

JUDGMENT OF THE COURT (Second Chamber)

7 July 2005 *

In Case C-147/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 31 March 2003,

Commission of the European Communities, represented by W. Bogensberger and D. Martin, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

Republic of Finland, represented by A. Guimaraes-Purokoski and T. Pynnä, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: German.

Republic of Austria, represented by H. Dossi and E. Riedl, acting as Agents, assisted by C. Ruhs and H. Kasparovsky, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Fifth Chamber acting for the President of the Second Chamber, C. Gulmann, J. Makarczyk (Rapporteur), P. Kūris and J. Klučka, Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 November 2004,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2005,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities is seeking a declaration from the Court that, by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as holders of secondary education diplomas awarded in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC.

The legal framework

Community legislation

- 2 Article 3(1) EC provides:

‘For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

...

(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States’.

3 The first paragraph of Article 12 EC provides:

‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

4 According to Article 149 EC:

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

2. Community action shall be aimed at:

...

- encouraging mobility of students and teachers, inter alia by encouraging 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.

...'

5 Finally, under 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 ...'

National legislation

- 6 Paragraph 36 of the Law on University Studies, (Universitäts-Studiengesetz, 'the UniStG'), entitled 'university entrance qualification' (Besondere Universitätsreife), provides:
 - '(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 Universitätsberechtungsverordnung [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.'

Pre-litigation procedure

- 7 On 9 November 1999 the Commission sent to the Republic of Austria a letter of formal notice by which it claimed that Paragraph 36 of the UniStG infringes Articles 12 EC, 149 EC and 150 EC. It requested the Republic of Austria to submit its observations within two months.
- 8 By letter of 3 January 2000 the Republic of Austria replied to that letter of formal notice.
- 9 On 29 January 2001 the Commission sent a supplementary letter of formal notice to the Austrian authorities, to which those authorities replied by letter of 3 April 2001.

- 10 Since it was not satisfied by the replies submitted by the Republic of Austria, the Commission sent it a reasoned opinion on 17 January 2002, calling on it to adopt within two months of the date of notification of that opinion the measures necessary to ensure that holders of secondary education diplomas awarded in other Member States can gain access to Austrian higher or university education under the same conditions as holders of secondary education diplomas awarded in Austria.

- 11 Finding the Austrian Government's reply of 22 March 2002 unsatisfactory, the Commission brought the present action.

- 12 By order of the President of the Court of 17 September 2003, the Republic of Finland was granted leave to intervene in this case in support of the form of order sought by the Commission.

The application to reopen the oral procedure

- 13 By application of 8 February 2005, received at the Court Registry on 15 February 2005, the Republic of Austria requested the reopening of the oral procedure. It bases its request on information emanating from the media after the hearing. According to that information, five German Länder plan to introduce student registration fees of EUR 500 as from winter 2005/06. The introduction of those registration fees would have the effect of interfering with the regulation of access to Austrian higher education.

- 14 Moreover, the reopening of the oral procedure would enable the Republic of Austria to debate the Opinion of the Advocate General.
- 15 On this point, it is sufficient to recall that the Statute of the Court and its Rules of Procedure make no provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 2).
- 16 As regards the other reason put forward by the Republic of Austria for the purpose of reopening the oral procedure, it must be borne in mind that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order that the oral procedure should be reopened in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, paragraph 19, and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraph 12).
- 17 Since this case does not correspond to either of those two situations, the Court considers that there is no reason to order the reopening of the oral procedure.

Admissibility

Arguments of the parties

- 18 The Republic of Austria contends that the action is inadmissible on the ground that the Commission altered the subject-matter of the procedure between the pre-

litigation phase and this action. Thus, the Commission submitted in its application that the proceedings do not concern the academic recognition of secondary education diplomas as carried out by the Austrian authorities, whereas in the reasoned opinion it defined the subject-matter of the procedure as being 'whether the Austrian rules governing the academic recognition of diplomas awarded in other Member States and the access by holders of those diplomas to higher education are compatible with Community law'.

- 19 In the alternative, the Republic of Austria contends that the plea relating to the regulatory power of the Austrian authorities under Paragraph 36(4) of the UniStG is inadmissible on the ground that the Commission puts forward, in its application and for the first time, a set of arguments in that regard.
- 20 In response, the Commission submits that the subject-matter of the procedure initiated against the Republic of Austria has remained identical between the pre-litigation phase and this action. It notes in particular that, in the supplementary letter of formal notice which it sent to the Republic of Austria, it stated that the subject-matter of the procedure concerned only the compatibility of Austrian legislation with the EC Treaty as regards access to higher education by holders of general university entrance qualifications awarded in other Member States, to the exclusion of the academic recognition of diplomas.
- 21 As regards Paragraph 36(4) of the UniStG, the Commission states that it did not intend to put forward a new complaint. It sought merely to bring to the Court's attention the fact that that provision, which introduced indirect discrimination against nationals of other Member States, has replaced a similar provision which gave rise to direct discrimination based on nationality. In so doing, the Commission did not put forward a new complaint, but merely illustrated the fact that, while it accepts the Republic of Austria's argument that Paragraph 36 of the UniStG does not give rise to direct discrimination, it none the less constitutes a covert form of discrimination.

