OPINION OF ADVOCATE GENERAL DARMON

delivered on 14 July 1993 *

Mr President,
Members of the Court,

1. This reference for a preliminary ruling originates in the amendment, made on 22 May 1990, to Paragraph 5(2) of the Bundesausbildungsförderungsgesetz (Federal Law on grants for training and higher education, 'BAföG').

2. Since that amendment, a German national who wishes to follow a course abroad can only claim public financial assistance if

(1) he can derive benefit from his studies given his previous education (he must therefore possess a certain level of knowledge) or if

(2) the course is only available abroad and was commenced before 1 July 1990 (the payment of assistance to finance a full course of study beginning after this date is therefore excluded).

3. Mr Stephan Wirth, a German national resident in Germany, [1] is pursuing musical studies in jazz saxophone at the Hogeschool voor de Kunsten (Arts College) at Arnhem, in the Netherlands. On 31 August 1990, he requested an educational grant ('Gewährung von Ausbildungsförderung') to pursue his training at that institution, emphasizing that he was obliged to pursue his training abroad due to the lack of places available in Germany.

4. Mr Wirth, whose eligibility for the educational grant was taken away by the amendment to Paragraph 5(2) of the BAföG, has been refused this allowance by the city of Hannover. He is challenging that decision before the courts, lastly before the Verwaltungsgericht (Administrative Court) Hannover which has referred the matter to this Court.

5. Noting that Mr Wirth has not been able to pursue his studies in Germany principally because insufficient places are available on courses there, the Verwaltungsgericht finds that the applicant is deprived of assistance and therefore placed at a disadvantage for the sole reason that the institution he is attending is in another Member State. In substance, the court asks whether the pursuit of studies comes within Article 60 of the Treaty, in which case, under Article 62 of the Treaty, access could be made subject to any new restrictions. Moreover, it raises the question whether the 'principle of equality' does not require educational grants to be awarded by a Member State to its nationals regardless of the Member State in which the establishment attended is situated. [2]

* Original language: French.

1 — On this point see the order for reference II-1.

2 — The preliminary questions are set out at paragraph 6 of the report for the hearing.

6. The first question is whether the situation before the Court falls within the scope of Article 59 et seq. of the Treaty of Rome.

7. In *Humbel*, [3] the Court was asked whether courses provided in a technical institute, which formed part of secondary education under the national education system, were to be regarded as services.

8. Noting that under the first paragraph of Article 60 of the Treaty, only services normally provided for remuneration are to be considered to be 'services' within the meaning of the Treaty, [4] the Court proceeded to analyse that concept, declaring that its 'essential characteristic' was 'the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service'. [5]

9. The Court held that

'That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system ...'. [6]

10. The judgment in *Humbel* is aimed, in a general way, at 'courses provided under the national education system'. [7] Its scope is not therefore limited to technical institutes. It extends to courses followed in an establishment of higher education, where they are organized and financed by the State. [8]

11. The deciding factor in this matter is therefore the remuneration of the provider of services. [9]

12. Consequently, the possibility that a provision of services is involved cannot be ruled out when the tuition or studies are financed entirely or essentially out of contributions from the students or from individuals acting on their behalf. [10]

3 — Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5365.

4 — Paragraph 15.

5 — Paragraph 17.

6 — Paragraphs 18 and 19.

7 — Paragraph 18.

8 — See also the Opinion of Advocate General Sir Gordon Slynn in *Humbel* 'education provided by the State is not provided "for remuneration". The State is not a commercial organization seeking a profit or indeed to recover its costs and break even' [1988] ECR 5379.

9 — See paragraph 10 of the judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [19984] ECR 337: Article 60 'fulfils the objective of liberalizing *all gainful activity* (...)' (my emphasis).

10 — See the observations of the United Kingdom, at paragraph 17, the Opinion of Advocate General Sir Gordon Slynn in Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593, at page 603, and paragraph 20 of the Opinion of Advocate General Van Gerven in Case C-19/92 *Kraus* v *Land Baden-Württenberg* [1993] ECR I-1663.

13. The Court seems to have taken that approach when it accepted that the rules of a Member State on a private individual setting up a coaching establishment or a private music and dancing school did not fall within Article 55 of the EEC Treaty and could be examined in the light of Articles 48, 52 and 59. [11]

14. Is the establishment of a commercial nature and is it financed entirely or mainly out of the contributions of those who attend it? This aspect of the question is decisive.

