to consider the questions to which they relate.

23. To focus for the time being on the doubt expressed by the German Government, I note that at the hearing the German Government drew the Court's attention to a number of rather unusual features of the dispute from which the main proceedings arose. In particular, it made much of the fact that Mr Helm's opinion of the German legislation at issue here was no different from that of Mr Mangold, since Mr Helm too had spoken out publicly against it on several occasions. In the German Government's view, that coincidence of views could justify some suspicion as to the true nature of the main proceedings. It might be surmised, in other words, that the plaintiff (Mr Mangold) and the defendant (Mr Helm), united by the common cause of having Paragraph 14(3) of the TzBfG struck down, had brought a collusive action with the sole purpose of achieving that end.

24. I will say at once that, in the light of that and other aspects of this case (as to which see point 29 below), the German Government's doubts do not appear to me entirely unfounded. I do not believe, however, for the reasons I will now set out, that they are sufficient to sustain a ruling of inadmissibility in respect of the questions referred to the Court. Besides, the German Government did not go so far as to formally request a ruling to that effect.

25. The first thing that needs to be said on this matter, in my view, is that under Article 234 EC, a national court may request the Court of Justice to give a ruling on a question if it considers that a decision on that question is 'necessary' to enable it to give judgment.

26. In the allocation of functions contemplated by the Treaty, it is therefore for the national court, which 'alone has direct knowledge of the facts of the case' and is therefore 'in the best position' to do so, to assess 'whether a preliminary ruling is necessary'. (10) Where the national court considers it 'necessary' to refer a question, the Court is therefore, 'in principle, bound to give a ruling'. (11)

27. It is also the case, however, that the Court's function 'is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions'. In

order to uphold that function, the Court has always reserved the right 'to examine the conditions in which the case has been referred to it by the national court', (12) and in exceptional cases has gone so far as to rule a reference inadmissible, where it is '*quite obvious*' (13) that the interpretation of Community law sought does 'not correspond to an objective requirement inherent in the resolution of a dispute'. (14)

28. It was in the exercise of this exceptional power of review that in a number of cases, which have become famous, the Court declined to give an answer to a national court precisely because the questions arose in collusive actions. (15) But even in other more recent and less well-known cases where the Court did entertain the reference, it did so only because it had found that it was 'not *manifestly apparent* from the facts set out in the order for reference that the dispute is in fact fictitious'. (16) And in the same vein, but taking a less rigid attitude, the Court has more recently made clear that the fact 'that the parties to the main proceedings are in agreement as to the result to be obtained makes the dispute no less real' and therefore does not make a reference inadmissible if it proves to be 'objectively necessary to the outcome of the main proceedings'. (17)

29. In the light of all that, and turning to the case in hand, I first have to say that objectively there are a number of elements in the file which appear to bear out the suspicions of the German Government as to the contrived nature of the dispute in the main proceedings. I am thinking, for example, of the fact, which came out at the hearing, that Mr Mangold's contract of employment required him to work for only a few hours a week. I am thinking also of the fact that the contract spelled out in perhaps excessive detail the fact that the fixed-term clause was based solely on Paragraph 14(3) of the TzBfG, excluding any other possible justification that might have been available under German statute and case-law. Finally, it was certainly unusual for Mr Mangold to go to the Arbeitsgericht just a matter of weeks after starting work seeking to have that clause of his contract declared void.

30. As the Commission pointed out, however, the national court had already taken cognisance of the above circumstances and had itself therefore considered the possibility that the dispute in the main proceedings was contrived by the parties. The Arbeitsgericht dismissed that possibility, however, having considered all the other evidence before it and having examined Mr Mangold directly.

31. In the light of that specific finding by the national court, the Commission concludes that the main proceedings cannot be regarded as 'manifestly' bogus and that the reference arising from those proceedings should therefore be held admissible, having regard to the Court's case-law cited above (see point 28), which requires the collusion to be manifest in order to attract a ruling of inadmissibility.

32. For my part, I agree with that conclusion, but I think it preferable to base it on the more recent approach taken by the Court which, for the purposes of deciding on admissibility, plays down the relevance of any collusion between the parties as to the outcome of the main proceedings and emphasises instead the actual relevance of the question referred to the resolution of the main proceedings (see point 28 above).

33. In my view, that approach is more in keeping with the allocation of functions between the Court of Justice and the national court contemplated by the Treaty and, above all, more consistent with that 'spirit of cooperation' between them which is implicit in Article 234 EC (18) and has always been emphasised by this Court. It seems to me that that approach cannot but entail an attitude of presumptive trust in the findings of the national court and a presumption that it is not 'a mere "instrument" in the hands of … the parties', (19) which they use at will for their own ends.

34. It also seems to me that, for the purpose of upholding the role of the Court, rather than attempting to establish the degree to which the collusion is manifest, which, by definition, will often be difficult and open to doubt, what matters most, especially if the case is 'suspect', is establishing that the interpretation of Community law sought genuinely corresponds 'to an objective requirement inherent in the resolution of a dispute'.

35. In the light of those considerations, I therefore am of the opinion that the alleged collusive nature of the main proceedings cannot of itself have the effect of rendering the reference inadmissible, and that the focus must instead be directed, and with particular rigour, at assessing the relevance of the questions referred.

(2) *Directive 1999/70*

(i) Clause 5

36. By Question 1(b), which falls to be considered first, the referring court asks whether Clause 5 of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, which lays down no restrictions for fixed-term contracts of employment with workers over the age of 52.

37. Adopting the rigorous approach I have advocated above, I can say at once that, in my view, the Commission is correct in arguing that the question is inadmissible.

38. It is clear from its letter and purpose that Clause 5 applies where there are several fixed-term

contracts in succession and, accordingly, the interpretation of that provision is of no relevance whatsoever to the facts of this case, which concerns the first and only contract of employment between Mr Mangold and Mr Helm.

39. In terms of the letter of the provision, the clause requires Member States to introduce into national law measures concerning 'objective reasons justifying the *renewal* of fixed-term contracts' (subparagraph (a)), 'the maximum total duration' of '*successive*' employment contracts (subparagraph (b)), or 'the number of *renewals*' of successive contracts (subparagraph (c)). The provision thus requires restrictive measures where *several successive* contracts are involved but has no application in the case of a worker engaged for a single fixed-term contract.

40. The literal argument is confirmed by the directive's purpose, which is 'to establish a framework to prevent abuse arising from the use of *successive* fixed-term employment contracts or relationships' (14th recital). What it is sought to regulate is not therefore the first-time fixed-term contract but rather the repeated use of fixed-term contracts, which is considered open to abuse.

41. Yet as Mr Mangold and Mr Helm have confirmed, their contract is a *first* and *only contract* of employment. It follows, in the light of the above discussion, that Clause 5 has no application to this contract and that therefore the interpretation of that clause is manifestly irrelevant to the resolution of the dispute in the main proceedings.

42. On that ground, I propose that the Court should rule that it has no jurisdiction to express a view on Question 1(b).

(ii) *Clause 8(3) (the 'non-regression clause')*

43. By Question 1(a), the Arbeitsgericht asks whether Clause 8(3) of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, which in transposing Directive 1999/70 lowered the age at which fixed-term contracts of employment can be entered into without restrictions from 60 to 58.

Preliminary points

44. For a better understanding of this question, I should first recap the chronology of legislative provisions enacted in Germany:

– the 1985 Law to Promote Employment, as amended by the 1996 Law to Promote Growth and Employment, which allowed workers *over the age of 60* to be employed on fixed-term contracts with no restrictions;

– Paragraph 14(3) of the TzBfG, giving effect to Directive 1999/70, which in 2000 lowered the relevant threshold from age 60 to *58*;

– the Hartz law which amended that provision of the TzBfG, further lowering the threshold to *52*.

45. Given the above legislative chronology, the Commission argues that an issue of admissibility could also arise in relation to Question 1(a). It notes that Mr Mangold was not hired after reaching the age of 58, on the basis of the original version of Paragraph 14(3) of the TzBfG (by reference to which the national court asks the question), but rather at the age of 56, as permitted under the subsequent Hartz Law which amended that provision. According to the Commission, it is therefore only in relation to the latter law that a ruling by the Court would be relevant.

46. For its part, the Arbeitsgericht gave a cursory explanation that an interpretation of the original version of Paragraph 14(3) of the TzBfG would still be useful, since a ruling of incompatibility in relation to that provision would automatically also strike down the later provision of the Hartz Law, relied upon by Mr Helm as justifying the fixed term in Mr Mangold's contract of employment.

47. However, under the rigorous scrutiny which I have proposed to bring to bear in this case (see point 35 above), that explanation appears incomplete and unconvincing. It does not give the Court to understand the reasons why, instead of asking the question by reference to the provisions applicable to the facts of the case (those resulting from the amendments introduced by the Hartz Law), the national court chose to frame the question by reference to the law previously in force which appears not to be strictly relevant to this case.

48. Nevertheless, since the referring court has still provided the Court with all the legal details necessary for a useful answer to its queries, I agree with the Commission that question 1(a) should not be held inadmissible but that the Court might instead follow the practice, which it frequently adopts in these cases, of rephrasing the question so as to clarify what it is actually useful for the national court to know. The question would then become whether or not Clause 8(3) of the framework agreement precludes a national provision, such as Paragraph 14(3) of the TzBfG, *as amended by the Hartz Law*, which, *following the transposition of Directive 1999/70*, lowered the age at which fixed-term contracts of employment can be entered into without restrictions from 58 to 52.

Observations of the parties

49. With Question 1(a) rephrased accordingly, I note that the submissions relating to that question focused considerable attention on the meaning and effect of Clause 8(3), according to which

'[i]mplementation of [the] [framework] agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement'.

50. The parties that made observations in relation to that clause went to some lengths to show that by enacting the provisions referred to above the German legislature reduced (or did not reduce) the general level of protection provided to workers by national law prior to the transposition of Directive 1999/70.

51. According to Mr Mangold, a reduction did take place, as the age at which the restrictions on fixed-term contracts cease to apply was lowered considerably. The German Government disagrees, arguing that the lowering of the age-limit complained of was more than offset by the introduction of new safeguards for fixed-term employees such as a general prohibition of discrimination and the extension of the fixed-term contract restrictions to small businesses and to short-term work.

52. For my part, I am not sure whether the parties have correctly identified the key issue. They appear to take for granted that Clause 8(3) is to be read as a binding provision, which absolutely prohibits Member States from reducing the general level of protection already in place. It seems to me, however, that the matter of the nature and effect of such clauses is anything but settled and is in fact a source of lively contention among commentators.

53. An analysis of the nature and effect of such clauses is therefore required.

The legal nature of the clause

54. I will begin by noting that we are concerned here with provisions, traditionally described as *non-regression clauses*, which began to be included in the Community's social affairs directives at the end of the 1980s, (20) so as to provide, albeit by different forms of words, that the implementation of a particular directive should not constitute a 'justification', 'ground' or 'reason' for providing less favourable treatment than that already available in the various Member States. (21)

55. For the purposes of this analysis, two categories of non-regression clauses may be distinguished: those included only in the recitals to the relevant acts, (22) and those set out in the body of the directives or Community-level agreements negotiated by the social partners and given effect by directives. (23)

56. This second category, to which Clause 8(3) of the framework agreement belongs, has *binding legal character* according to the majority view among legal writers. Others commentators, however, regard it as quintessentially political: a mere exhortation, in effect, to national legislatures not to reduce the protection already provided in national law when transposing directives in the field of social policy.

57. For my part, I tend to the former view, both in general and in this particular case, on grounds both literal and schematic. (24)

58. As regards the literal argument, the form of the verb used ('Implementation of [the] [framework] agreement *shall not constitute* valid grounds for reducing the general level of protection') (25) suggests, in the light of the usual canons of construction applied in these cases, (26) that a mandatory provision was intended, imposing on Member States a full-blown negative *obligation* not to use transposition as a ground for reducing the protection already enjoyed by workers under existing national law.

59. That interpretation appears borne out also by the placement of the clause within the scheme of the directive. It was not included among the recitals (as similar clauses had sometimes been), but in the actual body of the directive. Like all the other normative provisions of the directive, therefore, the clause in question, in accordance with the third paragraph of Article 249 EC, is binding on Member States as to the result to be achieved, which in this case is to avoid the possibility of transposition providing a legitimate basis for rowing back on existing protections at national level.

The effect of the 'non-regression' obligation

60. That having been clarified, I will now attempt to analyse the effect of the obligation laid down by Clause 8(3).

61. In that regard, let me say at once that, contrary to what Mr Mangold argues, this is not a standstill clause absolutely prohibiting any lowering of the level of protection that exists under national law at the time of implementation of the directive.

62. It is rather, in my opinion, a *transparency clause*, in other words a clause which, in order to guard against abuses, prohibits Member States from taking advantage of the transposition of the directive to implement, in a sensitive area such as social policy, a reduction in the protection already provided under their own law, while blaming it (as unfortunately all too often happens!) on non-existent Community law obligations rather than on an autonomous home-grown agenda.

63. This follows firstly from the letter of the clause, which does not preclude, as a general rule, any reduction in the level of protection enjoyed by workers, but rather provides that 'implementation' of the directive cannot itself constitute 'valid grounds' for undertaking such a reduction. Subject to compliance with the requirements of the directive, a curtailing of protections at national level is

therefore entirely possible, but only on grounds *other than* the need to give effect to the directive, the existence of which grounds it is for the Member State to demonstrate.
64. On proper consideration, any other interpretation would not only do violence to the very clear language of the clause but would also be at odds with the scheme of allocation of responsibilities intended by the Treaty, which in the domain of social policy assigns to the Community the task of 'support[ing] and complement[ing] the activities of the Member States' in specified fields (Article 137 EC).
65. If the clause in question were to be interpreted not, as I have argued, as a transparency requirement, but rather as a fully-fledged standstill provision, then upon implementation of the directive Member States would find themselves denied the possibility not only – as is obvious – of contravening the obligations imposed by the directive but also of absolutely any rowing back, for good cause, in the area governed by the directive. But that would be neither to support nor to complement their activities but to tie their hands completely in the field of social policy.
66. That having been said, in terms of the effect of Clause 8(3), it remains to be determined whether the reference to 'implementation' of the directive means the 'first implementation' of the directive or, more generally, any legislation, including any later legislation, enacted within its sphere of application.
67. The German Government appears to favour the former interpretation. It argues that the clause in question constrains the national legislature only in relation to the *first* implementation of Directive 1999/70 and has no bearing on any subsequent interventions by the state. In the instant case, therefore, there could be no question of the clause being violated, since it had no bearing on the Hartz Law, the legislation at issue here, which was enacted only in 2002, two years after the formal transposition of the aforementioned directive via the TzBfG.
68. I take the view, however, that that argument cannot be accepted, and that Mr Mangold is correct, on both literal and teleological grounds, in urging the contrary interpretation.
69. As far as the language of the clause is concerned, I would point out that in providing that 'implementation' of the directive does not constitute valid grounds for regression, the clause uses a very broad term, capable of covering any domestic rules intended to achieve the results pursued by the directive. It is therefore not only the national provisions that give effect to the obligations flowing from the directive which must comply with the transparency requirement described above, but also any subsequent provisions that, to the same end, supplement or amend the rules already adopted.
70. As regards its objectives, let me say again that the clause is aimed at preventing national legislatures using Directive 1999/70 as grounds for reducing the safeguards enjoyed by workers, by blaming the directive for measures which are in fact the product of their own autonomous legislative choices.
71. Clearly, the risk of such behaviour on the part of the State is greatest at the time of first transposition, when a clear distinction, within the same legislation, between provisions enacted to meet Community law obligations and those having no such purpose is very difficult to discern and the temptation to 'dress up' the latter as the former can therefore be all the stronger.
72. However, it seems to me that the risk is still there afterwards, in particular when – as in the present case – the legislature supplements or amends the legislation of first transposition by inserting new provisions. It may be equally unclear in the case of such provisions, which are merged in with those previously enacted, whether they are still attributable to a requirement of Community law or to the domestic legislature's own agenda.
73. For that reason, it seems to me that laws, such as the Hartz Law in this case, enacted subsequent to the legislation of first transposition, which amend or supplement that legislation, are also subject to the transparency requirement laid down by Clause 8(3). Since the Hartz Law amended the TzBfG, which was the legislation that gave effect to Directive 1999/70, it too must therefore be tested in that respect.
Application to the case in hand
74. In the light of all that, and turning now to the case in hand, I can say right away that to my mind Germany did not violate Clause 8(3) by enacting the Hartz Law.
75. The order for reference and the German Government's observations at the hearing disclose a number of factors to indicate that the ground on which the Hartz Law lowered from 58 to 52 the age at which fixed-term contracts may be entered into without restriction was the need to promote the employment of older people in Germany and was thus quite independent of the requirements of implementing Directive 1999/70.
76. The first such factor is the fact that both before and after the implementation of the directive various legislative interventions took place to gradually reduce the age threshold in question. These were, as noted earlier: in 1996, the Law *to Promote* Growth and *Employment*, which set the age-limit at 60; in 2000, the TzBfG, which dropped the age-limit to 58; and finally, in 2002, the Hartz Law, which

further lowered it to 52. The German legislature, therefore, even before the implementation of the directive, decided autonomously to reduce the protection provided in this area to older workers, with a view to boosting their prospects of employment, and it persisted with this policy even after the implementation of the directive, thereby demonstrating its intention of pursuing its own economic and social policy agenda independently of Community constraints.

77. A second factor, which relates to the Hartz Law specifically, is the fact that that law was enacted in the wake of a report by a government commission which found that 'an unemployed person over the age of 55 has about a one-in-four chance of reemployment' (see point 15 above). The lowering of the age threshold was therefore clearly based on specific employment-related considerations and not an exploitation of the obligations imposed by the Community.

78. In the light of those factors, I therefore take the view that Clause 8(3) of the framework agreement does not preclude a national provision, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which, for justified reasons of employment policy unconnected with the transposition of Directive 1999/70, lowered the age at which fixed-term contracts of employment can be entered into without restriction from 58 to 52.

79. It still remains to be examined, however, whether that lowering is compatible with the other directive (Directive 2000/78) cited by the national court in the second question referred, which I now turn to consider.

(3) *Directive 2000/78*

80. By its second question, the referring court asks whether Article 6 of Directive 2000/78 precludes a national provision, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which allows workers over the age of 52 to be employed on fixed-term contracts with no restrictions even where there is no objective reason, thereby departing from the general rule under domestic law that an objective reason is normally required.

81. It will be recalled that according to Article 6(1) of that directive 'Member States may provide that *differences of treatment* on grounds of age shall not constitute discrimination, if, within the context of national law, they are *objectively and reasonably justifiedby a legitimate aim*, including legitimate employment policy, labour market and vocational training objectives, and if *the means of achieving that aim are appropriate and necessary*'.

82. Under subparagraph (a) of that article, such differences of treatment may include, inter alia, 'the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for … older workers … in order to *promote their vocational integration* or ensure their protection'.

83. It may also be recalled that, even before the adoption of Directive 2000/78 and the specific provisions it contains, the Court had recognised the existence of a general principle of equality which is binding on Member States 'when they implement Community rules' and which can therefore be used by the Court to review national rules which 'fall within the scope of Community law'. (27) That principle requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way unless such *treatment* is *objectively justified*' (28) by the pursuit of a legitimate aim and provided that it 'is *appropriate and necessary* in order to achieve' that aim. (29)

84. As a comparison between them shows, both requirements – the specific requirement of the directive and the general requirement just described – are essentially identical, so that the analysis of the compatibility of a rule such as the German one could be carried out in the light of either requirement with similar results. The better option is perhaps to use the principle of equality – which was also raised, albeit indirectly, by the national court – since, being a general principle of Community law imposing an obligation that is precise and unconditional, it is effective against all parties and, unlike the directive, could therefore be relied upon directly by Mr Mangold against Mr Helm and could be applied by the Arbeitsgericht in the main proceedings.

85. But the result would be no different if the issue were dealt with on the basis of Article 6 of Directive 2000/78. In that case too, to determine whether a national rule such as Paragraph 14(3) of the TzBfG constitutes age-based discrimination would similarly require analysing whether there is a difference of treatment, and, if so, whether it is justified by a legitimate aim and is appropriate and necessary in order to pursue that aim.

86. Before embarking on that analysis, it may be recalled that Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, is in the following terms: 'An objective reason is not required for a fixed-term contract of employment if upon commencing the fixed-term employment the employee is aged 58 or over. A fixed term may not apply if there is a close objective connection with a previous permanent contract of employment between the same employee and the same employer … For the period to 31 December 2006, the age-limit referred to in the first sentence hereof shall be 52 instead of 58.'