Findings of the Court

- 22 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 23; Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10, and Case C-185/00 *Commission v Finland* [2003] ECR I-14189, paragraph 79).
- 23 Accordingly, the letter of formal notice from the Commission to the Member State concerned and then the reasoned opinion issued by it delimit the subject-matter of the dispute, so that it cannot thereafter be extended. Consequently, the reasoned opinion and the application must be based on the same complaints (see, in particular, Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 55; Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 18, and *Commission v Finland*, cited above, paragraph 80).
- 24 However, that requirement cannot be stretched so far as to mean that in every case the statement of the complaints set out in the letter of formal notice, the wording 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 as defined in the reasoned opinion has not been extended or altered (see, in particular, the judgments cited above in *Commission v Germany*, paragraph 56, *Commission v Spain*, paragraph 19, and *Commission v Finland*, paragraph 81).
- 25 In the present case, the Commission did not alter the subject-matter of the dispute between the pre-litigation and judicial phases. In its application, the Commission

formulated complaints and pleas in law identical to those referred to in the two letters of formal notice and the reasoned opinion. The Republic of Austria was thus duly informed of the nature of the infringement of Community law alleged by the Commission and, in particular, the indirectly discriminatory nature of the national provision in question, which related therefore to the conditions of access to the Austrian higher and university education system for students holding secondary education diplomas from other Member States.

- 26 With regard to the objection relating to Paragraph 36(4) of the UniStG, the Commission has clearly stated that it mentioned it only for the purposes of illustrating the fact that that subparagraph had replaced a similar provision which was directly discriminatory. It is not therefore a new complaint.
- 27 Accordingly, the Commission has not altered or extended the subject-matter of the dispute in its application and the action is admissible.

Substance

The scope of Community law

Arguments of the parties

- 28 The Commission is of the opinion that the discrimination contained in Paragraph 36 of the UniStG relates solely to the conditions of access to Austrian higher or university education, a matter which, in its view, falls within the material scope of the Treaty.

- 29 The Republic of Finland also takes the view, like the Commission, that the action relates solely to the conditions of admission to Austrian higher education of holders of diplomas awarded in another Member State, and that it does not affect the question of the academic recognition of diplomas.
- 30 The Republic of Austria asserts that Paragraph 36 of the UniStG governs the recognition of secondary education diplomas for the purpose of gaining access to Austrian universities. However, it submits that the academic recognition of diplomas for the purpose of commencing or pursuing higher education or other training does not fall within the scope of the Treaty.

Findings of the Court

- 31 Under the first paragraph of Article 12 EC, within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is to be prohibited.
- 32 As the Court has already held in paragraph 25 of Case 293/83 *Gravier* [1985] ECR 593, the conditions of access to vocational training fall within the scope of the Treaty (see also Case C-65/03 *Commission v Belgium* [2004] ECR I-6427, paragraph 25).
- 33 It also follows from the case-law that both higher education and university education constitute vocational training (see Case 24/86 *Blaizot* [1988] ECR 379, paragraphs 15 to 20, and Case 42/87 *Commission v Belgium* [1988] ECR 5445, paragraphs 7 and 8).

- 34 In the present case, Paragraph 36 of the UniStG lays down the conditions governing access to higher or university education in Austria. In that connection, it provides that, in addition to satisfying the general requirements for access to higher or university studies, holders of general university entrance qualifications awarded in other Member States must prove that they meet the specific requirements governing access to the chosen course, which are laid down by the State which issued those qualifications and give entitlement to direct admission to those studies.
- 35 In those circumstances, the provision at issue must be examined in the light of the Treaty and, in particular, in the light of the principle of non-discrimination on the grounds of nationality contained in Article 12 EC.

The plea alleging infringement of Community law

Arguments of the parties

- 36 The Commission asserts that the right to equal treatment laid down by Article 12 EC necessarily includes the right for holders of diplomas awarded in another Member State, once their diploma is deemed to be equivalent, not to be made subject to conditions which are not imposed on students who have obtained their diploma in Austria for the purpose of gaining access to the same Austrian higher or university education course. Otherwise, that article would be deprived of all useful effect.
- 37 Pursuant to Paragraph 36 of the UniStG, access by holders of diplomas awarded in another Member State to certain Austrian higher or university education courses is made subject to a condition to which holders of general university entrance qualifications awarded in Austria are not subject.