15. Finally, in order to rely on Article 59, the recipient of services must satisfy another condition. His stay in the Member State of the provider of services must be temporary. University studies are by nature temporary and cannot be excluded from the scope of Article 59 as 'an activity carried out on a permanent basis, or, in any event, without a foreseeable limit to its duration'. [12]

16. The Court has no information on the way in which the Hoogeschool voor de Kunsten operates and is financed and only the national court could determine, on the basis of the criteria mentioned above, whether the services it provides fall within the scope of Article 60.

17. Only if they do will it have to examine the possible consequences from the point of view of Article 62.

18. For the moment, let me reserve my observations on this aspect of the first question and move on to the second question.

19. In substance, it is this: Does the 'general principle of equality' permit a Member State to award its nationals grants for higher education only if the courses are followed within the State itself, particularly when no such restriction existed under earlier legislation?

20. The national court, in its order for reference, demonstrates a breadth of interpretation of what is meant by the 'general principle of equality as a fundamental principle of Community law' which seems to go beyond the scope of Article 7 of the Treaty, by referring in particular to Articles 5 and 128 of the Treaty, and even to its preamble.

21. However fascinating that debate might be, it could only be relevant to the national court's resolution of the case if — which I do not believe to be the case — the assistance in question comes within the scope of Community law.

22. The Court's case-law in this respect, is helpful. Let me summarize the main strands.

23. In *Gravier*, [13] a French student objected to her enrolment at the University of Liège being made subject to the payment of a 'minerval' (enrolment fee) from which Belgian nationals were exempt.

11 — Case 147/86 *Commission* v *Greece* [1988] ECR 1637.

12 — Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, at paragraph 16.

13 — See references at note 10 above.

24. The Court held that conditions for access to vocational training fell within the scope of the Treaty and, therefore, that the imposition of a pecuniary charge as a condition for access to courses of vocational training for nationals of other Member States amounted to discrimination prohibited by Article 7 of the Treaty if the same charge was not imposed on national students.

25. Specifically, the Court held that:

'*Access* to vocational training is in particular likely to promote free movement of persons throughout the Community, by enabling them to obtain a qualification in the Member State where they intend to work and by enabling them to complete their training and develop their particular talents in the Member State whose vocational training programmes include the special subject desired.' [14]

26. In the light of Article 128 of the Treaty, Council Decision 63/266/EEC of 2 April 1963 laying down general principles for implementing a common vocational training policy [15] and the general guidelines drawn up by the Council in that regard in 1971, [16] the Court considered, in particular, that:

'any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is vocational training, whatever the age and the level of training of the pupils or students, and even if the training programme includes an element of general education'. [17]

27. The Court confirmed that point of view in of *Blaizot* v *University of Liège and Others*. [18]

28. There is therefore no doubt that a course in jazz saxophone leading to a professional qualification is 'vocational training' within the meaning of Community law and that conditions of access are subject to the principle of non-discrimination.

29. The financing of studies, to the extent that it is intended to cover registration or other costs involved in obtaining vocational training, forms part of those conditions of access.

30. But what is the situation when the financing takes the form of an 'educational grant' whose purpose is not so much to cover the registration costs which must be paid to gain access to the course but to provide for the student's 'bed and board' or, more generally, maintenance?

14 — Paragraph 24, my emphasis.
15 — OJ, English Special Edition 1963-1964, p. 25.
16 — JO 1971 C 81, p. 5.
17 — Paragraph 30.
18 — Case 24/86 [1988] ECR 379, at paragraph 24. See also Case 242/87 *Commission* v *Council*-(Erasmus) [1989] ECR 1425, at paragraph 25.