87. In that light, I therefore turn to the analysis described above, which, to repeat, entails establishing whether a difference of treatment exists and, if so, whether it is objectively justified and whether the principle of proportionality has been observed.
88. As for the first point, it does not seem to me that there is much room for doubt. As the referring court noted, the possibility of entering into fixed-term contracts without restrictions, in particular in the absence of an objective reason, is available only in respect of workers over the age of 52. The difference in treatment based on age is therefore self-evident.
89. Notwithstanding the literal meaning of the provision in question, it also seems fairly clear to me that there is an objective justification, albeit implicit, for that difference.
90. If one looks beyond the in one sense misleading wording of the provision (which appears to dispense with the requirement of an 'objective reason' for fixed-term contracts with workers over the age of 52) and if one considers instead – as discussed above – the government commission report which led to the enactment of the Hartz Law (see points 15, 76 and 77 above), one realises that both the provision itself and its predecessors have a very specific justification. They are all aimed at enhancing the employability of unemployed older workers who, according to the official figures cited by the commission, have particular trouble finding new employment.
91. It is more difficult, however, to determine whether that aim has been pursued by appropriate and necessary means. I am impressed, however, by the analysis of this issue conducted by the national court, which came to a clear conclusion that Paragraph 14(3) of the TzBfG goes beyond what is necessary in order to enhance the employability of unemployed older workers.
92. In the first place, the national court observed that the contentious provision allows 'a 52-year-old worker to be employed on a fixed-term contract for what is effectively an unlimited duration (13 years, for example, up to the age of 65)' or 'to be employed on an indefinite number of short fixed-term contracts with one or more employers' up to that age. (30)
93. The national court also pointed out that the age threshold of 52, which is lower, moreover, than the age threshold of 55 referred to by the aforementioned government commission (see point 15 above), is in practice reduced by a further two years, since the contentious provision prohibits a fixed-term hiring if the 52-year-old worker 'was previously employed under a contract *of indefinite duration*', but not if he or she was previously employed under a fixed-term contract, which, according to the other provisions of the TzBfG, (31) may last for up to two years. (32)
94. In short, according to the national court's analysis, the contentious provision ultimately means that workers hired on a fixed-term basis for the first time after turning 50 can thereafter be employed on a fixed-term basis without restrictions until their retirement.
95. In those circumstances, it seems to me that the national court is right in its view that this goes beyond what is necessary in order to enhance the employability of older workers. It does indeed make it easier for them to find a new job, but at the price of their being, in principle, *permanently* excluded from the safeguards that go with permanent employment, which, according to the intentions of the social partners endorsed by the Community legislature, must instead continue to be 'the general form of employment relationships' for all (paragraph 6 of the general considerations of the framework agreement annexed to Directive 1997/70; see point 3 above).
96. Nor, for that matter, may it be objected that the lowering of the age threshold from 58 to 52 under the Hartz Law applies only until 31 December 2006. That objection is met by simply pointing out that by that date a large proportion of the workers covered by the Hartz Law (Mr Mangold among them) will have turned 58 and will therefore fall once more under the special rules laid down by Paragraph 14(3) of the TzBfG. Accordingly, for those workers at least, the exclusion from the safeguards of stable employment is already permanent and therefore disproportionate.
97. In the light of the Arbeitsgericht's analysis, it therefore seems to me that the aim of enhancing the employment prospects of older workers has been pursued by means which are clearly disproportionate and that therefore the treatment accorded workers over 52 by Paragraph 14(3) of the TzBfG constitutes full-blown discrimination on grounds of age.
98. On those grounds, I take the view that Article 6 of Directive 2000/78 and, more generally, the general principle of non-discrimination preclude a national rule, such as the provision at issue in this case, which allows persons over the age of 52 to be employed on fixed-term contracts with no restrictions.
4) The consequences of the interpretation adopted by the Court
99. Before concluding, it remains to identify the legal consequences which the national court must draw from the Court's decision in circumstances, such as those in the main proceedings, in which an interpretation is sought of a directive in the context of a dispute between private parties.
100. It remains, that is, to answer the third question, by which the national court asks what the effect would be on the main proceedings of a declaration that a national rule such as that in issue was

incompatible and, specifically, whether following such a declaration the national court could disapply that rule.
101. On close consideration, that question would be disposed of if the Court – following my suggestion – were to decide to declare incompatible a law, such as the law in issue, using as its yardstick of interpretation the general principle of equality, the clear, precise and unconditional content of which is binding on all legal persons and can therefore be relied upon by private parties both against the State (33) and against other private parties (see point 84 above). There is no doubt that in that eventuality the national court would have to disapply a national rule held contrary to that principle which is regarded as having direct effect.
102. The question regains all its significance, however, if the Court decides – as I have suggested as an alternative – to declare incompatibility in the light of the rule against discrimination laid down in Article 6 of Directive 2000/78. In that eventuality, the answer to the question would be complicated still further by the fact that at the material time the deadline for transposition of the directive had not yet passed (see points 8 and 9 above).
103. In that regard, the Arbeitsgericht and, in substance, the Commission too argue that if Directives 1999/70 and 2000/78 were to preclude a provision, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which allows workers over the age of 52 to be employed on fixed-term contracts with no restrictions, that provision would have to be disapplied and the general rule under Paragraph 14(1) of the TzBfG, which allows such contracts to be entered into only if objectively justified, applied in its place.
104. According to the Arbeitsgericht and the Commission, the contentious national provision would also have to be disapplied in the event it were found incompatible with Directive 2000/78 alone, albeit the deadline for transposition had not yet passed. In that case, if I understand them correctly, such a consequence would be the natural sanction for the breach of the obligation on Member States to refrain, prior to that deadline, from adopting measures – such as, in their opinion, the measure in issue – liable seriously to compromise the result prescribed by the directive.
105. It is true – the Commission goes on – that, being addressed to Member States, Community directives, including those whose transposition deadline has not yet passed, cannot give rise to 'horizontal' direct effect, in other words as against a private party, such as Mr Helm, being sued by another private party. However, in the present case, the application of the directives concerned would not give rise to such an effect: if Paragraph 14(3) of the TzBfG were to be set aside, it is another provision of national law, Paragraph 14(1) of the TzBfG, which would fall to be applied and not, of itself, any provision of the directives concerned.
106. Let me say at once that, in my opinion, that view cannot be upheld. It ignores the fact that in those circumstances the disapplication of the national rule in question would in reality constitute a direct effect of the Community act and it would therefore in fact be the Community act that prevented the party concerned from relying on the rights conferred on him by his own national law.
107. In the present case, for instance, the contrary view would mean Mr Helm being prevented by a directive from relying in the Arbeitsgericht on his right under national law to hire workers over the age of 52 on fixed-term contracts with no restrictions. (34)
108. That would clearly be at odds with the settled case-law of the Court according to which a directive, being formally addressed to Member States, 'cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual'. (35)
109. But that is not all. The above principle applies, as has been confirmed time and again, in cases where the deadline for transposition of the directive relied upon had already passed and the obligation on Member States was therefore in that respect unconditional. It must obviously apply with even greater force when the deadline has not yet elapsed.
110. Nor is that conclusion contradicted, in my view, by the case-law cited by the Arbeitsgericht and by the Commission, in which the Court held that Member States had an obligation to refrain, in advance of the deadline for transposition, from adopting measures liable seriously to compromise achievement of the result prescribed by a directive. (36) On the contrary, just recently the Court explained that the existence of that obligation did not give individuals the right (which is in fact expressly excluded) to rely on the directive 'before national courts to have a pre-existing national rule incompatible with the Directive disapplied'. (37) That statement obviously appears even more justified where, as here, the dispute in the main proceedings is between two private parties.
111. In my opinion, therefore, in the main proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, if it is held incompatible with Directive 1999/70 or – according to my proposal – with Directive 2000/78.
112. That said, however, I must add that – again according to settled case-law – this conclusion does

not absolve the referring court of the duty to construe its own law in a manner consistent with the directives.
113. In cases where a directive cannot produce direct effect in the main proceedings, the Court has long held that the national court must none the less 'do whatever lies within its jurisdiction', 'having regard to the whole body of rules of national law', using all 'interpretative methods recognised by national law', in order to 'achieve the result sought by the directive'. (38) National courts, just like other Member State authorities, are subject to the obligation arising under the third paragraph of Article 249 EC, according to which directives have binding effect, and, more generally, under the second paragraph of Article 10 EC, which requires Member State authorities 'to take all appropriate measures, whether general or particular' necessary to ensure compliance with Community law. (39)
114. This duty to construe national provisions in conformity with Community law clearly applies in the case of Directive 1999/70, the deadline for transposition of which had already passed by the time Mr Mangold entered into Mr Helm's employ, which directive, however, is of no great relevance in my analysis, since it is my view that the questions relating to it must be either ruled inadmissible (Question 1(b), see point 42 above) or answered in the negative (Question 1(a), see point 78 above).
115. But, on proper consideration, the duty in question also applies in the case of directives, such as Directive 2000/78 (which is of greater relevance in my analysis: see point 98 above), which had already entered into force at the material time but the deadline for transposition of which had as of then not yet expired. (40)
116. Why this is so I will now consider.
117. It must first be recalled that the duty of consistent interpretation is one of the 'structural' effects of Community law which, together with the more 'invasive' device of direct effect, enables national law to be brought into line with the substance and aims of Community law. Because it is structural in nature, the duty applies with respect to all sources of Community law, whether constituted by primary) or secondary legislation,) and whether embodied in acts whose legal effects are binding) or not. Even in the case of recommendations, the Court has held, 'national courts *are bound* to take [them] into consideration in order to decide disputes submitted to them'.
118. It is clear then that the same duty must be held to apply also in the case of directives for which the deadline for transposition has not yet elapsed, since these are one of the sources of Community law and produce effects not only as from that deadline but from the date of their entry into force, that is, in terms of Article 254 EC, on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.
119. This is also borne out, moreover, by the case-law cited (see points 104 and 110 above), which holds that '[a]lthough the Member States are not obliged to adopt [the] measures [to implement a directive] before the end of the period prescribed for transposition', it follows from the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC that 'during that period they must refrain from taking any measures liable seriously to compromise the result prescribed'. (45)
120. There can be no doubt but that this negative duty, like the positive duty to take all measures necessary to achieve the result sought by the directive, is borne by *all Member State authorities*, including, within their sphere of responsibility, the national courts. It therefore follows that, in advance of the deadline for transposition, the national courts too must do everything possible, in the exercise of their powers, to avoid the result prescribed by the directive being jeopardised. In other words, they must also endeavour to favour the interpretation of national law which is most in keeping with the letter and spirit of the directive.
121. Coming now to the case at hand and drawing the conclusions from the above analysis, I take the view that in the proceedings between Mr Mangold and Mr Helm, the Arbeitsgericht cannot disapply, at the latter's expense, Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, for being incompatible with the prohibition of age-based discrimination laid down by Article 6 of Directive 2000/78. However, even though the deadline for the transposition of that directive has not yet expired, the Arbeitsgericht is bound to take into consideration all rules of national law, including those having constitutional status, which contain the same prohibition, in order to arrive, if possible, at a result consistent with what the directive prescribes.
122. For all the reasons set out above, I therefore take the view that a national court hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive. However, in view of the duties that flow from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC, the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired.

IV – Conclusion

In the light of the foregoing considerations, I propose that the Court should reply to the Arbeitsgericht München as follows:

'1(a). Clause 8(3) of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP does not preclude a national provision, such as Paragraph 14(3) of the Law on Part-Time and Fixed-Term Employment of 21 December 2000, (the TzBfG), as amended by the First Law for the Provision of Modern Services on the Employment Market of 23 December 2002 (known as "the Hartz Law"), which, for justified reasons of employment policy unconnected with the transposition of Directive 1999/70, lowers the age at which fixed-term contracts of employment can be entered into without restriction from 58 to 52.

1(b). The Court has no jurisdiction to express a view on Question 1(b).

2. Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, more generally, the general principle of non-discrimination preclude a national rule, such as Paragraph 14(3) of the TzBfG, as amended by the Hartz Law, which allows persons over the age of 52 to be employed on fixed-term contracts with no restrictions.

3. A national court, hearing a dispute involving private parties only, cannot disapply, at their expense, provisions of national law which are in conflict with a directive.

However, in view of the duties that flow from the second paragraph of Article 10 EC and the third paragraph of Article 249 EC, the national court is bound to construe those provisions as far as possible in the light of the wording and purpose of the directive, in order to achieve the result sought by it, and this applies also in the cases of directives for which the deadline for transposition into national law has not yet expired'.

In Case C-129/96,
REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between
Inter-Environnement Wallonie ASBL
and
Région Wallonne
on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),
THE COURT,
after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,
gives the following
Judgment

……..
Facts of the case in the main proceedings

16 By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'État to annul the Order in its entirety or, in the alternative, certain of its provisions.
17 In its order for reference, the Conseil d'État has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.
18 In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms `an integral part of an industrial production process'.
19 In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the permit requirement for undertakings carrying out waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.
20 On that point, the Conseil d'État considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.
21 Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'État questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.
22 In the second part of its plea, Inter-Environnement Wallonie claims that the exception in Article 5(1) of the Order is contrary to the Decree which, it states, does not provide for any derogation for operations forming part of an industrial process.
23 On that point, the Conseil d'État finds that Article 3(1) of the Decree and the annex to which it refers are intended to be a faithful transposition of Directive 75/442, as amended. While the case-law of the Court makes it clear that waste means any substances and objects which the holder discards or is required to discard without intending thereby to exclude their economic reutilization by other persons, it does not make it possible to establish whether a substance or object referred to in Article 1 of Directive 75/442, as amended, which directly or indirectly forms an integral part of an industrial production process is waste within the meaning of Article 1(a) of that directive.
24 In those circumstances, the Conseil d'État has referred the following questions to the Court for a preliminary ruling:
`(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?
Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?
(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?'

…….
Question 1
35 By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.
36 According to Inter-Environnement Wallonie, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the Région Wallonne should have complied with that directive.

…….
40 It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen [1977] ECR 113, paragraph 22; Case 152/84 Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723, paragraph 48, and Case 72/95 Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 Marleasing v Comercial Internacional de Alimentación [1990] ECR I-4135, paragraph 8, and Kraaijeveld, cited above, paragraph 55).
41 The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, `[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.
42 Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.
43 Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.
44 Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.
45 Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.
46 It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.
47 In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.
48 For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.
49 Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed.
50 The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

JUDGMENT OF THE COURT (Grand Chamber)
23 October 2007 (*)
(Citizenship of the Union – Articles 17 EC and 18 EC – Refusal to award an education or training grant to nationals of Member States pursuing their studies in another Member State – Requirement of continuation between studies pursued in another Member State and those pursued previously for at least one year in an establishment in the student's Member State of origin)
In Joined Cases C-11/06 and C-12/06,
REFERENCES for a preliminary ruling under Article 234 EC, by the Verwaltungsgericht Aachen (Germany), made by decisions of 22 November 2005, received at the Court on 11 January 2006, in the proceedings
Rhiannon Morgan (C-11/06)
v
Bezirksregierung Köln,
and
Iris Bucher (C-12/06)
v
Landrat des Kreises Düren,

THE COURT (Grand Chamber),
…….
after hearing the Opinion of the Advocate General at the sitting on 20 March 2007
gives the following
Judgment
1 The references for a preliminary ruling relate to the interpretation of Articles 17 EC and 18 EC.
2 Those references were made in the context of two sets of proceedings, the first between Ms Morgan and the Bezirksregierung Köln (Regional Authority, Cologne) and the second between Ms Bucher and the Landrat des Kreises Düren (Chief Officer of the District Authority of Düren), regarding the entitlement of the applicants in the main proceedings to an education or training grant in order to pursue studies in a higher education establishment outside the Federal Republic of Germany.
National legal context
3 Paragraph 5(1) of the Bundesgesetz über individuelle Förderung der Ausbildung – Bundesausbildungsförderungsgesetz (Federal Law on the encouragement of education and training; 'the BAföG') states:
'An education or training grant shall be awarded to students referred to in Paragraph 8(1) where they attend an education or training establishment abroad each day from their permanent residence in Germany. The permanent residence within the meaning of this Law shall be established at the place which is the centre of interests, not only temporarily, of the person concerned, irrespective of the intention to become permanently established; a person who resides at a place only for education or training purposes has not established his permanent residence there'.
4 As provided in Paragraph 5(2) of the BAföG:
'Students who have their permanent residence in Germany shall be awarded an education or training grant for attending an education or training establishment abroad if:
…
3. having attended a German education or training establishment for a period of at least one year, the students continue their education or training at an education or training establishment in a Member State of the European Union,
and [they] possess sufficient language knowledge. ...'
5 Paragraph 8(1) of the BAföG is worded as follows:
'An education or training grant shall be awarded to
1. Germans within the meaning of the Basic Law,
…
8. Students who have a right of entry or residence as spouses or children, under the conditions laid down in Paragraph 3 of the Law on general freedom of movement for citizens of the Union, or who do not enjoy such rights as a child of a citizen of the Union only because they are 21 years of age or older and do not receive support from either parent or from the spouse of a parent,
9. Students who are nationals of another Member State of the European Union or another State party to the Agreement on the European Economic Area and who have been employed in Germany before commencing education or training;
…'
The disputes in the main proceedings

Case C-11/06

6 Having completed her secondary education in Germany, Ms Morgan, a German national born in 1983, spent one year working as an au pair in the United Kingdom.

7 On 20 September 2004 she began studies in applied genetics at the University of the West of England in Bristol (United Kingdom).

8 During August 2004 she applied to the Bezirksregierung Köln, defendant in the main proceedings, for an education or training grant for her studies in the United Kingdom, claiming in particular that courses in genetics were not offered in Germany.

9 By decision of 25 August 2004, that application was rejected on the ground that Ms Morgan did not meet the conditions laid down in Paragraph 5(2) of the BAföG for an education or training grant for studies at an education or training establishment outside Germany. In particular, since she was not continuing, in another Member State, studies pursued in Germany for at least one year, she did not satisfy the condition laid down in point 3 of Paragraph 5(2), in accordance with which courses of study attended outside Germany have to represent the continuation of education or training pursued for at least one year in Germany ('the first-stage studies condition').

10 The administrative appeal lodged by Ms Morgan against that rejection having itself been dismissed by decision of 3 February 2005 of the Bezirksregierung Köln, the dispute was brought before the referring court.

Case C-12/06

11 On 1 September 2003 Ms Bucher, a German national, began studies in ergotherapy at the Hogeschool Zuyd in Heerlen (Netherlands), very close to the German border.

12 Until 1 July 2003 Ms Bucher lived with her parents in Bonn (Germany). Then, together with her partner, she moved to accommodation in Düren (Germany), which she registered as her principal residence and from which she travelled to Heerlen for study purposes.

13 During January 2004 she applied to the Landrat des Kreises Düren, defendant in the main proceedings, for an education or training grant for her studies in the Netherlands.

14 That application was rejected by decision of 7 July 2004, on the ground that Ms Bucher did not satisfy the conditions laid down in Paragraph 5(1) of the BAföG. According to that decision, Ms Bucher had established her residence in a border area for the sole purpose of pursuing her professional education or training.

15 The administrative appeal lodged by Ms Bucher against that rejection having itself been dismissed by decision of 16 November 2004 of the Bezirksregierung Köln, the dispute was brought before the referring court. According to that court, Ms Bucher does not satisfy either the conditions laid down in Paragraph 5(1) of the BAföG or those flowing from Paragraph 5(2)(3) thereof.

The questions referred for a preliminary ruling

16 The claims of Ms Morgan and Ms Bucher having thus been brought before it, the Verwaltungsgericht Aachen (Administrative Court, Aachen) seeks to know whether Articles 17 EC and 18 EC preclude the alternative conditions laid down in Paragraph 5(2)(3) and Paragraph 5(1) of the BAföG for the award of an education or training grant for studies in a Member State other than the Federal Republic of Germany.

17 In those circumstances, the Verwaltungsgericht Aachen decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the first of which – common to both disputes before the referring court – is the only question in Case C-11/06:

'1. Does the freedom of movement guaranteed for citizens of the Union under Articles 17 EC and 18 EC prohibit a Member State, in a case such as the present, from refusing to award an education or training grant to one of its nationals for a full course of study in another Member State on the ground that the course does not represent the continuation of studies pursued at an education or training establishment located in the national territory for a period of at least one year?

2. Does the freedom of movement guaranteed for citizens of the Union under Articles 17 EC and 18 EC prohibit a Member State, in a case such as the present, from refusing to award an education or training grant to one of its nationals, who as a cross-border commuter is pursuing her course of study in a neighbouring Member State, on the grounds that she is residing at a border location in [the first-mentioned Member State] only for education or training purposes and that that place of abode is not her permanent residence?'

The questions referred for a preliminary ruling

The question common to Cases C-11/06 and C-12/06

18 By that question, the referring court asks, in essence, whether Articles 17 EC and 18 EC preclude a condition such as the first-stage studies condition. That condition consists, as is apparent from the references for a preliminary ruling, in a twofold obligation which must be fulfilled in order to obtain an

education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals: first, to have attended an education or training course for at least one year in the Member State of which they are nationals and, second, to continue only that same education or training in another Member State.

19 Ms Morgan and Ms Bucher claim in particular that, because professional education and training courses in applied genetics and ergotherapy, respectively, are not available in Germany, they are obliged to forego a grant under the BAföG for education or training in another Member State.

20 The German Government and the defendants in the main proceedings contend that the first-stage studies condition does not amount to a restriction of the right of freedom of movement and of residence provided for in Article 18 EC and, in the alternative, they contend that, even if there is such a restriction, it is justifiable and proportionate. That view is essentially shared by the Netherlands, Austrian and United Kingdom Governments as well as by the Commission of the European Communities.

21 According to the Italian, Finnish and Swedish Governments, the first-stage studies condition amounts to a restriction of freedom of movement for citizens of the Union. The Italian Government, contrary to the submissions of the Swedish Government in this respect, takes the view that that restriction is not justified in the circumstances of the cases before the referring court. According to the Finnish Government, it is for the referring court to assess whether that restriction may be justified by objective considerations which are proportionate to the objective being legitimately pursued.

22 It should be noted that, as German nationals, Ms Morgan and Ms Bucher enjoy the status of citizens of the Union under Article 17(1) EC and may therefore rely on the rights conferred on those having that status, including against their Member State of origin (see Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 19).

23 The situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-0000, paragraph 87, and the case-law cited). In the main proceedings, the assistance at issue relates specifically to studies pursued in another Member State.

24 In this respect, it should first of all be pointed out that, although, as the German, Netherlands, Austrian, Swedish and United Kingdom Governments as well as the Commission have observed, the Member States are competent, under Article 149(1) EC, as regards the content of teaching and the organisation of their respective education systems, it is none the less the case that that competence must be exercised in compliance with Community law (see, to that effect, Case C-308/89 *di Leo* [1990] ECR I-4185, paragraphs 14 and 15; Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 25; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraphs 31 to 35, and *Schwarz and Gootjes-Schwarz*, paragraph 70) and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article 18(1) EC (see, to that effect, *Schwarz and Gootjes-Schwarz*, paragraph 99).

25 Next, it should be recalled that national legislation which places certain nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (see Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39; *Tas Hagen and Tas*, paragraph 31; and *Schwarzand Gootjes-Schwarz*, paragraph 93).

26 Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his State of origin penalising the mere fact that he has used those opportunities (see, to that effect, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 31; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19; and *Schwarz and Gootjes-Schwarz*, paragraph 89).

27 That consideration is particularly important in the field of education in view of the aims pursued by Article 3(1)(q) EC and the second indent of Article 149(2) EC, namely, inter alia, encouraging mobility of students and teachers (see *D'Hoop*, paragraph 32, and *Commission* v *Austria*, paragraph 44).

28 Consequently, where a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States (see, by analogy, as regards Article 39 EC, Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 27).

29 In the present case, it is undisputed that the applicants in the main proceedings, who commenced

their higher education studies in a Member State other than the Federal Republic of Germany, were made subject, in order to obtain an education or training grant, to the first-stage studies condition, which is to be imposed, however, only in the case of studies pursued outside Germany.

