OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 20 March 2007 [1]

I — Introduction

1. According to a Latin American jurist, there are three kinds of judge: the artisan, a veritable automaton who, using only his hands, produces mass judgments in industrial quantities, without lowering himself to consider the human aspects or the social order; the craftsman, who uses his hands and his brain, using traditional interpretative methods, which inevitably lead him merely to represent the legislature's intention; and the artist, who, using his hands, his head and his heart, broadens the horizon for citizens, without losing sight of reality or of specific circumstances. [2]

2. Although they are all needed in the fulfilment of the judicial function, the Court of Justice, in the exercise of its proper role, has always identified itself with the last kind, especially now that the constant evolution of the ideas which inspired the creation of the Community has slowed down.

3. Freedom of movement is one of these original ideas, which has become a fundamental premiss, but one whose content varies, since it applies to a changeable situation, which evolves in accordance with social needs, improved transport facilities, the increase in trade and so many other factors which increase the mobility of individuals and their families. [3]

4. This provides the context for the questions referred for a preliminary ruling by the Verwaltungsgericht Aachen (Administrative

1 — Original language: Spanish.

2 — Nanclares Arango, A., *Los jueces de mármol*, La Pisca Tabaca Editores, Medillín, 2001, p. 14.

3 — Lirola Delgado, I., *Libre circulación de personas y Unión Europea*, Ed. Civitas, Madrid, 1994, p. 61, maintains that, with the advance of European integration, as a result of its own dynamics and the development of its political dimension, the principle of the freedom of movement of persons has been extended by the incorporation of new situations into the scope *ratione personae* of Community law. That increase in scope has come about as the result of a gradual process, fraught with difficulties and, often, with contradictions, which starts with the wide interpretation of the content which may have to be included within the framework of the financial freedoms.

Court, Aachen), which afford the opportunity to consider the implications of the freedom of movement of European students and of grants to study in other Member States, and to outline the main aspects of that freedom.

II — Legal framework

A — *Community legislation*

5. Briefly, the case concerns two young German women whose applications for grants to study in the United Kingdom and in the Netherlands have been refused; in the first case, because the course of study is not the continuation of a course taken, for at least a year, in Germany; in the second case, because the student is not permanently resident in a border location.

7. The national court considers that the provisions of the EC Treaty concerning European citizenship and the freedom of movement (1) are relevant to the cases before it; the legislative position is completed by the references made in the EC Treaty itself to education (2) and by the provisions of secondary legislation referring to students (3).

6. The importance of these matters means that, after setting out the legal framework (II), and the facts and the procedural stages in the cases (III and IV), I should draw attention to the mobility of students (V), set out the case-law on the two central points of the questions raised (VI) and analyse various significant aspects of educational grants, such as their characterisation or their connections with the freedom of movement and the freedom to provide services (VII). These observations are designed to resolve the doubts raised (VIII). To end, I should dispel any apprehensions regarding the consequences of my proposal (IX).

1. European citizenship and freedom of movement

8. Article 17(1) EC establishes 'Citizenship of the Union', placing the individual at the heart of its activities; [4] '[every] person holding the nationality of a Member State shall be

4 — Report from the Commission: Fourth report on citizenship of the Union (1 May 2001-30 April 2004) (COM(2004) 695 final), point 4.

a citizen of the Union'; it is therefore for the national law of each Member State to determine whether a person has that status. [5]

9. Under Article 17(2) EC, citizens of the Union are to enjoy the rights conferred by the Treaty and are to be subject to the duties imposed thereby. Article 18(1) EC provides specifically that citizenship confers the 'right to move and reside freely within the territory of the Member States', subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

10. It also confers electoral rights (Article 19 EC), the right to protection abroad (Article 20 EC), and the right to lodge complaints and requests (Article 21 EC).

11. The Charter of Fundamental Rights of the European Union [6] uses the concept of Article 17 EC on several occasions [7] and, in Article 45(1), proclaims 'the right to move and reside freely within the territory of the Member States'.

5 — Declaration No 2: Declaration on nationality of a Member State, annexed to the Final Act of the Treaty on European Union (OJ 1992 C 191, p. 98).

6 — OJ 2000 C 364, p. 1.

7 — Articles 12(2) and 15(2), and also, in Chapter V, entitled 'Citizenship', Articles 39(1), 40, 42, 43, 44, 45(1) and 46.

2. Community powers in respect of education

12. Community action for the purpose of attaining the objectives proposed includes, according to Article 3(1)(q) EC, 'a contribution to education and training of quality and to the flowering of the cultures of the Member States'.

13. Part Three, Title XI, Chapter 3, of the Treaty, entitled 'Education, vocational training and youth', comprises Articles 149 EC and 150 EC, which were introduced in 1992 by the Treaty on European Union.

14. Article 149 EC states:

'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: ...

— developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,

— encouraging mobility of students and teachers, by encouraging, inter alia, the academic recognition of diplomas and periods of study,

— promoting cooperation between educational establishments,

— developing exchanges of information and experience on issues common to the education systems of the Member States,

— encouraging the development of youth exchanges and of exchanges of socio-educational instructors,

— encouraging the development of distance education.

4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

— acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,

— acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.'

15. Article 150 EC, which concerns vocational training, is expressed in similar terms.

3. Secondary legislation

16. As there are groups which have different characteristics, it is not surprising that the Community should deal with them individually, as in Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. [8]

17. The introduction of European citizenship revealed the need to adapt the rules on the freedom of movement and the freedom of residence, a task carried out by 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 [9] which repealed Directive 93/96.

18. Directive 2004/38 governs entry to and exit from the territory of the Member States (Articles 4 and 5), and also residence, for which it lays down conditions, which vary according to the duration of the residence: (a) for a period of residence of up to three months, a valid identity card or passport is required (Article 6); (b) for a period of between three months and five years, persons who are enrolled at a private or public establishment must have comprehensive sickness insurance cover in the host Member State and have sufficient resources not to become a burden on the social assistance system of the host Member State (Article 7(1)(c)); (c) Union citizens who have resided legally for a continuous period of five years in the host Member State acquire the right of permanent residence with no conditions whatsoever (Article 16).

B — *German legislation*

19. Study grants are dealt with in the Bundesgesetz über individuelle Förderung der Ausbildung (Federal Law on individual support for education and training; 'the BAföG'). [10] Paragraph 4 defines the territorial scope, and awards these grants only for study within Germany, with a few exceptions, contained in Paragraphs 5 and 6.

8 — OJ 1993 L 317, p. 39. This directive, together with Council Directives 90/364/EEC and 90/365/EEC of 28 June 1990 concerning, respectively, the right to residence and the right to residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, pp. 26 and 28), constituted the European legislature's reply to the extension of the concept of freedom of movement proposed by the Court of Justice, 'an institution which is more integrating in nature and whose interpretations of the Treaty of Rome often help considerably to overcome Community restraint' (Abellán Honrubia, V. and Vilá Costa, B., *Lecciones de Derecho comunitario europeo*, Ed. Ariel, Barcelona, 1993, p. 191) (free translation).

9 — 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 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigendum in OJ 2004 L 229, p. 35).

10 — New version published on 6 June 1983, BGBl. I, p. 645; last amended by the Law of 22 September 2005, BGBl. I, p. 2809.