31. In *Lair* v *Universität Hannover*, [19] the Court held that such a grant only falls within the scope of the Treaty

'to the extent to which [it] is intended to cover registration and other fees, in particular tuition fees, charged for access to education', [20]

and that

'Subject to that reservation, it must be stated that at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7'. [21]

32. The reason given by the Court is that the assistance granted to students for maintenance falls within 'educational policy', which is not as such included in the spheres entrusted to the Community institutions, and 'social policy' which, in so far as it is not covered by specific provisions of the Treaty, remains within the competence of the Member States. [22]

33. It will be noted that *Lair* related specifically to assistance for maintenance and training provided by the BAföG.

34. It is because the main applicant in that case could be classed as a worker that the Court described this assistance as a 'social advantage' and examined its compatibility with Community law in the context of Article 7 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [23]

35. The Court 'consolidated' that case-law in *Raulin* v *Minister van Onderwijs en Wetenschappen* [24] in which one of the preliminary questions — the seventh — was the following: 'Does a system of study finance ..., in which no distinction is made between an allowance for the cost of access to the course and an allowance for maintenance costs, fall wholly or in part within the scope of the EEC Treaty (and in particular Articles 7 and 128 thereof)?'. [25]

36. After recalling the cases of *Lair* and *Brown*, [26] the Court considered that

'the first paragraph of Article 7 of the EEC Treaty applies to financial assistance granted by a Member State to its own nationals in order to allow them to follow a course of vocational training *in so far as that assistance is intended to cover the costs of access to the course*'. [27]

37. Consequently, as Community law stands, since there is no sufficiently direct connection with access to the courses themselves, an allowance for maintenance costs falls outside the prohibition of discrimination. [28]

19 — Case 39/86 [1988] ECR 3161.

20 — Paragraph 14.

21 — Paragraph 15

22 — Ibid. These principles again stated in Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 16 to 18.

23 — OJ, English Special Edition 1968 (II), p. 475.

24 — Case C 357/89 [1992] ECR I-1027.

25 — Paragraph 6.

26 — See, for the latter, the reference at note 22 above.

27 — Paragraph 29, my emphasis.

28 — See the Opinion of Advocate General Van Gerven in *Raulin* at point 18. It is to be noted that Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, cited above, which was annulled by the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I 4193, but whose effects were maintained, does not impose on the host Member State the obligations to pay maintenance grants to students who benefit from the right of residence (Article 3 and sixth recital in the preamble)

38. If the system for financing studies makes no distinction between the assistance granted to cover the costs of access to a course of vocational training, such as registration costs (to which the right to non-discriminatory treatment applies), and the assistance intended to cover other costs (to which the right in question does not apply), it is for the national court to decide which part of the assistance relates to access to vocational training.

39. Such a distinction is, however, only of interest if there is discrimination.

40. The situation before the Court is, in this respect, radically distinct from those which gave rise to the cases of *Gravier*, *Blaizot*, *Lair*, *Brown* and *Raulin*, mentioned above.

41. The rules in issue in those cases made distinctions in the host State based on nationality. In this case it is not a question of a national of one Member State alleging that the rules *another Member State* relating to the conditions of access to vocational training *in that State* are discriminatory. As the United Kingdom observes, [29] 'Mr Wirth is not a "national of another Member State" who is being treated less favourably than a national of the Member State from which the assistance is sought'.

42. Nor is the applicant in the main proceedings seeking to align his rights *vis-à-vis* the State giving assistance with those of nationals from other Member States, but rather to widen the territorial conditions for making the grant and indeed to restore the conditions previously in force. In no way is he a victim of discrimination on the grounds of nationality. [30]

43. In the absence of discrimination on the grounds of nationality, Article 7 of the Treaty does not preclude a Member State from awarding grants for higher education to its nationals only if the studies take place within the State itself.

44. Nor does it preclude a State which until then had awarded grants for higher education courses followed in another Member State from discontinuing them without justifying its decision on economic grounds.

45. Let me now return to the second part of the first question raised by the national court.

46. If the national court were to find that an establishment of higher education in Member State B is a provider of services, does the fact that it is impossible for a national of Member State A attending that establishment to obtain an educational grant from his own State amount to a restriction on the freedom to provide services within the meaning of Articles 59 and 62 of the Treaty?

29 — Paragraph 29 of its observations.

30 — The question whether the rules in the BAföG for non-national in Germany are compatible with Article 7 has not been referred to the Court.

47. The terms of comparison are therefore the following: may a student be deprived of the allowance when he attends in another Member State a teaching establishment which satisfies the criteria of Article 60 of the Treaty whereas he could receive such an allowance if he attended an establishment which was also a provider of services situated in his State of origin?