30 The twofold obligation – set out at paragraph 18 of this judgment – flowing from the first-stage studies condition, is liable, on account of the personal inconvenience, additional costs and possible delays which it entails, to discourage citizens of the Union from leaving the Federal Republic of Germany in order to pursue studies in another Member State and thus from availing themselves of their freedom to move and reside in that Member State, as conferred by Article 18(1) EC.

31 Thus, the requirement that students spend one year at an educational establishment in Germany before they are entitled to receive assistance for an education or training course attended in another Member State is liable to discourage them from moving subsequently to another Member State in order to pursue their studies. This is *a fortiori* the case where that year of study in Germany is not taken into account for the purposes of calculating the duration of studies in the other Member State.

32 Contrary to what the German Government in effect contends, the restrictive effects created by the first-stage studies condition cannot be regarded as too uncertain or too insignificant, in particular for those whose financial resources are limited, to constitute a restriction on the freedom to move and reside within the territory of the Member States, as conferred by Article 18(1) EC.

33 Such a restriction can be justified in the light of Community law only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and if it is proportionate to the legitimate objective pursued by the provisions of national law (see *De Cuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33; and *Schwarz and Gootjes-Schwarz*, paragraph 94). It follows from the case-law of the Court that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (*De Cuyper*, paragraph 42).

34 It is in the light of the requirements of the case-law recalled in the previous paragraph that the arguments submitted to the Court seeking to justify the first-stage studies condition should be examined.

35 First, according to the Bezirksregierung Köln, that condition is justified by the concern to ensure that education or training grants are granted only to students who have the capacity to succeed in their studies. Similarly, at the hearing, the German Government stated that the purpose of that condition is to enable students to show their willingness to pursue and complete their studies successfully and without delay.

36 There is no doubt that the objective of ensuring that students complete their courses in a short period of time, thus contributing in particular to the financial equilibrium of the education system of the Member State concerned, may constitute a legitimate aim in the context of the organisation of such a system. However, there is nothing before the Court to support the conclusion that the first-stage studies condition is or could be appropriate, in itself, to ensure that the students concerned complete their courses. In addition, the imposition of that condition in the disputes before the referring court, to the extent that it may, in practice, bring about an increase in the overall duration of studies for which the assistance at issue in the main proceedings is awarded, appears to be inconsistent with that objective and, therefore, inappropriate for achieving it. Such a condition cannot therefore be regarded as proportionate to the objective pursued.

37 Second, the German Government also stated, at the hearing, that the purpose of the first-stage studies condition is to enable students to determine whether they have made 'the right choice' in respect of their studies.

38 However, in so far as that condition requires continuity between the studies pursued for at least one year in Germany and those pursued in another Member State, it appears to run counter to that purpose. That requirement of continuity is liable not only to discourage, or even prevent, students from pursuing in a Member State other than the Federal Republic of Germany education or training different from that pursued for at least one year in Germany, but also, by the same token, to discourage them from abandoning the education or training course initially chosen where they form the view that the choice is no longer the right one and that they wish to pursue their education or training in a Member State other than the Federal Republic of Germany.

39 Moreover, as regards education or training courses in respect of which there are no equivalents in Germany, that requirement of continuity, as the referring court observed, obliges the students concerned – among whom, as is apparent from paragraph 19 of this judgment, the applicants in the main proceedings submit that they are included – to choose between foregoing entirely the education or training course that they had planned to attend in another Member State and losing entirely their entitlement to an education or training grant. That condition cannot therefore be regarded as proportionate to the objective of facilitating an appropriate choice of education or training course on

the part of the students concerned.
40 Third, the German Government further submitted at the hearing that the German system of education or training grants, taken as a whole, is intended to promote the pursuit of studies in Member States other then the Federal Republic of Germany. Provided that the students concerned satisfy the first-stage studies condition, they could be entitled to an education or training grant for an additional year if they return to Germany in order to complete their studies in a German education establishment and could also claim contributions in respect of certain travel costs and, as the case may be, and within certain predefined limits, in respect of registration fees and medical insurance.
41 In this respect, it suffices to observe that such factors, whilst admittedly useful for students who satisfy the first-stage studies condition, are not of themselves capable of justifying the restriction of the right of freedom of movement and of residence provided for in Article 18 EC which that condition constitutes, particularly in the case of students who move to another Member State in order to pursue their entire higher education and who will not therefore complete their studies in an educational establishment in Germany.
42 Fourth, the Bezirksregierung Köln as well as the Netherlands and Austrian Governments contend, in essence, that a restriction such as that arising from the implementation of the first-stage studies condition may be justified by the interest in preventing education or training grants awarded in respect of studies pursued entirely in a Member State other than that of origin from becoming an unreasonable burden which could lead to a general reduction in study allowances granted in the Member State of origin. The Swedish Government and the Commission take the view that it is legitimate for a Member State, so far as concerns the award of training or education grants, to ensure a link between the students concerned and its society in general as well as its education system.
43 It is true that the Court has recognised that it may be legitimate for a Member State, in order to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State, to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State (Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 56 and 57).
44 In principle, if a risk of such an unreasonable burden exists, similar considerations may apply as regards the award by a Member State of education or training grants to students wishing to study in other Member States.
45 However, in the main proceedings, as the referring court essentially observed, the degree of integration into its society which a Member State could legitimately require must, in any event, be regarded as satisfied by the fact that the applicants in the main proceedings were raised in Germany and completed their schooling there.
46 In those circumstances, it is apparent that the first-stage studies condition, in accordance with which higher education studies of at least one year must have been undertaken beforehand in the Member State of origin, is too general and exclusive in this respect. It unduly favours an element which is not necessarily representative of the degree of integration into the society of that Member State at the time the application for assistance is made. It thus goes beyond what is necessary to attain the objective pursued and cannot therefore be regarded as proportionate (see, by analogy, *D'Hoop*, paragraph 39).
47 Fifth, the Austrian, Swedish and United Kingdom Governments as well as the Commission refer to the absence of coordinating provisions between the Member States so far as concerns education or training grants. They submit that, in the absence of such provisions, there is a risk of duplication of entitlements if a condition such as the first-stage studies condition were to be abolished.
48 In that respect, the United Kingdom Government referred, both in its written observations and at the hearing, to that the fact that it appears that Ms Morgan received from the United Kingdom authorities, in respect of her studies at the University of the West of England, financial support in the form of an allowance for tuition fees and maintenance costs, as well as a loan.
49 On that point, the German Government stated at the hearing, in reply to the questions put by the Court, that Paragraph 21(3) of the BAföG contains a provision which aims to take into account, in the calculation of the relevant income for the purposes of applying that law, any education or training grants or other allowances of the same type which may have been received from sources other than the provisions of that law.
50 In contrast, the first-stage studies condition is in no way intended to prevent or take account of grants of the same nature which may be received in another Member State. It cannot therefore be usefully argued that that condition is appropriate or necessary, by itself, to ensure that those grants are not duplicated.
51 In the light of all the foregoing, the answer to the question common to both disputes before the referring court must be that Articles 17 EC and 18 EC preclude, in circumstances such as those in the

cases before the referring court, a condition in accordance with which, in order to obtain an education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin of those students.

The second question in Case C-12/06

52 According to the referring court, the action which was brought before it by Ms Bucher should be upheld if the question common to both cases in the main proceedings is answered in the affirmative.

53 In those circumstances, since that question has been answered in the affirmative, there is no need here to reply to the second question referred in Case C-12/06.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 17 EC and 18 EC preclude, in circumstances such as those in the cases before the referring court, a condition in accordance with which, in order to obtain an education or training grant for studies in a Member State other than that of which the students applying for such assistance are nationals, those studies must be a continuation of education or training pursued for at least one year in the Member State of origin of those students.

JUDGMENT OF THE COURT (Grand Chamber)
16 October 2007 (*)
(Directive 2000/78/EC − Equal treatment in employment and occupation − Scope − Collective agreement providing for automatic termination of employment relationship where a worker has reached 65 years of age and is entitled to a retirement pension − Age discrimination − Justification)
In Case C-411/05,
REFERENCE for a preliminary ruling under Article 234 EC, by the Juzgado de lo Social No 33 de Madrid (Spain), made by decision of 14 November 2005, received at the Court on 22 November 2005, in the proceedings
Félix Palacios de la Villa
v
Cortefiel Servicios SA,
THE COURT (Grand Chamber),
……..
after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,
gives the following

Judgment
1 This reference for a preliminary ruling concerns the interpretation of Article 13 EC and Articles 2(1) and (6) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
2 The reference was made in the course of proceedings between Mr Palacios de la Villa and his employer, Cortefiel Servicios SA ('Cortefiel'), concerning the automatic termination of his contract of employment by reason of the fact that he had reached the age-limit for compulsory retirement, set at 65 years of age by national law.

Legal background
Community rules
3 Directive 2000/78 was adopted on the basis of Article 13 EC. Recitals 4, 6, 8, 9, 11 to 14, 25 and 36 state:
'(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.
…
(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.
…
(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.
…
(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the

Community. …
(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.
(14) This Directive shall be without prejudice to national provisions laying down retirement ages.
…
(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.
…
(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.'
4 Article 1 of Directive 2000/78 states: '[t]he purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'
5 Article 2 of Directive 2000/78, under the heading 'Concept of discrimination' states, in paragraphs (1) and (2)(a):
'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.
6 Article 3(1) of Directive 2000/78, under the heading 'Scope', provides:
'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
…
(c) employment and working conditions, including dismissals and pay
…'
7 Under Article 6 of Directive 2000/78, under the heading 'Justification of differences of treatment on grounds of age':
'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'
8 Article 8 of Directive 2000/78, under the heading 'Minimum requirements', is worded as follows:

‘1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.’
9 Article 16 of Directive 2000/78, under the heading ‘Compliance’, provides:
‘Member States shall take the necessary measures to ensure that:
(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.’
10 In accordance with the first paragraph of Article 18 of Directive 2000/78, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003 at the latest or could entrust the social partners, at their joint request, with the implementation of the directive as regards provisions concerning collective agreements. In such cases, Member States were to ensure that, no later than 2 December 2003, the social partners introduced the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by that directive. They were forthwith to inform the Commission of the European Communities of those measures.

National law

11 From 1980 until 2001 compulsory retirement of workers who had reached a certain age was used by the Spanish legislature as a mechanism to absorb unemployment.
12 Thus the Fifth Additional Provision of Law 8/1980 on the Workers’ Statute (Ley 8/1980 del Estatuto de los Trabajadores) of 10 March 1980 provided:
‘The maximum age-limit applicable to capacity to work and the termination of employment contracts shall be set by the Government by reference to the resources of the social security system and the labour market. In any event, the maximum age shall be 69 years, without prejudice to the right to complete qualifying periods for retirement.
Retirement ages may be agreed freely during collective bargaining, without prejudice to the social security provisions in that regard.’
13 Royal Legislative Decree 1/1995 of 24 March 1995 (BOE No 75, of 29 March 1995, p. 9654) approved the consolidated version of Law 8/1980, the Tenth Additional Provision of which (‘the Tenth Additional Provision’) essentially reproduced the Fifth Additional Provision of Law 8/1980 permitting the use of compulsory retirement as an instrument of employment policy.
14 Decree-Law 5/2001 of 2 March 2001 on emergency measures to reform the labour market in order to increase employment and to improve its quality, ratified by Law 12/2001 of 9 July 2001, repealed the Tenth Additional Provision with effect from 11 July 2001.
15 The national court states in that regard that, on account of the improvement in the economic situation, the Spanish legislature went from regarding compulsory retirement as an instrument favouring employment policy to viewing it as a burden on the social security system, so that it decided to replace the policy of encouraging compulsory retirement with measures intended to promote the implementation of a system of flexible retirement.
16 Articles 4 and 17 of the Law 8/1980, in the amended version resulting from Law 62/2003 of 30 December 2003 laying down fiscal, administrative and social measures (BOE No 313 of 31 December 2003, p. 46874) (‘the Workers’ Statute’), which is designed to transpose Directive 2000/78 into Spanish law and entered into force on 1 January 2004, deal with the principle of non-discrimination, inter alia, on grounds of age.
17 According to Article 4(2) of the Workers’ Statute:
‘Workers have the right, in their employment:
…
(c) not to be discriminated against directly or indirectly, when seeking employment or once in employment, on the basis of sex, marital status, age within the limits laid down by this Law, racial or ethnic origin, social status, religion or beliefs, political ideas, sexual orientation, membership or lack of membership of a trade union or on the basis of their language on Spanish territory. Nor may workers be discriminated against on the basis of disability, provided that they are capable of carrying out the work or job in question.

…'
18 Article 17(1) of the Workers' Statute provides:
'Regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by employers, which involve direct or indirect unfavourable discrimination on the basis of age … shall be deemed to be null and void.'
19 According to the referring court, the repeal of the Tenth Additional Provision of the Workers' Statute has given rise to many disputes regarding the legality of clauses in collective agreements authorising the compulsory retirement of workers.
20 Subsequently, the Spanish legislature adopted Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age (Ley 14/2005 sobre las cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubiliación), of 1 July 2005 (BOE No 157, of 2 July 2005, p. 23634), which entered into force on 3 July 2005.
21 Law 14/2005 reintroduced the mechanism for compulsory retirement, but laid down in that respect different conditions depending on whether the definitive or transitional rules of that law were applicable.
22 Thus, as regards collective agreements concluded after its entry into force, the sole article of Law 14/2005 reinstates the Tenth Additional Provision of the Workers' Statute as follows:
'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:
(a) such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.
(b) a worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'
23 However, as regards collective agreements concluded before its entry into force, the single transitional provision of Law 14/2001 ('the single transitional provision'), imposes only the second of the conditions laid down in the sole article of Law 14/2005, excluding any reference to the pursuit of an aim relating to employment policy.
24 The single transitional provision is worded as follows:
'Clauses in collective agreements concluded prior to the entry into force of this Law, which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided it is ensured that the workers concerned have completed the minimum period of contributions and satisfy the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.
The preceding paragraph is not applicable to legal situations which became definitive before the entry into force of this Law.'
25 The relationship between the parties in the main proceedings is governed by the Textile Trade Collective Agreement for the Autonomous Community of Madrid ('the collective agreement').
26 The collective agreement was concluded on 10 March 2005 and published on 26 May 2005. In accordance with Article 3 thereof, it remained in force until 31 December 2005. As the collective agreement preceded the entry into force of Law 14/2005, the single transitional provision is applicable to it.
27 Thus, the third paragraph of Article 19 of the collective agreement provides:
'In the interests of promoting employment, it is agreed that the retirement age will be 65 years unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.'
The dispute in the main proceedings and the questions referred for a preliminary ruling
28 It is clear from the file transmitted to the Court by the referring court that Mr Palacios de la Villa, who was born on 3 February 1940, worked for Cortefiel from 17 August 1981 as organisational manager.
29 By letter of 18 July 2005, Cortefiel notified him of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age provided for in the third paragraph of Article 19 of the collective agreement and that, on 2 July 2005, Law 14/2005 had been published, the single transitional provision of which authorises such a measure.
30 It is common ground that, at the date on which his contract of employment with Cortefiel was terminated, Mr Palacios de la Villa had completed the periods of employment necessary to draw a

retirement pension under the social security scheme amounting to 100% of his contribution base of EUR 2 347.78, without prejudice to the maximum limits laid down by national legislation.

31 On 9 August 2005, Mr Palacios de la Villa, taking the view that the notification amounted to dismissal, brought an action before the Juzgado de lo Social No 33, Madrid. In that action, he requested that the measure taken in his regard be declared null and void on the ground that it was in breach of his fundamental rights and, more particularly, his right not to be discriminated against on the ground of age, since the measure was based solely on the fact that he had reached the age of 65.

32 Cortefiel submitted conversely, that the termination of Mr Palacio de Villa's contract of employment was in accordance with the third paragraph of Article 19 of the collective agreement and the single transitional provision and that, furthermore, it was not incompatible with the requirements of Community law.

33 The referring court expresses serious doubts as to whether the first paragraph of the single transitional provision complies with Community law, inasmuch as it authorises the maintenance of clauses contained in collective agreements existing at the date of the entry into force of Law 14/2005 that provide for the compulsory retirement of workers if they have reached retirement age and satisfy the other conditions imposed by national social security legislation for entitlement to a contributory retirement pension. That provision does not require the termination of the employment relationship on the ground that the worker has reached retirement age to be justified by the employment policy pursued by the Member State concerned, whereas agreements negotiated after the entry into force of Law 14/2005 may contain compulsory retirement clauses only if, in addition to the condition that the workers concerned must be entitled to a pension, that measure pursues objectives set out in the collective agreement relating to national employment policy, such as increased stability in employment, conversion of temporary into permanent contracts, sustaining employment, the recruitment of new workers or the improvement of the quality of employment.

34 In those circumstances, under the same law and in the same economic circumstances, workers who have reached the age of 65 would be treated differently by reason solely of the fact that the collective agreement applicable to them came into force before or after the date of publication of Law 14/2005, that is, 2 July 2005; if the collective agreement was in force before that date no account would be taken of the requirements of employment policy, even though those requirements are imposed by Directive 2000/78, the time-limit for transposition of which expired on 2 December 2003.

35 It is true that Article 6(1) of Directive 2000/78 authorises an exception to the principle of non-discrimination on the basis of age for the purposes of certain legitimate aims, so long as the means to achieve them are appropriate and necessary. Further, according to the referring court, the definitive rules laid down in the Tenth Additional Provision are undoubtedly covered by Article 6(1), since they require the existence of an actual connection between the compulsory retirement of workers and legitimate employment policy objectives.

36 By contrast, according to the referring court, the first paragraph of the single transitional provision does not require there to be such a connection and, therefore, it does not appear to comply with the conditions laid down in Article 6(1) of Directive 2000/78. Furthermore, from 2001 labour market trends were clearly favourable and the decision of the Spanish legislature to introduce that transitional measure, influenced by the social partners, was aimed at amending the case-law of the Supreme Court. Moreover, the Constitutional Court has never accepted that collective bargaining may in itself constitute an objective and reasonable justification for the compulsory retirement of a worker who has reached a specific age.

37 The referring court adds that Article 13 EC and Article 2(1) of Directive 2000/78 constitute clear and unconditional rules requiring the national court, in accordance with the principle of the primacy of Community law, to disapply national law which is contrary to it, as in the case of the single transitional provision.

38 Furthermore, in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47 the Court has already declared a clause in a collective agreement to be contrary to Community law on the ground that it was discriminatory, holding that, without requiring or waiting for that clause to be abolished by collective bargaining or by some other procedure, the national court must therefore apply the same rules to the members of the group disadvantaged by that discrimination as those applicable to other workers.

39 It follows, in the view of the referring court, that, if Community law were to be interpreted as meaning that it in fact precludes the application in the case in the main proceedings of the first paragraph of the single transitional provision, the third paragraph of Article 19 of the collective agreement would have no legal basis and could not therefore apply in the case in the main proceedings.

40 In those circumstances, the Juzgado de lo Social No 33, Madrid decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the single transitional provision …) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to a retirement pension under their contribution regime?

In the event that the reply to the first question is in the affirmative:

(2) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the single transitional provision …?’

The questions referred for a preliminary ruling

The first question

41 In order to give a useful reply to that question, it is appropriate to determine, first, whether Directive 2000/78 is applicable to a situation such as that in the main proceedings before examining secondly, and if necessary, whether and to what extent the directive precludes legislation such as that referred to by the national court.

Applicability of Directive 2000/78

42 As is clear both from its title and preamble and its content and purpose, Directive 2000/78 is designed to lay down a general framework in order to guarantee equal treatment ‘in employment and occupation’ to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which includes age.

43 More particularly, it follows from Article 3(1)(c) of Directive 2000/78 that it applies, within the framework of the competence conferred on the Community, ‘to all persons … in relation to employment and working conditions, including dismissals and pay’.

44 It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.

45 The legislation at issue in the main proceedings, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.

46 Consequently, legislation of that kind must be regarded as establishing rules relating to ‘employment and working conditions, including dismissals and pay’ within the meaning of Article 3(1)(c) of Directive 2000/78.

47 In those circumstances, Directive 2000/78 is applicable to a situation such as that giving rise to the dispute before the national court.

The interpretation of Articles 2 and 6 of Directive 2000/78

48 By its first question, the referring court asks essentially whether the prohibition of any discrimination based on age in employment and occupation must be interpreted as meaning that it precludes national legislation such as that in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are regarded as lawful, where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 years by the national legislation, and must fulfil the other social security conditions for entitlement to draw a contributory retirement pension.

49 In that connection, it should be recalled from the outset that, in accordance with Article 1, the aim of Directive 2000/78 is to combat certain types of discrimination, including discrimination on grounds of age, as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment.

50 Under Article 2(1) of Directive 2000/78, for the purposes of the Directive, the ‘principle of equal treatment’ is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. Article 2(2)(a) states that, for the purposes of paragraph 1, direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

51 National legislation such as that at issue in the main proceedings, according to which the fact that a worker has reached the retirement age laid down by that legislation leads to automatic termination of

his employment contract, must be regarded as directly imposing less favourable treatment for workers who have reached that age as compared with all other persons in the labour force. Such legislation therefore establishes a difference in treatment directly based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78.

52 Specifically concerning differences of treatment on grounds of age, it is clear from the first subparagraph of Article 6(1) of the directive that such inequalities will not constitute discrimination prohibited under Article 2 'if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. The second subparagraph of Article 6(1) sets out several examples of differences of treatment having characteristics such as those mentioned in the first subparagraph and, therefore, compatible with the requirements of Community law.

53 In this case, it must be observed, as the Advocate General pointed out in point 71 of his Opinion, that the single transitional provision, which allows the inclusion of compulsory retirement clauses in collective agreements, was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations.

54 It is true, as the national court has pointed out, that that provision does not expressly refer to an objective of that kind.

55 However, that fact alone is not decisive.

56 It cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision.

57 In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary.

58 In this case, it is clear from the referring court's explanations that, first, the compulsory retirement of workers who have reached a certain age was introduced into Spanish legislation in the course of 1980, against an economic background characterised by high unemployment, in order to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment.

