MEMORANDUM FOR RESPONDENT

Filip Balcerzak - Anna Farat - Jan Pawlak - Marcin Rodek - Agnieszka Stachowiak

ADAM MICKIEWICZ UNIVERSITY, POZNAN

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QUESTION 1a

Respondent's first submission is that an autonomous region is not the right addressee of the claim.

1. Art. 249 section 3 EC provides that it is a Member States who has a duty to fully and timely transpose the content of directives within the prescribed time limit. An autonomous region is not obliged to implement a directive as there are no provisions in the Treaties empowering the Community to issue secondary acts (directive) that would bind an autonomous region.
2. Moreover, this view finds support in the opinion of Advocate General in case against Flemish government (case 212/06), where it is his position that autonomous regions do not take part in making Community law and thus they have been granted mutually exclusive spheres of competence for certain matters.

If however it is acknowledged that Respondent has a duty to transpose directives into its legal order, Respondent submits that an unimplemented directive cannot develop legal consequences if the time-limit for the implementation has not lapsed yet, irrespective of whether the time-limit was extended or not.

1. Respondent admits, that the doctrine of *vertical direct effect* of directives has been adopted in case law, however the condition for its application to this case is that the time limit for implementation has expired (cf. **Van Duyn**, case 41/74). A directive cannot be directly effective before the time limit for the transposition, which was confirmed by the ECJ in case *Ratti* (case 148/78). In this light the position adopted in **Region Wallonie** (case 129/96) should be rather treated as an exception to the general rule. In this case the ECJ held that a directive creates legal effects prior to the expiry of transposition date only if the Member State has introduced new legislation "*liable seriously to compromise the attainment of the result prescribed by that directive*". This is not the case here as Decree 49/2004 was introduced with aim to encourage more stability and continuity in employment of young persons and only one of its provisions was considered to be discriminatory and questioned by Applicant. Thus the direct effect of Directive 2000/78 must be denied.
2. In **Mangold** (case 144/04) the ECJ has not overruled the reasoning adopted in **Region Wallonie** and reconfirmed that only serious infringement of the aims of directive at a national legislation level would lead to the directive being directly applicable before the period for its transposition. The main point expressed in **Mangold** was however not the negative duty owed by Member States but the fact that observance of the general principle of equal treatment cannot be conditional upon the expiry of the period for the transposition of a framework directive. In that light Directive 2000/78 has only a declaratory meaning and therefore the point in this case is whether national legislation adopted in Roop was of a discriminatory type under general principles of Community law and not whether one should apply a not yet transposed framework directive.

Respondent's third submission is, alternatively, that the Decree 49/2004 was justified on the basis of Art 6 (1) of Directive 2000/78 and that a Member State is not 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 **Palacios** (case 411/05) the ECJ stated that the adopted discriminatory measures were within the scope of the directive but the court has acknowledged they were justified. In this case however it shall be distinguished that the legal scope of the directive is slightly different that the legal scope of the national legislation. The law governing employment of young persons only in one point refers to "restrictive measures" regarding persons of certain age. Its main objective is to promote long-term employment of younger persons and primarily it deals with encouraging stability and continuity in employment thereof whereas the purpose of the directive is to lay down a general framework for combating discrimination, *inter alia* on the grounds of age. Therefore Decree 49/2004 is outside the scope of the Directive 2000/78 and cannot be challenged under EU law.
2. Further or alternatively, it should be assumed that a Member State is not bound by the provision of a directive solely on the basis that an autonomous region has adopted legislation falling within this legal area but it must be established that the measures are not objectively

and reasonably justified in the context of national law by a legitimate aim and that the means do not appear to be inappropriate and necessary for the purpose (as in **Palacios**). In this case Decree 49/2004 was justified on the basis of Article 6(1) of the Directive. The aim of promoting employment of young persons is objectively and reasonably justified in the context of national law and the means of setting up a minimum age limit does not appear to be inappropriate or unnecessary as it refers primarily to the minimum age of the person that is already under 25. Obviously, the legislator inserted this provision with view to limit the number of teenagers and protect young people from applying for and performing inappropriate jobs in terms of their age. The employers have been left a certain margin of discretion in that regard and the Member State cannot be held responsible for them having misunderstood the purpose of the whole legislation in favour of young people. Respondent's position is that Decree 49/2004 is not inconsistent with Directive 2000/78.