20. Paragraph 5(1) refers to cross-border education:

'An education or training grant shall be awarded to students referred to in Paragraph 8(1) where they attend an education or training establishment abroad each day from their permanent residence in Germany. The permanent residence within the meaning of this Law shall be established at the place which is the centre of interests not only temporarily ...; a person who resides at a place only for education or training purposes has not established his permanent residence there.'

21. Paragraph 5(2) refers to education abroad:

'Students who have their permanent residence in Germany shall be awarded an education or training grant for attending an education or training establishment abroad if:

1. that attendance is beneficial in the light of their previous education or training and at least part of that education or training can be counted towards the requisite or normal period of study; or

2. in the context of international cooperation between a German and a foreign education or training establishment, mutually complementary teaching in a single course of study is provided alternately by the German and the foreign establishment; or

3. having attended a German education or training establishment for a period of at least one year, the students continue their education or training at an education or training establishment in a Member State of the European Union, and possess sufficient language knowledge.

...'

22. Paragraph 6 authorises the award of grants in particular circumstances:

'An education or training grant may be awarded to Germans within the meaning of the Basic Law who have their permanent residence in a foreign State and attend an education or training establishment in that State or, travelling from that State, in a neighbouring State, where this is justified by the particular circumstances of the individual case. ...'

23. Paragraph 8(1) defines the personal scope of the BAföG, stating that:

'A grant for education or training shall be awarded:

1. to Germans, within the meaning of the Basic Law;

...

8. to students who have a right of entry or residence as spouses or children, under the conditions laid down in Paragraph 3 of the Freizügigkeitsgesetz/EU (Law on general freedom of movement for citizens of the Union), or who do not enjoy such rights as a child of a citizen of the Union only because they are 21 years of age or older and do not receive support from their parents or spouses;

9. to students who are nationals of another Member State of the European Union or another State party to the Agreement on the European Economic Area and have been employed in Germany before commencing education or training, provided that there is a link between the activity carried out and the subject-matter of the education or training ...'

III — The facts and the main actions

A — *Case C-11/06*

24. Ms Morgan, who was born in Germany in 1983, is a German national. She attended grammar school in Germany and, after passing her school-leaving examination, went to Great Britain, where she spent one year working as an au pair.

25. Since 20 September 2004, she has been studying applied genetics at the University of the West of England in Bristol. The British authorities have recognised her status as a migrant worker and awarded her maintenance support. [11]

26. In August 2004, before she settled in the United Kingdom, she applied to the Bezirksregierung Köln (Regional Authority, Cologne) for a grant. By a decision of 25 August 2004, her application was turned down on the ground that she did not satisfy the requirements laid down in Paragraph

11 — Points 12 and 44 of the written observations presented by Great Britain. At the hearing, the benefits provided by the host country were described: exemption from registration fees, a subsidised annual loan of the order of GBP 4 400, and money for books and other expenses.

5(2) of the BAföG. That decision was confirmed by another, on 3 February 2005, which also stated that Paragraph 6, in conjunction with Paragraph 5(1) of the BAföG, was not applicable.

27. The applicant brought an administrative action against that administrative decision before the Verwaltungsgericht Aachen, which is the basis for Case C-11/06.

B — *Case C-12/06*

28. Ms Bucher, who was born in 1983 and is a German national, lived with her parents in Bonn until 1 July 2003 and then, together with her partner, moved to Düren. [12]

29. Since 1 July 2003, she has studied ergotherapy at the Hogeschool Zuyd in Heerlen, [13] the Netherlands.

30. On 28 January 2004, she applied for a grant. On 7 July 2004, her application was refused by the Landrat des Kreises Düren (Chief Officer of the District Authority of Düren) on the ground that the requirements for a grant under Paragraph 5(1) of the BAföG were not satisfied, since she had changed residence only for education or training purposes. That decision was confirmed by the Bezirksregierung Köln on 16 November 2004.

31. The applicant lodged an administrative appeal before the Verwaltungsgericht Aachen, which forms the basis of Case C-12/06.

IV — The questions referred for a preliminary ruling and the procedure before the Court of Justice

32. The Verwaltungsgericht Aachen, believing that the applicants' claims, although not supported by Paragraph 5 or Paragraph 6 of the BAföG, may be supported by Community legislation, has stayed proceedings in both cases and referred the following questions to the Court of Justice:

'(1) Does the freedom of movement guaranteed for citizens of the Union under Articles 17 EC and 18 EC prohibit a Member State, in a case such as the present, from refusing to award an education or training grant to one of

12 — A town between Bonn and Aachen, situated about 70 km from Bonn and 35 km from Aachen.

13 — A town situated approximately 9 km from the border with Germany and 47 km from Düren.

its nationals for a full course of study in another Member State on the ground that the course does not represent the continuation of attendance at a German education or training establishment for a period of at least one year?

(2) Does the freedom of movement guaranteed for citizens of the Union under Articles 17 EC and 18 EC prohibit a Member State, in a case such as the present, from refusing to award an education or training grant to one of its nationals, who as a cross-border commuter is pursuing her course of study in a neighbouring Member State, on the grounds that she is residing at a border location in Germany only for education or training purposes and that that place of abode is not her permanent residence?'

33. The first question is common to the two cases, whereas the second relates only to Ms Bucher.

34. By order of 16 March 2006, the President of the Court of Justice joined the actions in Cases C-11/06 and C-12/06, since they deal with the same subject-matter.

35. Written observations have been submitted, within the period laid down by Article 23 of the Statute of the Court of Justice, by the Bezirksregierung Köln, the Landrat des Kreises Düren, the Governments of Germany, Austria, Finland, Italy, the Netherlands, the United Kingdom and Sweden, and also by the Commission.

36. At the hearing held on 30 January 2007, the representatives of Ms Morgan, Ms Bucher, Germany, the Netherlands, Austria, the United Kingdom and the Commission presented oral argument.

V — The mobility of students

A — *A constant throughout history*

37. Although, according to Thomas More, it is better for learning to be imparted in one's own tongue, 'in which a man can fully express his mind', [14] the thirst for knowledge leads people to look for the sources of that knowledge and to learn from the experts, irrespective of where they are or the

14 — More, T., *Utopia*, 1516, Second Book, Part II.

language in which they teach. It is evident that that thirst for learning has led pupils to seek out teachers throughout the ages.

38. In classical times, the centres which attracted the greatest variety of people included Plato's Academy, Aristotle's Lyceum or the Pythagorean and Alexandrian Schools, the latter founded by Ptolomy Soler in the third century BC, in which Euclid was a star pupil.

39. From the ninth century, when monastic life flourished, classrooms were opened in convents and abbeys to teach monks; in many areas, these used outside centres to receive other pupils (Jarrow, Cork, Corbie, Richenau, Montecassino, etc.). At the same time, the bishops and chapters set up, under the protection of the cathedrals, cathedral schools (Reims, Chartres, Cologne, Mainz, Vienna, Liège, etc.). Nor did the Arab world ignore the phenomenon, since Baghdad and Córdoba, for example, established study centres with well-stocked libraries and astronomy observatories.