59 Secondly, such an objective was expressly set out in the Tenth Additional Provision.

60 Thirdly, after the repeal, in the course of 2001, of the Tenth Additional Provision, and following signature by the Spanish Government and employers' and trade union organisations of the Declaration for Social Dialogue 2004 relating to competitiveness, stable employment and social cohesion, the Spanish legislature reintroduced the compulsory retirement mechanism by Law 14/2005. The aim of Law 14/2005 itself is to create opportunities in the labour market for persons seeking employment. Its single article thus makes it possible, in collective agreements, to include clauses authorising the termination of an employment contract on the ground that the worker has reached retirement age, provided that that measure is 'linked to objectives which are consistent with employment policy and are set out in the collective agreement', such as 'the conversion of temporary contracts into permanent contracts [or] the recruitment of new workers'.

61 In that context, and given the numerous disputes concerning the repercussions of repeal of the Tenth Additional Provision on compulsory retirement clauses contained in collective agreements concluded under Law 8/1980, both in its original version and that approved by Royal Legislative Decree 1/1995, together with the ensuing legal uncertainty for the social partners, the single transitional provision of Law 14/2005 confirmed that it was possible to set an age-limit for compulsory retirement in accordance with those collective agreements.

62 Thus, placed in its context, the single transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment.

63 That assessment is further reinforced by the fact that, in this case, the third paragraph of Article 19 of the collective agreement expressly mentions the 'interests of promoting employment' as an objective of the measure established by that provision.

64 The legitimacy of such an aim of public interest cannot reasonably be called into question, since employment policy and labour market trends are among the objectives expressly laid down in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first indent of the first paragraph of Article 2 EU and Article 2 EC, the promotion of a high level of employment is one of the ends pursued both by the European Union and the European Community.

65 Furthermore, the Court has already held that encouragement of recruitment undoubtedly

constitutes a legitimate aim of social policy (see, in particular, Case C-208/05 [2007] ECR I-181, paragraph 39) and that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers.

66 Therefore, an objective such as that referred to by the legislation at issue must, in principle, be regarded as 'objectively and reasonably' justifying 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on grounds of age laid down by the Member States.

67 It remains to be determined whether, in accordance with the terms of that provision, the means employed to achieve such a legitimate aim are 'appropriate and necessary'.

68 It should be recalled in this context that, as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63).

69 As is already clear from the wording, 'specific provisions which may vary in accordance with the situation in Member States', in recital 25 in the preamble to Directive 2000/78, such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement.

70 Furthermore, the competent authorities at national, regional or sectoral level must have the possibility available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned. The fact that the compulsory retirement procedure was reintroduced in Spain after being repealed for several years is accordingly of no relevance.

71 It is, therefore, for the competent authorities of the Member States to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the Member State concerned.

72 It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.

73 Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable.

74 Moreover, the relevant national legislation allows the social partners to opt, by way of collective agreements – and therefore with considerable flexibility – for application of the compulsory retirement mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question.

75 In the light of those factors, it cannot reasonably be maintained that national legislation such as that at issue in the main proceedings is incompatible with the requirements of Directive 2000/78.

76 Given the foregoing interpretation of Directive 2000/78, there is no need for the Court to give a ruling in relation to Article 13 EC – also referred to in the first question – on the basis of which that directive was adopted.

77 In the light of all the foregoing considerations, the answer to the first question must be that the prohibition on any discrimination on grounds of age, as implemented by Directive 2000/78, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

– the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and

– it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.

The second question

78 In view of the answer in the negative given to the first question of the referring court, it is unnecessary to answer the second question.

…….

On those grounds, the Court (Grand Chamber) hereby rules:

The prohibition on any discrimination on grounds of age, as implemented by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

– the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and

– the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 15 February 2007 (1)
Case C-411/05
Félix Palacios de la Villa
v
Cortefiel Servicios SA
(Reference for a preliminary ruling from the Juzgado de lo Social No 33, Madrid) (Council Directive 2000/78/EC – Article 6 – General principle of Community law – Age discrimination – Compulsory retirement – Direct effect – Obligation to set aside conflicting national law)

I – Introduction

1. By the two questions which it referred for a preliminary ruling by order of 14 November 2005, (2) the Juzgado de lo Social No 33, Madrid, essentially wishes to ascertain whether the prohibition of discrimination on the grounds of age as laid down, in particular, in Article 2(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (3) precludes a national law allowing compulsory retirement clauses to be included in collective agreements. In the event of an affirmative answer, the referring court also wishes to know if it is required to disapply the national law concerned.

2. These questions have been raised in the context of a dispute between private parties, namely proceedings brought by Félix Palacios de la Villa against Cortefiel Servicios SA, José Maria Sanz Corral and Martin Tebar Less in which Mr Palacios claims that his dismissal on the ground that he had attained the compulsory retirement age laid down in a collective agreement was unlawful.

3. Questions on the interpretation of Directive 2000/78 have already been referred to the Court in the *Mangold* (4) and *Navas* (5) cases. As regards, more specifically, discrimination on grounds of age, this is the third time (after *Mangold* (6) and *Lindorfer* (7)) that the Court has been called upon to adjudicate an age discrimination claim, although it must be emphasised that the present case differs considerably from those cases in terms of the factual and legal background.

II – Legal framework

A – Community law

4. Directive 2000/78 was adopted on the basis of Article 13 EC in the version prior to the Treaty of Nice, which provides:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

5. The 1st and the 14th recitals in the preamble to Directive 2000/78 are worded as follows:

'(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

6. Article 1 of Directive 2000/78 states that the purpose of that Directive is:

'… to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

7. Paragraph 1 of Article 2, which defines the concept of discrimination, provides as follows:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.'

8. Article 3 of Directive 2000/78, entitled 'Scope', provides in paragraphs 1 and 3:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection

criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
…(c) employment and working conditions, including dismissals and pay;
3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
9. Article 6 provides for justification of differences of treatment on grounds of age:
'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
Such differences of treatment may include, among others:
(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'
10. Under the first paragraph of Article 18 of Directive 2000/78, transposition of the directive had to take place by 2 December 2003. Since Spain did not avail itself of the option, provided for in the second paragraph of Article 18, of having an additional period of three years from 2 December 2003, that date also marks the end of the period allowed for implementation of the directive in Spain.

***B* – Relevant national law**

11. According to the order for reference, from 1980 (starting with Law 8/80 on the Workers' Statute) until 2001, compulsory retirement was used by the Spanish legislature as a mechanism for promoting intergenerational employment.
12. After provisions of Law 8/80 providing for the setting of compulsory retirement ages in collective agreements had been ruled unconstitutional by the Constitutional Court, Law 8/80 was replaced in that respect by Royal Legislative Decree 1/1995 governing the Law on the Workers' Statute ('WS'). The WS is currently the principal national legislation in the field of industrial relations.
13. In the current version of the WS – that is to say, as amended by Law 62/03, which came into force on 1 January 2004 and which transposed Directive 2000/78 into Spanish law – Articles 4 and 17 lay down a prohibition of discrimination on grounds, inter alia, of age.
14. As regards compulsory retirement, the Tenth Additional Provision of the WS, in the version in force until July 2001, provided as follows:
'In accordance with the limits and conditions laid down in this provision, compulsory retirement may be used as an instrument in the implementation of employment policy. The maximum age-limit applicable to the capacity to work and the termination of employment contracts shall be set by the Government by reference to the resources of the social security system and the labour market, without prejudice to the right to complete qualifying periods for retirement. Retirement ages may be agreed freely by collective bargaining, without prejudice to the social security provisions in that regard.'
15. Due to a shift on the part of the legislature from perceiving compulsory retirement as an instrument favourable to employment to considering it a burden on the social security system, the Tenth Additional Provision was repealed in 2001 and compulsory retirement abolished. This gave rise to a large number of disputes before the Courts, challenging the lawfulness of clauses in collective agreements providing for the compulsory retirement of workers. As is clear from the order for reference, the Spanish Supreme Court took the view that, following the abolition of their legal basis, the compulsory retirement clauses included in a number of collective agreements were no longer lawful.
16. However, at the instigation of social partners, employers' organisations and trade union organisations, compulsory retirement was reinstated by Law 14/2005 of 1 July 2005 on clauses in

collective agreements concerning the attainment of normal retirement age ('Law 14/2005'), which came into force on 3 July 2005. The Sole Article of that Law reinstated the Tenth Additional Provision of the WS – in somewhat different wording – ('the definitive Law 14/2005 regime') and reads as follows:

'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:

(a) Such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.

(b) A worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'

17. Law 14/2005 was designed not only to govern collective agreements concluded after its entry into force on 3 July 2005, but also – by means of the 'Single Transitional Provision' – to govern agreements already in force when the law was published.

18. The Single Transitional Provision ('STP'), to which the questions referred in the present case relate, provides as follows:

'Clauses in collective agreements concluded prior to the entry into force of this Law, which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided that the agreement stipulates that the workers concerned must have completed the minimum period of contributions and that they must have satisfied the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.'

19. As the referring court pointed out, the STP differs from the rules on compulsory retirement contained in the Sole Article of Law 14/2005 governing collective agreements concluded after the entry into force of that law in that, according to the wording of the STP, there is no express requirement for compulsory retirement to be linked to objectives consistent with employment policy, which must be set out in the collective agreements concerned.

III – Factual background, procedure and questions referred

20. According to the order for reference, Mr Palacios, born on 3 February 1940, worked for the undertaking Cortefiel Servicios SA since 17 August 1981 as organisational manager.

21. On 18 July 2005, the undertaking informed Mr Palacios by letter of his dismissal on the basis that he satisfied all the requirements laid down in Article 19 of the Collective Agreement and in the STP.

22. The relationship between the parties is governed by the Textile Trade Collective Agreement for the Community of Madrid ('TTCA'), which was concluded on 10 March 2005 and published on 26 May 2005. Article 3 of the TTCA provides that it will remain in force until 31 December 2005.

23. Article 19(3) of the TTCA provides: 'In the interests of promoting employment, it is agreed that the retirement age will be 65 years unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.'

24. If Mr Palacios had retired on 18 July 2005, the date on which he was dismissed from the undertaking, he would have been entitled to receive from the social security scheme a retirement pension amounting to 100% of his contribution base of EUR 2 347.78, without prejudice to the maximum limits laid down in law.

25. In his action in the main proceedings Mr Palacios claims that his dismissal is void for breach of fundamental rights. In addition to an allegation of harassment, which the referring court regards as unfounded, Mr Palacios argues that he was discriminated against because he had reached the age of 65 and challenges directly the letter of dismissal.

26. The referring court notes that the letter of dismissal applied Law 14/2005 and that it is that single issue, namely whether the STP is compatible with Community law, which is the subject of the questions referred to the Court of Justice.

27. In addition, the referring court points out in its legal analysis that under the STP it is lawful to dismiss a worker provided that two conditions are satisfied, namely, that he has reached retirement age and that he fulfils the other conditions required for entitlement to a State pension. In its view, if the STP is incompatible with Community law, it must not be applied, in accordance with the principle of primacy.

28. The referring court emphasises also that, in contrast to the STP, the definitive Law 14/2005 regime makes compulsory retirement conditional upon the pursuit of objectives which are consistent with employment policy. It appears from the order for reference that the referring court therefore considers the definitive Law 14/2005 regime to be compatible with Directive 2000/78, pursuant to the derogation provided for in Article 6(1) thereof in relation to differences of treatment on grounds of age.
29. Moreover, the referring court takes the view that under Law 14/2005 workers who have reached the age of 65 are treated differently depending on whether the collective agreement under which they are subject to compulsory retirement at the age of 65 was already in force when that law was enacted or has been negotiated subsequently.
30. Finally, the referring court considers Article 13 EC and Article 2(1) of Directive 2000/78 to be precise and unconditional provisions which may be applied directly to the case before it.
31. Against that background, in order to establish with greater legal certainty an applicable criterion of interpretation, the Juzgado de lo Social has referred the following questions to the Court for a preliminary ruling:
– Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to draw a retirement pension under their contribution regime?
In the event that the reply to the first question is in the affirmative:
– Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the Single Transitional Provision of Law 14/2005 cited above?

IV – Legal analysis

A – The first question

Introductory remarks

32. Before embarking on the analysis it appears appropriate to determine in greater detail the issues which arise from the first question referred.
33. First of all, as the Commission has noted in its written observations, the referring court seems to allude in the order for reference, alongside the alleged discrimination on grounds of age, to a possible discrimination arising from the fact that two different provisions of national law on compulsory retirement – namely the STP and the definitive Law 14/2005 regime – apply depending on whether the collective agreement concerned was concluded before or after Law 14/2005 entered into force.
34. However, as appears especially from the wording of the first question, which refers expressly to discrimination on grounds of age and the related Community provisions, the latter – different – type of discrimination on grounds of the date of the conclusion of the collective agreement may well be considered by the referring court as a problem arising under the principle of equality as provided for by national law. However, in my view, it is not the subject of the question referred to the Court in the present case. That view is shared, I might add, by the parties to the present proceedings, as is clear from the statements made at the hearing.
35. Secondly, it should be noted, as regards discrimination on grounds of age, that in its first question the referring court mentions, in addition to Directive 2000/78, also Article 13 EC and expresses the view that this provision may be capable of producing direct effect.
36. It should be emphasised, however, that Article 13 EC is simply an empowering provision, enabling the Council to take appropriate action to combat, inter alia, discrimination on grounds of age. As such, it cannot have direct effect; nor can it preclude the application of a national law such as the STP. (8)
37. I agree therefore with the parties that the first question referred should not be examined directly in the light of Article 13 EC. On the other hand, that does not mean that Article 13 EC is of no importance for the interpretation of Directive 2000/78 and the principle of non-discrimination on grounds of age.
38. Thirdly, it must be borne in mind that the questions in issue were referred for a preliminary ruling prior to the ruling of the Court in *Mangold*, (9) in which the Court took the far-reaching view that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law. Accordingly, in order to provide the referring court with a helpful answer, the first

question must also be examined with regard to that general principle.
39. In the light of the above considerations the following issues arise, in my view, from the first question referred.
40. First, it must be examined whether Directive 2000/78 is applicable *ratione materiae* to the circumstances underlying the present case. If so, the second issue to be addressed is whether a national law allowing for compulsory retirement, such as the STP, is compatible with Directive 2000/78 and, in particular, whether such a measure can be justified under that directive. Thirdly, the first question referred should be assessed in the light of the general principle of non-discrimination on grounds of age as defined by the Court in *Mangold*. The controversies triggered by that judgment, especially with regard to the existence of a general principle of that kind, call for some additional comments.
41. The issue of the possible consequences which the referring court has to draw from the answer to the first question is the subject of the second question referred.
Main submissions of the parties
42. In the present proceedings, written observations have been submitted by the Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as by the Commission and the parties to the main proceedings. With the exception of Mr Palacios, those parties were also represented at the hearing held on 21 November 2006.
43. As to the first question referred, all parties except for Mr Palacios agree essentially that that question should be answered in the negative, albeit on the basis of slightly differing arguments. The Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as Cortefiel, maintain that the principle of non-discrimination on grounds of age as laid down in Directive 2000/78 does not apply to a national law such as the STP. In that respect, those parties refer in particular to the 14th recital of the directive regarding national provisions laying down retirement ages.
44. In the alternative, those Governments submit that a national provision allowing for the setting of a compulsory retirement age is in any event justified under Article 6(1) of Directive 2000/78. The Commission maintains that Directive 2000/78 is applicable to a national provision such as the STP, but agrees that such a provision is justifiable under Article 6(1) of the directive.
Applicability of Directive 2000/78 ratione materiae?
45. In order to determine whether the scope of Directive 2000/78 is to be interpreted as extending to a national rule such as the STP, account must be taken not only of the wording but also of the purpose and general scheme of the directive. (10)
46. Under Article 1 of Directive 2000/78, the purpose of that directive is to lay down a general framework for combating discrimination on the grounds specified in that article – which include grounds of age – as regards *employment and occupation*.
47. The material scope of the directive is defined in detail in Article 3. In particular, pursuant to point (c) of Article 3(1), the directive applies in relation to 'employment and working conditions, including dismissals and pay'.
48. Whereas the Commission argues that the STP lays down a working condition for the purposes of Article 3(1)(c) of Directive 2000/78, most other parties maintain that, as a national provision providing for the setting of retirement ages, the STP falls outside the scope of that directive.
49. In that respect, the first point to note is that the referring court describes the STP as a provision laying down conditions concerning retirement, namely allowing for compulsory retirement clauses to be included in collective agreements. Such compulsory retirement is conditional upon the completion of the minimum period of contributions and fulfilment of the other requirements laid down in social security legislation for entitlement to a retirement pension under that contribution scheme.
50. On the other hand, Mr Palacios refers in this context to his 'dismissal' because of compulsory retirement as provided for by the collective agreement on the basis of the STP. By contrast, the Spanish Government challenged that terminology at the hearing, pointing out that, in reality, Mr Palacios had not been dismissed, but had simply been obliged to retire pursuant to national rules providing for compulsory retirement at the age of 65. According to that Government, the letter sent to Mr Palacios does not refer to 'dismissal'.
51. In that regard it should be emphasised, first of all, that according to the 14th recital of Directive 2000/78, of which account must be taken in interpreting the directive, (11) the directive is to be without prejudice to national provisions laying down retirement ages.
52. I must say that I find it somewhat difficult not to regard the national rule in question as a provision of the kind envisaged by that recital.
53. It is true that the STP does not itself govern the social security regime containing the requirements for entitlement to a retirement pension, but rather refers to that scheme as a condition for the setting of a compulsory retirement age. Nevertheless, I think the fact remains that the STP – in connection with a collective agreement based on it – lays down a compulsory retirement age. It entails

the termination of the employment and the commencement of the pension.
54. To regard this instead as 'dismissal' is in my view rather far-fetched, although, admittedly, the Court espoused an interpretation to that effect in its case-law on that term as used in Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. (12)
55. In the line of cases I am referring to, (13) the Court distinguished access to a statutory or occupational retirement scheme, that is to say, the conditions for payment of an old-age retirement pension, from the fixing of an age limit with regard to the termination of employment. The Court found that the latter question concerns the conditions governing dismissal and therefore falls to be considered under Directive 76/207. (14)
56. That interpretation, however, was based on the premises that the word 'dismissal' as used in that directive must be given a wide meaning. (15)
57. By contrast, Directive 2000/78 calls in my view for a narrow interpretation of its scope of application, in particular so far as non-discrimination on grounds of age is concerned.
58. I can align myself in that respect with Advocate General Geelhoed's view in his Opinion in *Navas,* where he pointed out that the history and wording of Article 13 EC as the legal basis of Directive 2000/78 suggest a rather restrained interpretation of that directive and that the Community legislature must have been aware of the potentially far-reaching economic and financial consequences of, in particular, the prohibition of discrimination on grounds of age. (16)
59. Indeed, a very careful approach is in general advisable when it comes to the interpretation and application of prohibitions of discrimination in Community law since, owing to the rather open and not clearly definable concept of non-discrimination, there is a danger that such rules may very generally eliminate or call into question requirements and conditions laid down in national law. (17)
60. As Advocate General Geelhoed rightly put it, prohibitions of discrimination 'can be used as a lever to correct, without the intervention of the authors of the Treaty or the Community legislature, the decisions made by the Member States in the exercise of the powers which they – still – retain'. (18)
61. So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. (19) It is therefore a much more difficult task to determine the existence of a discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators involved are more clearly defined. (20)
62. What is more, whilst the application of the prohibition of discrimination on grounds of age thus requires a complex and subtle assessment, age-related distinctions are very common in social and employment policies.
63. In particular, age-related distinctions are, naturally, inherent in retirement schemes. It should be borne in mind that national provisions laying down retirement ages automatically entail, according to the concept of discrimination as defined in Article 2 of Directive 2000/78, direct discrimination on grounds of age. Consequently, if such national provisions were to fall within the scope of Directive 2000/78, every such national rule, whether it lays down a minimum or a maximum age of retirement, would in principle have to be measured against the directive.
64. Even though Article 6 of the directive provides for specific exceptions and limitations with regard to age discrimination, it would, in my opinion, still be very problematic to have this Sword of Damocles hanging over all national provisions laying down retirement ages, especially as retirement ages are closely linked with areas like social and employment policies where the primary powers remain with the Member States.
65. I take the view that the Community legislature was aware of these problems and that it inserted the 14th recital in the preamble of Directive 2000/78 in order to make clear that it did not intend the scope of that directive to extend to rules setting retirement ages. (21)
66. Lastly, I am unconvinced by the argument of the Commission that the 14th recital may refer not to the scope of the Directive but to the grounds of justification provided for in Article 6 of the directive. A possibility of justifying national provisions under a directive is quite different from a directive being 'without prejudice' to such provisions. Moreover, paragraph 2 of Article 6 of the directive refers only to the fixing of ages for occupational social security schemes: it does not refer, as the 14th recital does, to provisions laying down retirement ages in general.
67. In the light of the foregoing considerations I reach the view that a national provision providing for the setting of a compulsory retirement age, such as the STP, does not for the purposes of Directive 2000/78 relate to 'employment and working conditions, including dismissals and pay', and does not therefore fall within the scope of that Directive. Such a national provision cannot therefore be precluded by the prohibition of discrimination on grounds of age as laid down in that directive.

Justification of a rule such as the one at issue?

68. Should the Court none the less conclude that a national rule such as the STP falls within the scope of Directive 2000/78, it will be necessary to examine if that rule can be justified under Article 6 of that directive, it being understood, as mentioned above, that a rule providing for the setting of a compulsory retirement age entails direct discrimination on grounds of age within the meaning of Article 2 of that directive.

69. Quite obviously, on a proper application of the concept of discrimination, the alleged discrimination would consist in the present case in the fact that persons who reach the age of compulsory retirement, as opposed to younger persons, are not to be employed any more. It should be observed, however, that it is perhaps more usual for people to feel treated less favourably on grounds of age with regard to a minimum retirement age – as is provided for in probably most of the pension schemes of the Member States – since, in general, retirement seems to be perceived more as a social right than as an obligation.

70. In any event, Article 6(1) of Directive 2000/78 lays down, specifically with regard to differences of treatment on grounds of age, that Member States may provide that such differences 'shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.

71. It appears from the order for reference – and from the submissions of the Spanish Government – that the STP allowing for the inclusion of compulsory retirement clauses in collective agreements was adopted, at the instigation of the social partners, as part of a policy promoting intergenerational employment.

72. In my view there is no doubt that this provision, read in conjunction with Article 19(3) of the Collective Agreement, serves a legitimate public-interest aim of employment and labour market policy capable of justifying a difference of treatment on grounds of age in accordance with Article 6(1) of the directive. In this context I confess that I do not agree with the assumption that the referring court seems to make, that is to say, I do not consider it necessary for the national provision in question to refer expressly to a legitimate policy ground for the purposes of Article 6(1) of Directive 2000/78 in order to be justifiable under that provision. Also, given that directives are binding only as to the result to be achieved, it should be sufficient and decisive that the national law is in actual fact and in the result justified by such a legitimate aim.

