JUDGMENT OF THE COURT (Fifth Chamber)

13 November 2003 *

In Case C-153/02,

REFERENCE to the Court under Article 234 EC by the Giudice di pace di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Valentina Neri

and

European School of Economics (ESE Insight World Education System Ltd)

on the interpretation of Articles 39 EC, 43 EC and 49 EC, of Council Decision 63/266/EEC of 2 April 1963 laying down general principles for implementing a common vocational training policy (OJ, English Special Edition 1963-1964 (I), p. 25) and Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting for the President of the Fifth Chamber, A. La Pergola and S. von Bahr (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Valentina Neri, by A. Rocca, avvocato,

— the European School of Economics, by G. Conte and E. Minozzi, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by M. Massella Ducci Teri, avvocato dello Stato,

— the Commission of the European Communities, by E. Traversa and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the European School of Economics, represented by G. Conte, G. Giacomini and C.G. Izzo, avvocati; of the Italian Government, represented by A. Cingolo, avvocato dell Stato; and of the Commission, represented by E. Traversa, at the hearing on 13 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By order of 18 April 2002, received at the Court on 26 April 2002, the Giudice di pace (Magistrate's Court), Genoa, referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 39 EC, 43 EC and 49 EC, of Council Decision 63/266/EEC of 2 April 1963 laying down general principles for implementing a common vocational training policy (OJ, English Special Edition 1963-1964 (I), p. 25) and of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16).

Legal background

Community legislation

2 Article 43 EC provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

3 Directive 89/48 seeks to make it easier for European citizens to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided they hold such a diploma preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State.

4 Article 1(a) of Directive 89/48 provides:

'For the purposes of this Directive the following definitions shall apply:

(a) diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

— which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;

— which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

— which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognised a third-country diploma, certificate or other evidence of formal qualifications.

The following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State'.

5 Under the first paragraph of Article 2 of Directive 89/48, the Directive is to apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

6 Under the second principle (e) of Council Decision 63/266, the common vocational training policy is to seek to avoid any harmful interruption either between completion of general education and commencement of vocational training or during the latter.

Italian legislation

7 In the order for reference, the Giudice di pace, Genoa, set out the Italian legislation in the following way.

8 Under Article 170 of Regio Decreto No 1592 on 'approvazione del testo unico delle leggi sull'istruzione superiore' (Royal Decree relating to approval of the

consolidating Act of laws on higher education) of 31 August 1933 (Ordinary Supplement to GURI No 283 of 7 December 1933; 'Royal Decree No 1592/33'):

'Academic qualifications awarded abroad shall not have legal force [in Italy] except on the basis of special laws.

However, those who hold one of the degrees referred to in a list approved, and, where appropriate, amended by an order of the Minister of National Education, by a foreign establishment of higher education may obtain from one of the universities or establishments [of higher education] referred to in Tables A and B the degree which is equivalent to the degree awarded abroad.

In cases where academic qualifications which are not referred to on the list in the preceding paragraph are at issue, the Minister, after hearing the opinion of the competent academic authorities and the executive committee of the first section of the Higher Council of National Education, may declare that the degree awarded abroad is of the same value as the equivalent degree issued by the universities or establishments [of higher education in Italy] or allow the person concerned to sit masters or degree examinations, with total or partial exemption from examinations required by the regulations of the university or establishment [of higher education] for the equivalent course of studies.'

9 Article 332 of Royal Decree No 1592/33 provides:

'Pending adoption of the ministerial order approving the list referred to in Article 147, Italian citizens abroad, Italians who are not subjects of the Kingdom and foreigners may be admitted to universities and establishments [of higher

education] on the year of the course for which the competent academic authorities consider the degrees awarded on completion of secondary and higher education abroad are sufficient.

Pending adoption of the ministerial order approving the list referred to in Article 170, the competent academic authorities which are asked to recognise the academic qualifications awarded abroad may, on a case-by-case basis, provided the degrees involved are those awarded by foreign universities or establishments [of higher education] with an excellent reputation, and also having regard to the studies pursued and the special or general examinations taken abroad, declare that the foreign degree is of the same value, in all respects, as the equivalent degree issued by [Italian] universities and establishments [of higher education], or otherwise allow the person concerned to sit masters or degree examinations, with a total or partial exemption from examinations required by the regulations of the university or establishment [of higher education] for the equivalent course of studies.'

