MEMORANDUM FOR APPLICANT

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ADAM MICKIEWICZ UNIVERSITY, POZNAN

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QUESTION 1a

Firstly, Applicant submits, that responsibility of implementing Directive 2000/78 relating to employment policy falls onto autonomous regions whom the constitution gives power to adopt legistation in that area. Substantive provisions contained in Community acts restrict the rights of autonomous regions to independently shape its policy. In **Fratelli Constanzo (**case 103/88) the ECJ held that all organs of the administration, including decentralized authorities, are obliged to apply provisions of directives that are directly effective. If an autonomous region is responsible for executing Community law, it is the Member State that is responsible for its actions or omissions at the Community level. The region is held responsible only in constitutional terms against the Member State. Moreover, constitutional competences of regions does not constitute a justification for excluding responsibility of a Member State because the granting of autonomy and its scope is an internal matter of each country.

Applicant's second submission is that a Member State is bound by the provisions of a Directive even prior to the expiry of an extended period for implementation.

1. Art. 249 section 3 EC provides that Member States have a duty to fully and timely transpose the content of directives within the prescribed time limit. Member States have some discretion as to the form and method of implementation, but not as to the result. Directives are admittedly not described as "directly applicable", however the ECJ established beyond doubt the direct effect of directives in **Van Duyn Home Office** (case 41/74). Criteria for direct effect have been specified by case law. In order to be invoked directly directives must be sufficiently clear, precise and unconditional. The time limit for implementation must have expired and the Respondent against whom a directive may be invoked must be, basically, a State. Under these conditions so called "*vertical direct effect*" of directives has been acknowledged.
2. The expiry of the time-limit for implementation is not however a requirement that knows no exceptions. Following the logic expressed in **Kolpinguis** (case 80/86) the ECJ adopted a strong position in **Region Wallonie** (case 129/96) where it held that Member States are not entitled to take any measures which could seriously compromise the result required by the directive, even if the implementation period has not lapsed. This view found strengthening and additional support in **Mangold** (case 144/2004), where the ECJ ruled that observance of the general principle of equal treatment, 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 only a general framework for combating discrimination.
3. The Directive 2000/78 was to have been implemented in Kingdom Laredef by 2nd December 2003. A Member State may be granted an additional period of 4-years in order to implement the provisions of the directive on age discrimination. Article 18 of the directive allows that any Member State that chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age discrimination and on the progress it is making therein. Shortly after having been granted such an extension, the government of Roop implemented the questionable Decree 49/2004. The ruling in **Mangold** stated that obligation would be rendered redundant if the Member State were to be permitted, during the period allowed for the implementation of the directive to adopt measures incompatible with the objectives pursued by that act. It has no bearing if the domestic act is concerned with the transposition of the directive or not (cf. **ATRAL**, case 14/02). In the present case the Member State should have sought to achieve results required by the yet not transposed Directive 2000/78, as indicated in case law, rather than having introduced legislation which gave ground to discriminatory treatment of younger people.
4. Moreover, as observed Advocate General in its opinion on **Mangold**, directives are ones of the source of Community law and produce effects not only from that deadline but from the date of their entry into force. It needs to be stressed that Community law may lose its effectiveness if national enforcement authorities and courts do not provide adequate administration and execution of EC Treaty provisions and legislation.
5. In the light of **Mangold** a Member State is bound by the provisions of a directive (*vertical direct effect*) notwithstanding that the time limit for implementation has not expired. It follows

from the Article 10 EC that during the period prescribed for transposition a Member State must refrain from taking any measures liable seriously to compromise the result prescribed. Alternatively Applicant submits that national legislation should be interpreted in accordance with Directive 2000/78 under the doctrine of "indirect effect" (cf. **Marleasing**, case 106/89)

Applicant's third submission is that a Member State is bound by the provisions of a Directive on the basis that an autonomous region within that Member State has adopted legislation falling within the legal area covered by the Directive.