40. Around the 12th century, education began to be imparted by people other than the religious schools. There arose the concept of universities, open to students and teachers of different nationalities, who, using Latin as their lingua franca, sought to communicate and pass on knowledge. The first was established in Bologna, but they subsequently spread throughout Europe (Paris, Palencia, Oxford, Montpellier, Salamanca, etc.). [15]

41. The university gave rise to extensive social mobility. The sons of the nobility, the bourgeoisie, merchants, craftsmen and peasants were admitted, and financial difficulties were resolved by means of scholarships and grants. However, the emergence of nation States and wars of religion reduced the ecumenical nature of its beginnings.

42. Thus, Juan Luis Vives (1492-1540) worked at the University of Valencia, at the Sorbonne in Paris, in Bruges, Leuven and Oxford; Miguel Servet (1511-53) studied law in Toulouse, medicine in Paris, and theology in Leuven; David Hume (1711-76) studied literature and philosophy in Reims and Anjou and then, after living in Paris for two years, returned to Scotland, where he refused the Chair he was offered; Karl Marx

15 — The graduate Sansón Carrasco, who, under the names 'Knight of the Spangles' and 'Knight of the White Moon', had several engagements with Don Quixote, had studied in Salamanca, where he had heard the first part of the adventures of the famous knight, which he recounted in detail, at the beginning of the second part, when he returned to the area of La Mancha in which they both lived (Cervantes Saavedra, M., *El ingenioso hidalgo Don Quijote de la Mancha*, Part II, Chapter II) (translation of the names taken from John Rutherford's translation of the work, Penguin Books, 2000).

(1818-83) graduated from the University of Bonn, but lived in Paris, Brussels and London, where he had a profound intellectual influence.

43. Among these travellers in pursuit of knowledge, Erasmus of Rotterdam (1469-1536) deserves pride of place. He studied at the University of Paris, was tutor to the son of King James II of Scotland, and gained his doctorate in theology at Bologna, refusing Pope Leo X's invitation to stay in Rome. He moved to England, where he was well received by Henry VIII and knew John Colet and Thomas More. He held a readership in theology at Cambridge. He worked at the publishing house of Aldus Manutius in Venice. He won the respect of Emperor Charles V, also King of Spain, who appointed him counsellor of Flanders. [16] He lived in Freiburg for a while and then retired to Basle to work on the publication of his works. [17] His life is the stuff of dreams for us nowadays, when we realise that, at the end of the Middle Ages, Europe had no frontiers for intellectual life and was not split by linguistic differences which, although they are doubtless of cultural value, hinder the exchange of ideas between the peoples of this continent and their progress towards a closer and more committed union. The legend of Erasmus provides a ray of hope that those barriers may be overcome. [18]

16 — In 1516 he dedicated his *Institutio Principis Christiani* to the then Charles of Ghent.

17 — Stefan Zweig wrote an excellent biography, *Triumph und Tragik des Erasmus von Rotterdam*, Vienna, 1934 (translated into English by Eden and Cedar Paul, *Erasmus of Rotterdam*, Viking Press, New York, 1956).

18 — Flory, M., 'Le mythe d'Érasme', *L'Europe et le droit, Mélanges en hommage à Jean Boulouis*, Ed. Dalloz, 1991, p. 258.

B — *A present-day concern*

44. The speed at which society evolves nowadays entails an increase in the demand for teaching at a high level, greater specialisation in teaching, and a growing awareness of its importance for building the future. Everywhere higher education is faced with the same difficulties and challenges related to financing, quality, equity of conditions, the qualifications of staff, employability of graduates and equitable access to the benefits of international cooperation.

45. This is the background to the 'Bologna process', which began with the declaration of 40 ministers on 19 June 1999, [19] with a view to establishing in 2010 a European higher education area, [20] in which there is gradual progress towards a series of objectives, such

19 — Web page: http://ec.europa.eu/education/policies/educ/bologna/bologna_en.html. It was preceded by the Sorbonne Declaration, signed on 25 May 1998 by the Ministers for Education of France, Germany, Italy and the United Kingdom.

20 — Higher education includes 'all types of studies, training or training for research at the post-secondary level, provided by universities or other educational establishments that are approved as institutions of higher education by the competent State authorities', *World declaration on higher education for the twenty-first century: vision and action*, adopted on 9 October 1998 by the Unesco World Conference on Higher Education, available on web page: http://www.unesco.org/education/educprog/wche/declaration_eng.htm.

as the mobility of students, which is still very important, in spite of the high degree of communication achieved by means of computer networks.

46. In connection with the Bologna process, numerous instruments have been adopted by the Community institutions with regard to the movement of students, [21] since applications to study outside the country of origin for a variable period have increased, since they are linked to the opportunity of subsequently working and settling within the structures of any State in the Union, offering very stimulating opportunities. These exchanges favour those who move, the society which receives them and the society which they leave, although they may involve risks, since they may jeopardise diversity, increase the commercialisation of teaching and stimulate the brain drain.

47. Furthermore, moves abroad present challenges of various kinds, mainly linguistic or problems of adaptation, [22] and administrative and economic difficulties. [23] It is sought to offset the cost of fees, monthly payments and board and lodging by study grants, which have three sources: private, national or European. The first are covered by private individuals on the terms which they decide; the second are awarded in accordance with local, regional or national provisions and subject to certain principles, such as objectivity and equality; the third are arranged by Community actions, the main ones being the Erasmus programme, introduced in 1987 and now incorporated into the Socrates programme, [24] and the Leonardo da Vinci programme, established in 1994 to encourage vocational training.

48. In the actions brought by Ms Morgan and Ms Bucher, it is national subsidies which are at issue, even though the compatibility of the three methods of financing depends on

21 — For example, the resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 14 December 2000 concerning an action plan for mobility (OJ 2000 C 371, p. 4); also the recommendation of the European Parliament and of the Council of 10 July 2001on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers (OJ 2001 L 215, p. 30); the Council resolution of 3 June 2002 on skills and mobility (OJ 2002 C 162, p. 1); or the European Mobility Quality Charter, annexed to the Commission proposal for a recommendation of the European Parliament and of the Council on transnational mobility within the Community for education and training purposes (COM(2005) 450 final); furthermore, these topics are mentioned as one of the 13 goals of the work programme 'Education and training 2010' agreed by the Barcelona European Council in 2002.

22 — 'You are going to live in a land which is far away, not in miles, but in ideas and customs.' This is how André Maurois began his 'Conseils à un jeune français partant pour Angleterre' (Maurois, A., *Obras completas*, Vol. IV, Ed. Plaza y Janés, Barcelona, 1967, p. 1035) (free translation).

23 — The Commission's Green Paper 'Education — Training — Research: the obstacles to transnational mobility' (COM(1996) 462 final) analysed these impediments.

24 — This had very modest beginnings, involving only 3 244 persons in the first year; in 2005, the number was 144 032; during the 20 years it has operated, more than one and a half million students have been awarded grants (source: http://ec.europa.eu/education/news/erasmus20_en.html).

the rules of each, since, as they do not usually cover all the costs, [25] they are often granted simultaneously.

VI — The case-law on education or training grants and on freedom of movement

49. In order to reply to the Verwaltungsgericht Aachen, it is necessary to review the case-law on the two points raised in the questions referred for a preliminary ruling.