Respondent submits that the provisions of unimplemented directive do not bind the Member State and although the Member State is obliged not to infringe the objectives of the directive before the time-limit expires, this obligation must have an exceptional character and refers to seriously incompatible measures. Adopting national discriminatory legislation falling within the legal area covered by the directive does not itself bind the Member State if additional conditions are not met, as it is the case here.

QUESTION 1b

The Respondent submits as follows

1. The legal incorporation of general principles into community law is not established on a firm basis, for the three Articles related to this issue are quite vague. Article 230 (ex 173) gives the ECJ power to review the legality of Community acts on the basis of *'any rule of law relating to* its *application'*. Furthermore, Article 288(2) (ex 215(2)), states that tort liability is to be determined *'in accordance with the general principles common* to *the laws of the Member States'*. Article 220 (ex 164), which regulates the role ECJ, states that 'the law' should be observed, which makes for a rather imprecise reference.

The Respondent submits that Article 13 **ECT** cannot be relied upon directly. The Respondent submits as follows:

2. Article 13 **ECT** states that: ' (...)*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.'* Thus, it can be argued that Article 13 grants the Council a right to take certain steps shall a need to combat the discrimination occur. However, Article 13 contains rather an empowering provision for the Council and as such it cannot be relied upon directly.
3. As stated by the Advocate General Mazak on the case **Félix Palacios de la Villa v Cortefiel Servicios SA**, the intention of the makers of the Treaty and, thus, of the Article 13 of this Treaty, was to leave as much freedom as possible to the Community legislature and the Member States to take appropriate steps to give effect to the provisions of the ECT. Therefore, where such a considerable margin of freedom is left to the Member States, one cannot rely directly on the Article 13 **ECT.**

Secondly, the Respondent submits that EUCFR was not legally binding and had a merely declaratory status and, as a result, Article 21 **EUCFR** could not be used as a source from which to derive a general principle of non-disrimination.

4. Although the ECJ has already *referred* to the EUCFR in a number of judgments when it wanted to confirm that the Community law order recognises particular fundamental rights **(R v SoS ex parte BAT** (Case C-491/01), there has been no judgement *based* on the **EUCFR** so far.
5. What is more, even if the principle of non-discrimination was to be derived from provisions of ECHR, then it should be underlined that in **Mannesmannrohren-Werke AG v Commission** (Case T-112/98), the CFI emphasised that although the ECHR has special significance in defining fundamental rights recognised by the Community, the Court has no jurisdiction to apply the ECHR itself.
6. An important point should be made, that if the ECJ is to decide on the cases related to the

general principles of Community law, then it leads to an undesired concentration of power in the Court, against whose rulings there is no appeal.

QUESTION 2a

Respondent submits as follows:

1. The submission that the national court should assume the proportionality of the exception unless the contrary is rather probable is the better option.
2. In case C-144/04, **Werner Mangold-v- Rüdiger Helm,** the ECJ already found out that if the purpose of the legislation is plainly to promote integration of unemployed workers, *the legitimacy of such public interest objective cannot reasonably be thrown in doubt*. As the Court submits further *An objective of that kind must as a rule, therefore, be regarded as justifying, 'objectively and reasonably', as provided for by the first subparagrap*h *of Article 6(1) of Directive 2000/78, a difference of treatment on grounds of age laid down by Member States.*
3. If the stance is taken that such objectives are objectively and reasonably legitimate, only when it could be made probable, that they are unnecessary and inappropriate, the court should investigate the matter.
4. As the ECJ points out in this case, *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.* If we assume that the legislator is rational, as the law theory does in order to effectively construe legal texts, he should not choose a disproportionate measure. Hence unless it is apparent that the proportionality of a measure taken is to be reasonably thrown in doubt, the court should not investigate the issue of proportionality. In the **Mangold** case, the referring Munich court found it apparent, that a measure linking the conditions of work solely on the grounds of age was suspicious, thus it tested it on proportionality. As a result, it found out that it was inappropriate. The outcome was correct.
5. It is necessary to point out further, that a contrary view on the burden of proportionality proof, would amount to the possibility of a complex Social Security Regulations from being too easily challenged. Such rationale must also be taken into consideration as in Case C-406/04 **De Cuyper v. Office national de l'emploi** the Court did, thus protecting the integrity of the Social Security System.
6. It is far to easy to simply reiterate, that the individual is the weaker party thus it should be done as far as possible to improve his stance. The legitimate interests of the state and the integrity of the Social Security System needs to be taken into account. To make it incumbent on the state to prove a further circumstance when it is already plain that the measure is taken to reach an objectively and reasonably legitimate aim would make the whole Social Security System vulnerable to free-riders, as pointed out in the AG opinion in **case C-293/83 Gravier v City of Liege**.
7. The recent tax cases **Lindfors**[1] and **Schempp**[2] provide other examples of such finding. 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 a valid claim on discrimination; the migrant citizen had to show that they had suffered disadvantage in comparison with nationals.
8. The stance, that national court should assume propotionality is even strenghtened by the fact, that placing the burden of proof differently may too invoke Member States liability for non implementation, where they should be free of liability. As eminent Scholars point out(J Steiner & L Woods, 'Textbook on EC Law' (8th ed, London: Blackstone 2003, chapter 5.4.3.)because the rules of Community law are often not clear, the court will restrict itself solely to the question of whether there was a patent error in the Member State's action *(*case C-44/94**, R v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisation**). 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

