JUDGMENT OF THE COURT (Fifth Chamber)
7 December 1993 *

In Case C-109/92,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Hannover (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Stephan Max Wirth

and

Landeshauptstadt Hannover,

on the interpretation of the EEC Treaty and, in particular, Articles 59, 60 and 62 thereof,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, D. A. O. Edward and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Federal Republic of Germany, by Ernst Röder, Ministerialrat at the Federal Ministry of the Economy, acting as Agent,

— the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Eleanor Sharpston, Barrister,

— the Commission of the European Communities, by Jürgen Grunwald, of its Legal Service, acting as Agent,

* Language of the case: German.

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Wirth, represented by Helmut Vogt, Rechtsanwalt, Hameln, the United Kingdom and the Commission, at the hearing on 10 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 14 July 1993,

gives the following

Judgment

1 By order of 18 February 1992, received at the Court on 3 April 1992, the Verwaltungsgericht (Administrative Court) Hannover referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, two questions on the interpretation of that Treaty and, in particular, Articles 59, 60 and 62 thereof.

2 These questions were raised in proceedings between Mr Wirth, a German national, and the Landeshauptstadt Hannover ('the defendant'), concerning educational grants.

3 It appears from the case that, at the material time, educational grants were governed, in Germany, by the Bundesausbildungsförderungsgesetz (Federal Law on grants for training and higher education, 'BAföG') of 26 July 1971 (BGBl. I, p. 1409), as amended by the Zwölftes Gesetz zur Änderung des Bundesausbildungsförderungsgesetz (12th law amending the BAföG) of 22 May 1990 (BGBl. I, p. 936). Most provisions of the 12th law amending the BAföG, including those which relate to Paragraph 5 of the BAföG, came into force on 1 July 1990.

4 Paragraph 5(2) of the BAföG, as amended, provides *inter alia* that:

'An educational grant is awarded to applicants who are permanently resident in the territory to which this Law applies and who study at an educational or training institute outside that territory provided that

1. their studies are beneficial in the light of their previous education and at least part of that education or training can be recognized as being of the requisite or normal length of the education or training,

2. the education or training cannot be pursued within the territory to which this Law applies, if it was undertaken prior to 1 July 1990

and provided that they have adequate linguistic knowledge. ...'

5 On 31 August 1990, Mr Wirth, who was at that time living in Tettnang, Germany, applied for an educational grant under the BAföG to pursue a course in jazz saxophone at the Hoogeschool voor de Kunsten (Arts College) at Arnhem, in the Netherlands. To support this application, he explained that he had been obliged to pursue his training abroad, because there was no place available at a German establishment.

6 By a decision of 1 November 1990, the defendant rejected that application. It stated that, since the applicant was permanently resident in Germany, a grant for education abroad could only be awarded to him under Article 5(2) of the BAföG if it could be beneficial to him in the light of his previous education. That condition was not met in this case since the applicant was in the first term of his course.

7 Mr Wirth lodged an objection to that decision. He stated, *inter alia*, that he was permanently resident not in Germany but in the Netherlands, where he was studying, and that he was therefore entitled an educational grant under Paragraph 6 of the BAföG. Under that provision, a German national permanently resident in a foreign State can receive an educational grant if the particular circumstances of his case so justify. Mr Wirth considered that he had fulfilled that condition, since he had not been able to enrol in a German institution. By a decision of 5 February 1991, however, the Bezirksregierung (District Authority) Hannover rejected that claim.

8 On 8 March 1991, Mr Wirth appealed to the Verwaltungsgericht Sigmaringen. By a decision of 7 June 1991, that court held that it did not have jurisdiction and referred the case to the Verwaltungsgericht Hannover.

9 The latter court held that Mr Wirth was not entitled to a grant under the BAföG. Because he was permanently resident in Germany, he could not rely on Paragraph 6 of that Law. In addition, since he was beginning his course, he did not fulfil the condition imposed by Paragraph 5 of the BAföG, as amended.