A — *Education and training grants*

50. The Court of Justice has previously had occasion to consider grants of different kinds applied for at the beginning, during or on completion of a period of education or training. In the cases it has dealt with until now, the application was made to the host Member State or to the Member State of origin, but after the move, whereas Ms Morgan and Ms Bucher sent their applications to the Member State of origin, without leaving the country. Although, as has been pointed out in most of the observations submitted, that fact prevents a finding that there has been unequal treatment as between Germans and the nationals of other Community countries, and that therefore the existing case-law does not apply, there is no harm in setting out the rulings which may be useful on this occasion.

51. Among the judgments which deal with points similar to those raised here are those in *Grzelczyk*, [26] *D'Hoop* [27] and *Bidar*, [28] which also involve citizenship of the Union and provide useful contributions.

52. Previously, the Court held in the judgment in *Gravier* [29] that the imposition on students who are nationals of other Member States of a charge, a registration fee or enrolment fee as a condition of access to vocational training courses,constitutes discrimination on grounds of nationality prohibited under the Treaty (paragraph 26). On the same lines, the judgment in *Blaizot* [30] found that 'a supplementary enrolment fee charged to students who are nationals of other Member States and wish to enrol for

25 — Calvo Pérez, B., 'Perspectiva europea de la educación superior. Carácter transversal y redes universitarias (internacionalización, movilidad y redes)', *El carácter transversal en la educación universitaria*, Michavila, F. and Martínez, J. (eds), Madrid, 2002, p. 33, lists the criticisms of the Socrates-Erasmus programme, a main one being that the amounts granted are small, and adds that 'they are grants for the rich' and 'constitute a regressive method of financing'.

26 — Case C-184/99 [2001] ECR I-6193.

27 — Case C-224/98 [2002] ECR I-6191.

28 — Case C-209/03 [2005] ECR I-2119.

29 — Case 293/83 [1985] ECR 593.

30 — Case 24/86 [1988] ECR 379.

such studies' constituted discrimination, since 'studies in veterinary medicine fall within the meaning of the term "vocational training"'(paragraph 24).

53. This doctrine was stated shortly afterwards in the judgments in *Lair*[31] and *Brown*[32] which distinguished between assistance for 'registration and other fees, in particular tuition fees, charged for access to education' and assistance for 'maintenance and for training', and held that only the former fall within the scope of the Treaty (paragraphs 14 to 16 of the judgment in *Lair* and paragraphs 17 to 19 of the judgment in *Brown*). The innovations introduced by the Treaty on European Union[33] and the adoption of Directive 93/96 had the consequence that, after the judgment in *Grzelczyk*, that distinction was no longer made.

1. The judgment in *Grzelczyk*

54. Mr Grzelczyk, a French national, studied physical education at the Catholic University of Louvain-la-Neuve (Belgium) and bore the costs of the studies and of maintenance and accommodation himself. At the beginning of his fourth and final year of study, he applied for payment of the minimex — the minimum subsistence allowance — but his application was refused on the grounds that he was not Belgian.

55. The Court of Justice recalled that, in the judgment in *Hoeckx*,[34] it had held that the minimex was 'a social advantage within the meaning of Regulation No 1612/68'[35] (paragraph 27); it also pointed out the changes in the applicable national legislation (paragraph 28), under which a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk, would satisfy the conditions for obtaining the minimex, and held that the case was therefore one of discrimination solely on the ground of nationality (paragraph 29), 'in principle' prohibited by Article 6 of the EC Treaty (now, after amendment, Article 12 EC), read 'in conjunction with the provisions ... concerning citizenship of the Union in order to determine its sphere of application' (paragraph 30).

56. After making a few observations on European citizenship (paragraphs 31 to 33) and recalling the case-law in *Lair* and *Brown* (paragraphs 34 and 35), the Court of Justice considered the prohibition against unequal treatment in conjunction with 'the right to move and reside freely within the territory of the Member States', subject to certain limitations imposed pursuant to Directive 93/96, emphasising the requirement of sufficient financial resources, a point on which, owing to 'the special characteristics of student residence', that directive differs

31 — Case 39/86 [1988] ECR 3161.

32 — Case 197/86 [1988] ECR 3205.

33 — This introduced citizenship of the Union into the EC Treaty, to which it also added, in Part Three, Title VIII, a Chapter 3 on education, vocational training and youth (Articles 149 and 150).

34 — Case 249/83 [1985] ECR 973.

35 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 47).

from Directives 90/364 and 90/365 (paragraphs 37 to 44),[36] and stressing that a student's situation may change (paragraph 45).

2. The judgment in *D'Hoop*

57. Ms D'Hoop, who has Belgian nationality, obtained her baccalaureate diploma in France. That diploma was recognised by the authorities in her country of origin, where she attended university. Later, she applied for a tideover allowance, a benefit granted to young people seeking their first employment and giving them access to special employment programmes. Her application was refused on the ground that she had not completed her higher secondary education at a Belgian educational establishment.

58. Although the tideover allowance constitutes a social advantage within the meaning of Regulation No 1612/68,[37] Ms D'Hoop's circumstances precluded application of both that regulation and of Article 48 EC to her case (paragraphs 17 to 20); the Court of Justice therefore based its considerations on citizenship of the Union, which covered the situation *ratione temporis* (paragraphs 23 to 26), and according to which it would be incompatible with the right of freedom of movement were a citizen, 'in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement' (paragraphs 30 and 31), an analysis that is particularly important in 'the field of education' (paragraph 32).

59. On these premisses, it held that there was a difference in treatment 'between Belgian nationals who have had all their secondary education in Belgium and those who, having availed themselves of their freedom to move, have obtained their diploma ... in another Member State' (paragraph 33), who are placed at a disadvantage (paragraph 34). However, unequal treatment could be justified if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim pursued, but, in the case under examination, although it is legitimate 'for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned', a single condition concerning the place where the diploma of completion of secondary education was obtained is 'too general and exclusive in nature' (paragraphs 36 to 39).

3. The judgment in *Bidar*

60. Mr Bidar, a French national, moved to the United Kingdom, where he completed his secondary education. With a view to

36 — Paragraph 40 of the judgment in Case C-424/98 *Commission* v *Italy* [2000] ECR I-4001, explained the reasons for those differences.

37 — Case 94/84 *Deak* [1985] ECR 1873, paragraph 27, and Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307, paragraph 25.

entering higher education, he applied for the relevant financial help to the London Borough of Ealing, which granted him assistance with respect to tuition fees, but refused to give him a student loan to cover his maintenance costs, on the ground that he had not 'settled' in the country.

61. The Court had to determine whether the refusal of assistance infringed the Treaty, specifically Article 12 EC; for that purpose, it recalled established legal academic literature concerning that provision and Article 18 EC, and the development of the case-law and of Community law (paragraphs 28 to 41), and then held that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs (paragraph 42), which it corroborated by reference to Directive 2004/38 (paragraph 43).

62. The Court then examined the reservations in Article 18 EC, which refers to the limitations laid down in the Treaty and in the measures adopted to give it effect, which include those laid down by Directive 93/96, Article 3 of which excludes the right to payment of maintenance grants to students benefiting from the right of residence (Article 44). It considered, in accordance with the judgment in *Grzelczyk*, that the fact that a student was unable to base any right to payment of maintenance assistance on Directive 93/96 (paragraph 45) did not prevent him from relying on Article 12 EC (paragraph 46).