1. In the important case of **Palacios** (case 411/05) the ECJ accepted that the Spanish discriminatory retirement laws were justified on the grounds that they were introduced for the purpose of a legitimate social policy, i.e for the promotion of employment. Going against the Advocate General's opinion in this case, the ECJ decided that the discriminatory measures were within the scope of the directive. Therefore, a legislation falling within the legal area covered by the directive does not necessarily mean that a Member State is bound by its provisions. Member States are permitted a wide margin of discretion, however, according to conditions set forth in **Palacios**, the provisions of Directive 2000/78 will preclude national legislation adopted within the same legal area only where the measures are not objectively and reasonably justified in the context of national law by a legitimate aim and where the means do not appear to be appropriate and necessary for the purpose. It is Applicant's position that this is the case here. The main aim of Decree 49/2004 is to encourage more stability and continuity in employment of young persons. The purpose itself may be treated as objectively and reasonably justified, however allowing employers to impose restrictive measures in employment contracts with persons aged below 25 does not seem to be an appropriate and necessary means to guarantee more long-term employment for younger persons and is inconsistent with the Youth Employment Scheme, which aims to support financially employers that take on young people under 25. In fact, as this case reveals it, this provision invites employers to seek workers aged 25 or above instead of promoting long-term contracts to younger workers.

Applicant submits that the provisions of unimplemented directive do bind the Member State from the moment of its entry into force and although the Member State is not obliged to implement its provisions before the time-limit expires, it is obliged not to adopt measures incompatible with its objectives. Adopting national discriminatory legislation falling within the legal area covered by the directive does not itself bind the Member State, however when means of achieving a legitimate aim are inappropriate and unnecessary national legislation is precluded, as it is the case here.

QUESTION 1b

The Applicant submits that a general principle of Community law, which prohibits age discrimination can be derived from **Article 13 ECT** and/or **Article 21 EUCFR.**

1. The existence of the general principles of EC law is unquestionable. In the past, a longer process of incorporation of the general principles of law into Community law was to be observed. At first, it was based on the Article 230 (ex 173), Article 288(2) (ex 215(2)) and Article 220 (ex 164) and found confirmation in the jurisdiction of the ECJ. The ECJ consequently widened the scope of protection of human rights, the example of this is the case of **Internationale Handelsgesellschaft GmbH** (case 11/70)**.** It is worth mentioning that the ECJ has been willing to apply the ECHR rules and even to invoke the jurisprudence of European Court of Human Rights itself, as could be seen in **Roquette Freres** (Case C-94/00). Although the ruling of CFI in **Mannesmannrohren-Werke AG v Commission** (Case T-112/98) stated that the CFI did not technically possess the right to apply the ECHR, this ruling might be treated as a quite unusual exception to the other judgements of ECJ and CFI, which in general have been willing to apply the ECHR, as the case of **Roquette Freres** (Case C-94/00) proves.
2. The general principles of law were incorporated by the ECJ into the EC law **(Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agriculture Produce).**
3. The case **Angel Rodriguez Caballero v Fondo de Garantia Salarial** confirmed that the rule

of non-discrimination in respect of the age has a fundamental character and is being derived from the general rules of law. As such, it cannot be hindered with any exceptions which are contrary to the fundaments of the Community.

The Applicant submits that a general principle of Community law, which prohibits age discrimination can be derived from Article 21 **EUCFR**. According to the Article 51 **EUCFR**, the provisions of the discussed act apply to the Member States while they are implementing EU law. Although Article 52 **EUCFR** states that some limitations might be imposed on the exercise of the rights and freedoms, the essence of those rights and freedoms must be preserved.