- 38 The Commission submits that that condition constitutes indirect discrimination since, although Austrian nationals who have obtained a diploma in another Member State are also subject to that same condition, it affects nationals from other Member States more than Austrian nationals.
- 39 The Republic of Finland takes the view, like the Commission, that the condition laid down in Paragraph 36 of the UniStG, which does not concern holders of Austrian secondary education diplomas, is contrary to Community law, in particular to Article 12 EC.
- 40 The Republic of Austria disputes the Commission's analysis according to which access to higher education is subject in Austria to a two-stage procedure consisting of, first, recognition on an equal basis of diplomas awarded on completion of secondary studies and, second, verification of other conditions. Admission to Austrian universities is, in reality, subject to proof of general aptitude and of specific aptitude for university studies and no condition other than academic recognition of the qualification giving access to university studies is required.

Findings of the Court

- 41 According to settled case-law, the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (see, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-65/03 *Commission v Belgium*, cited above, paragraph 28, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 51).

- 42 In the present case, the national legislation in question provides that students who have obtained their secondary education diploma in a Member State other than the Republic of Austria and who wish to pursue their higher or university studies in a given area of Austrian education must not only produce that diploma, but also prove that they fulfil the conditions of access to higher or university studies in the State where they obtained their diploma, such as, in particular, success in an entrance examination or obtaining a sufficient grade to be included in the *numerus clausus*.
- 43 It appears therefore that Paragraph 36 of the UniStG introduces not only differential treatment to the detriment of students who have obtained their secondary education diplomas in a Member State other than the Republic of Austria, but also between those same students according to the Member State in which they obtained their secondary education diploma.
- 44 The opportunities offered by the Treaty relating to free movement are not fully effective if a person is penalised merely for using them. That consideration is particularly important in the field of education in view of the aims pursued by Article 3(1)(q) EC and the second indent of Article 149(2) EC, namely encouraging mobility of students and teachers (see Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraphs 30 to 32).
- 45 Case-law has moreover established 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 the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and *D'Hoop*, cited above, paragraph 28).

46 Thus, the legislation in question places holders of secondary education diplomas awarded in a Member State other than the Republic of Austria at a disadvantage, since they cannot gain access to Austrian higher education under the same conditions as holders of the equivalent Austrian diploma.

47 Thus, although Paragraph 36 of the UniStG applies without distinction to all students, it is liable to have a greater effect on nationals of other Member States than on Austrian nationals, and therefore the difference in treatment introduced by that provision results in indirect discrimination.

48 Consequently, the differential treatment in question could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27, and *D'Hoop*, cited above, paragraph 36).

Justification of discrimination

Arguments of the parties

— Justification based on safeguarding the homogeneity of the Austrian higher or university education system

49 The Republic of Austria submits that justification of unequal treatment falling within the scope of Article 12 EC is not limited to grounds of public policy, public

security and public health, and that, according to settled case-law, it is possible to justify discrimination based on nationality in cases of indirect discrimination.

50 The Republic of Austria invokes, in that regard, the safeguarding of the homogeneity of the Austrian education system. Relying by analogy on the case-law of the Court, it submits that, if the rights available in the country of origin are not taken into consideration, it can expect a large number of holders of diplomas awarded in other Member States to try to attend university and higher education courses in Austria and that that situation would cause structural, staffing and financial problems (see Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41, and Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 47).

51 The Commission submits that it follows from the case-law of the Court, in particular from Case 15/69 *Ugliola* [1969] ECR 363 and Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, that a discriminatory measure may be justified only on the exceptional grounds expressly provided for in the Treaty, namely public policy, public security and public health. However, no ground of that type has been put forward by the Republic of Austria.

52 In addition, to concede that the Austrian legislation may be justified by grounds other than those expressly provided for by the Treaty would render meaningless, according to the Commission, the concept of indirect discrimination as it results from *Sotgiu*, cited above, that is discrimination which, although based on an apparently neutral criterion, in fact leads to the same result as discrimination on the grounds of nationality.

53 Moreover, the Commission claims that in any event Paragraph 36 of the UniStG infringes the principle of proportionality.

— Justification based on preventing abuse of Community law

54 The Republic of Austria points out that, in Case 115/78 *Knoors* [1979] ECR 399 and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, the Court recognised the legitimate interest that a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from improperly evading the application of their national legislation as regards training for a trade or profession and that Community law does not allow national legislation to be circumvented in that area.

55 In response, the Commission points out that in Case C-436/00 *X and Y* [2002] ECR I-10829, the Court found that whether there is abuse or fraudulent conduct must be examined individually on a case-by-case basis and should be based on objective evidence, and that the mere fact of exercising the right to freedom of movement cannot be regarded as an abuse (Case C-212/97 *Centros* [1999] ECR I-1459).