63. Having established that Article 12 EC applies, it considered whether the conditions for the grant of assistance were objective. However, the requirements that the person concerned is 'settled' in the United Kingdom for the purposes of national law risk placing at a disadvantage 'primarily nationals of other Member States', since they are likely to be 'more easily satisfied' by United Kingdom nationals (paragraphs 50 to 53). However, the difference in treatment may be justified, so as to favour 'students who have demonstrated a certain degree of integration' (paragraphs 54 to 57), which may be regarded as established by evidence that the student in question has resided 'in the host Member State for a certain length of time' (paragraph 59), since the situation 'is not comparable to that of an applicant for a tideover allowance ... or for a jobseeker's allowance (paragraph 58). It inferred from these details that the British regulations in question infringed Article 12 EC (paragraphs 60 to 63).

B — *Freedom of movement*

64. The Court of Justice is being requested more and more frequently to define the limits of European citizenship and the rights it confers.

65. The judgment in *Grzelczyk* declared the importance of citizenship, designed to be 'the

fundamental status of nationals of the Member States' (paragraph 31) [38] which has gained in significance from the prohibition of discrimination laid down by Article 12 EC, which, as a result of the judgment in *Martínez Sala*, [39] may be relied upon by any person holding a Community passport in all situations 'which fall within the scope *ratione materiae* of Community law' (paragraph 63), although not in purely internal situations. [40]

66. The situations concerned include those involving the exercise of the fundamental freedoms, like freedom of movement and residence. [41] As a result, equality of treatment and freedom of movement are often relied on together, against the host State — the judgments in *Grzelczyk* and *Bidar* — or against the State of origin — the judgment in *D'Hoop* —, in this last case owing to the incompatibility of legislation which places at a disadvantage its own nationals simply because they have exercised their rights. [42]

67. The combined reference to the exclusion of discrimination and the freedom of movement is no obstacle to the independence of those principles, each of which may be evaluated on its own. [43] Thus, the judgment in *Baumbast and R.* [44] suggested that Article 18 EC has direct effect [45] because it is 'a clear and precise provision of the EC Treaty' (paragraph 84), [46] since freedom of movement — and freedom of residence — 'is the central right of citizenship of the Union'. [47]

68. The judgment in *Grzelczyk* also pointed out that the aforementioned freedoms have

38 — For Borja, J., Dourthe, G., and Peugeot, V., *La Ciudadanía Europea*, Ed. Península, Barcelona, 2001, p. 37, the present importance of the concept is explained by the need to generate among those who make up certain societies 'a kind of "identity" in which they recognise each other and which makes them feel immersed in its spirit, because this type of society is clearly lacking adhesion ... to the body of the community, and without that adhesion it is impossible to respond jointly to the challenges with which everyone is faced'.

39 — Case C-85/96 [1998] ECR I-2691.

40 — Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23; Case C-148/02 *García Avello* [2003] ECR I-11613, paragraph 26; and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 23.

41 — Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16; *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29; and *Bidar*, paragraph 33.

42 — Case C-224/02 *Pusa* [2004] ECR I-5763, paragraphs 19 and 20; Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39; *D'Hoop*, paragraph 34; and *Tas-Hagen and Tas*, paragraphs 27, 30 and 31.

43 — Case C-456/02 *Trojani* [2004] ECR I-7573, of which paragraphs 30 to 36 concern Article 18 EC and paragraphs 39 to 44 Article 12 EC. Advocate General Geelhoed, in the Opinion he delivered in *De Cuyper*, rightly infers that discrimination need not be established for Article 18 EC to apply (point 104); the question is whether there is any restriction on the exercise of the right to move and reside freely, and if so whether such a restriction may be justified (point 108). In fact, in the judgments in *De Cuyper* and *Tas-Hagen and Tas*, only Article 18 EC is mentioned.

44 — Case C-413/99 [2002] ECR I-7091.

45 — Academic lawyers had suggested this characteristic: Dorrego de Carlos, A., 'La libertad de circulación de personas: del Tratado de Roma al Tratado de la Unión Europea', in the work coordinated by Gil-Robles, J.M., *Los derechos del europeo*, Incipit editores, Madrid, 1993, p. 30; also Mattera, A., 'La liberté de circulation et de séjour des citoyens européens et l'applicabilité directe de l'article 8 A du traité CE', *Mélanges en hommage à Fernand Schockweiler*, edited by Gil Carlos Rodríguez Iglesias, Ole Due, Romain Schintgen and Charles Elsen, Baden-Baden, 1999, p. 413 et seq.

46 — A thesis reiterated in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 26; Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraph 34; and *Trojani*, paragraph 31. It has been enshrined in the 11th recital in the preamble to Directive 2004/38.

47 — Council notice 'The Hague programme: strengthening freedom, security and justice in the European Union', Title III, point 1.1 (OJ 2005 C 53, p. 1). Adrián Arnáiz, A.J., 'Algunas consideraciones sobre la ciudadanía de la Unión Europea y la Conferencia Intergubernamental de 1996 para la reforma del Tratado de Maastricht', *Revista de Estudios Europeos*, No 11, September-December 1995, Madrid, p. 59, describes freedom of movement as 'a composite right, both economic and political, since it seeks both the complete achievement of the internal market and an increase in the sense of belonging to the European Union' (free translation).

limitations (paragraph 37), which may be inferred from the Treaty itself and from the provisions adopted to give it effect, so that, where there is a specific rule, it takes the place of Article 18 EC; [48] in the remaining cases, justification for the restrictions, as, for example, the requirement that the person concerned has a real link with the State, [49] depends on whether they are objective, independent of the nationality of the person concerned and proportionate to the aim pursued. [50]

VII — Significant aspects of grants to study in another Member State

69. Following this review of the judgments of the Court of Justice with most impact on the present cases, it is necessary to consider other aspects underlying the questions referred for a preliminary ruling, which delimit their legal context: the nature and special features of grants to study abroad (A); whether it is possible to rely on freedom of movement in the circumstances of these cases (B); and the effect of the freedom to provide services (C).

A — *The nature of grants to study abroad*

70. As I have already pointed out, grants for education and training are very varied, because they alleviate problems of all kinds. For instance, some are connected directly with education, subsidising registration costs or tuition fee instalments, and others, indirectly, lessen the burden of purchasing books or other materials, or of transport or subsistence expenses.

71. From a general point of view, the heading 'Study grants' covers all those grants awarded to people who wish to begin or who are already receiving instruction designed to improve their educational, cultural, professional or scientific level, and also to achieve academic prizes.

72. The nature of the action of the public authorities in this field has been the subject of discussion; in particular, whether it is a public service or an incentive. If the former, the authorities provide services to individuals; if the latter, they encourage them to direct their work towards the common good. [51]

48 — Regarding freedom of establishment, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22, and regarding freedom of movement for workers, Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 55; and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 37.

49 — *D'Hoop*, paragraph 38, and *Collins*, paragraph 67.

50 — *Bickel and Franz*, paragraph 27; *D'Hoop*, paragraph 36; *Collins*, paragraph 66; *Bidar*, paragraph 54; *De Cuyper*, paragraph 40; and *Tas-Hagen and Tas*, paragraph 33.