4. The proclamation of the EUCFR was a logical step forward in the aforementioned process of acknowledgement of the general principals of law by the Community. ECJ has already made reference to EUCFR in a number of judgments in order to confirm that the European legal order recognises particular fundamental rights (**R v SoS ex parte BAT** (Case C-491/01),

The Applicant submits that a general principle of Community law prohibiting age discrimination can be also derived from the Article 13 **ECT.**

5. The case **Hilmar Killinghausen v Amt für Land- und Wasserwirschaft Kiel** confirmed that it is a general principle of EC law under Article 10 **ECT** that the Member States are bound by the obligations arising from the Treaty and have to take all appropriate measures to fulfill these obligations. As a result, under all circumstances a general principle of non-discrimination is to be observed by the Member States.

QUESTION 2a

Applicant submits as follows:

1. To ensure the effect of Community law and to protect the individual from the omnipotent State, the burden of proof shall rest within the State.
2. Since ancient times, one of the most important legal rule is the one that demands from the party wishing to invoke a circumstance, to prove the existence of it. Thus if a Member State wishes to introduce an exception to a provision of a Directive (a rule), it is always incumbent upon a Member State to prove that the conditions for an exception are met.
3. In the examined case such submission is strongly supported by the wording of art**. 2(2)(b) of Council Directive 2000/78** which defines discrimination. By using the words *indirect discrimination shall be taken to occur…, **unless***. Hence when a provision having an adverse effect on equality described in art. 2(2)(b) occurs, it is deemed discriminatory unless it can be proved that the conditions for an exception are met. It is for no one else but for the state, that wants to rely on the exception to prove it is the case.
4. It can easily be derived from art. 10 of the Treaty Establishing European Community (**TEC**), that *Member States shall take all appropriate measures…to ensure fulfillment of the obligations arising out of this Treaty or resulting from the action taken by the institutions of the Community*… Hence if a State wishes to derogate from a measure taken by the institutions of the Community, it shall give the reasons why it did so in the light of empowerment given by the Community legislation. To provide the *effet utile* of the Community law, it is incumbent also on the national courts of the Member States to examine whether the actions taken by the government of the State are to fulfill the Member States Obligation under the treaty. The way the court can give this effect with respect to the question referred to the Ecj is by requiring the government of the State to prove, whether the means are among other *necessary and appropriate*.
5. The ECJ has shown clearly that the court should examine the justification of the exceptions in **D'Hoop** case (C-224/98). National court had not submitted any evidence to the ECJ on this point. The Court itself suggested various justifications for the national rule and then considered the question of proportionality, manifesting what the national court should do in order to serve justice.
6. The answer to question 2a referred by the court is of great importance to the issue of state liability under **Francovich** principle. It may be argued that the state needs to be safeguarded form opening the floodgates of liability claims. Yet it is necessary to observe that to establish such liability, a sufficiently serious breach of community law needs to be proven(**Brasserie**

du Pecheur C-46/93). It is that part of the proceedings for the state to easy defend, not the rules on the burden of proof.

7. Concluding. The most appropriate way the courts could and should give the useful effect of Community law is to investigate whether the state did make reasonable and proportionate use of the scope of freedom attained to it.

QUESTION 2b

The Applicant states that the general principle of Community law of non-discrimination in respect of age, which in accordance with paragraph 32 of **Angel Rodriguez Caballero v Fondo de Garantia Salarial** is also a fundamental right, being a principle deriving from the general rules of law, constitutional tradition of Members States and Community primary law, cannot be encumbered with any exceptions which are contrary to the fundaments of the Community.