73. Turning, next, to the requirement under Article 6(1) of Directive 2000/78 that the means used to achieve the legitimate objective at issue be 'appropriate and necessary', it should be emphasised, as the Court pointed out in *Mangold*, that the Member States enjoy broad discretion in their choice of the measure capable of attaining their objectives in the field of social and employment policy. (22)

74. Indeed, as a rule, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature or the other political and societal forces involved in the definition of the social and employment policy of a particular Member State (such as the social partners in the present case). At most, only a manifestly disproportionate national measure should be censured at this level.

75. In *Mangold,* however, the Court, basing itself on the information provided by the national court, concluded that the national rule on fixed-term contracts at issue in that case had to be regarded as going beyond what is appropriate and necessary for the attainment of the objective of the vocational integration of unemployed older workers. In that context, the Court referred inter alia to the fact that a significant body of workers, determined solely on the basis of age, is in danger during a substantial part of its members' working life, of being excluded from the benefit of stable employment. (23)

76. By contrast, in the present case there appear to be no indications to the effect that providing for a compulsory retirement as such or, in the concrete case, the fixing of a retirement age of 65 would go beyond what is appropriate and necessary for the attainment of the objectives pursued.

77. Admittedly, in view of the demographic challenges and budgetary constraints facing most Member States – which induced the Commission just recently to call for urgent action – the crucial issue in Europe seems rather to be to prolong employment and raise pensionable age. But, then again, it is for the Member States to define their policies in this context.

78. For these reasons I conclude that even if the scope of Directive 2000/78 were to be interpreted as covering a national provision such as that in issue, such a provision would not be precluded by that directive.

The prohibition of discrimination on grounds of age as a general principle of Community law, and the implications of* Mangold*, part I

79. The most salient feature of the judgment in *Mangold*, in which the Court was called upon to rule on the compatibility with Article 6(1) of Directive 2000/78 of a provision of German law providing for

the conclusion of fixed-term contracts of employment for workers who have reached the age of 52, is probably the finding that 'the principle of non-discrimination on grounds of age must … be regarded as a general principle of Community law'. (24)

80. The Court made that statement following a suggestion made by Advocate General Tizzano that the general principle of equality should be used as a yardstick for assessing the compatibility of the national rule in question, rather than the directive itself. (25) This approach apparently enabled two problems underlying that case to be overcome: first, the Court used that concept to defuse the objection that at the material time the period allowed for the transposition of Directive 2000/78 had not yet expired for Germany, (26) secondly, the Court was able to avoid the question whether the directive has 'horizontal direct effect'. (27)

81. The Court stated that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation; rather, the 'source of the actual principle underlying the prohibition of those forms of discrimination' is to be found, 'as is clear from the [first] and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States'. (28)

82. In this context, the Court apparently starts from the assumption that a specific prohibition on grounds of age is already inherent in or derives from the general principle of equality. (29)

83. The approach adopted by the Court in *Mangold* has received serious criticism from academia, the media and also from most of the parties to the present proceedings and certainly merits further comment.

84. First of all, it should be emphasised that the concept of general principles of law has been central to the development of the Community legal order.

85. By formulating general principles of Community law – pursuant to its obligation under Article 220 EC to ensure observance of the law in the interpretation and application of the Treaty – the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based on a framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'.

86. This source of law enabled the Court – often drawing inspiration from legal traditions common to the Member States, and international treaties – to guarantee and add content to legal principles in such important areas as the protection of fundamental rights and administrative law. However, it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty.

87. It is nevertheless possible to reflect on the soundness and conclusiveness of the reasons on which the Court based its findings in *Mangold* concerning the existence of a general principle of non-discrimination on grounds of age.

88. In that regard it may be noted that, indeed, various international instruments and constitutional traditions common to the Member States to which the Court refers in *Mangold* enshrine the general principle of equal treatment, but not – except in a few cases, such as the Finnish constitution – the specific principle of non-discrimination on grounds of age as such.

89. On a closer analysis it is actually a bold proposition and a significant move to infer, solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on grounds of age – or any other specific type of discrimination as referred to in Article 1 of Directive 2000/78. The following general remarks on the mechanism of non-discrimination may illustrate that view.

90. According to the commonly accepted definition, as well as established case-law, the general principle of equal treatment, or of non-discrimination, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. (30)

91. It is not overly difficult to establish whether two situations are treated differently or, as the case may be, in the same way. The really crucial step in the application of the general principle of equality is rather, first, to determine whether the situations in question are comparable or, in other words, relevantly similar – which necessitates an analysis based on the criterion of relevance. That assessment is normally not made explicit in the judgments of the Court and in fact entails a value judgment.

92. What distinguishes the general principle of non-discrimination from a specific prohibition of a particular type of discrimination is essentially that in the latter case the criterion on which differentiation may not legitimately be based is already expressly identified. Thus, it is already determined that differentiation may not be based on grounds of nationality, sex, age or any other 'batch' of discrimination referred to in the formulation of the specific prohibition concerned. By contrast, the general prohibition of discrimination leaves open the question of which grounds for differentiation are acceptable. That question has apparently been answered in different ways over time and is currently subject to ongoing developments at both national and international level.

93. One could say that the general principle of equality *potentially* implies a prohibition of discrimination *on any ground* which may be deemed unacceptable.
94. It is therefore correct to state, as the Court did with regard to prohibitions of discrimination on specific grounds, that specific prohibitions constitute particular expressions of the general principle of equality which forms part of the foundations of the Community. (31) However, to infer – as the Court did in *Mangold* – from the general principle of equality, the existence of a prohibition of discrimination on a specific ground is quite different and far from compelling.
95. In my view, moreover, neither Article 13 EC nor Directive 2000/78 necessarily reflect an already existing prohibition of all the forms of discrimination to which they refer. Rather, the underlying intention was in both cases to leave it to the Community legislature and the Member States to take appropriate action to that effect. In any event, that is what the Court, too, seems to suggest in *Grant,* in which it concluded that Community law, as it stood, did not cover discrimination based on sexual orientation. (32)
96. It should be added that if the reasoning in *Mangold* were followed to its logical conclusion, not only prohibition on grounds of age, but all specific prohibitions of the types of discrimination referred to in Article 1 of Directive 2000/78 would have to be regarded as general principles of Community law.
97. In the light of the foregoing considerations I do not regard as particularly compelling the conclusion drawn in *Mangold* as to the existence of a general principle of non-discrimination on grounds of age.
98. In any event, even if that finding were taken as a basis for the present assessment, it is clear from *Mangold* that the Court proceeds from the assumption that the general principle of non-discrimination on grounds of age is no different in substance from the equivalent prohibition under Directive 2000/78, in particular so far as justification is concerned. (33)
99. With reference to my above observations in that regard, I can therefore conclude that even by reference to the existence of a general principle of non-discrimination on grounds of age, a national rule such as that in issue would not be precluded by Community law.
100. For all the reasons set out above, I therefore take the view that the Court should state by way of reply to the first question referred that the principle of non-discrimination on grounds of age as laid down in Article 2(1) of Directive 2000/78 does not preclude a national rule such as the STP.

B – The second question

Main submissions of the parties

101. By its second question, the referring court essentially seeks to ascertain whether it has to disapply the STP if that provision proves to be precluded by the prohibition of discrimination on grounds of age.
102. Since the Governments of Spain, Ireland, the Netherlands and the United Kingdom, as well as Cortefiel, submitted that the Court should answer the first question in the negative, they made only subsidiary submissions on the question whether the national rule in issue should be set aside, although the United Kingdom Government put particular emphasis on that question.
103. All of those parties essentially agree that neither Directive 2000/78 nor a general principle of law prohibiting discrimination on grounds of age can have the effect of requiring a national court to disapply a conflicting national provision. Since the dispute in the main proceedings lies between private parties, such a finding would undermine the rule that directives cannot produce horizontal direct effect. However, there would still be an obligation to interpret the national rule in issue as far as possible in such a way as to be in conformity with Directive 2000/78 and the principle enshrined therein.
104. By contrast, the Commission maintains – as, apparently, does Mr Palacios – that in the event of an affirmative answer to the first question, the national court would be required to set aside any conflicting national provision. In that context the Commission relies again on *Mangold* and argues that if the Court found in that case that there was an obligation to set aside national law conflicting with the prohibition of discrimination on grounds of age, (34) then, *a fortiori*, the same must be true in the present case, where the period prescribed for the transposition of Directive 2000/78 has already expired.

Obligation to set aside or the implications of Mangold*, part II*

105. Obviously, the second question does not arise if the Court, following my suggestion, declares the rule in issue compatible. I will nevertheless address, wholly in the alternative, the question as to the appropriate conclusions to be drawn by the referring court for the purposes of the main proceedings in the event that the prohibition of discrimination on grounds of age, as laid down in Directive 2000/78 – or, as the case may be, in a corresponding general principle of Community law – were to be construed as precluding a provision such as the STP, bearing in mind that this issue has been raised in a dispute between private parties concerning the termination of an employment relationship.

106. First of all, the cornerstones of the relevant case-law should be recalled.
107. It should be noted that, according to established case-law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly. (35)
108. The Court has attributed this effect to directives – despite the wording of Article 249 EC which, as regards directives, does not refer to the conferral of rights on individuals – with a view to the binding nature and the practical effect of the directive and, above all, on the grounds that a defaulting Member State should not be able to rely, as against individuals, on its own failure to perform the obligations which the directive entails. (36)
109. Naturally, that reasoning cannot hold true with regard to obligations incumbent upon an individual. Accordingly, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. (37)
110. Thus, where a provision of a directive satisfies the substantive requirement of being unconditional and sufficiently precise, an individual can, as a rule, avail himself of that provision as against a public authority (vertical direct effect), but not as against an individual (horizontal direct effect).
111. The Court emphasised in this context that the acceptance of the latter effect would amount to recognising 'a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'. (38) The Court also pointed out that the principle of legal certainty prevents directives from creating obligations for individuals. (39)
112. However, that general rule needs to be nuanced at least in two respects. First, the Court has accepted that 'mere adverse repercussions' on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned. (40) Second, a certain line of case-law suggests that, even in a purely private dispute, an individual may, in certain circumstances, rely on a directive in order to have the conflicting national rule in issue set aside (sometimes referred to as 'incidental direct effect'). (41)
113. Turning now to the circumstances of the present case, I will first discuss the question of a possible obligation to disapply the national rule in issue with regard to Directive 2000/78. I will then address the possible impact of a general principle of non-discrimination on grounds of age as applied in *Mangold*.
114. In the first place, it should be noted that in my view there is no doubt that the prohibition of discrimination on grounds of age as laid down in Directive 2000/78, particularly in Articles 1 and 6 thereof, is sufficiently precise and unconditional as to satisfy the substantive conditions for direct effect as regards the setting of a compulsory retirement age. Suffice it to say that it is clear from the case-law of the Court that the fact that provisions of a directive are subject to exceptions or, as in the present case, provide for justifications does not in itself mean that the conditions necessary for those provisions to produce direct effect are not fulfilled. (42)
115. Next, it appears from the order for reference that the referring court – which relies in that regard inter alia on the case-law of the Spanish Constitutional Court – would have to consider the collective agreement setting the compulsory retirement age to be unlawful in the absence of the express legal basis provided for it by the STP.
116. The setting aside of the STP, to which the present reference for a preliminary ruling refers, as a consequence of its preclusion by the prohibition of discrimination on grounds of age, would thus result in the collective agreement being considered unlawful by the referring court.
117. In the dispute in the main proceedings, Mr Palacios challenges the act by which his employer Cortefiel informed him of the termination of his employment contract on grounds of retirement. We are thus clearly concerned with a horizontal contractual relationship, involving mutual rights and obligations relating to employment. A finding by the referring court to the effect that Mr Palacios' claim is founded and that the termination of the working relationship (being based on the STP and the collective agreement) is void, would directly concern Cortefiel in that it would impose on it an obligation to uphold the working relationship or, as the case may be, to bear other consequences such as the provision of compensation.
118. Thus, in the present context, invoking the directive would clearly impose some sort of obligation on another individual, in this case the former employer.
119. In the light of the case-law outlined above one could ask, first, if this effect could not be acceptable in that it amounts merely to 'adverse repercussions' within the meaning of the *Wells* case-law. In *Wells*, the Court admittedly treads a fine line in distinguishing a situation 'where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party' from 'mere adverse repercussions on the rights of third parties'. (43)

120. It should, however, be observed that *Wells* concerns a triangular relationship in the sense that it is aimed, first and foremost, at the *fulfilment by a Member State* of an obligation arising under a directive, the resulting impact on an individual constituting merely a collateral effect of that obligation.
121. Certainly, one could theoretically construe the present situation as representing a triangular situation in the sense that in fact the directive would be invoked against the STP and the collective agreement, that is to say, against the State, on which the obligation of proper implementation is incumbent. (44)
122. However, that approach would certainly overstretch the *Wells* rationale and could in principle be applied to almost any horizontal legal relationship since, ultimately, even private-law contractual relationships are always based on or must comply with State (contract) law. Rather, in a case such as that before the referring court, it seems appropriate to me to consider the imposition of an obligation on an individual as a direct consequence of invoking the directive, not only as a side-effect of relying on the directive as against the State.
123. The issue of horizontal direct effect has also been discussed by the parties from yet another perspective, which relates to the specific implications for the present case if the directive were to be attributed direct effect. Mr Palacios is seeking to rely on Directive 2000/78 in order to preclude the application of the STP and to benefit instead from general national law under which, as appears from the order for reference, the fixing of compulsory retirement, having lost its legal basis, would be unlawful.
124. That discussion relates to the distinction – well-known in doctrinal writings but also, to a certain extent, reflected in case-law – between the 'exclusionary' as opposed to the 'substitution' effect of invoking a directive. As the argument goes, it should be possible to rely on a directive in litigation between private parties if its only effect is that of 'knocking out' conflicting national rules in order to make way for other national rules on which the litigant can then base his claim. On that view, the directive would not itself take the place, in substantive terms, of the conflicting national rule, or, to put it in the words of the case-law in *Marshall* and *Faccini Dori*, (45) would not 'of itself impose obligations on an individual'.
125. Arguably, under that approach direct effect is not so much considered from the perspective of 'invocability' or the legal position of individuals under directives, but instead more from the perspective of the primacy of Community law and the related 'objective' obligation incumbent in general upon national courts – as on all public authorities in the Member States – to ensure that the desired result of the directive is achieved and, in particular, to refrain from applying conflicting rules of national law. (46)
126. However, what is to my mind decisive, in particular with due respect to the principle of legal certainty, is whether the legal position of an individual is affected to his detriment as a result of the invocation of a directive, regardless of whether, technically, that adverse effect was brought about by the mere exclusion of the conflicting national provision in question or in consequence of its substitution by the directive.
127. The argument that, in cases such as that before the referring court, directives may be attributed at least 'exclusionary' horizontal direct effect cannot therefore in my view be upheld. (47)
128. It is true that in some cases such as *CIA Security* and *Unilever* the Court seems to have accepted such an effect and ordered the disapplication of national rules in proceedings between individuals. (48) But I think that these cases have to be understood in the light of the specific circumstances underlying them, involving directives concerned with public law duties of a technical or procedural kind, which are not in my view comparable with a directive like that at issue.
129. Lastly, it should be noted that in *Pfeiffer and Others,* which concerned proceedings between private parties, the Court did not set aside, in accordance with the case-law in *Simmenthal*, (49) the conflicting national rule on working time, even though that was all that was required in order to achieve the desired result. Instead, it referred to the less invasive and generally applicable 'default' obligation to adopt an interpretation of the national legislation that is in conformity. (50)
130. Does that mean that, just after *Pfeiffer and Others,* the Court abandoned its previous stance on the non-horizontal direct effect of directives by ruling in *Mangold* (51) that it is the responsibility of the national court to set aside any provision of national law which conflicts with Community law, pursuant to the *Simmenthal* case-law? (52)
131. I would argue that, on closer inspection, that is not really the case. It was actually the application of the general principle of non-discrimination on grounds of age that prompted the Court in *Mangold* to decide to that effect. It may be instructive in this respect to note that in its answer to the second question on the compatibility of the national rule, the Court referred in particular to Directive 2000/78, whilst it held in the subsequent paragraph, in answer to the third question, that it is the responsibility of the national court to guarantee the full effectiveness 'of the general principle of non-discrimination on

grounds of age'. (53)
132. As I read the judgment, the Court did not therefore accept that Directive 2000/78 has horizontal direct effect; rather, it bypassed the lack of it by ascribing direct effect to the corresponding general principle of law.
133. In adopting that approach the Court set foot on a very slippery slope, not only with regard to the question whether such a general principle of law on the non-discrimination on grounds of age exists, (54) but also with regard to the way it applied that principle.
134. I do not maintain that general principles of law would, as a general rule, fall short of the substantive requirements for direct effect (to be unconditional and sufficiently precise). My point is that the concept of general principle relates to a particular form of rule rather than to a particular content: it describes a source of law which may embrace rules of widely varying content and degree of completeness, ranging from interpretative maxims to fully fledged norms like fundamental rights or the highly developed body of Community principles of sound administration and procedure.
135. Accordingly, the function of general principles varies, too, depending both on the principle in question and the actual context in which it is used. General principles can, for instance, serve as interpretative criteria, as a direct yardstick by which to gauge the lawfulness of Community acts or even to found an enforceable claim to a particular legal remedy in Community law. (55)
136. It should be observed, however, that as a rule, in a context such as the circumstances of the present case, where a directive has been adopted, such an act of secondary Community law may be interpreted in the light of the general principles underlying it and measured against those principles. Thus general principles of law – referred to by the Court on the basis of Article 220 EC as part of primary Community law – are given expression and effect through specific Community legislation. That is in fact the approach followed by the Court in *Caballero* (56) to which it made reference in *Mangold.* (57) In that case, too, the general principle of equality and non-discrimination is not applied autonomously, but as a means of interpreting Council Directive 80/987/EEC. (58)
137. A problematic situation could arise, however, if this concept were to be turned practically upside down by allowing a general principle of Community law which, as in the present case, may be considered to be expressed in specific Community legislation, (59) a degree of emancipation such that it can be invoked instead or independently of that legislation.
138. Not only would such an approach raise serious concerns in relation to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general. It should be recalled in this connection that Article 13 EC expressly reserved to the Council the power, acting in accordance with the procedure provided for under that article, to take appropriate action to combat, inter alia, discrimination on grounds of age – which it has chosen to do by means of a directive. In my view the limitations which this specific Community act entails, notably with regard to horizontal direct effect, should not therefore be undermined by recourse to a general principle.
139. In the light of all the foregoing considerations I conclude that, in the event that the prohibition of discrimination on grounds of age as laid down in Directive 2000/78 or, as the case may be, in a corresponding general principle of Community law, is construed as precluding a national rule such as the STP, the national court would not be obliged to disapply that rule.
V – Conclusion
140. In the light of the foregoing I propose that the reply to the questions referred to the Court should be:
The principle of non-discrimination on grounds of age as laid down in Article 2(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Member State concerned for entitlement to draw a retirement pension under the relevant contribution regime.

JUDGMENT OF THE COURT (Grand Chamber)
11 September 2007 (*)
(Article 8a of the EC Treaty (now, after amendment, Article 18 EC) – European Citizenship – Article 59 of the EC Treaty (now, after amendment, Article 49 EC) – Freedom to provide services – Income tax legislation – School fees – Tax deductibility limited to school fees paid to national private establishments)
In Case C-76/05,
REFERENCE for a preliminary ruling under Article 234 EC, by the Finanzgericht Köln (Germany), made by decision of 27 January 2005, received at the Court on 16 February 2005, in the proceedings
Herbert Schwarz,
Marga Gootjes-Schwarz
v
Finanzamt Bergisch Gladbach,
THE COURT (Grand Chamber)
……
after hearing the Opinion of the Advocate General at the sitting on 21 September 2006
gives the following
Judgment
1 This reference for a preliminary ruling concerns the interpretation of Articles 8a(1) of the EC Treaty (now Article 18(1) EC), 48, 52 and 59 of the EC Treaty (now respectively, after amendment, Articles 39 EC, 43 EC and 49 EC).
2 It was submitted in an action between Mr Schwarz and Mrs Gootjes-Schwarz ('the Schwarzes'), German nationals living in Germany, and the Finanzamt Bergisch Gladbach ('the Finanzamt'), concerning the latter's refusal to allow them tax relief on school fees incurred in respect of their children attending schools in other Member States, the German legislation on income tax reserving the grant of that tax relief to taxpayers who have paid school fees to certain German private schools.
National legal context
3 Paragraph 7(4) of the Basic Law of the Federal Republic of Germany of 23 May 1949 (Grundgesetz für die Bundesrepublik Deutschland, 'the Basic Law') provides:
'The right to set up private schools is guaranteed. Private schools as substitutes for public schools need the approval of the State and are governed by statutes of the State. Such approval is to be given if private schools are not inferior to public schools in their teaching aims and arrangements and the training of teachers, and separation of the pupils according to the means of their parents is not promoted. Approval is to be refused if the economic and legal standing of the teachers is not adequately secured.'
4 Paragraph 10(1)(9) of the Law on Income Tax, in the version applicable at the date of the facts in the main proceedings (Einkommensteuergesetz, BGBl. 1997 I, p. 821, 'the EStG') provides:
'Special expenses ["Sonderausgaben"] [which are tax-deductible for income tax purposes] are the following expenses, where they are neither operating expenses nor professional charges:
1. …
9. 30% of the amount paid by the taxpayer for the attendance by a child, in respect of whom he enjoys tax relief for dependent children or family allowances, of a substitute school approved by the State or authorised by the law of the Land, in accordance with Paragraph 7(4) of the Basic Law, or of a complementary school for general education recognised by the law of the Land, with the exception of the price of lodging, supervision and meals.'
5 In addition, in accordance with Paragraph 33(1) of the EStG, the taxpayer may, at his request, benefit from a reduction of income tax if he is obliged to bear expenses greater than those affecting the large majority of taxpayers having an equivalent income and in a similar financial and family situation.
The dispute in the main proceedings and the question referred
6 At the time of the facts in the main proceedings, the Schwarzes lived in Germany and were assessed jointly to income tax there. According to them, their three children require special schooling. For that reason, they enrolled two of them, born in 1981 and 1986, in a school in Scotland for exceptionally gifted children: the Cademuir International School ('Cademuir School'), to which they paid school fees in 1998 and 1999.
7 As the Schwarzes did not initially submit tax declarations for those years, the competent authorities made an estimate of their taxable amount. The Schwarzes have lodged an objection before the Finanzamt against the notices of estimated assessment sent to them.

