OPINION OF ADVOCATE GENERAL JACOBS

delivered on 20 January 2005 [1]

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.

1 — Original language: English.

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 Member States 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 Member States 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.

9. Secondly, according to Austria, by contesting for the first time in its application before the Court the discriminatory character of subparagraph 4 of the contested national provision, the Commission has extended the subject-matter of its infringement action.

Admissibility

7. Austria objects to the admissibility of the Commission's action on two interrelated grounds.

8. First, it claims that the Commission has altered the subject-matter of the action between the pre-litigation and the judicial phases thereby preventing Austria from properly preparing its defence. According to Austria, the first letter of formal notice of 9 November 1999, the supplementary letter of formal notice of 29 January 2001 and the reasoned opinion of 17 January 2002 stated that the infringement related to the recognition of secondary education diplomas obtained in other Member States. In contrast, the application before the Court refers to discriminatory conditions of access to higher education in Austria as the contested infringement, the recognition of secondary education diplomas no longer being at issue.

10. It is settled case-law that 'in the context of proceedings brought by the Commission under [Article 226 EC], the letter addressed by the Commission to the Member State inviting it to submit its observations and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, which cannot thereafter be extended'. [2] The Court has also consistently stated that 'the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure' [3] and that 'the application must be based on the same grounds and pleas as the reasoned opinion'. [4] Those requirements cannot, however, be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited. [5]

2 — See, inter alia, Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, at paragraph 6 of the judgment.

3 — See, inter alia, judgment of 9 September 2004 in Case C-195/02 *Commission* v *Spain*, not yet reported, at paragraph 36.

4 — See, inter alia, Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, at paragraph 18 of the judgment.

5 — See, inter alia, Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, at paragraph 25 of the judgment.

11. I do not agree that the Commission has altered the subject-matter of the dispute to any relevant degree. It suffices to compare the wording of the two letters of formal notice and the reasoned opinion with that of the application to demonstrate that the complaints and grounds on which the Commission has brought the action have remained consistent throughout the pre-litigation and judicial phases.

12. Moreover, in response to Austria's reply to its first letter of formal notice of 9 November 1999, the Commission issued a supplementary letter of formal notice on 29 January 2001, of which the sole purpose was to clarify any 'misunderstandings and confusion that emerge from the reply of the Republic of Austria'. In that supplementary letter, the Commission made very clear the nature of its claims and, in particular, the fact that the alleged breach of Community law did not relate to the issue of recognition of secondary education diplomas in Austria, but to the conditions governing access to higher and university education in Austria of students holding a secondary education diploma from other Member States, and in particular, the indirectly discriminatory character of the contested national provision. The same line of reasoning was then repeated in the reasoned opinion and in the application before the Court. The Austrian Government was thus duly informed of the nature of the alleged infringement and was in a position to prepare its defence.

13. With respect to the second objection relating to subparagraph 4 of the contested national provision, the Commission has indicated that it mentioned it in its reply only for the purposes of illustrating the fact that subparagraph 4 replaced a similar provision which was in the Commission's view directly discriminatory. The Commission did not therefore intend to add a further complaint as regards subparagraph 4. On that basis, I do not propose to consider subparagraph 4 as a separate issue. That being so, the objection by the Republic of Austria on this point is no longer relevant.

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 Member State, 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

6 — Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ 1992 L 209, p. 25 and Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L 19, p. 16.

7 — Case C-65/03, judgment of 1 July 2004, not yet reported.

8 — Case 293/83 [1985] ECR 593.

9 — Paragraph 25 of the judgment.

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

10 — See Case C-55/00 *Gottardo* [2002] ECR I-413, paragraphs 31 to 33 of the judgment and the case-law there cited.

11 — *Commission* v *Belgium*, cited in footnote 7, at paragraph 28 of the judgment.

12 — See, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, at paragraph 36 of the judgment.

13 — *Commission* v *Belgium*, cited in footnote 7, at paragraph 29 of the judgment.

14 — Ibid. at paragraphs 29 and 30 of the judgment.

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

15 — Article 39(3) EC and Article 46 EC.

16 — As regards national measures which are truly non-discriminatory but may none the less restrict free movement, as I have already discussed in my Opinion in Case C-76/90 *Säger* [1991] ECR I-4221, with respect to the freedom to provide services, the case-law on objective justification and proportionality should apply.