1. The Applicant reiterates that – as found by the Court in the case **Hilmar Killinghausen v Amt für Land- und Wasserwirschaft Kiel** - it is a general principle of EC law under Article 10 **EC Treaty** that *"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."* Therefore, as proved above in the answer to question 1(b) – the general principle of non-discrimination is to be observed by the Member States under all circumstances. At the same time the Applicant mentions that there is no duty imposed on the Member States under the Directive to implement differences of treatment on grounds of age, as Article 6(1) of the Directive constitutes a competence of the Member States to provide such differences and not their obligation.
2. **Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Stauder v City of Ulm – Sozialamt** and **Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agriculture Produce** all incorporate the general principles of law into EC law. Moreover, according to the judgement given in **Internationale Gesellschaft** the protection of general principles *"must be enshrined within the structure and objectives of the Community"*.
3. The 1st recital of the Preamble to the Directive refers to the general principles of Community law and – therefore – constitutes a basis to interpret the Directive in the light of the general principle of non-discrimination in respect of age.
4. The 74th paragraph of **Werner Mangold v Rüdiger Helm** states: *"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."* The same is upheld by the Advocate General Mazak in the 80th paragraph of his opinion on **Félix Palacios de la Villa v Cortefiel Servicios SA**.
5. The judgment in **Mangold** is given on grounds of the findings of the opinion of the Advocate General Tizzano, the 101st paragraph of which states that in the issue of assessing of the application of the general principle of non-discrimination the general principle of equality might be used and then there would be no doubt that the national court would have to disapply a rule, which is contrary to that principle. The Applicant notices that the principle of equality is mentioned in the 30th recital to the Directive, so it is fully justified to refer to it in this case.
6. It must be also stated that in accordance with the 65th paragraph of **Mangold** each derogation of the individual right to equal treatment under the Directive needs to be proportional to the aim pursued, what is a traditional approach of the Court expressed in several other cases, e.g. **Lommers v Minister van Landbouw, Natuurbeheer en Visserij**. The Applicant undermines the view of the Defendant that it is appropriate and necessary to disallow employment due to age in order to increase stability of young workers. Moreover, the measures taken by the State are misguided and contrary to the aims of the Community.

7. According to the 75th paragraph of **Mangold** it is a duty of the Court must provide all the criteria of interpretation needed by the national court to determine whether national rules are compatible with a general principle. Moreover, the 110th paragraph of **Konstantinos Adeneler, and others v Ellinikos Organismos Galaktos** states: *"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."* This view is a direct continuation of the Court's findings in **Maria Pupino** and clearly shows that the general principle is a higher authority for the national court than the provisions of a directive themselves.
8. The general principle of non-discrimination in respect of age is derived from the provisions EC Treaty. It is, therefore, a normal practice to interpret the principle on grounds of **The Vienna Convention on the Law of Treaties 1969**, article 31 of which states: *"A treaty shall be interpreted in good faith an in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose."* Also the doctrine highlights that the usual approach of the Court is teleological (*"The ECJ has become well-known for interpreting provisions of Community law be reference not just – or even principally – be reference to their wording, but also by reference to their spirit and the general scheme of the instrument of which they form part"* - **Wyatt and Dashwood's EU Law**, 2000, p. 197).

In the light of the aforementioned facts and statements, as well as the cited previous Court's judgments, the exceptions to the general principles of Community law may be different than the exceptions to the rules established in the Directive in case they are not proportional to the values established by the EC Treaty as well as the aims of the Community, which is based on the respect of individual rights and freedoms (as mentioned in the 1st recital of the Preamble to the Directive 2000/78: *"the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"*). Limitations of these rights and freedoms are only allowed in the event they serve to such values, which are as much appreciated by the EC Treaty as the general principle of non-discrimination.

QUESTION 3a

The Applicants observes that in the light of the previous Court's judgments as well as the presented position of the private universities in the region of ROOP the Sumsare University falls within the definition of the State and therefore – with no doubts - is required to comply with the obligation contained in secondary EC law, which the obligation simply results from the previously cited provision contained in Article 10 **EC Treaty.**