51 — Gil Ibáñez, J.L., 'El régimen des las becas y ayudas al estudio', in the joint work *Aspectos administrativos del derecho a la educación. Especial consideración de las universidades públicas, Manuales de Formación Continuada*, No 16, Consejo General del Poder Judicial, Madrid, 2001, pp. 221 to 226.

73. The solution depends on the classification of each subsidy, having regard to its concept and its objectives. At compulsory education levels, the authorities provide citizens with a certain level of education, so there is a distinct service component.

74. At the higher levels, on the other hand, the national authorities do not guarantee the right to education, but equality in the exercise of that right, avoiding discrimination on financial grounds; they also try to encourage people to increase their knowledge and to make it possible for the applicant to pursue the studies he prefers or those which are of most benefit to society. To that end, incentive techniques are used, by means of direct aid — a grant — and indirect aid — exemption from registration fees —, and the service component therefore moves into the background.

75. Further considerations arise when the student asks his own country to alleviate the problems, especially financial problems, of studying abroad. Thus concepts which have already been mentioned — mobility and freedom of movement — arise, with a specific cross-border dimension, the European dimension.

76. A grant from the State of origin is not 'exported' to the host State nor, as the Commission believes, does the former State subsidise freedom of movement. Each subsidy is granted on specific terms, and a subsidy assigned to education or training in one territory is not transferred to other courses or other places, unless the provisions which govern such transfers so provide. However, as regards assistance for educational training outside the country, exportation is an inherent feature, because the assistance is requested to cover general costs in other States.

77. Consequently, that assistance to go abroad is an advantage in which the State has wider discretion than if it were in the nature of a service and in which there is a cross-border element.

78. This classification avoids the influence of the case-law in respect of taxation in the case of a change of residence, when it states that 'the Treaty offers no guarantee to a citizen of the Union that transferring his activities to a Member State other than that in which he previously resided will be neutral as regards taxation'.[52] Those situations cannot be

52 — Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 55; Case C-365/02 *Lindfors* [2004] ECR I-7183, paragraph 34; and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45.

likened to those of the main actions since, apart from the fact that they have different objectives, in the former there is an obligation to contribute to public funds whereas, in the latter, sums are received from those funds.

B — *The possibility of relying on the right to freedom of movement*

79. Several of the written observations lodged with the Court of Justice claim that the European Union has no jurisdiction over study grants granted by the Member States. Since Community matters are not involved, the rights conferred by Article 18 EC are unconnected with the facts of the questions referred for a preliminary ruling and no reply should be given to the national court, because the cases of Ms Morgan and Ms Bucher may be resolved in accordance with German law.

80. I do not agree with those claims. In order to refute them, I need only use two complementary arguments, regarding freedom of movement, in the strict sense, and powers with regard to education.

1. The scope of freedom of movement

81. First of all, a person may rely on the Community freedom of movement as against the State of which he is a national. Article 17 EC makes it clear that every person holding 'the nationality of a Member State' is a citizen of the Union, [53] and enjoys the corresponding rights. [54]

82. I have explained in previous Opinions my views regarding the autonomy of free-

53 — Bhabha, J., criticises the reservation to the legislations of the Member States, and maintains that there is no procedure for acquiring citizenship of the EU, so that this status is, to a certain extent, inconsistent and widely divergent: it is not based on a common platform of criteria for belonging ('Belonging in Europe: citizenship and post-national rights', *International Social Sciences Journal*, Vol. LI, No 159, March 1999. Academic lawyers try to explain the difference between nationality and citizenship, attributing to the latter concept a sense of belonging to a community larger than that of the State, with a different political power and characterising the former as the legal status resulting from the connection between the individual and the State (Jiménez Piernas, C., 'La protección diplomática y consular del ciudadano de la Unión Europea', *Revista de Instituciones Europeas*, Vol. 20, 1993, pp. 9 to 49; Jiménez de Parga Maseda, P., *El derecho a la libre circulación de las personas físicas en la Europa comunitaria — Desde el Acta Única Europea al Tratado de la Unión Europea*, Tecnos, Madrid, 1994, pp. 184 and 185).

54 — In point 24 of the Opinion I delivered in Case C-18/95 *Terhoeve* [1999] ECR I-345, I point out that the Court has held that a person may rely on Union law as against the State of which he is a national in the judgments in Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16; Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9; and Case C-107/94 *Asscher* [1996] ECR I-3089. In point 25 of that Opinion, I point out that, in the judgment in Case 246/80 *Broekmeulen* [1981] ECR 2311, paragraph 20, the Court held that 'the free movement of persons, the right of establishment and the freedom to provide services ... would not be fully realised if Member States were able to deny the benefit of provisions of Community law to those of their nationals who have availed themselves of the freedom of movement and the right of establishment'.

dom of movement. I repeat that 'the creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political *status* of the citizens of the Union'. [55]

83. The recent judgment in *Tas-Hagen and Tas* has included this argument when establishing whether Article 18 EC can be relied upon only if, over and above the exercise of the right to freedom of movement, the facts of the case relate to a matter covered by Community law.

84. Mrs Tas-Hagen and Mr Tas, who were Dutch nationals, applied to the Netherlands authorities for benefits granted to civilian war victims; these were refused on the ground that, when the applications were made, the claimants were living in Spain.

85. Advocate General Kokott, in points 27 to 43 of her Opinion in that case, establishes convincingly that the fact that the matter concerned is governed by Community law or serves the aims of the Community constitutes at most an additional factor in the appraisal of a particular case, not an imperative requirement for the application of Article 18 EC.

86. The judgment followed this view, acknowledging that, as things now stand, the benefit claimed 'falls within the competence of the Member States' (paragraph 21), but pointed out that that competence must be exercised in accordance with 'the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory' of the Community (paragraph 22). It added that, although citizenship of the Union does not permit recourse to the Treaty in respect of internal situations, since the exercise of a right acquired under Community law has affected the claimant's prospects of obtaining a benefit provided

55 — Opinion in Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, point 34, and Opinion in Case C-386/02 *Baldinger* [2004] ECR I-8411, point 25, in neither of which did the Court of Justice adjudicate on Article 18 EC.

under national law, such a situation cannot be considered to be a purely internal matter with no link to Community law (paragraph 28).

87. However, this doctrine must not be restricted to the situations to which a person has moved, since it also includes situations in which persons are prevented or dissuaded from moving, where the assistance is intended for education or training in other Member States, where the Community link required for the application of Article 18 EC is clearly present.

88. European law remains apart from the policy of the States regarding grants to study abroad, but, if they do award them, it makes sure that the conditions imposed for obtaining them do not unduly limit freedom of movement.

2. Powers with regard to education

89. The Community contributes to the development of quality education (Article 3(1)(q) EC) 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 (Article 149(1) EC); it also encourages 'mobility of students' and 'the development of youth exchanges' (Article 149(2) EC). The legal instruments for attaining the objectives of the Community actions are grouped into 'incentive measures', excluding any harmonisation of the laws and regulations of the Member States, and into 'recommendations' (Article 149(4)). [56]

90. I infer from those guidelines that the Community countries have exclusive power to regulate the main aspects of education, but not everything in respect of education.