10 Under Article 8(1) of Law No 341 of 19 November 1990 on the 'riforma degli ordinamenti didattici universitari' (Law on the organisation of university education) (GURI No 274 of 23 December 1990, p. 6; 'Law No 341/90'):

'Universities may, in accordance with rules set out by each institution, call upon the cooperation of public and private bodies in order to organise study courses, cultural activities and training sessions referred to in Article 6 of this Law. They can set up associations, in particular of private law, and enter into agreements to this effect.'

11 Memorandum No 228 of the Ministry for Universities and Scientific and Technological Research of 3 October 2000 states that recognition in Italy of a degree awarded abroad remains governed by Article 332 of Royal Decree No 1592/33, whilst Legislative Decree No 115 of 27 January 1992 implementing Directive 89/48 (GURI No 40 of 18 February 1992, p. 6), allows only pursuit of the profession already pursued in the country of origin.

12 An information circular issued by the Ministry of Foreign Affairs provides, in accordance with circular No 442 of the same Ministry of 30 April 1997 on courses of studies partly completed in Italy, that a foreign university degree may only be admitted to a recognition procedure if it is accompanied by an 'attestation from the Italian diplomatic or consular representation in the foreign country in which the degree was awarded proving actual residence in that country by the person concerned for the whole period of the university studies.'

13 The circular of the Ministry for Universities and Scientific and Technological Research of 8 January 2001 states that 'degrees awarded by universities recognised in the United Kingdom may be recognised in Italy only if completed after regular attendance for the whole course of studies at those universities or other foreign body of the same educational level, to the exclusion therefore of degrees awarded to Italian nationals on the basis of periods of study completed with branches or private bodies operating in Italy with whom they have entered into private-law contracts.'

The main proceedings

14 Ms Neri enrolled at Nottingham Trent University ('NTU') with a view to acquiring a BA Honours degree in International Political Studies on completion of a four-year course of studies.

15 NTU is a university subject to United Kingdom legislation and is included in the list of bodies authorised to award, on completion of a four-year course of studies, BA honours degrees having legal status.

16 NTU administers its courses of study at its establishment in the United Kingdom, where final degrees are awarded.

17 However, Article 216 of the Education Reform Act 1988 provides for another system by means of which universities may award degrees.

18 Under this provision, the Secretary of State approves a list of bodies who may provide any course which is in preparation for a degree to be granted by a recognised body and is approved by or on behalf of the recognised body. It is apparent from the order for reference that this list includes the European School of Economics (ESE Insight World Education System Ltd; 'ESE').

19 It is also apparent from the order for reference that this body is a Higher Education College authorised according to the United Kingdom educational system to organise and provide the university courses of study approved by NTU.

20 ESE, which is incorporated as a limited liability company, is established in the United Kingdom with a number of secondary establishments in other Member States. It is registered with the Rome Chamber of Commerce having the legal form of a company incorporated according to the laws of another Member State and has 12 branches in Italy.

21 ESE does not award its own degrees but for remuneration organises courses for the students enrolled with NTU in accordance with study plans validated by that university, which then awards a final degree of Bachelor of Arts with Honours. The quality of the courses of study provided by ESE is also subject to audit by the UK Quality Assurance Agency for Higher Education.

22 In order to avoid the high financial cost attendant on residence in the United Kingdom for the entire duration of her studies, Ms Neri decided to attend university courses in Italy at ESE. Having enrolled for the first year of the course of studies held by ESE in Genoa (Italy) and paid in advance to ESE the sum of ITL 4 000 000 (EUR 2 065.83), she learned from authoritative Italian sources that ESE was not authorised to organise university-level courses and that recognition could not be granted to the university's degrees, albeit legally recognised in the United Kingdom, if they had been obtained on the basis of periods of study completed in Italy.

23 Ms Neri claimed that she had made an undue payment and, unable to secure reimbursement on an amicable basis of the amount paid to ESE, applied to the Giudice di pace, Genoa, for an order enjoining ESE to repay to her the sum at issue.

24 In support of her claim, Ms Neri produced in evidence several circulars from the Ministry for Universities and Scientific and Technological Research which, according to her, could bear out the substance of her claim.

25 The Giudice di pace, Genoa, states that ESE is a private profit-making undertaking which carries on business within the Community in the market for educational services. NTU students who wish to attend the courses organised by ESE enter into a contract with it which provides for payment of a fee which constitutes consideration for ESE's services.

26 ESE through its Italian establishment provides in Italy the same services which it is authorised to provide in its State of origin in full compliance with the legislation of the host State.