8 In the tax declarations produced in connection with that objection, the Schwarzes principally claimed as exceptional expenses pursuant to Paragraph 33(1) of the EStG various amounts for the years 1998 and 1999, in respect of school fees paid to the private schools attended by their children and the hospitalisation costs of one of them.
9 The referring court states that the Schwarzes have not indicated what part of those amounts was in respect of school fees, independently of lodging, supervision and meals, but that that part amounts to at least DEM 10 000 per year.
10 In the objection proceedings, the Finanzamt issued revised notices of taxation on 13 September 2001, in which it took account of the taxable amount declared by the Schwarzes, save for the exceptional expenses which they had put forward. The Schwarzes maintained their objection, and the Finanzamt dismissed it as unfounded by a decision of 6 December 2001. It is against that latter decision that the Schwarzes brought an action before the Finanzgericht Köln.
11 In their action, the Schwarzes claim, primarily, that the Finanzamt should reduce the income tax to which they were assessed for 1998 and 1999, by taking into consideration the exceptional expenses which they claim under Paragraph 33(1) of the EStG. In the alternative, they claim that they should be granted relief in relation to the special expenses, on the basis of Paragraph 10(1)(9) of the EStG.
12 The referring court rejects at the outset the Schwarzes' claim that the amount incurred by them by way of exceptional expenses under Paragraph 33(1) of the EstG should be taken into account.
13 It then states that Paragraph 10(1)(9) of the EstG applies only in the case where certain schools in Germany are attended and that, therefore, school fees paid to schools situated in another Member State cannot be taken into consideration as special expenses conferring the right to enjoy a reduction in tax. It expresses doubts as to the compatibility with Community law of the limitation of the tax relief provided for in Paragraph 10(1)(9) of the EStG to costs incurred in certain schools in Germany.
14 In those circumstances, the Finanzgericht Köln decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
'Is it contrary to Articles 8a (freedom of movement [for citizens of the Union]), 48 (freedom of movement for workers), 52 (freedom of establishment) or 59 (freedom to provide services) of the EC Treaty to treat payments of school fees to certain German schools, but not payments of school fees to schools in the rest of the European Community territory, as special expenditure leading to a reduction of income tax, pursuant to Paragraph 10(1)(9) of the EStG as applicable in 1998 and 1999?'

The question referred
15 By its question, the referring court effectively asks whether Articles 8a(1), 48, 52 and 59 of the Treaty preclude legislation of a Member State which enables taxpayers to claim school fees paid to certain private schools established in national territory as special expenses giving a right to reduction of income tax, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.
16 It should be observed at the outset that, since the facts at the origin of the dispute relate to the years 1998 and 1999, the provisions on the free movement of citizens of the Union, the freedom of establishment, the free movement of workers and the freedom to provide services come under different versions of the EC Treaty according to whether the legal situation at issue in the main proceedings was before or after 1 May 1999, the date on which the Treaty of Amsterdam entered into force (Articles 8a(1), 48, 52 and 59 of the EC Treaty concerning the legal situation before 1 May 1999; Articles 18(1) EC, 39 EC, 43 EC and 49 EC concerning the legal situation after that date.
17 Since, however, as the Advocate General has pointed out in point 16 of her Opinion, the content of the articles concerned has not been essentially altered by the Treaty of Amsterdam, the relevant provisions will be designated in their version in force after 1 May 1999.
The relevant EC Treaty provisions

……
The reply of the Court
33 It should first be noted that, as the Advocate General has pointed out in point 25 of her Opinion, in order to determine the provisions of the EC Treaty applicable to facts such as those in the main proceedings, there is no cause to examine those facts in the light of Articles 39 EC and 43 EC. Parents who, like the Schwarzes, are subject to income tax in one Member State and send their children to a private school established in another, where they themselves are neither employed nor carry on any economic activity, do not thereby make use of their right to be employed in another Member State or to establish themselves there as self-employed persons, with the result that Articles 39 EC and 43 EC do not apply to their situation.
34 Secondly, it should be noted that Article 18 EC, which lays down generally the right for every

citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services (Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18, and Case C-208/05 *ITC* [2007] ECR I-0000, paragraph 64). If, therefore, the case in the main proceedings falls under Article 49 EC, it will not be necessary for the Court to rule on the interpretation of Article 18 EC (*Stylianakis*, paragraph 20, and *ITC*, paragraph 65).

35 It is therefore necessary to rule on Article 18(1) EC only in so far as the case in the main proceedings does not fall within the scope of Article 49 EC.

36 In that regard, it should first be noted that, whilst the third paragraph of Article 50 EC refers only to the active provision of services, where the provider moves to the beneficiary of the services, well-established case-law shows that the freedom to provide services includes the freedom of the persons for whom the services are intended to go to another Member State, where the provider is, in order to enjoy the services there (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16). In the main proceedings here, the issues are the refusal to grant tax relief on the ground that the private school attended is established in another Member State and, hence, the possibility of taking advantage of offers of education emanating from such a school.

37 It needs to be examined, however, whether those offers of education have the supply of services as their subject-matter. To that end, it needs to be examined whether courses offered by a school such as Cademuir School constitute, in accordance with the first paragraph of Article 50 EC, 'services ... normally provided for remuneration'.

38 The Court has already held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (*Humbel and Edel*, paragraph 17; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 26; Case C-355/00 *Freskot* [2003] ECR I-5263, paragraph 55; and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 23).

39 The Court has thus excluded from the definition of services within the meaning of Article 50 EC courses offered by certain establishments forming part of a system of public education and financed, entirely or mainly, by public funds (see, to that effect, *Humbel and Edel*, paragraphs 17 and 18, and *Wirth*, paragraphs 15 to 16). The Court thus held that, by establishing and maintaining such a system of public education, financed as a general rule by the public budget and not by pupils or their parents, the State did not intend to involve itself in remunerated activities, but was carrying out its task in the social, cultural and educational fields towards its population.

40 However, the Court has held that courses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article 50 EC, since the aim of those establishments is to offer a service for remuneration (*Wirth*, paragraph 17).

41 It should be noted here that it is not necessary for that private financing to be provided principally by the pupils or their parents. According to consistent case-law, Article 50 EC does not require that the service be paid for by those for whom it is performed (see, for example, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56; *Smits and Peerbooms*, paragraph 57; and *Skandia and Ramstedt*, paragraph 24).

42 The information from the referring court shows that the school fees paid by the Schwarzes to Cademuir School for the two children were estimated in themselves at DEM 10 000 per year at least. According to the German Government, that amount is significantly higher than that charged by private schools established in Germany and benefiting from Paragraph 10(1)(9) of the EStG.

43 Since the decision to refer contains no precise information on the financing and operating methods of Cademuir School, it is in any event for the national court to assess whether that school is essentially financed by private funds.

44 It should be added that, for the purposes of determining whether Article 49 EC is applicable to facts such as those at issue here, it is irrelevant whether or not schools established in the Member State of the beneficiary of the service – here the Federal Republic of Germany – which are approved, authorised or recognised in that State for the purposes of Paragraph 10(1)(9) of the EStG, provide services within the meaning of the first paragraph of Article 50 EC. All that matters is that the private school established in another Member State may be regarded as supplying services for remuneration.

45 In Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 90, which concerns medical services, which constitute supplies of services, the Court held that Article 49 EC applies to the situation of a patient living in the United Kingdom, whose state of health required hospital treatment and who, having gone to another Member State to receive the services in question for payment, then applied for reimbursement from the National Health Service, even though services identical in nature were supplied free by the National Health Service of the United Kingdom.

46 In paragraph 91 of that judgment, the Court held that, without there being any need to determine in that case whether the provision of hospital treatment in the context of a national health service such as the NHS was in itself a service within the meaning of the EC Treaty provisions on the freedom to provide services, a situation such as that which gave rise to the dispute in the main proceedings, in which a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration, falls within the scope of those provisions.
47 It follows that Article 49 EC is applicable to facts such as those in the main proceedings, where taxpayers of a given Member State send their children to a private school established in another Member State which may be regarded as providing services for remuneration, that is to say which is essentially financed by private funds, which it is for the national court to verify.
The existence of an obstacle to the freedom to provide services
……
64 Tax legislation of a Member State such as that under Paragraph 10(1)(9) of the EStG makes the granting of tax relief subject to the condition that schooling costs be incurred in private schools approved by that Member State, or authorised or recognised by the law of the relevant Land, which presupposes that they are established in that Member State.
65 That legislation generally excludes the possibility for German taxpayers of deducting from their taxable income part of the school fees linked to sending their children to a private school situated in another Member State, whereas that possibility exists as regards school fees paid to certain German private schools. It therefore involves a higher tax burden for those taxpayers who, like the Schwarzes, send their children to a private school situated in another Member State and not to a private school situated in German territory.
66 Legislation such as that under Paragraph 10(1)(9) of the EStG has the effect of deterring taxpayers resident in Germany from sending their children to schools established in another Member State. Furthermore, it also hinders the offering of education by private educational establishments established in other Member States, to the children of taxpayers resident in Germany.
67 Such legislation constitutes an obstacle to the freedom to provide services guaranteed by Article 49 EC. That article precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (see, for example, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23; *Smits and Peerbooms*, paragraph 61; *Danner*, paragraph 29; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 23; *Watts*, paragraph 94; and Case C-444/05 *Stamatelaki* [2007] ECR I-0000, paragraph 25).
68 According to the German Government, any obstacle to the freedom to provide services is justified, first, by the fact that the freedom to provide services does not imply any obligation to extend the privileged tax treatment granted to certain schools under the educational system of one Member State to those of another Member State.
69 It should be noted in that respect that Paragraph 10(1)(9) of the EstG concerns the tax treatment of school fees. According to well-established case-law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see, for example, *Danner*, paragraph 28; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-0000, paragraph 25).
70 Similarly, whilst Community law does not detract from the power of the Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity (Article 149(1) EC) and, secondly, the content and organisation of vocational training (Article 150(1) EC), the fact remains that, when exercising that power, Member States must comply with Community law, in particular the provisions on the freedom to provide services (see, by analogy, *Watts*, paragraphs 92 and 147).
71 Moreover, concerning the German Government's argument that a Member State cannot be required to subsidise schools which fall under the educational system of another Member State, it is sufficient to point out that Paragraph 10(1)(9) of the EstG provides not for a direct subsidy by the German State to the schools concerned but for the grant of a tax advantage to parents in respect of school fees incurred on behalf of their children.
72 Concerning the German Government's argument that the refusal to grant the tax advantage under Paragraph 10(1)(9) of the EStG in respect of school fees paid to private schools established in another Member State is justified by the fact that the German schools concerned by that article and private schools established in another Member State such as Cademuir School are not in an objectively comparable situation, it should be noted that that article makes the deductibility of part of the school fees subject to the approval, authorisation or recognition in Germany of the private school concerned,

without fixing an objective criterion allowing it to be determined which types of school fees charged by German schools are deductible.

73 It follows that any private school established in a Member State other than the Federal Republic of Germany, merely by reason of the fact that it is not established in Germany, is automatically excluded from the tax advantage at issue in the main proceedings, whether or not it meets criteria such as the charging of school fees of an amount that does not give rise to the selection of pupils according to parental means.

74 In order to justify the obstacle to the freedom to private services which the legislation at issue in the main proceedings constitutes, the German Government further argues, with reference to the judgment in *Bidar*, that it is legitimate for a Member State to link the granting of an aid or a tax advantage to criteria designed to prevent those aids or advantages being brought below a level which the Member State considers necessary.

75 According to that government, the arguments in that judgment concerning the granting of aid designed to cover the maintenance costs of students and the free movement of citizens of the Union should be placed in a general context, in the sense that, where public funds are limited, the extension of the benefit of a tax relief necessarily implies a reduction in the amount of the individual reliefs granted to individuals in order to arrive at a fiscally neutral operation. The German Government argues in that regard that additional charges on the State budget would result from the extension of the application of Paragraph 10(1)(9) of the EstG to the payment of school fees to certain schools situated in another Member State.

76 Such an argument cannot however be accepted for the following reasons.

77 First, according to the consistent case-law of the court, prevention of a reduction in tax receipts is not one of the reasons set out in Article 46 EC, read in conjunction with Article 55 EC, and neither can it be regarded as an imperative reason in the public interest.

78 Secondly, as regards the German Government's argument that any Member State is entitled to ensure that the granting of aid in relation to school fees does not become an unreasonable burden that could have consequences on the overall level of aid which that State can grant, the information supplied by that government shows that the excessive financial burden which, in its submission, extension of the tax relief to school fees paid to certain schools situated in another Member State would represent arises from the fact that the aid indirectly granted in respect of those schools is of an amount far higher than that paid to educational establishments approved, authorised or recognised in Germany because those schools established in another Member State have to finance themselves by means of high school fees.

79 Even if reasoning identical to that followed in the *Bidar* judgment were to apply in a situation such as that which gave rise to the main proceedings, concerning a tax advantage in relation to school fees, it should be noted in that regard that, as the Commission has argued, the objective pursued by the refusal to grant the tax advantage in question for school fees paid to schools established in another Member State, namely to ensure that the operating costs of private schools are covered without causing an unreasonable burden on the State, according to the analysis followed in *Bidar*, could be achieved by less stringent methods.

80 As the Advocate General has pointed out in point 62 of her Opinion, in order to avoid an excessive burden it is legitimate for a Member State to limit the amount deductible in respect of school fees to a given level, corresponding to the tax relief granted by that State, taking account of certain values of its own, for the attendance of schools situated in its territory, which would constitute a less stringent method than refusing to grant the tax relief in question.

81 It appears in any event disproportionate totally to exclude from the tax relief under Paragraph 10(1)(9) of the EStG school fees paid by income tax payers in Germany to schools established in a Member State other than the Federal Republic of Germany. That excludes school fees paid by those taxpayers to schools established in another Member State from the tax relief at issue, whether or not those schools fulfil objective criteria determined on the basis of principles individual to each Member State and allowing it to be determined what types of school fees confer a right to that tax relief.

82 In the light of the above considerations, the answer to the referring court must be that, where taxpayers of a Member State send their children to a school situated in another Member State the financing of which is essentially from private funds, Article 49 EC must be interpreted as precluding legislation of a Member State which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

……..

The existence of an obstacle to the free movement of citizens of the Union

83 As indicated in paragraphs 35 and 47 of this judgment, in so far as the referring court might conclude that Article 49 EC does not apply to the facts in the main proceedings, it is necessary to examine legislation such as that at issue in the main proceedings in the light of Article 18 EC.

Observations submitted to the Court

84 The German Government argues that Article 18 EC does not preclude legislation such as Paragraph 10(1)(9) of the EStG.

85 The Commission argues that, should the Court find that Article 49 does not apply, that legislation infringes the rights conferred on the applicants in the main proceedings by the combined provisions of the first paragraph of Article 12 EC and Article 18(1) EC.

Reply of the Court

86 According to settled case-law, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy the same treatment in law within the area of application *ratione materiae* of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-148/02 *GarciaAvello* [2003] ECR I-11613, paragraphs 22 and 23; and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16).

87 Situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, in particular, *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29; *GarciaAvello*, paragraph 24; and *Pusa*, paragraph 17).

88 Inasmuch as a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the EC Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30; and *Pusa*, paragraph 18).

89 Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his stay in the host Member State by legislation in his State of origin penalising the mere fact that he has used them (see, to that effect, Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 23; *D'Hoop*, paragraph 31; *Pusa*, paragraph 19; and Case C-406/04 *DeCuyper* [2006] ECR I-6947, paragraph 39).

90 The Schwarz children, by attending an educational establishment situated in another Member State, used their right of free movement. As is shown by the judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 20, even a young child may make use of the rights of free movement and residence guaranteed by Community law.

91 National legislation such as that at issue in the main proceedings introduces a difference in treatment between taxpayers subject to income tax in Germany who have sent their children to a school in Germany, and those who have sent their children to a school established in another Member State.

92 In so far as it links the granting of tax relief for school fees to the condition that those fees be paid to a private school meeting certain conditions in Germany, and causes such relief to be refused to payers of income tax in Germany on the ground that they have sent their children to a school in another Member State, the national legislation at issue in the main proceedings disadvantages the children of nationals solely on the ground that they have availed themselves of their freedom of movement by going to another Member State to attend a school there.

93 National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (*DeCuyper*, paragraph 39; and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 31).

94 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36; *DeCuyper*, paragraph 40; and *Tas-Hagen and Tas*, paragraph 33)

95 In order to justify a possible restriction on the freedom to provide services, the German Government has put forward the arguments set out in paragraphs 58 to 60 of this judgment, referring to the analysis followed by the Court in *Bidar*, concerning the interpretation of Article 18 EC.

96 In paragraph 56 of that judgment, the Court held it permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.

97 However, even if identical reasoning were applicable in a situation such as that giving rise to the dispute in the main proceedings, concerning a tax advantage for school fees, the fact remains that legislation such as Paragraph 10(1)(9) of the EStG appears in any case disproportionate in relation to the objectives it pursues, for the same reasons as those set out in paragraph 81 of this judgment, in the context of the examination of this legislation from the standpoint of the principle of the freedom to provide services.

98 It follows that, where the children of taxpayers of a Member State are sent to school in another Member State, at a school whose services are not covered by Article 49 EC, legislation such as Paragraph 10(1)(9) of the EStG places those children at an unjustifiable disadvantage by comparison with those who have not availed themselves of their freedom of movement by going to school in another Member State, and infringes the rights that are conferred upon them by Article 18(1) EC.

99 The answer to the referring court must therefore be that, where taxpayers of a Member State send their children to school at a school established in another Member State, the services of which are not covered by Article 49 EC, Article 18 EC precludes legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

On those grounds, the Court (Grand Chamber) hereby rules:

…….

2. Where taxpayers of a Member State send their children to a school established in another Member State, the services of which are not covered by Article 49 EC, Article 18 EC precludes legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

JUDGMENT OF THE COURT (Grand Chamber)
15 March 2005 (1)
(Citizenship of the Union – Articles 12 EC and 18 EC – Assistance for students in the form of subsidised loans – Provision limiting the grant of such loans to students settled in national territory)
In Case C-209/03,
REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 12 February 2003, received at the Court on 15 May 2003, in the proceedings
The Queen(on the application of Dany Bidar)
v
London Borough of Ealing,
Secretary of State for Education and Skills,

THE COURT (Grand Chamber),
……..
after hearing the Opinion of the Advocate General at the sitting on 11 November 2004,
gives the following

Judgment

1
This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 12 EC and Article 18 EC.
2
The reference was made in the course of proceedings between Mr Bidar and the London Borough of Ealing and the Secretary of State for Education and Skills concerning the refusal of his application for a subsidised student loan to cover his maintenance costs.

Legal background
Community legislation
3
The first paragraph of Article 12 EC provides:
'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'
4
Article 18(1) EC reads as follows:
'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'
5
Article 149 EC provides:
'1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
2. Community action shall be aimed at:

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
- encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
- promoting cooperation between educational establishments,
- developing exchanges of information and experience on issues common to the education systems of the Member States,
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors,
- encouraging the development of distance education.

4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
- acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.'

6

Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) provides in Article 1(1) that the Member States are 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, 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 that State's social assistance system during their period of residence.

7

Under Article 3 of that directive, the right of residence is to remain for as long as the beneficiaries of that right fulfil the conditions laid down in Article 1 of the directive.

8

According to the seventh recital in the preamble to Council Directive 93/36/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59):

'… in the present state of Community law, as established by the case-law of the Court of Justice, assistance granted to students, does not fall within the scope of the [EEC] Treaty within the meaning of Article 7 thereof [later Article 6 of the EC Treaty, now, after amendment, Article 12 EC]'.

9

Article 1 of that directive provides:

'In order to lay down conditions to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.'

10

Article 3 of that directive provides:

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

11

Directives 90/364 and 93/96 were repealed with effect from 30 April 2006 by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 229, p. 35), which, in accordance with Article 40, must be transposed by the Member States by 30 April 2006.

National legislation

12

In England and Wales, financial assistance for students to cover maintenance costs is, under the Education (Student Support) Regulations 2001 ('the Student Support Regulations'), provided essentially by means of loans.

13

Under the Student Support Regulations, students who are recipients of a loan receive 75% of the maximum amount of the loan, while the remaining 25% is granted on the basis of the financial position of the student and of his parents or partner. The loan is provided at an interest rate which is linked to the rate of inflation and is therefore below the normal rate for a commercial loan. The loan is repayable after the student completes his studies, provided that he is earning in excess of GBP 10 000. If that is the case, he pays an annual amount equivalent to 9% of the income earned above GBP 10 000, until the loan is repaid in full.

14
Under regulation 4 of the Student Support Regulations, a person is eligible for a student loan for a designated course if he falls within one of the situations mentioned in Schedule 1 to those regulations.
15
Under paragraph 1 of that schedule, a person is eligible to receive a student loan if he is settled in the United Kingdom within the meaning of the Immigration Act 1971 and meets the residence conditions referred to in paragraph 8 of the schedule, namely:
(a) he is ordinarily resident in England and Wales on the first day of the first academic year of the course;
(b)he has been ordinarily resident throughout the three-year period preceding that day in the United Kingdom and Islands; and
(c) his residence in the United Kingdom and Islands has not during any part of that three-year period been wholly or mainly for the purpose of receiving full-time education.
16
As regards migrant workers and members of their families covered by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), paragraphs 4 to 6 of Schedule 1 to the Student Support Regulations do not require them to be settled in the United Kingdom and make their eligibility for a student loan subject to the same residence conditions, while considering that they satisfy the condition of ordinary residence in paragraph 8(b) of that schedule from the time when they reside in the European Economic Area.
17
Under the Immigration Act 1971 a person is settled in the United Kingdom if he is ordinarily resident there without being subject to any restriction on the period for which he may remain in the territory.
18
However, it is apparent from the case-file that under United Kingdom law a national of another Member State cannot, in his capacity as a student, obtain the status of being settled in the United Kingdom.
19
As regards tuition fees, the Student Support Regulations provide for financial support on the same conditions for nationals of the United Kingdom and those of other Member States.