— Justification based on international conventions

56 The Republic of Austria contends that Paragraph 36 of the UniStG complies with conventions concluded within the framework of the Council of Europe, in this case

that of 11 December 1953 on the equivalence of diplomas leading to admission to universities (*European Treaties Series*, No 15, 'the 1953 Convention'), and that of 11 April 1997 on the recognition of qualifications concerning higher education in the European Region (*European Treaties Series*, No 165, 'the 1997 Convention').

- 57 The Commission points out that, under Article 307 EC, the rights and obligations arising from agreements concluded between one or more Member States and one or more third countries before the accession of a Member State are not affected by the provisions of the Treaty. However, to the extent that such agreements are not compatible with the Treaty, the Member State or States concerned must take all appropriate steps to eliminate the incompatibilities established.
- 58 It also draws attention to the settled case-law of the Court, according to which whilst Article 307 EC 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 (Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 40).
- 59 Consequently, according to the Commission, the Republic of Austria may not rely on the 1953 Convention. Nor may the 1997 Convention be relied on, since it was concluded after the accession of the Republic of Austria.

Findings of the Court

— Justification based on safeguarding the homogeneity of the Austrian higher or university education system

- 60 It must be borne in mind, as found in paragraph 47 of this judgment, that Paragraph 36 of the UniStG gives rise to indirect discrimination, since it is liable to affect students from other Member States more than Austrian students. Furthermore, it emerged from the hearing before the Court that the Austrian legislation aims to restrict access to Austrian universities for holders of diplomas awarded in other Member States.
- 61 As the Advocate General points out in point 52 of his Opinion, excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade; thus Article 12 EC would be complied with.
- 62 Furthermore, it must be observed that the risks alleged by the Republic of Austria are not exclusive to its higher or university education system but have been and are suffered by other Member States. Among those Member States is the Kingdom of Belgium, which had introduced similar restrictions, which were held to be incompatible with the requirements of Community law (see Case C-65/03 *Commission v Belgium*, cited above).

63 Moreover, it is for the national authorities which invoke a derogation from the fundamental principle of freedom of movement for persons to show in each individual case that their rules are necessary and proportionate to attain the aim pursued. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments (see, to that effect, Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25, and Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45).

64 In the present case, the Republic of Austria simply maintained at the hearing that the number of students registering for courses in medicine could be five times the number of available places, which would pose a risk to the financial equilibrium of the Austrian higher education system and, consequently, to its very existence.

65 It must be pointed out that no estimates relating to other courses have been submitted to the Court and that the Republic of Austria has conceded that it does not have any figures in that connection. Moreover, the Austrian authorities have accepted that the national legislation in question is essentially preventive in nature.

66 Consequently, it must be held that the Republic of Austria has failed to demonstrate that, in the absence of Paragraph 36 of the UnistG, the existence of the Austrian education system in general and the safeguarding of the homogeneity of higher education in particular would be jeopardised. The legislation in question is therefore incompatible with the objectives of the Treaty.

— Justification based on preventing abuse of Community law

- 67 Second, the Austrian Government has put forward a justification alleging that it is necessary for Member States to prevent abuse of Community law and drawing attention to the legitimate interest that a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from improperly evading the application of their national legislation as regards training for a trade or profession.
- 68 According to case-law, whether there is abuse or fraudulent conduct must be examined individually on a case-by-case basis and must be based on objective evidence (see *Centros*, paragraphs 24 and 25, and *X and Y*, paragraphs 42 and 43).
- 69 It must also be borne in mind that Article 149(2) EC, second indent, 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. Moreover, Article 150(2) EC, third indent, provides that Community action is to aim to facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people.
- 70 In this case, it need merely be observed that the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right.

— Justification based on international conventions

- 71 The Republic of Austria submits, third, that Paragraph 36 of the UniStG complies with the 1953 and 1997 Conventions.
- 72 In that regard, it must be held that, according to Article 307 EC, the rights and obligations arising from agreements concluded for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the Treaty. However, and to the extent that such agreements are not compatible with the Treaty, the Member State or States concerned must take all appropriate steps to eliminate the incompatibilities established.
- 73 It is settled case-law that, whilst Article 307 EC 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 (see, in particular, *Commission v Luxembourg*, cited above, paragraph 40, and Case C-203/03 *Commission v Austria* [2005] ECR I-935, paragraphs 57 to 59).
- 74 Consequently, the Republic of Austria may not invoke by way of justification either the 1953 Convention or *a fortiori* the 1997 Convention, which was concluded after the Republic of Austria acceded to the Union.
- 75 Having regard to the foregoing considerations, it must be held that, by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education

organised by it under the same conditions as holders of secondary education diplomas awarded in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC.

Costs

- ⁷⁶ Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been unsuccessful, the Republic of Austria must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that, by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as holders of secondary education diplomas awarded in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC;**
- 2. Orders the Republic of Austria to pay the costs.**

[Signatures]