27 The Giudice di pace, Genoa, states that the Ministry for Universities and Scientific and Technological Research and the Ministry for Foreign Affairs have issued memoranda and circulars which lay down that degrees awarded by universities in the Member States may be recognised in Italy only if students have attended courses in the States in which the degrees are issued. By contrast, degrees awarded to Italian nationals on the basis of periods of study at establishments operating in Italy with which these universities have entered into private-law contracts are not to be recognised. The referring court believes that these circulars and memoranda may have the effect of deterring students from attending these university courses and, in addition, are likely to hinder the use in Italy of university degrees awarded by foreign universities.

28 For this reason, the Giudice di pace, Genoa, believes that this administrative practice, being regulatory in nature since it is applied by all branches of the public administration, may have the effect of deterring students from enrolling in those university courses and/or, as has been found in the present case, of prompting students to withdraw their registrations for those courses of study.

29 According to the Giudice di pace, Genoa, this administrative practice may therefore constitute a barrier to freedom of movement for persons, freedom of establishment and freedom to provide services.

30 Moreover, the Giudice di pace, Genoa, takes the view that the administrative practice of the Italian authorities may be incompatible with Directive 89/48/EC if the rights conferred by the directive could be relied on by the nationals of the Member States prior to award of the degree mentioned in Article 1 thereof.

31 The Giudice di pace, Genoa, also points out that the administrative practice of the Italian authorities could be incompatible with Decision 63/266 which provides that the common vocational training policy is to seek to avoid any harmful interruption either between completion of general education and commencement of vocational training or during the latter.

The questions referred for a preliminary ruling

32 By order of 18 April 2002 the Giudice di pace, Genoa, decided to stay the proceedings and to seek a preliminary ruling from the Court on the following three questions:

'1. Are the rules or administrative practices of the national legal order, such as those described in sections III and IV of this order, compatible with the principles of the EC Treaty concerning the free movement of persons (Article 39 et seq. EC), the right of establishment (Article 43 et seq. EC) and

freedom to provide services (Article 49 et seq. EC), as interpreted by the Court of Justice? Of particular relevance in that regard are national rules and/or administrative practices which:

— impede the establishment in Italy of a limited company whose principal business is in the United Kingdom from carrying on in the host state the business of organising and administering courses of study for preparation for university examinations, for which the company is duly authorised and accredited by the United Kingdom public authorities;

— discriminate as between nationals pursuing the same activities;

— prohibit and/or seriously impede the establishment in Italy of that undertaking in obtaining, in another Member State and for valuable consideration, the services conducive to the pursuit of the abovementioned activity;

— discourage students from enrolling in those courses of study;

— impede the professional training of enrolled students and the obtaining of an award capable of conferring on its holder advantages either in securing access to a professional activity or in exercising it with greater reward in other Member States as well.

2. On an interpretation — herein requested — of Article 2 of Council Directive 89/48/EEC of 21 December 1988, does that directive confer rights which may be relied on also before acquisition of the degree mentioned in Article 1 of the directive itself? If the reply to that question is affirmative, does the directive itself, regard also being had to the Court's judgment in Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, permit rules or administrative practices in the national legal order which:

— make recognition of university degrees obtained on completion of training of at least three years' duration subject to the discretion of the public authorities;

— grant recognition of degrees awarded by universities recognised in the United Kingdom only if completed after regular attendance for the whole course of studies at those universities, to the exclusion therefore of degrees awarded on the basis of periods of study completed with foreign institutions operating in Italy even though they are approved and accredited by the competent public authorities in the Member State to which they belong;

— require production of an attestation from the Italian diplomatic or consular representation in the foreign country in which the degree was awarded proving actual residence in that country by the person concerned for the whole period of the university studies;

— limit recognition of degrees "solely" to the pursuit of a profession already pursued in the State of origin, thus precluding recognition for the purposes of access to a regulated profession even though not previously exercised?

3. What is the meaning and scope of the expression "harmful interruption of vocational training" in Council Decision 63/266 of 2 April 1963, and does it cover the creation at national level by the public authorities of a permanent system of information which evidences that degrees awarded by a university, even though legally recognised in the United Kingdom, cannot be recognised under national legislation if they have been obtained on the basis of periods of study completed in Italy?'

Preliminary remark

33 The Italian Government stated at the hearing that the description of national law in the order for reference is incorrect on certain points and that the order does not take into account all the relevant national provisions. The Italian Government also referred to amendments to the Italian and United Kingdom legislation subsequent to the order for reference as well as to changes in the relationship between ESE and NTU.