[1] Case C-365/02 *Lindfors* [2004] ECR I-7183, para. 34.
[2] Case C-403/33 *Schempp* v. *Finanzamt München* [2005] ECR I-6421, para. 45.

dangerous, it would be contrary to the principle of legal certainty, itself a respected principle of Community laws .

9. Further, it needs to be highlighted, that directives are not a measure of unifying law but of harmonization. They need to take different situation in every State. Assuming that an exception is disporportionate would make it very difficult for the state to tune the law to their internal situation. As AG in C-411/05 **Félix Palacios de la Villa-v-Cortefiel Servicios SA,** noted, *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.* He went on further to state *A possibility of justifying national provisions under a directive is quite different from a directive being 'without prejudice' to such provisions*, and in recital 12 ther wording is the same as in recital 14, to which primarily the words of AG applied.
10. AG Mazak went further to say, *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*
11. To conclude, it would be too an impractical answer to state, that the national court should in all cases where the Member State introduced a an exception to a freedom especially given under a directive and not to a fundamental one, investigate whether the measure is necessary and appropriate. If the courts needed to investigate it every single time, they would be clogged. As a result the proceedings would be cost and time consuming, putting the maxim justice delayed is justice denied into question. It is mostly ineffective, that the court should be presented extremely COMPLICATED evidence that none of the possible measures would be more proportional than the applied one. Only when it is apparent that the measure may not be necessary and appropriate, shall the court investigate the measure. Only than it will be encumbered on the State to show that the threshold of proportionality are met, thus protecting the individual, giving the useful effect to the EU law and saving the courts resources.

QUESTION 2b

The Respondent is of opinion that the situation of the main proceedings does not undermine the general principle of Community law, which is non-discrimination in respect of age, and that the national rules applied to this field are consistent with the Directive 2000/78, which is the right source of Community law in the field of equal treatment in employment and occupation. And that, therefore, no abuse under Community law has occurred.

1. The Respondent states that the Directive 2000/78 applies to the situation as in the main proceedings where an in issue of access to employment is raised. This is because such a case is covered by this Directive as stated in its Article 3(1(a)). The Respondent also notices that this case does not underlie the exception established in Article 3(2) of this Directive, as the Applicant was not refused the post on grounds of his nationality.

2. The Respondent shares the opinion of the Advocate General Mazak on the case **Félix Palacios de la Villa v Cortefiel Servicios SA**, which the opinion states in the 95th paragraph that the intention of the makers of Article 13 **EC Treaty** as well as of the makers of the Directive was to leave as much space as possible to the Community legislature and the Member States to take appropriate actions with regards to the issues covered by these provisions.
3. And so, said Article 13 states: *"the Council (…) may take appropriate action to combat discrimination …"*. Also the said Directive states that under some circumstances *"… Member States may provide that difference of treatment on grounds of age shall not constitute discrimination…"*.
4. The Respondent notices that on grounds of Article 13 s 1 and 2 itself in connection with Article 251 **EC Treaty** – so, in accordance with the will of the Member States being the pillars of this Community, which the will was expressed by each Member States in the way prescribed by their own constitutional traditions and provisions – the Council adopted the Directive with full dedication to the provisions of the **EC Treaty**.