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

17 — Case C-158/96 *Kohll* [1998] ECR I-1931, at paragraph 41 of the judgment and Case C-368/98 *Vanbraekel* [2001] ECR I-5363 at paragraph 47. On those judgments and their consequences see V. Hatzopoulos, 'Killing national health and insurance systems but healing patients? The European market for health-care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 *Common Market Law Review*, pp. 683 to 729.

18 — Commission/Italy judgment, and Case C-35/98 Verkooijen [2000] ECR I-4071, at paragraph 48.

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 Member State 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

19 — It is worth noting that in both cases the Court did not accept on the facts of both cases that the risk actually existed.

20 — Articles 149 and 150 EC state that the Community action should fully respect the responsibility of Member States for the content of teaching and organisation of education systems and vocational training, respectively. As regards health systems, Article 152(5) EC similarly states that Community action must fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.

21 — Data referring to 2001 show that public spending on all levels of education amounts, on average, to 5.5% of GDP in the EU. When public spending on higher education is considered alone, the percentage is, on average, 1.4% of GDP in the EU. As regards public expenditure on health, in 2002 the EU average was 6.4% of GDP. Austria's public expenditure on both sectors corresponds roughly to the average: 5.8% GDP in education, of which 1.4% GDP on higher education, and 5.4% GDP on health. Source OECD 2004.

22 — See the judgment in *Kohll*, which, according to some authors, sent 'shivers through all social security and health-care funds', V. Hatzopoulos, at p. 688 of his article, both cited in footnote 17 above.

23 — See Case-157/99 *Peerbooms* [2001] ECR I-5473, decided the same day as *Vanbraekel*, in which the Court accepted that it 'is generally recognised that the hospital care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for health care are not unlimited, whatever the mode of funding applied', at paragraph 79 of the judgment.

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 Member State. 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

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 footnote 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 footnote 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.

26 — Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ 1993 L 317, p. 59.

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 footnote 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.

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 for mobility 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.

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 footnote 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 footnote 25. The latter are summarised by Advocate General Geelhoed at paragraph 65 of his Opinion in the same case.

31 — *Gravier*, cited in footnote 8; and Case 24/86 *Blaizot* [1988] ECR 379.

40. Second, there are students who seek access to more liberal neighbouring education systems in order to escape restrictions in their Member State of origin. Their intention, at least at the outset, is to return to their Member State 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

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.

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

33 — Cited in footnote 25.

34 — Cited in footnote 12.

35 — *D'Hoop*, at paragraph 28 of the judgment, and *Grzelczyk*, at paragraph 31.

36 — *D'Hoop*, at paragraphs 31 and 32 of the judgment.

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 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

37 — See also the Opinion of Advocate General Geelhoed in *Bidar*, cited in footnote 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 footnote 12, at paragraph 38 of the judgment. That restriction was confirmed in Case C-138/02 *Collins*, judgment of 23 March 2004, ECR I-2703, although that case did not refer to the field of public education.

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 Member State 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,

39 — In the context of the public-health exemption under Article 30 EC, see judgments of 5 February 2004 in Case C-24/00 *Commission* v *France* ECR 1277, at paragraph 53, and in Case C-270/02 *Commission* v *Italy*, ECR 1559 at paragraphs 20 to 22, and the case-law cited therein.

40 — *Commission* v *France*, cited in footnote 39 above, at paragraph 54 of the judgment and *Commission* v *Denmark* [2003] ECR I-9693, at paragraph 47.

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

41 — See, inter alia, Case C-42/89 *Commission* v *Belgium* [1990] ECR I-2821, at paragraph 24 of the judgment.

42 — In 2000 the UK was by far the biggest net importer of foreign students. Source OECD 2002.

43 — *Grzelczyk*, cited in footnote 25, at paragraph 44 of the judgment.

44 — Case 115/78 *Knoors* [1979] ECR 399.

45 — Case C-61/89 *Bouchoucha* [1990] ECR I-3551.

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.

46 — On this point, see the observations of Advocate General La Pergola in his Opinion in Case C-212/97 *Centros* [1999] ECR I-1459, in particular point 20.

47 — Case C-436/00 *X. and Y.* [2002] ECR I-10829 at paragraph 42 of the judgment; and *Centros*, cited in footnote 46 above, at paragraph 25.

48 — Case C-473/93 *Commission* v *Luxembourg* [1996] ECR 3207, at paragraph 40 of the judgment and the case-law cited therein.

49 — Joined cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279.

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.