34 It is to be remembered in this regard that it is not for the Court of Justice to rule on the interpretation and applicability of provisions of national law or to establish the facts relevant to the decision in the main proceedings.

35 The Court must take account, under the division of jurisdiction between the Community Courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the question put to it is set (Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10).

36 The questions referred for a preliminary ruling should therefore be examined in the factual and legislative context described by the Giudice di pace, Genoa, in the order for reference.

The questions

37 The national court asks in its first question, essentially, if an administrative practice such as the one at issue in the main proceedings, under which university degrees awarded by a university of one Member State are not recognised by another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Articles 39 EC, 43 EC and 49 EC.

38 Ms Neri pleads this administrative practice before the national court in order to claim reimbursement of the enrolment fees paid to ESE, whereas ESE challenges such administrative practice on the basis of Community law. In order to give a reply to the questions referred for a preliminary ruling which could be of assistance in deciding the main proceedings before the national court, the Community law relevant to ESE's activities must therefore be interpreted.

39 The organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State (see, to that effect, Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 21).

40 Given that ESE, which has its principal establishment in the United Kingdom, organises university courses from secondary establishments in Italy, and in this case from its branch in Genoa, the questions referred to the Court, to the extent that they concern the fundamental freedoms protected by the Treaty, must be examined from the point of view of the freedom of establishment of ESE.

41 Article 43 EC requires the elimination of restrictions on freedom of establishment. All measures which prohibit, impede or render less attractive the exercise of this freedom must be regarded as constituting such restrictions (see Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraph 22).

42 For an institution like ESE, which organises courses intended to enable its students to obtain degrees capable of facilitating their access to the employment market, the recognition of those degrees by the authorities of a Member State is of considerable importance.

43 It is clear that an administrative practice such as the one at issue in the main proceedings, under which certain degrees awarded at the end of a university training course given by ESE are not recognised in Italy, is likely to deter students from attending these courses and thus seriously hinder the pursuit by ESE of its economic activity in that Member State.

44 Therefore an administrative practice such as the one at issue in the main proceedings constitutes a restriction on the freedom of establishment of ESE within the meaning of Article 43 EC.

45 The Italian Government appears to wish to justify that restriction by the need to ensure high standards of university education. It maintains that the Italian legal order does not accept agreements such as the one at issue in the main proceedings on university education since it remains attached to a view of such education as a matter of 'public interest', expressing as it does the cultural and historical values of the State. According to the Italian Government, such an agreement on university education prevents direct quality control of these private bodies by the competent authorities both in the Member State of origin and the host Member State.

46 However whilst the aim of ensuring high standards of university education appears legitimate to justify restrictions on fundamental freedoms, such restrictions must be suitable for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it (see Case C-439/99 *Commission* v *Italy* cited above, paragraph 23).

47 Given that the Italian legal order appears to allow, pursuant to Article 8(1) of Law No 341/90, agreements between Italian universities and other Italian establishments of higher education which are comparable to the agreement entered into between NTU and ESE and, as appears from the circular cited in paragraph 13 above, the non-recognition of degrees awarded in circumstances like those at issue in the main proceedings relates solely to degrees awarded to Italian nationals, the administrative practice described in the order for reference doe not appear suitable for attaining the objective of ensuring high standards of university education pleaded by the Italian Government.

48 In any event, the administrative practice at issue does not appear to satisfy the requirement of proportionality in relation to the objective pursued.

49 As the Advocate General makes clear in paragraph 49 of his Opinion, the administrative practice described in the order for reference appears to preclude any examination by the national authorities and, consequently, any possibility of recognition of degrees awarded in circumstances like those in the main proceedings.

50 Clearly such an administrative practice goes beyond what is necessary to secure the objective pursued.

51 In those circumstances, the reply to the first question referred must be that an administrative practice such as the one at issue in the main proceedings, under which degrees awarded by a university of one Member State cannot be recognised in another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Article 43 EC.

52 In view of the reply given to the first question, there is no need to reply to the second and third questions.

Costs

53 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Giudice di pace, Genoa, by order of 18 April 2002, hereby rules:

An administrative practice such as the one at issue in the main proceedings, under which degrees awarded by a university of one Member State cannot be recognised in another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Article 43 EC.

Edward La Pergola von Bahr

Delivered in open court in Luxembourg on 13 November 2003.

R. Grass V. Skouris

Registrar President