5. According to Article 249 **EC Treaty**: *"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."* It is an undisputed issue of law that a directive *"gives the State some discretion as to the form and method of implementation"* (**Steiner and Wood's Textbook on EC Law**, 2003, pp. 85-86).
6. The Respondent hereby reminds the findings of Court in 2nd paragraph of the famous **Yvonne van Duyn v Home Office** with regards to the directives: *"The useful effect of such an act would be weakened if individuals were prevented from relying on it before the national courts and if the latter were prevented from taking it into consideration as an element of Community law."* In the light of this finding the text of the Directive must be examined in this case properly.
7. The Respondent also observes that the Directive should be read considering that the 25th recital of the Preamble to the Directive states that *"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 Members States."* In this situation a special attention must be dedicated to the rules established by Article 6(1) of the Directive, which regulates the situations, under which exceptions may occur, after using the phrase *"(n)otwithstanding Article 2(2)"*. The meaning of this phrase leads an interpreter of the Directive to a statement that social and economical conditions of a particular Member State justify a number of exceptions from the matter of the Directive's regulation.
8. The findings of the 99th paragraph of the Opinion of Advocate General Mazak as well as of the 70th paragraph of the judgment itself in **Palacios** make us consider that – in accordance with the principle of subsidiarity: *"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 national rule as this in the issue of these proceedings does not, therefore, affect, any rules of Community law.
9. The Respondent notices that the facts of the main proceedings, including the economic and social situation and structure of the Member State concerned as well as the objectives of its policy in the field of employments, occupation and vocational education, fully justify the dedication of the national legislature to the exceptions established by Article 6(1) of the Directive. They are also consistent with the Community's aim as established in Article 2 **EC Treaty**, which are sustainable development and high level of employment.

Taking into account the aforementioned facts, findings and statements, the Respondents observes that there is no ground to undermine the legal certainty created by the Directive 2000/78 in the field of employment and occupation and therefore to undermine the legality of the exceptions from any general principle of Community law under Article 6(1) of the Directive. The Respondent highlights that no law should be applied with no reference to the factual situation it regulates and also that the skeleton of Community law created by the EC Treaty must be – for the purposes of full legal capacity of the Community – fulfilled with rules describing the particular situation being in the field of the Community's interest, such as those rules established in the Directive concerned.

QUESTION 3a

Respondent submits as follows:

1. The Sumsare University can by no means be regarded as an emanation of State in the respect of fulfilling the state's obligations contained in an EC directive.
2. The University is a private body that is willing to have as little as possible in common with the state as possible. It would have enormous problems in meeting the requirements set for a public university.

3. The leading cases in that respect are **Marshall v Southampton & South West Hampshire Area Health Authority (Teaching)** (case 152/84) and **Foster v British Gas plc** (case C-188/89).
4. The **Marshall** case established that a Member State is liable for acts of public body, regardless of the capacity in which the latter is acting, whether as employer or as public authority. A public body designed to provide public services in area of health care was thus found to fall within the definition of State. Are we encountered with a similar situation here?
5. The answer to this question must be based on the ruling in **Foster** case. The Court observed in para 20 of its judgement 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.*
6. Analysing the facts of the case we come to a conclusion that the Sumsare University has no special powers. Nor was not been made responsible, pursuant to a measure adopted by state for providing public services. The University is an enterprise, pursuing business objectives. It does not want to be bound by means that limit its ability to freely set students fees. The university is funded by a vast majority from the fees, not by subsidies paid to it directly by the state. By the mere fact that it receives subsidies encouraging it to improve the employment prospects, payable to other wholly private businesses as well, it cannot be establish that it is a body representing a state. The fact that 70% of the fees is paid of the governmental loan means just as much that students have other means of funding their study than the loan- in addition that the university in itself does not grant these loans. Once the loan is granted, a student may as well choose another school to spent it.
7. The control exercised over it by the state is very scarcely and the magnitude of it is negligently bigger than that exercised over almost all entrepreneurs. In many branches of modern economy it is necessary to obtain licence of some kind, e.g. in aviation, petrol services. This requirement does at any level amount to the fact that such businesses are to be treated as an emanation of the State. Nor the fact that it needs to supply the government with some statistical data. It is common that statistical information is collected by governmental agencies in order to enable the government to better manage State. The burden lies on private bodies to supply statistical data. In the light of these submissions, it cannot be said that Sumsare University falls within the scope of an emanation of State as defined in para 20 of **Foster,** hence it cannot be regarded as one.
8. This submission is not touched by para 18 of that judgement, where the court mentioned a broader definition by stating, *subject to the authority or control of the State or had special powers* it shall be assumed that this broad statement was refined and curbed as follows in para 20. Otherwise, by stating that any form of being subject to the authority or control of the state, would mean that everyone controlled in any way by the state would fall within the definition of state. This would be as absurd as to put the whole rationality and consistency of the EC law into question let alone the principle of legal certainty.
9. In the light of other ECJ rulings it is clear as well as from the Foster perspective that the University cannot be treated as part of the State machinery. The Sumsare School is not even a legally independent public body, which according to **Haim v KLV** (case C-424/97) would amount to being an emanation of State.
10. What is more, the university is not an organ of the administration, including decentralised authorities such as municipalities as in **Fratelli Costanzo SPA v Comune di Milano** (case 103/88) stated.
11. Having duly analysed the EC law and the facts of the case, the submission that the Sumsare University falls not within the definition of the State, seems infinitely more convincing than the alternative.