1. In order to avoid any doubts which might arise from the national court's reference the Applicant reiterates that in accordance with the Court's judgment in **Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn** the Court answers only the question existing in the national court's reference. The only question contained in this reference is whether the Sumsare University falls within the definition of the State. The national court presumes that if this question is answered in affirmative, both mentioned directives implementing the principles impose obligations on the University. The Applicant supports the view of the national court. Therefore, the Applicant below refers only to the question whether the University falls within the definition of the State. Just for the reasons of prudence the Applicant hereby refers to the such Courts' judgments as: **NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration**, **Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen**, **M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)** which justify the presumption made by the national court and supported by the Applicant with regards to this reference.
2. Above all, the Applicant reminds the case **Fratelli Costanzo SpA v Comune di Milano**, where the Court in the 2nd paragraph of its judgment stated that *"all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions"*. This judgment applies to the ROOP region which – in accordance

with s 4.10 **Constitution of the Kingdom of LAREDEF** – is entitled to regulate all issues related to the higher education. The ROOP region does in fact regulate these issues and, therefore, exercises this part of the LAREDEF's obligations towards the citizens. In the light thereof, it appears to be clear that in relation to the duty to comply with EC law there is no difference between the Kingdom and the autonomous region. It would be a breach of the fundamental rules of law, if a member state was allowed to delegate some of its duties (i.e. education) to its regions in order to avoid liability.

3. Next, the question is whether a private body may anyhow fall within the definition of the State. The answer requires again some teleological approach towards the provisions and, primarily, the previous judgments of the Court which are related to the topic. The source of this approach may be found in the famous case of **A. Foster and others v British Gas plc.** In the 18th paragraph of its judgment the Court stated: *"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."* In the 20th paragraph the Court continued as follows: *"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."*

4. The Applicant is aware of the fact that some doubts do arise on ground of this judgment and it requires some further interpretation whether the criteria of 'control' and 'power' must be both fulfilled in order for the individuals to be able to rely upon any provisions of a directive against the particular body. Therefore, the Applicant, proves that the Sumsare University meets all the criteria established in the cited case. First of all, the Court in the cited case stated that the obligations may be imposed on a body whatever legal form it has. In the light thereof, it is clear that a private body may fall within the definition of the State. The University is also made responsible – on grounds of ROOP legislation based on the Member States' Constitution – for providing a public service (i.e. higher education). The control of the regional authorities (which for the reasons presented in point 2 above falls within the definition of the State) is clearly visible in the legislation, as the University must submit some reports thereto. The above is sufficient for the University to fall within the alternatively established definition of the State in the 18th paragraph of the cited case. Since the University is made responsible for providing public services and – in this way – is entitled to decide which individuals are allowed to take benefits of these public services, the specifics of the relations of the University and the Applicant go beyond the normal rules applicable in the individuals' relations. The University is also entitled to act in the way usually reserved for the State's authorities. The provisions relied upon by the Applicant are also unconditional and sufficiently precise, so that they can be enforced as a basis for the non-discrimination principle.

5. The Applicant highlights that the teleological approach towards the question of being or not being a state agency in the light of Community law was also recognized in **Marshall** as well as in **Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary**.

In the light of the aforementioned provisions, Courts' judgments and presented facts and statements, it is clear that the University falls within the definition of the State in sense of Community law and, therefore, is bound by the provision as in the national court's reference. It would be neither just nor moral to allow bodies, which are granted on grounds of the national law some special powers towards citizens, not to respect the general principles of Community law based on the fundamental rights of the individuals.

QUESTION 3b

The Applicants state that in case of qualification of the Sumsare University as a private body, prohibitions indicated in course of analysis of the question 1 do apply between the University (private body) and the Applicants (prospective employees).