The main proceedings and the questions referred for a preliminary ruling
20
In August 1998 Mr Bidar, a French national, entered the territory of the United Kingdom, accompanying his mother who was to undergo medical treatment there. It is common ground that in the United Kingdom he lived with his grandmother, as her dependant, and pursued and completed his secondary education without ever having recourse to social assistance.
21
In September 2001 he started a course in economics at University College London.
22
While Mr Bidar received assistance with respect to tuition fees, his application for financial assistance to cover his maintenance costs, in the form of a student loan, was refused on the ground that he was not settled in the United Kingdom.
23
In the proceedings brought by him against that refusal, Mr Bidar submits that, by making the grant of a student loan to a national of a Member State conditional on his being settled in the United Kingdom, the Student Support Regulations introduced discrimination prohibited under Article 12 EC. He submits, in the alternative, that, even if it were accepted that the provision of a grant falls outside the scope of the Treaty, that is not the case with an application for assistance in the form of a subsidised loan.
24
The Secretary of State for Education and Skills, who is the responsible authority for making the Student Support Regulations, contends, on the other hand, that the provision of assistance for maintenance costs, whether in the form of a grant or a loan, does not fall within the scope of Article 12 EC, as the Court acknowledged in Case 39/86 *Lair* [1988] ECR 3161 and Case 197/86 *Brown* [1988] ECR 3205. Even if such assistance were to fall within the scope of the Treaty, the conditions for granting that assistance would guarantee the existence of a direct link between the recipient of the assistance and the State which finances it.
25
The national court observes that student loans represent a cost to the State, because of the reduced rates

of interest and possible problems with repayment, a cost which the Secretary of State for Education and Skills estimates at the equivalent of 50% of the amount of the loans. The average loan made to a student for the academic year 2000/01 is said to be GBP 3 155. If the 41 713 nationals of the European Union who studied in England and Wales during that year without being settled there had received student loans, the probable cost to the State would thus have been GBP 66 million.
26
According to the national court, Mr Bidar is not covered by Regulation No 1612/68 and cannot claim any right to a student loan on the basis of Directive 93/96.
27
In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
'1.
Whether, given the decisions of the Court of Justice of the European Communities in … *Lair* … and … *Brown* … and developments in the law of the European Union, including the adoption of Article 18 EC and developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses, such assistance being given by way of either (a) subsidised loans or (b) grants, continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition on discrimination on grounds of nationality?
2.
If either part of question 1 is answered in the negative, and if assistance with maintenance costs for students in the form of grants or loans [does] now fall within the scope of Article 12 EC, what criteria should the national court apply in determining whether the conditions governing eligibility for such assistance are based on objectively justifiable considerations not dependent on nationality?
3.
If either part of question 1 is answered in the negative, whether Article 12 EC may be relied upon to claim entitlement to assistance with maintenance costs from a date prior to the date of the judgment of the Court of Justice in the present case and, if [not], whether an exception should be made for those who initiated legal proceedings before that date?'

The questions referred for a preliminary ruling
Question 1
28
By its first question, the national court asks essentially whether, in the present state of Community law, assistance to students in higher education intended to cover their maintenance costs, in the form of a subsidised loan or a grant, falls outside the scope of the Treaty, in particular the first paragraph of Article 12 EC.
29
According to the order for reference, the claimant in the main proceedings is not covered by Regulation No 1612/68.
30
In that context, the national court wishes to know whether assistance granted to students to cover their maintenance costs is within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC, which states that, without prejudice to any special provisions contained in the Treaty, any discrimination on grounds of nationality is prohibited within that scope of application.
31
To assess the scope of application of the Treaty within the meaning of Article 12 EC, that article must be read in conjunction with the provisions of the Treaty on citizenship of the Union. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 30 and 31, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 22 and 23).
32
According to settled case-law, a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 63, and *Grzelczyk*, paragraph 32).
33

Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC (see Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16, *Grzelczyk*, paragraph 33, and *Garcia Avello*, paragraph 24).
34
Moreover, there is nothing in the text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union (*Grzelczyk*, paragraph 35).
35
As is apparent from Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraphs 29 to 34, a national of a Member State who goes to another Member State and pursues secondary education there exercises the freedom to move guaranteed by Article 18 EC.
36
Furthermore, a national of a Member State who, like the claimant in the main proceedings, lives in another Member State where he pursues and completes his secondary education, without it being objected that he does not have sufficient resources or sickness insurance, enjoys a right of residence on the basis of Article 18 EC and Directive 90/364.
37
With regard to social assistance benefits, the Court held in Case C-456/02 *Trojani* [2004] ECR I-0000, paragraph 43, that a citizen of the Union who is not economically active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.
38
It is true that the Court held in *Lair* and *Brown* (paragraphs 15 and 18 respectively) that 'at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof [later Article 6 of the EC Treaty, now, after amendment, Article 12 EC]'. In those judgments the Court considered that such assistance was, on the one hand, a matter of education policy, which was not as such included in the spheres entrusted to the Community institutions, and, on the other, a matter of social policy, which fell within the competence of the Member States in so far as it was not covered by specific provisions of the EEC Treaty.
39
However, since judgment was given in *Lair* and *Brown*, the Treaty on European Union has introduced citizenship of the Union into the EC Treaty and added to Title VIII (now Title XI) of Part Three a Chapter 3 devoted inter alia to education and vocational training (*Grzelczyk*, paragraph 35).
40
Thus Article 149(1) EC gives the Community the task of contributing to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of those States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
41
Under paragraphs 2 and 4 of that article, the Council may adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, and recommendations aimed in particular at encouraging the mobility of students and teachers (see *D'Hoop*, paragraph 32).
42
In view of those developments since the judgments in *Lair* and *Brown*, it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs.
43
That development of Community law is confirmed by Article 24 of Directive 2004/38, which states in paragraph 1 that all Union citizens residing in the territory of another Member State on the basis of that directive are to enjoy equal treatment 'within the scope of the Treaty'. In that the Community legislature, in paragraph 2 of that article, defined the content of paragraph 1 in more detail, by providing that a Member State may in the case of persons other than workers, self-employed persons, persons who retain such status and members of their families restrict the grant of maintenance aid in the form of grants or loans in respect of students who have not acquired a right of permanent residence, it took the view that the grant of such aid is a matter which, in accordance with Article 24(1), now falls within the scope of the Treaty.

44
That interpretation is not invalidated by the argument put forward by the governments which have submitted observations and by the Commission concerning the limitations and conditions referred to in Article 18 EC. Those governments and the Commission observe that, while citizenship of the Union enables nationals of the Member States to rely on the first paragraph of Article 12 EC when they exercise the right to move and reside within the territory of those States, their situation falls within the scope of application of the Treaty within the meaning of Article 12 EC only, in accordance with Article 18(1) EC, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect, which include those laid down by Directive 93/96. Since Article 3 of that directive excludes the right to payment of maintenance grants on the part of students benefiting from the right of residence, those grants are still outside the scope of the Treaty.
45
In this respect, it is indeed the case that students who go to another Member State to start or pursue higher education there and enjoy a right of residence there for that purpose under Directive 93/96 cannot base any right to payment of maintenance assistance on that directive.
46
However, Article 3 of Directive 93/96 does not preclude a national of a Member State who, by virtue of Article 18 EC and Directive 90/364, is lawfully resident in the territory of another Member State where he intends to start or pursue higher education from relying during that residence on the fundamental principle of equal treatment enshrined in the first paragraph of Article 12 EC.
47
In a context such as that of the main proceedings where the right of residence of the applicant for assistance is not contested, the assertion, made by some of the governments which have submitted observations, that Community law allows a Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence and if appropriate to take measures, within the limits imposed by Community law, for the removal of that national (see *Grzelczyk*, paragraph 42, and *Trojani*, paragraph 45) is moreover immaterial.
48
In the light of all the foregoing, the answer to Question 1 must be that assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC.
Question 2
49
By its second question, the national court seeks to know the criteria which a national court must apply to determine whether the conditions of granting assistance to cover the maintenance costs of students are based on objective considerations independent of nationality.
50
For this purpose it should first be examined whether the legislation at issue in the main proceedings distinguishes on the ground of nationality between students who apply for such assistance.
51
It must be recalled here that the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (see, inter alia, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44; and Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923, paragraph 24).
52
As regards persons not covered by Regulation No 1612/68, paragraph 1 of Schedule 1 to the Student Support Regulations requires, for the grant to students of assistance to cover their maintenance costs, that the person concerned is settled in the United Kingdom for the purposes of national law and satisfies certain residence conditions, namely that of residing in England and Wales on the first day of the first academic year and that of having resided in the United Kingdom and Islands for the three years preceding that day.
53
Such requirements risk placing at a disadvantage primarily nationals of other Member States. Both the condition requiring an applicant for that assistance to be settled in the United Kingdom and that requiring him to have resided there prior to his studies are likely to be more easily satisfied by United Kingdom nationals.
54

Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (see *Bickel and Franz*, paragraph 27, *D'Hoop*, paragraph 36, and *Garcia Avello*, paragraph 31).

55

According to the United Kingdom Government, it is legitimate for a Member State to ensure that the contribution made by parents or students through taxation is or will be sufficient to justify the provision of subsidised loans. It is also legitimate to require a genuine link between the student claiming assistance to cover his maintenance costs and the employment market of the host Member State.

56

On this point, it must be observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States (see *Grzelczyk*, paragraph 44), it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.

57

In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.

58

In this context, a Member State cannot, however, require the students concerned to establish a link with its employment market. Since the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical employment market, the situation of a student who applies for assistance to cover his maintenance costs is not comparable to that of an applicant for a tideover allowance granted to young persons seeking their first job or for a jobseeker's allowance (see, in this regard, *D'Hoop*, paragraph 38, and Case C-138/02 *Collins* [2004] ECR I-0000, paragraph 67, respectively).

59

On the other hand, the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

60

With respect to national legislation such as the Student Support Regulations, the guarantee of sufficient integration into the society of the host Member State follows from the conditions requiring previous residence in the territory of that State, in this case the three years' residence required by the United Kingdom rules at issue in the main proceedings.

61

The additional condition that students are entitled to assistance to cover their maintenance costs only if they are also settled in the host Member State could admittedly, like the requirement of three years' residence referred to in the preceding paragraph, correspond to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that State. However, it is common ground that the rules at issue in the main proceedings preclude any possibility of a national of another Member State obtaining settled status as a student. They thus make it impossible for such a national, whatever his actual degree of integration into the society of the host Member State, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs. Such treatment cannot be regarded as justified by the legitimate objective which those rules seek to secure.

62

Such treatment prevents a student who is a national of a Member State and who is lawfully resident and has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State, from being able to pursue his studies under the same conditions as a student who is a national of that State and is in the same situation.

63

The answer to Question 2 must accordingly be that the first paragraph of Article 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that State.

Question 3
64
By its third question, the national court asks the Court whether, if the Court were to rule that assistance to cover the maintenance costs of students falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC, the effects of such a judgment should be limited in time.
65
The United Kingdom, German and Austrian Governments request the Court, should it so rule, to limit in time the effects of its judgment, except as regards judicial proceedings brought before the date of that judgment. In support of their request, they rely in particular on the financial implications raised by the national court.
66
It should be recalled that the interpretation the Court gives to a rule of Community law is limited to clarifying and defining the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied (see Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16, and Case 24/86 *Blaizot* [1988] ECR 379, paragraph 27).
67
It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person concerned of relying on a provision it has interpreted with a view to calling in question legal relationships established in good faith (see *Blaizot*, paragraph 28; Case C-163/90 *Legros and Others* [1992] ECR I-4625, paragraph 30; and Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 108).
68
Moreover, it is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (see, inter alia, *Grzelczyk*, paragraph 52).
69
The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed (see *Grzelczyk*, paragraph 53).
70In the present case, it suffices to state that the information provided by the United Kingdom, German and Austrian Governments is not capable of supporting their argument that this judgment might, if its effects were not limited in time, entail significant financial consequences for the Member States. The figures referred to by those governments in fact relate also to cases which are not similar to that at issue in the main proceedings.
71Consequently, the answer to Question 3 must be that there is no need to limit the temporal effects of the present judgment.

On those grounds, the Court (Grand Chamber) rules as follows:
1.Assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the EC Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC.
2. The first paragraph of Article 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that State.

OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 23 May 2007 (1)
Case C-438/05
The International Transport Workers' Federation
and
The Finnish Seamen's Union
v
Viking Line ABP
and
OÜ Viking Line Eesti
(Reference for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division))

1. The Court of Appeal (England and Wales) (Civil Division), in proceedings on appeal from the High Court of Justice (Commercial Court), has referred a series of questions that require this Court to grapple with an issue that is, at the same time, of high legal complexity and great socio-political sensitivity. Sometimes, when the questions are complicated, the answers are simple. This is not one of those occasions. In a nutshell, the situation that gave rise to the present case is as follows. A Finnish operator of ferry services between Helsinki and Tallin wished to change its place of establishment to Estonia in order to benefit from lower wage levels and provide its services from there. A Finnish trade union, supported by an international association of trade unions, sought to prevent this from happening and threatened strike action and boycotts if the company were to move without maintaining its current wage levels. The legal problems raised by this stand-off touch on the horizontal effect of the Treaty provisions on freedom of movement, and on the relationship between social rights and the rights to freedom of movement.

I – Facts and reference for a preliminary ruling

The parties

2. Viking Line ABP ('Viking Line') is a Finnish passenger ferry operator. OÜ Viking Line Eesti is its Estonian subsidiary. Viking Line owns the *Rosella*, a vessel which operates under the Finnish flag on the Tallinn-Helsinki route between Estonia and Finland. The crew of the *Rosella* are members of the Finnish Seamen's Union ('the FSU').

3. The FSU, which is based in Helsinki, is a national union representing seafarers. It has about 10 000 members, including the crew members of the *Rosella*. The FSU is the Finnish affiliate of the International Transport Workers' Federation ('the ITF').

4. The ITF is a federation of 600 transport workers' unions in 140 countries, which is based in London. One of the principal policies of the ITF is its 'flag of convenience' ('FOC') policy. At the trial before the Commercial Court, the president of the ITF explained that 'the primary objectives of the FOC campaign are, first, to eliminate flags of convenience and to establish a genuine link between the flag of the ship and the nationality of the owner and, second, to protect and enhance the conditions of seafarers serving on FOC ships'. According to the document that sets out the FOC policy, a vessel is considered as sailing under a flag of convenience 'where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag'. The same document provides that 'unions in the country of beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries'. The FOC campaign is enforced by boycotts and other solidarity actions.

The facts

5. The *Rosella* has been operating at a loss, being in competition with Estonian-flagged vessels on the same route between Tallinn and Helsinki. Estonian crew wages are lower than Finnish crew wages. Since the *Rosella* sails under the Finnish flag, Viking Line is obliged by Finnish law and by the terms of a collective bargaining agreement to pay the crew at Finnish wage levels.

6. In October 2003, Viking Line sought to reflag the *Rosella* and register the vessel in Estonia, with a view to entering into a collective bargaining agreement with an Estonian union. It gave notice of its proposal to the crew and to the FSU. The FSU made it clear to Viking Line that it was opposed to the proposal to reflag the *Rosella*.

7. By email of 4 November 2003, the FSU asked the ITF to inform all affiliated unions about the matter and to request them not to negotiate with Viking Line. On 6 November 2003, the ITF did as requested and sent out a circular, pursuant to the FOC policy. The circular stated that the *Rosella* was

still beneficially owned in Finland and therefore that the FSU retained the negotiating rights. It called upon the affiliated unions not to enter into negotiations with Viking. Affiliated unions would not go against the circular because of the principle of solidarity. Failure to comply could lead to sanctions being taken – in the worst case exclusion from the ITF. (2) The circular therefore effectively precluded any possibility of Viking Line circumventing the FSU and dealing directly with an Estonian union.

8. Furthermore, the FSU claimed that the manning agreement for the *Rosella* expired on 17 November 2003 and that in consequence it was no longer under an obligation of industrial peace. The FSU gave notice that it intended to start industrial action in relation to the *Rosella* on 2 December 2003. It demanded that the crew be increased by eight and that Viking Line either give up its reflagging plans or that, in the event of reflagging, the crew should be employed under Finnish labour conditions. Viking Line initiated judicial proceedings in the Helsinki Labour Court for a declaration that the manning agreement remained in force and in the Helsinki District Court for an injunction to restrain the strike action. However, neither court was able to hear Viking Line in time.

9. On 2 December, Viking Line settled the dispute because of the threat of strike action. Viking Line conceded the extra crew and agreed not to commence reflagging before 28 February 2005. It also agreed to discontinue the proceedings before the Labour Court and the District Court.

10. ITF never withdrew its circular and the call on affiliated unions not to enter into negotiations with Viking Line therefore remained in effect. Meanwhile, the *Rosella* continued to make losses. Viking Line, still wishing to reflag the vessel to Estonia, planned to do so after the expiry of the new manning agreement on 28 February 2005.

11. Anticipating that a new attempt to reflag the *Rosella* would precipitate collective action from the ITF and the FSU once more, Viking Line brought an action in the Commercial Court in London on 18 August 2004, seeking declaratory and injunctive relief which required ITF to withdraw the circular and FSU not to interfere with Viking Line's rights to freedom of movement in relation to the reflagging of the *Rosella*. While the action was pending, the manning agreement for the *Rosella* was renewed until February 2008. As a consequence, the date of 28 February 2005 ceased to be of critical importance, but the *Rosella* continued to operate at a loss, as a result of working conditions that were less favourable for Viking Line than Estonian working conditions. It remained important, therefore, that the position be resolved. By judgment of 16 June 2005, the Commercial Court granted final injunctions upon an undertaking being given by Viking Line not to make any employees redundant as a result of the reflagging.

12. On 30 June 2005, the ITF and the FSU filed an appeal against that judgment before the Court of Appeal (Civil Division). By order of 3 November 2005, the Court of Appeal referred an extensive series of meticulously worded questions to the Court of Justice for a preliminary ruling. (3) I hope not to oversimplify matters when, for the sake of brevity, I condense these questions into what seem to be the three key issues.

13. The first issue is whether, by analogy with the ruling in *Albany*, (4) collective action such as that under consideration falls outside the scope of Article 43 EC and Article 1(1) of Council Regulation (EEC) No 4055/86 (5) by virtue of the Community's social policy.

14. Secondly, the referring court raises the question whether those same provisions 'have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against … a trade union or association of trade unions in respect of collective action by that union or association of unions'.

15. Finally, the referring court asks whether, in the circumstances at issue, actions such as those under consideration constitute a restriction on freedom of movement, and, if so, whether they are objectively justified, appropriate and proportionate, and 'strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services'. In this connection, the referring court also asks if the actions under consideration must be deemed directly discriminatory, indirectly discriminatory or non-discriminatory, and to what extent that would influence their assessment under the relevant rules on freedom of movement.

II – Assessment

***A* – Preliminary remarks**

16. The questions referred by the national court relate to Article 1(1) of Regulation No 4055/86 and to Article 43 EC.

17. Regulation No 4055/86 governs the freedom to provide maritime services between Member States and between Member States and third countries. That regulation renders 'the totality of the Treaty rules governing the freedom to provide services' applicable to the sphere of maritime transport between Member States. (6) Article 1(1) of the regulation provides that 'freedom to provide maritime transport services between Member States … shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

Essentially, that provision gives expression, in the field of maritime transport, to the principle of freedom to provide services, as guaranteed by Article 49 EC. (7)

18. However, the present case primarily concerns freedom of establishment, as guaranteed by Article 43 EC. The reflagging of the *Rosella* by Viking Line would amount to an exercise of the right to freedom of establishment. As the Court held in *Factortame and Others*, the registration of a vessel that is used 'for pursuing an economic activity which involves a fixed establishment in the Member State concerned' constitutes an act of establishment for the purposes of Article 43 EC. (8)

19. Thus, Viking Line intends, first, to exercise its right to freedom of establishment in order, subsequently, to exercise its right to freedom to provide services. Conversely, the ITF and the FSU seek to impose certain conditions on Viking Line's exercise of its right to freedom of establishment and have threatened to boycott the provision of passenger ferry services by Viking Line should it decide to reflag the *Rosella* without meeting their conditions.

***B* – The applicability of the provisions on freedom of movement to industrial action**

20. The FSU and the ITF are of the view that collective action taken by a trade union or association of trade unions which promotes the objectives of the Community's social policy, falls outside the scope of Article 43 EC and Regulation No 4055/86. They argue that application of the provisions on freedom of movement would undermine the right of workers to bargain collectively and to strike with a view to achieving a collective agreement. In this regard, they point out that the right of association and the right to strike are protected as a fundamental right in various international instruments. Moreover, respect for the right to strike in the context of collective bargaining is a constitutional tradition common to the Member States and therefore represents a general principle of Community law. Relying, by analogy, on the Court's reasoning in *Albany*, (9) the FSU and the ITF submit that the social provisions in Title XI of the Treaty effectively exclude the application of Article 43 EC and Regulation No 4055/86 in the field of labour disputes such as the dispute under consideration.

21. With its first question, the national court essentially asks whether this view is correct. In my opinion, the reply must be in the negative.

……..

……..

– The horizontal application of the provisions on freedom of movement

29. The second question referred by the national court pertains to the horizontal effect of Articles 43 EC and 49 EC. (26) The FSU and the ITF argue that these provisions do not impose obligations on them, since they aim to address public measures. They point out that both the FSU and the ITF are private legal persons without any regulatory powers. Viking, on the other hand, submits that it must be allowed to rely upon the provisions at issue, in particular in view of the capacity of trade unions to interfere with the rights to freedom of movement.

30. I shall examine the matter in four stages. First, as my point of departure, I shall explain that the provisions at issue are capable of creating obligations for private actors. Secondly, I shall attempt to clarify to what sort of private action the rules on freedom of movement apply. Thirdly, I shall address an oft-ignored and yet important problem: how can the horizontal effect of the provisions on freedom of movement be reconciled with respect for the way in which domestic law chooses to protect private autonomy and resolve conflicts between private actors? Finally, after these observations of a more general nature, I shall propose an answer to the question whether an undertaking can rely on Article 43 EC and Article 1(1) of Regulation No 4055/86 in judicial proceedings against a trade union or an association of trade unions.

Do the provisions on freedom of movement create obligations for private actors?