QUESTION 3b

Having in mind the negative answer for the question whether the Sumsare University is a body which falls within the definition of the State, the Respondents claim that there is no prohibition on age discrimination arising from the Question 1 between the Sumsare University (private employer) and the Applicants (prospective employees).

1. Considering provisions of the Directives, they *"shall be binding [...] upon each Member State to which it is addressed"* (art. 249 ECT) what excludes from its´ scope what is called a "horizontal effect." Recongition of this effect would lead to recognise power to enact obligations for individuals with immediate effect, what is reserved to the areas of Regulations - **El Corte Ingles SA v Rivero** (192/94).
2. Such direct application of the Directive´s provisions between private bodies is excluded on basis of judgment **Marshall v Southampton Area Health Authority** (Case 152/84), which allows reliance on a directive only against a State. In the same spirit ECJ states in **Paola Faccini Dori v Recreb Srl**: "*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*." This exclusion is justified also by the judgment **Becker v Finanzamt Miinster-Innenstadt** (8/81): *"a Directive may not on itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person."*
3. If the answer to Question 1 (b) is positive, the Respondents are of the opinion that general pricnciples of Community law are aid to interpretation, may be invoked to challenge Community action or to support a claim for damages against the Community, but there is no place to base solely on them any demand – they have no direct applicability, whilst the EU Charter of Fundamental Rights still has no legal effect, being more a political declaration (J Steiner & L Woods, "**Textbook on EC Law**", 2003, pp 88-126).
4. Although the principle of direct effect of the Treaty provisions is undoubted, the Respondents cannot agree with the statement that Article 13 of ECT is of this character. In case **N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingien (26/62)** is stated that such a provision must be clear, unambiguous, unconditional and must not depend on further action. Whilst Article 12 analysed in the cited case indeed fulfilled all this conditions and could have been declared as directly effective, Article 13 does not fulfill them. As "*the Council [...] may take appropriate action to combat discrimination"* – that provision definitely depends on further action. Moreover, is neither clear nor unambigous.

Summing up all aforementioned arguments, it seems to be beyond any doubt that prohibition on age discrimination arising from the question 1 is not directly applicable between individuals.

QUESTION 4

The Respondent observes that the Community is based on the provisions of the **EC Treaty**, which the provisions constitute the pillars of the Community and do express the will of the Member States and the people of the Member State who have established the Community. Therefore, the Treaty must be read as the primary source of the Community law and its provisions should not be overruled by any means.

1. The national court's question touches an issue which is connected with the regulations of law inside Member States. Therefore, this question should be answered in the light of Article 5 EC Treaty.
2. First of all, this provision provides us with the following rule: *"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."* Therefore, the question should be answered with a high respect for the content of Articles 18 and 39.
3. Next, the Respondent observes that the Community is based on the principle of subsidiarity, which the principle established also in Article 5 EC Treaty ("*In areas which do not fall within*

its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in 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 effects of the proposed action, be better achieved by the Community.) is shared by many constitutional systems of the Member States. This again requires and allows the Community to act in the Member State with a commitment to the particularly involved Treaty provisions, only if necessary.

4. Further, in accordance with the same provision, the Community may act beyond its powers when it is necessary for the fulfillment of its aims. In the light thereof the Respondent observes that the aim of the Community, as stated in Article 2 EC Treaty, is build the cohesion among Member States. Further to this, the Respondent states that what is not prescribed in the provisions discussed below should not be a subject of any action of the Community as far as internal affairs of a Member State are involved.
5. The rights of citizens mentioned in Article 18 are subjects to limitation laid down in the Treaty. Therefore, it is important to analyze the content of Article 39 in order to answer fully the question of the national court. Article 39 constitutes a ban of discrimination based of nationality. It is not, therefore, possible to interpret these provisions as establishing any provisions applying to the relations between citizens of the same Member State.
6. For the credibility of the institutions of the Community as well as for the legal certainty of those who interpret the Community law, the Respondent asks the Court to give judgment for the Respondent, so that it will be clear that in the Community there is no space for overruling the most important provisions of the founding Treaty. The Respondent reiterates that his statements are fully justified in the light of the aforementioned Treaty provisions.