1. Any prohibition on age discrimination derived from wording of the Treaty Establishing European Community (article 13) are directly effective, both vertically and horizontally, following the judgments in **Defrenne v. Sabena (43/75):** "*the prohibition on discrimination [...] applies not only to the action of public authorities, but also estends to all agreements [...] as well as contracts between individuals"* and in **Walrave v Association Union Cycliste Internationale (36/74):** Treaty´s provision "*does not only apply to the action of public authorities, but extends likewise to rules of any other nature."*
2. In terms of the prohibitions derived from the Directives, the Applicants agree with ECJ´s stance from **Van Duyn v Home Office (41/74)** that directives are of direct effect. The same stance was presented in **Publblico Ministero v Ratti (148/78):** *"whilst [...] regulations are [...] capable of producing direct effects, that does not mean that other categories of acts covered by that article can never produce similar effects."*
3. The Applicants argue that, having into account that Treaty provisions addressed to the Member States have been declared horizontally effective, there is no reason not to declare the same stance according to directives. Such statement is in accordance with binding character of directives expressed in article 249 ECT: *"A directive shall be binding."*
4. Following the 52nd paragraph of the **Marshall v Southampton Area Health Authority (152/84)** provisions of a directive must be "*considered [...] to be unconditional and sufficiently precise to be relied upon."*
   The documents in question seem to be unconditional and sufficiently precise, like Article 2 (Directive 2000/78/EC): *"there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1"* [among them - age].
5. If the answer to Question 1 (b) is positive, it has to be reminded that that general pricnciples of Community law are aid to interpretation (J Steiner & L Woods, "**Textbook on EC Law**", 2003, pp 88-126). Although the EC J´s jurisprudence holds they cannot be the sole basis of a claim, bearing in mind that:
   "it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination [...], to provide [...] 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" and that
   "it is the responsibility of the national court to guarantee the full effectiveness of the generalprinciple of non-discrimination" (paragraph 77 and ruling of **Mangold v Helm** 144/04), strenghten by the opinion of Advocate General Tizzano of the same case that:
   "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",
   the Applicant claims that either Article 13 as a general rule of Community law or provisions of the Directive 2007/78 or both of them concurrently should be found as producing horizontal effect.

Summing it all up, the Applicants claim that Community law´s prohibition on age discrimination apply directly between private bodies.

QUESTION 4

The Applicant asks the Court to treat this question as an issue of fundamental value for the Community based on the principles of equality, freedom, non-discrimination and human rights as in Article 2 **EC Treaty**. The Applicant observes that this question is a question of a fundamental value

for each human being in this Community. Since the issue of citizenship is involved here, the case must be treated as a one of highest importance.

1. Since the issue of interpretation of provisions is involved, the Applicant refers again to the principles the Court has been using so far for the interpretation of such provisions as well as the principles mentioned in the **Vienna Convention** (see: answer to question 2 (b)). Therefore, the Applicant observes that this issue should be particularly interpreted in the light of Article 17 **EC Treaty**.
2. Before going into details, the Applicant states that the provision of Article 17 was introduced by the **Treaty of Maastricht** as a milestone of the process of the integration of the Member States of the Community. This provision is based on the concept of the Union's citizenship and is a key part of the Community's organs' answer to the need for identification of the nations with the Community and the need for their feeling of loyalty to the Community. This provision embodies the concept that the Union has its own people who from this time are going to build the Community. Furthermore, it would be a violation of the idea of the citizenship, if any members of the Community were refused to enjoy their full rights, their full membership in the Community. This membership is because embodied in the possibility of enjoying all the civil and politician, as well as social rights.[1]
3. The clue for the answer to the question of the national court is found in the 2nd sentence of Article 17 s 1 **EC Treaty** which clearly states: *"Every person holding the nationality of a Member State shall be a citizen of the Union"*. This provisions clearly bans the Member States to exclude any of the Member States' citizens (including their own citizens) from exercising of any of the rights prescribed in the Community law. Every other interpretation of this provision might take us to a situation, in which the Member States might be violating the fundamental rights of their own citizens.
4. In the light of the statements, facts and previous Court's judgments presented by the Applicant in the answer to question 3 (a). The cases such as **Fratelli Costanzo SpA v Comune di Milano** make us sure that an autonomous region is in the light of the Community law an emanation of the Member State and – acting on grounds of the constitutional law of the Member State – must fulfill the State's obligations arising from the Community law.
5. This case, as a case involving the issue of the access to a course of higher education, may be judged by the Court as a continuation of the strong judgment in **Matteucci v Communauté française de Belgique** what is also consistent with the previous Court's judgments on grounds of Article 10 **EC Treaty**.