10 However, the Verwaltungsgericht Hannover observed that until the 12th Law amending the BAföG came into force, such a grant could have been awarded to Mr Wirth. Under the previous version of that Law, it was enough for an educational grant to be awarded to a student wishing to study abroad that the education or training could not be pursued in Germany and that the applicant had adequate linguistic knowledge. Both of those conditions would have been fulfilled in this case.

11 In doubt as to whether the system of educational grants provided by the 12th Law amending the BAföG was compatible with Community law, the Verwaltungsgericht Hannover stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Does the pursuit of studies at an establishment of higher education in another Member State which charges fees for such studies constitute the receipt of a service within the meaning of Article 60 of the EEC Treaty which, according to Article 62 of the Treaty, may not be made subject to any new restrictions?

Do the rules set out in Paragraph 1(3)(a) of the 12th Law amending the Bundesausbildungsförderungsgesetz (Federal Law on grants for training and higher education) constitute a restriction within the meaning of Article 62 of the EEC Treaty?

2. Is it compatible with the general principle of equality

(a) for a Member State to award its nationals educational grants for the pursuit of higher education only if such studies are undertaken within the State itself, and not if they are pursued in another Member State?

(b) for a Member State which had previously awarded grants for higher education in another Member State to discontinue such grants irrespective of whether they give rise to additional costs?'

12 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant German legislation, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

13 In the first part of its first question, the national court seeks to ascertain whether courses given in an establishment of higher education must be described as services within the meaning of Article 60 of the Treaty.

14 It must first be borne in mind that under the first paragraph of Article 60 of the Treaty the chapter on services covers only services normally provided for remuneration.

15 As the Court has already emphasized in Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

16 Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

17 However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration.

However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees (Gebühren) from the students.

19 The answer to the first part of the first question must therefore be that courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.

20 In the second part of its first question, the national court wishes to ascertain whether Articles 59 or 62 of the Treaty preclude a Member State, after the entry into force of the Treaty, from introducing legislation under which nationals who are resident in that State may claim an educational grant only if they pursue their education or training within that State and not in another Member State, where the previous legislation did not impose such a condition.

21 It must be noted here that, since the establishment in question is not a provider of services within the meaning of Article 60 of the Treaty, the application of Article 59 does not arise. The same is true of Article 62 of the Treaty, under which Member States are not to introduce any new restrictions on the freedom to provide services which has in fact been attained at the date of the entry into force of the Treaty. The Court has already held, in Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan* [1991] ECR I-4685, paragraph 29, that Article 62, which is complementary to Article 59, cannot prohibit restrictions which do not fall within the scope of Article 59.

22 The answer to the second part of the first question must therefore be that neither Article 59 nor Article 62 precludes a system of educational grants for studies pursued in an establishment whose activities do not constitute services within the meaning of Article 60 of the Treaty.

The second question

23 In its second question, the national court seeks to establish whether the general principle of non-discrimination precludes a Member State from awarding educational grants to its nationals only if their studies are undertaken within the State itself, and not in another Member State, where in the past that Member State had awarded grants to its nationals who pursued their training outside the State.

24 This question presupposes that the Community law applies to the subject in question.

25 The Court has already held — in particular in Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, which concerned a dispute about the award of an educational grant under the same national legislation as is at issue in the main proceedings, that at the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty.

26 The second question, therefore, does not fall to be answered.

Costs

27 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, 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 question referred to it by the Verwaltungsgericht Hannover, by order of 18 February 1992, hereby rules:

1. **Courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.**

2. **Neither Article 59 nor Article 62 of the Treaty precludes a system of educational grants for studies pursued in an establishment whose activities do not constitute services within the meaning of Article 60 of the EEC Treaty.**

Moitinho de Almeida Edward Zuleeg

Delivered in open court in Luxembourg on 7 December 1993

J.-G. Giraud — Registrar

J. C. Moitinho de Almedia — President of the Fifth Chamber