QUESTION 5a

The Respondent submits as follows

1. The issue of educational loans is exclusively governed by the internal law. According to section 4 of the Constitution, the applicable law here was ‘the 2000 Decree’. The ‘2000 Decree’ states that the permanent resident status is not obtainable by the people who are nationals of the Kingdom LAREDEF but were not born in ROOP. Therefore, they do not fulfill the requirements for obtaining of an educational loan.
2. As there is no cross-border element in the given case, the state can in principle discriminate its own nationals (case C- 64/96 **Uecker and Jaquet**). What is more, the introduction of ‘the 2000 Decree’ was fully justified from both national and Community law perspective, as it sought to improve the perspectives of the young persons in the region.
3. Furthermore, the limitation of the loan to persons either born or having the permanent resident status in ROOP had its reason in the budget limitations, which forced the regional government to impose such regulations. It should not be overlooked that most Treaty rules provide for some derogation in order to protect important public interests (Articles 30 (ex 36) and 39(3) (ex 48(3))).
4. The derogations of the Treaty rules are allowed if the principle of proportionality is respected, as in **Watson** (case 118/75) and **De Cuyper v. Office national de l’emploi** [2006] ECR I-000.(Case C-406/04)).
5. The character of even fundamental rights is not an absolute one. The judgement in **J. Nold KG v Commission** (case 4/73), show that such rights are always subject to limitations because of public interest, as well as limitations justified by the general objectives of the Community **(O'Dwyer v Council** (cases T-466, 469, 473-4 & 477 /93)**)**
6. The limitations imposed through the ‘2000 Decree’ find its justification also in the case of **Brown v. Secretary of State for Scotland** [1988] ECR 3205. The court stated therein that a proportionate residence can be required before grants and loans could be awarded. Such solution was adopted due to economic reasons. It seems that the government of ROOP also had strong economic reasons to prevent the other nationals of the Kingdom of LAREDEF, who were not born in ROOP, from obtaining a financial aid in the form of a loan.

QUESTION 5b

The Respondent is of the opinion that the Applicant has no right to demand the educational loan mentioned in the facts given. Thereof, the Respondent claims that the State is in no breach of Community law.

1. Despite the fact that "all Union citizens [...] shall enjoy equal treatment with the nationals" (art. 24(1) of the **Directive 2004/38**), the same legal Act leaves the possibility for the host Member State of derogation, inter alia, the obligation to grant "maintenance aid for studies", until the moment of acquisition of the right of permanent residence by the Applicant who has not a status of a, e.g., worker.
2. The concept of "worker" has a specific Community meaning. A job seeker fallsinto the definition of a worker only when he "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"(paragraph 26 of **Collins-v-Secretary of State for work and pensions,** 138/02) what is not complied due to the facts given.
3. Moreover, the concept of "worker" is not uniform in Regulation 1612/68 and "in Title II of Part I [art.7 is located in this part] of the regulation this term covers only persons who have already entered the employment market" (paragraph 32, **Collins-v-Secretary of State for work and pensions,** 138/02). This condition in not fulfilled by the Applicant.
4. Despite the fact that article 7 of **Regulation 1612/68** grants for "a worker who is a national of a Member State [...] in the territory of another Member State a right to enjoy the same social [...] advantages as [host Member State's] national workers," and having into account that ECJ´s jurisprudence established that a job seeker falls within the scope of a term "worker" (292/89, **Antonissen** 1991),
   the Respondent claims that the term "educational loan" for higher education has nothing in common with guaranteed by community law rights to „social advantage" or "vocational schools and retraining centres" (article 7 (3) of **Regulation 1612/68**), which are connected with a status of worker (job seeker), not a student or potentional student.
   Because of that, any demand of educational loan under mentioned circumstances can have no basis in the **Regulation 1612/68**.

Taking into account the aforementioned facts, the Respondent observes that there is no ground to claim that an EU citizen lawfully resident but without permanent residency status, shall be found eligible to receive an educational loan.
Although the State could legislate differently and permit the loan for such person, there is no Community obligation implied on the Member State to do so.