48. Can such a student rely on Article 59 in order to claim in the host State the maintenance grant provided by the State of which he is a national?

49. It is well established that the prohibition in Article 59 is aimed at restrictions affecting both providers of services and recipients of services when the latter go to the State of the provider of services. [31]

50. A student from Member State A who studies at an institution in Member State B which is a provider of services falls within the scope of the Treaty as a recipient of services in the Member State where those services are provided. [32]

51. A student might be dissuaded from going to study in another Member State if there he would be deprived of the maintenance grant which he would receive in his home State.

52. Does the lack of entitlement to a grant amount to a restriction on the freedom to provide services under Article 59? [33]

53. The rules under consideration have two particularities in this respect.

54. In the first place, as in *Luisi and Carbone*, [34] any infringement of the principle of the freedom to provide services arises from rules of the Member State of which the recipient of services is a national. It is not a matter of possible obstacles arising from the legislation of the State where the recipient of services is temporarily resident, as it was in *Cowan*. [35]

55. Secondly, the restriction on freedom to provide services would consist in access to establishments of higher education in another Member State being rendered more difficult as a result of its being impossible for a student going to that State to receive the grant which he would have enjoyed had he remained within his State of origin.

56. It is remarkable that a student — who cannot claim the status of a worker and the rights which it entails, particularly under Article 48 and the regulations adopted for its implementation — should fall within the scope of the Treaty here via the concept of 'recipient of services'.

31 — See Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 10, and Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

32 — 'the provision of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State', Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, at paragraph 9.

33 — See paragraph 2.1.2 of the order for reference.

34 — See reference at note 31 above.

35 — Ibid.

57. It is this second point which seems to me to be decisive.

58. Is there really a *restriction on freedom to provide services* here?

59. In *Luisi and Carbone*, the Court examined, in the light of Article 59, rules of the State of origin of a recipient of services which set maximum amounts for the export of foreign currency by residents for the purposes of tourism, business, education and medical treatment.

60. Once that maximum was reached, it was impossible for the national of that State to be a recipient of services in the host State, owing to a lack of financial resources.

61. Here, the recipient has not been deprived of access to the services in question. He merely loses his eligibility for a grant provided by his national law.

62. This is the very heart of a key question on the subject of provision of services.

63. Can a national of a Member State who receives financial assistance of a social nature in that State rely on Article 59 of the Treaty if he goes to another Member State in whose territory he can no longer claim that assistance?

64. Can he insist on his State of origin providing him with the same assistance irrespective of the Member State to which he goes as a recipient of services? Is he deprived of access to those services because of the absence of this assistance?

65. I do not think so, since the financial assistance is general and is not assigned to specific expenditure (as with income support or assistance for the most destitute) and only applies within the Member State of origin of the recipient of services. The discontinuance of that assistance when the recipient goes to another Member State does not deprive him of access to identifiable and specific services.

66. The maintenance grant awarded during education is not directly and principally allocated to repay course or enrolment fees. It allows the student to meet accommodation, maintenance and other sundry expenses. Only contingently and incidentally is it intended to 'remunerate' the institute providing the services. It is only in a situation where the *rules* expressly assign part of the grant to the payment of tuition that a restriction on the freedom to provide services could be established. It would seem that this is not the case with legislation such as the BAföG.

67. There is thus, in my opinion, too tenuous a link between the inability to claim educational grants outside the national territory of a Member State and a possible restriction on access to institutions of higher education

which provide services in other Member States.

68. In such a situation, Article 62 cannot therefore be found to apply.

69. I therefore propose that the Court rules as follows:

I. (1) Articles 59 and 60 of the EEC Treaty are to be interpreted as meaning that courses given in an establishment of higher education under the national education system cannot be described as services within the meaning of those provisions.

(2) On the other hand, that would be the case where courses were given in an educational institution financed, principally, out of contributions paid by individuals.

(3) Article 62 of the EEC Treaty does not preclude a Member State from withdrawing the right to an educational grant from nationals studying in another Member State.

II. Article 7 of the EEC Treaty does not preclude a Member State from awarding its nationals a grant for higher education only if studies are undertaken within the State itself even when, under earlier legislation, the same grant could be awarded to a national pursuing such studies in another Member State.