91. In education, several aspects combine to make up its essential core, such as teaching plans or the organisation of the system, which the national legislatures are responsible for defining, specifying and limiting, the institutions merely assuming roles providing guidance and incentive. In line with this, Article 14 of the Charter of Fundamental Rights of the European Union proclaims that

56 — Article 150 EC refers to vocational training in similar terms.

everyone has the right 'to education and to have access to vocational and continuing training' (paragraph 1), which includes 'the possibility to receive free compulsory education' (paragraph 2), referring only to the national laws regarding the exercise of those rights, the freedom to found educational establishments, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions is respected (paragraph 3). [57]

92. However, there are also features of a secondary nature, linked to a varying extent to the Community freedoms and principles. For example, grants to begin or continue studying, improving techniques, capabilities and aptitudes for doing a job, which are not directly connected with the aforementioned essential core. In these circumstances, the European legal order becomes more relevant.

93. I disagree with the Austrian Government's argument that grants form part of the content of education, because that content comprises study plans, training disciplines, the subjects they cover, the information they provide and the methods of obtaining it. Nor are grants part of the organisation of the education system, which concerns material and human resources and the division of duties between them; the responsibility of the Member States is 'the preservation or improvement' of that system. [58]

94. The Court of Justice has held that the conditions of access to vocational training, [59] which includes both higher education and university education, fall within the scope of the EC Treaty. [60]

95. Student grants remove the obstacles, usually of a financial nature, which prevent completion of training, so that they fall within the 'conditions of access', and this is equally true if the aim is not to begin but to continue education.

57 — Article II-74 of the Treaty establishing a Constitution for Europe.

58 — Case C-40/05 *Lyyski* [2007] ECR I-99, paragraph 39.

59 — Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, paragraph 15; Case C-65/03 *Commission* v *Belgium* [2004] ECR I-6427, paragraph 25; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 32; *Gravier*, paragraph 25; *Blaizot*, paragraph 11; and *Lyyski*, paragraph 28.

60 — Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, paragraphs 7 and 8; *Blaizot*, paragraphs 15 to 20; *Commission* v *Austria*, paragraph 33; and *Lyyski*, paragraph 29.

96. Therefore, responsibility for regulating study grants does not lie exclusively in the hands of the national legislatures, since the Community provisions impregnate it with their philosophy of integration. [61] However, even if such regulation fell within the scope of the national powers with regard to education, those powers must be exercised in accordance with Community law, [62] safeguarding its fundamental principles, such as that of freedom of movement.

C — The effect of the freedom to provide services

97. The orders for reference and the observations of those participating in the proceedings have considered the questions referred for a preliminary ruling from the point of view of the freedom of movement of European citizens, with regard to the situation of the applicants in the main proceedings. However, I think it is necessary to consider another aspect.

98. The point is that, in the cases of Ms Morgan and Ms Bucher, the obstacles to attending classes outside the country of origin, as well as limiting the range of options available to the students, have an effect on the educational establishment, by reducing their opportunities for attracting foreign students.

99. This is similar to the phenomenon which occurs when a patient wishes to receive treatment in a hospital abroad. The Court of Justice has held that the freedom to provide services includes the freedom for the recipients of services, including persons in need of medical treatment, to go to another Member State in order to receive those services there, [63] and also paid medical care. [64]

100. Although educational services are different from health services, the arguments which allow the application of Article 49 EC et seq. may be reproduced without the special nature of the services removing them from the ambit of the provisions of the Treaty. [65] As universities offer education in

61 — Advocate General Geelhoed, in his Opinion in *Bidar*, states his objections to the exclusion of student maintenance grants from the scope of Community law (point 49 and corresponding points).

62 — In the field of freedom of movement of persons, Joined Cases C-193/97 and C-194/97 *De Castro Freitas and Escallier* [1998] ECR I-6747, paragraph 23; Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31; Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 26; or *Tas-Hagen and Tas*, paragraph 22.

63 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 87.

64 — Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 18, and *Watts*, paragraph 86.

65 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 10; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 20; and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 54.

exchange for remuneration, any obstacle to attending their classes must be regarded as a restriction on that Community freedom.

101. Consideration is a fundamental aspect of service within the meaning of Article 50 EC and in this case there is no doubt that there would be consideration, since the person concerned normally has to pay registration charges or monthly instalments, because free education is usually only provided at the elementary levels. Isolated cases should be considered as exceptions and do not negate this argument.

102. Therefore, Article 49 EC may be affected if the questions from the national court are approached from the point of view of the schools in which it is sought to study, subject always to recognition of the right of the persons concerned, as Community citizens, to freedom of movement, which, according to the case-law, applies in the absence of the more specific rights established in Articles 39 EC, 43 EC and 49 EC. [66]

103. However, an examination of the questions raised by the Verwaltungsgericht Aachen from the point of view of the freedom to provide services would require information about the foreign education centres which is not currently available. [67]

VIII — Analysis of the questions referred for a preliminary ruling

A — *The first question*

104. It is clear from the foregoing considerations that Ms Morgan and Ms Bucher, as any other citizen of the Union, are free to move from their countries of origin to other Member States for educational purposes.

105. The first question referred for a preliminary ruling, which is common to both

66 — Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; Case C-293/03 *My* [2004] ECR I-12013, paragraph 33; *Skanavi and Chryssanthakopoulos*, paragraph 22; *Oteiza Olazabal*, paragraph 26; and *Ioannidis*, paragraph 37.

67 — The replies to the question I asked on this point at the hearing warned of the casuistry which prevails and the caution with which such an investigation would have to be conducted.

main actions, seeks to clarify whether that freedom precludes the refusal of grants to study in another Member State, on the ground that the course of study does not represent the continuation of studies pursued in the country of origin for at least one year (Paragraph 5(2)(3) of the BAföG). It is therefore necessary to determine whether a restriction has been placed on that fundamental freedom, and then to analyse, as I have pointed out, whether it is justified and whether it is proportionate.

1. The existence of a restriction

106. The BAföG does not prohibit the student moving to another State in the Union to gain qualifications, but makes a subsidy conditional on those studies representing the continuation of studies pursued for one year at a German establishment. That condition creates two significant problems.

107. First, it disregards the disparity in educational material, arising out of the reservation in favour of the States under Articles 149 EC and 150 EC, in the sense that, as there is no harmonisation, the education provided is not the same in all education establishments. The fact that continuity is required limits choice, because it discourages a student from beginning certain courses in the country chosen. In the orders for reference, it is pointed out that there are special fields of study which do not have an equivalent in Germany, in which case the student concerned has to decide between pursuing his desired course of study or claiming a grant, [68] a view corroborated by the Italian Government. [69]

108. Secondly, during the year of attendance at a specific establishment, a student establishes personal, material and other relationships which make it difficult for him to leave, because it is more convenient to stay where he has already settled and has begun to enjoy a new experience.

109. These factors, as the national court points out, dissuade students from registering for a full course of training at universities in other Community countries and waiving the financial advantages granted to those who, in similar circumstances, remain in their country of origin.

110. It is therefore established that the freedom of students to attend establishments abroad is restricted.

68 — Paragraphs 32 and 36 of the orders for reference in Case C-11/06 and Case C-12/06 respectively.

69 — At the hearing, the German government's representative answered evasively when asked whether the courses sought by the applicants were available in his country.