The Applicant observes that in the light of the aforementioned statements it is fully justified to answer the national court's question in favor of the Applicant. The Applicant hereby states that the question is a fundamental one for the historical development of the Community and refers to an issue of the highest value for all the citizens of the Community, on whose participation and co-operation the Community is based.

QUESTION 5a

Applicant submits as follows:

1. Art. 24(2) of the **Directive 2004/38** is intended to combat welfare tourism, which is a circumstance that needs to be focused on when interpreting the case. It cannot be submitted that the Applicant who was born in a far better situated autonomous region of the state is willing to exploit the student loans system of another region.
2. Despite the fact that when no cross border element is given, the state can in principle discriminate its own nationals (case C- 64/96 **Uecker and Jaquet**), the Court is in a position to rethink this issue. As AG Sharpstone in Case C-212/06 **Government of the French Community and Walloon Government V Flemish Governmen** and C-184/99 **Grzelczyk** case point out *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***.

[1] C. Bernard: Substance Law of EC. Chapter 15: Union Citizenship.

3. Further, it is to be noted, that Art. 18 is found to have a direct effect (**Grzelczyk**). Art. 12 which is no less precise states that *any discrimination on grounds of nationality shall be prohibited*. A directive cannot be incompatible with directly effective Treaty provisions, as it is the foundation of Community. If nationals of the host state are treated worse than those from other states, they are **discriminated on grounds of nationality**. Art. 24 (2) of the Directive in the respect in which it could lead to such discrimination shall be not applied.
4. In some cases like Case 115/78 **Knoors** the ECJ accepted that member states should not discriminate their own nationals if such nationals could rely on their rights due to the fact that they went abroad and came back to their country. Interpreting *ad maiori ad minus*, it is the only reasonable explanation, that nationals exercising the free movement right within their state are not to be discriminated.
5. There are important reasons in this case, to depart from the reasoning evident in **Uecker**. It is unreasonable to state in one sentence that there is no cross-border element and on the other, that the Applicant is not entitled to the loan because he crossed the border to another autonomous region. Such logical gaps in the stance allowing autonomous regions of member states to discriminate nationals born in another region are branded in AG opinion in case C 212/06 (see above).
6. The fact that nationals of the same member state who were born in another autonomous region of the same state cannot ever be granted permanent resident status is contrary to the very spirit of the Community and the Treaty (especially art. 12 EC), Human rights envisaged in the Charter of Fundamental Rights and last, but not least, contrary to common sense.

QUESTION 5b

The Applicant states that, having a status of a lawful resident in other Member State than one of his origin and being a job seeker there, he falls outside the scope of Article 24 (2) of a Directive 2004/38 and, thereof, he has a right to an educational loan on the same basis as nationals of the mentioned State.

1. Article 24 of the **Directive 2004/38** states that "all Union citizens residing [...] in the territory of the host Member State shall enjoy equal treatment with the nationals."
2. There is left a possibility for a Member State to derogate maintenance aid for studies from it's obligations and grant such aid under the condition of having the permanent residence status by the Applicant (art 24 (2) of the **Directive 2004/38**). However, such derogation cannot include any person who has a status of "worker".
3. In relation to the article 39 of **EC Treaty**, ECJ´s jurisprudence established that a job seeker falls within the scope of a term "worker" (292/89, **Antonissen** 1991). Following this interpretation, a job seeker cannot be included in mentioned derogation.
4. On the basis that "a worker who is a national of a Member State may not [...] be treated differently [...] by reason of his nationality" and that "he shall enjoy the same social [...] advantages" (article 7 of the **Regulation 1612/68**), the defendant demand an access to the educational loan under the same conditions as nationals of the Member State.

Taking into account the aforementioned facts, the Applicant observes that an EU citizen lawfully resident in another Member State and registered as a job seeker falls outside the scope of article 24 (2) of the Directive 2004/38. Therefore, he is absolutely eligible to receive an educational loan on the same grounds as nationals of the mentioned Member State.