31. The Treaty does not expressly resolve the issue of the horizontal effect of Articles 43 and 49 EC. It is therefore necessary to have regard to the place and function of these provisions in the scheme of the Treaty.

32. Together with the provisions on competition, the provisions on freedom of movement are part of a coherent set of rules, the purpose of which is described in Article 3 EC. (27) This purpose is to ensure, as between Member States, the free movement of goods, services, persons and capital under conditions of fair competition. (28)

33. The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. (29) The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market.

34. Member State authorities are generally in a position that enables them to intervene in the

functioning of the common market by restricting the activities of market participants. The same can be said for certain undertakings acting in collusion or holding a dominant position in a substantial part of the common market. Not surprisingly, therefore, the Treaty bestows rights upon market participants that can be invoked against Member State authorities and against such undertakings. As regards the latter, the rules on competition play the primary role; as regards Member State authorities, that role is played by the provisions on freedom of movement. (30) Hence, in order effectively to ensure the rights of market participants, the rules on competition have horizontal effect, (31) while the rules on freedom of movement have vertical effect. (32)

35. However, this does not validate the argument *a contrario* that the Treaty precludes horizontal effect of the provisions on freedom of movement. On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market participants throughout the Community to have equal opportunities to gain access to any part of the common market.

36. Thus, at the heart of the matter lies the following question: does the Treaty imply that, in order to ensure the proper functioning of the common market, the provisions on freedom of movement protect the rights of market participants, not just by limiting the powers of the authorities of the Member States, but also by limiting the autonomy of others?

37. Some commentators have proposed to answer that question firmly in the negative – their main argument being that the competition rules suffice to tackle interferences with the proper functioning of the common market by non-State actors. (33) Others, however, have pointed out that private action – that is to say, action that does not ultimately emanate from the State and to which the competition rules do not apply – may very well obstruct the proper functioning of the common market, and that it would therefore be wrong to exclude such action categorically from the application of the rules on freedom of movement. (34)

38. I believe the latter view to be more realistic. It is also endorsed by the case-law. The Court has acknowledged that the rules on freedom of movement can limit the autonomy of individuals, notably in its rulings in *Commission* v *France* (35) and *Schmidberger*. (36) Both cases rely fundamentally on the reasoning that private action can jeopardise the objectives of the provisions on freedom of movement. As a consequence, the Court held that private individuals must not be allowed to act without appropriate concern for the rights that other private individuals draw from the rules on freedom of movement. In *Commission* v *France*, the upshot of the violent acts of protest by French farmers was to deny to others the freedom to sell or import fruit and vegetables from other Member States. In *Schmidberger*, the obstruction to the free movement of goods was not nearly as serious. Crucially, however, the Court weighed the right to freedom of expression of a group of demonstrators against the right of a transport company freely to transport goods from one Member State to another and, in that way, applied the fundamental principle of the free movement of goods horizontally.

39. One might note that *Schmidberger* concerned an action brought by a private party against the State. Such a procedure is common in many, if not all, national legal systems, where a constitutional provision cannot be relied upon as an independent cause of action in civil proceedings. It is an alternative way of inducing the horizontal effect of constitutional rights, namely by deriving from those rights an obligation for the State to intervene in situations where one private party's constitutional rights are under threat from the actions of another. (37) A corollary and equally common way of giving constitutional rights normative force in horizontal relations is to consider them as binding on the judiciary when adjudicating a case between private parties. Whether it interprets a contractual clause, rules on an action for damages, or decides upon a request for an injunction, the court must, as an organ of the State, hand down a decision that respects the constitutional rights of the parties. (38) The demarcation of individual rights in these ways is known as 'mittelbare Drittwirkung', or *indirect* horizontal effect. The result is that constitutional rules that are addressed to the State translate into legal rules applying between private parties, illustrating that 'the government is the third party to every private suit and is so in the very form of the law and the judge who administers it'. (39)

40. With regard to the demarcation of the respective spheres of rights, indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance. (40) This explains why the ruling in *Defrenne* is considered as having recognised the 'direct horizontal effect' of Article 141 EC, even though the Court construed the horizontal effect of that provision as a duty on the national courts. (41) It also explains why the Commission's argument at the hearing, that the Court should reject direct horizontal effect, because the provisions on freedom of movement and their derogations were not tailored to apply to private parties, is already refuted by the case-law. If *Schmidberger* were to have been decided as a private suit between the transport company and the demonstrators, the Court would still have had to weigh the right to freedom of movement of the former against the right to demonstrate of the latter. (42) Indeed, the present case could theoretically have come to the Court in the framework of proceedings against the Finnish authorities for failing to curtail

collective action against Viking Line. It would not have affected the substance of the problem: how to reconcile Viking Line's rights to freedom of movement with the rights to associate and to strike of the FSU and the ITF? (43)

To what sort of private action do the rules on freedom of movement apply?

41. Nevertheless, this does not mean that the rules on freedom of movement can always be brought into play in proceedings against a private individual. The normative and socio-economic power inherent in State authorities entails that these authorities have, by definition, significant potential to thwart the proper functioning of the common market. This is exacerbated by the fact that, regardless of whether they are, formally speaking, of a general nature, the actions of State authorities never truly stand on their own. They denote broader policy choices and therefore have an impact on anyone who wishes to exercise his rights to freedom of movement within their jurisdiction. Moreover, State authorities are less likely than private economic operators to adapt their conduct in response to the commercial incentives that ensure the normal operation of the market. (44) Therefore, the scope of the rules on freedom of movement extends to any State action or inaction that is liable to impede or make less attractive the exercise of the rights to freedom of movement. (45)

42. By contrast, in many circumstances private actors simply do not wield enough influence successfully to prevent others from enjoying their rights to freedom of movement. The case of an individual shopkeeper who refuses to purchase goods from other Member States would not be liable to obstruct the functioning of the common market. The reason is that suppliers from other Member States would still have the opportunity to market their goods through alternative channels. Moreover, the shopkeeper would in all likelihood suffer from competition from retailers who had fewer qualms about buying foreign goods and who, as a result, might be able to offer lower prices and a larger choice to consumers. That prospect alone would probably be adequate to deter behaviour of this kind. Thus, the market will 'take care of it'. In those circumstances, there is no ground for Community law to intervene.

43. The implication is that the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement. But how should one determine whether that is the situation? There seems to be no simple answer to that question. The Court, in its case-law, has proceeded carefully by recognising the direct horizontal application of the rules on freedom of movement in specific cases.

44. A number of these cases have concerned the exercise of intellectual property rights. (46) The holders of such rights have a legitimate business interest in exercising their rights in the manner they choose. (47) None the less, these interests must be weighed against the principle of the free movement of goods. (48) Otherwise, holders of intellectual property rights 'would be able to partition off national markets and thereby restrict trade between Member States'. (49)

45. Similarly, the Court has applied the rules on freedom of movement to national and international professional sporting associations. (50) It is easy to see why. The associations in question have a commanding influence over the organisation of professional sports as a cross-border economic activity. They can draw up regulations that are effectively binding for nearly everyone who wishes to exercise that activity. As the Court noted in *Deliège*, 'the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy'. (51)

46. The application of the provisions on freedom of movement to private action carries particular significance in the area of working conditions and access to employment. (52) The Court recognised this in its judgment in *Angonese*, when it applied Article 39 EC to a private bank in Bolzano. (53) Mr Angonese wished to take part in a competition for a post with that bank. Yet, access to the competition was conditional on the possession of a certificate of bilingualism that was issued by the authorities of, and could only be obtained within, the province of Bolzano. The condition replicated a requirement that previously existed for access to the public service and in that sense prolonged an established practice. As the Court noted in its judgment, residents of Bolzano usually obtained the certificate as a matter of course for employment purposes and viewed it almost as a 'compulsory step as part of normal training'. (54) Although Mr Angonese was not in possession of the certificate, he was perfectly bilingual and had other diplomas bearing witness to that. He was nevertheless refused access to the competition.

47. Workers cannot change their professional qualifications or obtain alternative employment as easily as traders can alter their products or find alternative ways of marketing them. Recruitment conditions such as the one at issue in *Angonese* are therefore harmful to the functioning of the common market even when imposed by a private bank as part of an established regional practice. The possibility that, in the long run, economic incentives will undercut such discriminatory recruitment practices is of

little comfort to the individual who seeks employment today. Perhaps more than in any other field, the saying that 'the market can stay irrational longer than you can stay solvent' (55) rings true in the field of free movement for workers.

48. It follows from the foregoing that the provisions on freedom of movement apply to private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent.

The horizontal effect of the provisions on freedom of movement and respect for private autonomy as protected under domestic law

49. Of course, the finding that certain private actors are subject to the rules on freedom of movement does not spell the end of their private autonomy. Nor does it necessarily mean that they must be held to exactly the same standards as State authorities. The Court may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy. In other words, private actors may often still do things that public authorities may not. (56)

50. The Court has also recognised that Member States enjoy a margin of discretion when it comes to the prevention of obstacles to freedom of movement arising from the conduct of private actors. (57) In this regard, the Court has stated that it is 'not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard' the exercise of the right to freedom of movement. (58) Hence, the provisions on freedom of movement do not always provide a specific solution for each case, but merely set certain boundaries within which a conflict between two private parties may be resolved. (59)

51. This has an important consequence: even in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law.

52. That degree of freedom for the Member States has procedural implications. Although the rules of civil procedure vary among national legal systems, it is a common feature that the parties to the proceedings have the primary responsibility for framing the contents and the ambit of their dispute. If these parties were to be allowed to bring legal proceedings before a national court merely by reference to the applicable Treaty rules on freedom of movement, the risk would arise that the national rules which applied would be left out of consideration. In order to prevent that from happening, Member States may require, in conformity with the principle of procedural autonomy, that proceedings against a private party on account of a contravention of the right to freedom of movement, be brought within the national legal framework, pursuant to a domestic cause of action – for instance tort or breach of contract.

53. When adjudicating on the dispute thus brought before it, the national court is invited to apply its domestic law in a manner that is consistent with the Treaty rules on freedom of movement. (60) If that is not possible, and domestic law conflicts with the rules on freedom of movement, then the latter will prevail. (61) Should there be no remedy available, because domestic law does not provide a cause of action through which to challenge a breach of the right to freedom of movement, then, in accordance with the principle of effectiveness, the claim can be based directly on the relevant Treaty provision. (62)

54. National law, grounded in the values of the national legal system, accordingly preserves its proper place in the normative framework that governs conflicts between private parties. At the same time the effectiveness of Community law is assured.

Analysis of the present case

55. It follows from the facts as they are stated in the order for reference, that the practical effect of the coordinated actions of the FSU and the ITF, in particular where they preclude negotiations with ITF-affiliated unions in Estonia, is to render the exercise by Viking Line of its right to freedom of establishment subject to the FSU's consent. Taken together, the actions of the FSU and the ITF are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking.

56. I therefore propose that the Court reply as follows to the second question referred by the national court: 'Article 43 EC and Article 1(1) of Regulation No 4055/86 have horizontal effect in national legal proceedings between an undertaking and a trade union or an association of trade unions in circumstances such as those under consideration in the main proceedings.'

***D* – Striking a balance between the right to freedom of establishment and the right to collective action**

57. Viking, for business reasons that are clear, seeks above all to exercise its right to freedom of

establishment. The Treaty protects this right, because the possibility for a company to relocate to a Member State where its operating costs will be lower is pivotal to the pursuit of effective intra-Community trade. If companies were to be allowed to draw only on the productive resources available in a particular country or region, it would hamper the economic development of that region as well as of those regions where the required resources are better available. The exercise of the right to freedom of establishment is therefore instrumental to increasing the economic welfare of all the Member States. (63)

58. Yet, while the right to freedom of establishment generates overall benefits, it also often has painful consequences, in particular for the workers of companies that have decided to relocate. Inevitably, the realisation of economic progress through intra-Community trade involves the risk for workers throughout the Community of having to undergo changes of working circumstances or even suffer the loss of their jobs. This risk, when it materialised for the crew of the *Rosella*, is exactly what prompted the actions of the FSU and the ITF.

59. Although the Treaty establishes the common market, it does not turn a blind eye to the workers who are adversely affected by its negative traits. On the contrary, the European economic order is firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties. (64) As its preamble demonstrates, that contract is embodied in the Treaty.

60. The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract. They provide the means to emphasise that relocation, while ultimately gainful for society, entails costs for the workers who will become displaced, and that those costs should not be borne by those workers alone. Accordingly, the rights to associate and to collective action are of a fundamental character within the Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms. (65) The key question, however, that lies behind the present case, is to what ends collective action may be used and how far it may go. This touches upon a major challenge for the Community and its Member States: to look after those workers who are harmed as a consequence of the operation of the common market, while at the same time securing the overall benefits from intra-Community trade.

61. The referring court asks whether the anticipated actions by the ITF and the FSU 'strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services'. Having placed this question in its broader perspective, it is now possible to look more closely at the form and purpose of the collective action under discussion.

62. A coordinated policy of collective action among unions normally constitutes a legitimate means to protect the wages and working conditions of seafarers. Yet, collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded.

63. In order to establish whether the policy of coordinated collective action currently under consideration has the effect of partitioning the labour market in breach of the principle of non-discrimination, it is useful to distinguish between two types of collective action that may be at issue in the present case: collective action to persuade Viking Line to maintain the jobs and working conditions of the current crew and collective action to improve the terms of employment of seafarers throughout the Community.

Collective action in the interests of the jobs and working conditions of the current crew

64. A first reason for the ITF and the FSU to take collective action may be to alleviate any adverse consequences reflagging of the *Rosella* will have on its current crew. Coordinated collective action may accordingly serve, for example, to secure their wages and working conditions, to prevent redundancies, or to obtain equitable compensation.

65. In view of the margin of discretion which Community law leaves to the Member States, it is for the national court to determine, in the light of the applicable domestic rules regarding the exercise of the right to collective action, whether the action under consideration goes beyond what domestic law considers lawful for the purpose of protecting the interests of the current crew. However, when making this determination, national courts have a duty under Community law to guarantee that cases of intra-Community relocation are not treated less favourably than relocations within the national borders.

66. Thus, in principle, Community law does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to

another Member State, in order to protect the workers of that undertaking.

III – Conclusion

73. In view of the foregoing, I suggest that the Court give the following answer to the questions referred by the Court of Appeal:

(1) Collective action taken by a trade union or association of trade unions which seeks to promote the objectives of the Community's social policy, is not, for that reason alone, exempted from the application of Article 43 EC and Council Regulation (EEC) No 4055/86, of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.

(2) Article 43 EC and Article 1(1) of Regulation No 4055/86 have horizontal effect in national legal proceedings between an undertaking and a trade union or an association of trade unions in circumstances such as those under consideration in the main proceedings.

(3) Article 43 EC does not preclude a trade union or an association of trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking. It is for the national court to determine whether such action is lawful in the light of the applicable domestic rules regarding the exercise of the right to collective action, provided that cases of intra-Community relocation are not treated less favourably than cases of relocation within the national borders.

(4) Article 43 EC precludes a coordinated policy of collective action by a trade union and an association of trade unions which, by restricting the right to freedom of establishment, has the effect of partitioning the labour market and impeding the hiring of workers from certain Member States in order to protect the jobs of workers in other Member States.

In Case C-109/92,
REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Hannover (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between
Stephan Max Wirth
and
Landeshauptstadt Hannover,
on the interpretation of the EEC Treaty and, in particular, Articles 59, 60 and 62 thereof,
THE COURT (Fifth Chamber),
……..
after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,
gives the following
Judgment
Grounds
1 By order of 18 February 1992, received at the Court on 3 April 1992, the Verwaltungsgericht (Administrative Court) Hannover referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, two questions on the interpretation of that Treaty and, in particular, Articles 59, 60 and 62 thereof.
2. These questions were raised in proceedings between Mr Wirth, a German national, and the Landeshauptstadt Hannover (the defendant), concerning educational grants.
3. It appears from the case that, at the material time, educational grants were governed, in Germany, by the Bundesausbildungsfoerderungsgesetz (Federal Law on grants for training and higher education, BAfoeG) of 26 July 1971 (BGBl. I, p. 1409), as amended by the Zwoelftes Gesetz zur AEnderung des Bundesausbildungsfoerderungsgesetz (12th law amending the BAfoeG) of 22 May 1990 (BGBl. I, p. 936). Most provisions of the 12th law amending the BAfoeG, including those which relate to Paragraph 5 of the BAfoeG, came into force on 1 July 1990.
4. Paragraph 5(2) of the BAfoeG, as amended, provides inter alia that:
An educational grant is awarded to applicants who are permanently resident in the territory to which this Law applies and who study at an educational or training institute outside that territory provided that
1. their studies are beneficial in the light of their previous education and at least part of that education or training can be recognized as being of the requisite or normal length of the education or training,
2. the education or training cannot be pursued within the territory to which this Law applies, if it was undertaken prior to 1 July 1990
and provided that they have adequate linguistic knowledge. ...
5. On 31 August 1990, Mr Wirth, who was at that time living in Tettnang, Germany, applied for an educational grant under the BAfoeG to pursue a course in jazz saxophone at the Hoogeschool voor de Kunsten (Arts College) at Arnhem, in the Netherlands. To support this application, he explained that he had been obliged to pursue his training abroad, because there was no place available at a German establishment.
6. By a decision of 1 November 1990, the defendant rejected that application. It stated that, since the applicant was permanently resident in Germany, a grant for education abroad could only be awarded to him under Article 5(2) of the BAfoeG if it could be beneficial to him in the light of his previous education. That condition was not met in this case since the applicant was in the first term of his course.
7. Mr Wirth lodged an objection to that decision. He stated, inter alia, that he was permanently resident not in Germany but in the Netherlands, where he was studying, and that he was therefore entitled an educational grant under Paragraph 6 of the BAfoeG. Under that provision, a German national permanently resident in a foreign State can receive an educational grant if the particular circumstances of his case so justify. Mr Wirth considered that he had fulfilled that condition, since he had not been able to enrol in a German institution. By a decision of 5 February 1991, however, the Bezirksregierung (District Authority) Hannover rejected that claim.
8. On 8 March 1991, Mr Wirth appealed to the Verwaltungsgericht Sigmaringen. By a decision of 7 June 1991, that court held that it did not have jurisdiction and referred the case to the Verwaltungsgericht Hannover.
9. The latter court held that Mr Wirth was not entitled to a grant under the BAfoeG. Because he was permanently resident in Germany, he could not rely on Paragraph 6 of that Law. In addition, since he was beginning his course, he did not fulfil the condition imposed by Paragraph 5 of the BAfoeG, as amended.
10. However, the Verwaltungsgericht Hannover observed that until the 12th Law amending the

BAfoeG came into force, such a grant could have been awarded to Mr Wirth. Under the previous version of that Law, it was enough for an educational grant to be awarded to a student wishing to study abroad that the education or training could not be pursued in Germany and that the applicant had adequate linguistic knowledge. Both of those conditions would have been fulfilled in this case.
11. In doubt as to whether the system of educational grants provided by the 12th Law amending the BAfoeG was compatible with Community law, the Verwaltungsgericht Hannover stayed the proceedings and referred the following questions to the Court for a preliminary ruling:
1. Does the pursuit of studies at an establishment of higher education in another Member State which charges fees for such studies constitute the receipt of a service within the meaning of Article 60 of the EEC Treaty which, according to Article 62 of the Treaty, may not be made subject to any new restrictions?
Do the rules set out in Paragraph 1(3)(a) of the 12th Law amending the Bundesausbildungsfoerderungsgesetz (Federal Law on grants for training and higher education) constitute a restriction within the meaning of Article 62 of the EEC Treaty?
2. Is it compatible with the general principle of equality
(a) for a Member State to award its nationals educational grants for the pursuit of higher education only if such studies are undertaken within the State itself, and not if they are pursued in another Member State?
(b) for a Member State which had previously awarded grants for higher education in another Member State to discontinue such grants irrespective of whether they give rise to additional costs?
12. Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant German legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question
13. In the first part of its first question, the national court seeks to ascertain whether courses given in an establishment of higher education must be described as services within the meaning of Article 60 of the Treaty.
14. It must first be borne in mind that under the first paragraph of Article 60 of the Treaty the chapter on services covers only services normally provided for remuneration.
15. As the Court has already emphasized in Case 263/86 Belgian State v Humbel [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.
16. Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.
17. However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.
18. However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees (Gebuehren) from the students.
19. The answer to the first part of the first question must therefore be that courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.
20. In the second part of its first question, the national court wishes to ascertain whether Articles 59 or 62 of the Treaty preclude a Member State, after the entry into force of the Treaty, from introducing legislation under which nationals who are resident in that State may claim an educational grant only if they pursue their education or training within that State and not in another Member State, where the previous legislation did not impose such a condition.
21. It must be noted here that, since the establishment in question is not a provider of services within

the meaning of Article 60 of the Treaty, the application of Article 59 does not arise. The same is true of Article 62 of the Treaty, under which Member States are not to introduce any new restrictions on the freedom to provide services which has in fact been attained at the date of the entry into force of the Treaty. The Court has already held, in Case C-159/90 Society for the Protection of Unborn Children Ireland v Grogan [1991] ECR I-4685, paragraph 29, that Article 62, which is complementary to Article 59, cannot prohibit restrictions which do not fall within the scope of Article 59.
22. The answer to the second part of the first question must therefore be that neither Article 59 nor Article 62 precludes a system of educational grants for studies pursued in an establishment whose activities do not constitute services within the meaning of Article 60 of the Treaty.

The second question
23. In its second question, the national court seeks to establish whether the general principle of non-discrimination precludes a Member State from awarding educational grants to its nationals only if their studies are undertaken within the State itself, and not in another Member State, where in the past that Member State had awarded grants to its nationals who pursued their training outside the State.
24. This question presupposes that the Community law applies to the subject in question.
25. The Court has already held ° in particular in Case 39/86 Lair v Universitaet Hannover [1988] ECR 3161, which concerned a dispute about the award of an educational grant under the same national legislation as is at issue in the main proceedings, that at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty.
26. The second question, therefore, does not fall to be answered.
Operative part

On those grounds,
THE COURT (Fifth Chamber),
in answer to the question referred to it by the Verwaltungsgericht Hannover, by order of 18 February 1992, hereby rules:
1. Courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.
2. Neither Article 59 nor Article 62 of the Treaty precludes a system of educational grants for studies pursued in an establishment whose activities do not constitute services within the meaning of Article 60 of the EEC Treaty.