2. Justification and proportionality of the restriction

111. The Netherlands and Finland maintain that, if it were found that a restriction had been placed on the rights enshrined in Article 18 EC, that restriction would have a lawful objective, such as avoiding an excessive economic burden, and that it was for the national court to decide whether the measure was appropriate.

112. The Court of Justice should not accept this suggestion and should disassociate itself from the analysis, since it has enough information to provide a complete solution, which, furthermore, avoids subsequent referrals. [70]

113. Two basic arguments have been raised to justify refusing to finance educational training in States of the Union. On the one hand, the requirement that the party concerned should have a real link with his country of origin; on the other, inadequate funds.

114. I am surprised at the way in which the requirement that the person concerned should have a link with the country awarding the grant is framed, not because I consider it inappropriate that there should be evidence of a connection, but because it is obvious, since it affects nationals as well, who are required to show a link with the syllabuses, which has nothing to do with the territory. I agree with the observation made by the Verwaltungsgericht Aachen that the existence of a degree of integration is to be regarded as established if the student had his or her permanent residence in the State before commencing a course of study in another State, in which he or she takes up residence only for the duration of the course of study. [71]

70 — As has happened with internet gambling: Case C-67/98 *Zenatti* [1999] ECR I-7289; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031; and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891. In *Zenatti*, the Court of Justice held that the EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives. In *Gambelli and Others*, it qualified the previous judgment, declaring that 'national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively'. The Court added that it is for the national court to determine whether such legislation, taking account of the detailed rules for its application, is justified and whether the restrictions it imposes are disproportionate in the light of those aims. The difficulties which have arisen in carrying out that task have meant that, in *Placanica and Others*, the Court of Justice has had to do it itself.

71 — Paragraph 37 of the order for reference in Case C-11/06.

115. To associate an individual with the State at the time of the beginning of the course of study has consequences which are more harmful for the fundamental freedom, since it overestimates that first stage and neither accurately represents the real and effective level of the link, nor, contrary to what the Swedish Government believes, strengthens it. There are other alternatives which are more suited to that freedom, such as the one adopted by Finland, which requires a student to have lived in Finland for at least two years in the previous five before going to study abroad. [72]

116. So far as concerns justification on financial grounds, there is no doubt that there is a scarcity of public funds to meet the needs of this group. The fact that the course of study abroad must be a continuation of a course of study pursued for at least one year in the country of origin does not appear to reflect any economic obstacle, which would dictate that grants be awarded to those showing the greatest merit and ability, so that the amounts available would be distributed to those most suited to benefit from the opportunities offered. [73]

117. Reliance on Directives 93/96 and 2004/38 does not invalidate this argument, [74] since they govern the residence of students in the host country, a matter unconnected with the main actions, in which entry into or residence in a State other than the Member State of origin is not at issue.

B — *The second question*

118. In the case of Ms Bucher, the order for reference adds a second question, as to whether it is compatible with the freedom of movement to refuse a grant to a cross-border student on the ground that that is not his or her permanent residence and that he or she chose it only for educational or training purposes (Paragraph 5(1) of the BAföG).

119. The exception to the rule that a student must spend the previous academic year at a national establishment is therefore limited to students who have their permanent residence near the German borders, which

72 — Paragraph 18 of the observations presented by the Finnish Government, which refers to Article 1(2) and (4) of the Opintotukilaki (Law concerning study grants).

73 — I disagree with the Bezirksregierung Köln that, once a course has been started, it is more likely that the money will be put to good use; the same reason would support a decision to award a grant on completion of the course.

74 — According to Article 24(2) of Directive 2004/38, 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence ..., nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training ...'.

infringes freedom of movement to the detriment of those who, in order to attend their classes in the neighbouring country more regularly, move to adjacent localities.

120. I understand that, as the German Government maintains, regional policy considerations require measures to compensate for the negative effect on citizens who, as the Italian Government points out, sometimes by chance, live a short distance from another State and feel that the borders distort their ability to select establishments close to home. The exclusion of no other category of persons may be allowed.

121. In the main action, the link of residence is enough. I do not dispute the description of Ms Bucher's home in Düren, which is a matter for the national court, but the requirement that it should be 'permanent'. I share the concern of the Verwaltungsgericht Aachen over the fact that the student has his or her permanent residence in Germany both before and during the course of study [75] demonstrating the link with the German education system.

75 — Paragraph 41 of the order for reference in Case C-12/06.

122. There are other means which are fairer and at the same time less restrictive of freedom of movement, such as awarding grants in the light of academic performance.

IX — Corollary

123. From the above, I infer that Germany, like any other Member State, is not required under Community law to award grants for education or training abroad, since it has a wide discretion to award them and, if it does so, to lay down the relevant conditions. However, if it awards grants, it must do so in accordance with Union law.

124. Paragraph 5(1) and (2)(3) of the BAföG governs those grants, making them conditional, respectively, on the course of study representing the continuation of a course taken for at least one year in a German school and on permanent residence close to the border, both requirements which not only limit the freedom of movement of students, dissuading them from exercising

that freedom, but which are excessive in relation to the aims pursued.

125. The observations presented in these proceedings fear the consequences of the argument which has been developed, since, as Advocate General Geelhoed puts it very well in his Opinion in *Hartmann*,[76] 'any decision to move to another State involves experiencing difficulties and enjoying new advantages owing to the different legislations of the States concerned ... . It is the Community citizen who weighs up these pros and cons when he makes his decision, but without extending his rights to any kind of social benefit which the Member State of origin may grant by virtue of the different policies ..., depending entirely on the nature of the benefits in question. ... We must not forget that, when a person moves to another Member State, other rights may arise in the host State and, ..., just as the Member States are required not to impose restrictions on their nationals, when they want to move to another Member State, they likewise cannot be required to encourage them to leave' (point 86).

126. However, apart from the particular classification of the grants awarded by the State for education or training in the Community countries, if the Court of Justice assumes the role of the artist judge which I described at the beginning of this Opinion and, in the light of the observations made, recognises the European dimension of those grants, there would be no shortage of methods of correcting and preventing any disruptive consequences which may arise.

127. First, the national legislations on grants contain justified and proportionate restrictions, based on financial considerations or academic performance, prevent incompatibilities[77] and curb unjust enrichment.[78]

128. Secondly, the case-law of the Court of Justice allows measures to promote freedom of movement for students to be lawfully amended, having observed that such abuses are not covered by the Community legal order.[79]

76 — Case C-212/05.

77 — It was made apparent at the hearing that in the United Kingdom foreign grants have no impact, but in Germany, under Paragraph 21(3) of the BAföG, they are all offset, wherever they come from.

78 — The risk of accumulation of rights appears not only in grants awarded by the State of origin and by the host State, but also at other levels, and there are numerous opportunities for combining them according to the sources of financing, mentioned above (private, national or European).

79 — Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 36, and *Lair*, paragraph 43.

X — Conclusion

129. In the light of the foregoing considerations, I suggest that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Verwaltungsgericht Aachen:

The freedom of movement guaranteed under Article 18 EC is to be interpreted as precluding national legislation concerning grants for education or training in other States within the European Community which (a) requires that the course of study represent the continuation of attendance for a period of at least one year at an establishment in the country awarding the grant, and (b) refuses a grant to a student residing at a border location in that country only for education or training purposes.