that it constitutes consideration for the service in question, is absent in the case of courses provided in an establishment of higher education which is financed out of public funds and where students pay only enrolment fees.

Conversely, courses given in an establishment of higher education which seeks to make an economic profit and which is financed essentially out of private funds, particularly out of payments made by students or their parents, do constitute services within the meaning of Article 60 of the Treaty.

2. Where the courses concerned are followed in an establishment whose activities do not constitute services within the meaning of Article 60 of the Treaty, Articles 59 and 62 of the Treaty do not preclude a Member State from amending its legislation on educational grants, after the entry into force of the Treaty, so that nationals who are resident in that State may claim a grant only if they pursue education or training within the State itself, where previously they could receive a grant for studies pursued in another Member State.

# REPORT FOR THE HEARING
## in Case C-109/92 *

### I — Facts and Procedure

A — *Background to the dispute*

1. Mr Wirth, the applicant in the main proceedings, is a German national, studying jazz saxophone at the Hoogeschool voor de Kunsten (Arts College) in Arnhem (Netherlands). In an application dated 31 August 1990, Mr Wirth, who was at that time living in Tettnang, requested an educational grant to pursue a course in that institution. To support his application, he explained that he had been obliged to pursue his training abroad because there was no place available on a course in the Federal Republic of Germany.

2. By a decision of 1 November 1990, the defendant rejected the grant application because the criteria for awarding such a grant for study abroad had not been satisfied. Since the applicant was permanently resident in the Federal Republic of Germany, a grant for study abroad could only be awarded if it

* Language of the case: German.

could be beneficial in the light of the previous education of the person concerned, which was not so in this case since the applicant was in the first term of his course.

3. In response, Mr Wirth argued that he was not permanently resident in Germany but in Arnhem and that, therefore, he was entitled to an educational grant under Paragraph 6 of the Bundesausbildungsförderungsgesetz (Federal Law on grants for training and higher education, hereinafter the 'BAföG'), under which a German who is permanently resident in a foreign state may receive an educational grant if the special circumstances of the individual case so justify. The applicant claimed that he had fulfilled that condition, since he had not been able to obtain a place on a course in Germany.

4. By a decision of 5 February 1991, the Bezirksregierung (District Authority) Hannover rejected his claim.

5. On 8 March 1991, the applicant appealed to the Verwaltungsgericht (Administrative Court) Sigmaringen. By a decision of 7 June 1991, the Verwaltungsgericht Sigmaringen declared that it did not have jurisdiction and referred the case to the Verwaltungsgericht Hannover.

6. The Verwaltungsgericht Hannover considered that the solution to the dispute involved an interpretation of the EEC Treaty. Consequently, by a decision of 18 February 1992, it stayed the proceedings and submitted the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'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?'

B — *Procedure before the Court*

7. The Verwaltungsgericht Hannover lodged the order for reference at the Court Registry on 3 April 1992.

8. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 3 August 1992 by the Federal Republic of Germany, represented by Ernst Röder, acting as Agent, on 4 August 1992 by the Commission of the European Communities, represented by Jürgen Grunwald, of its Legal Service, and on 13 August 1992 by the United Kingdom, represented by John Collins of the Treasury Solicitor's Department and Eleanor Sharpston, Barrister.

9. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the First Chamber.

C — *Considerations of the national court*

10. In the order for reference, the Verwaltungsgericht Hannover sets out the considerations which led it to refer to the Court the preliminary questions set out above. The applicant had no right to a grant under the BAföG because he attends an institution abroad and he is permanently resident in the Federal Republic of Germany. Such a grant could have been awarded to him under the version of Article 5(2) of the BaföG which applied prior to the entry into force of the 12th Law amending that Law, which was already in force when the applicant began his studies. Under the previous version of the BAföG, an educational grant was awarded for study at an educational or training institute outside the territory covered by the Law, if such training was not available within that territory and the applicant had adequate linguistic knowledge. Both of these conditions were fulfilled in this case.

11. The national court questions, therefore, whether the amendments introduced by the 12th Law amending the BAföG are compatible with Community law. It does not see any prima facie justification for awarding grants for education or training at an institution within Germany but not for equivalent education or training in another Member State. As these doubts ultimately turn on the fact that the applicant has been placed at a disadvantage in respect of the award of a grant solely because the institution which he is attending is in another Member State, the national court asks whether Articles 59 and 60 of the EEC Treaty or the general principle of equality as a principle of Community law should be interpreted as meaning that it is compatible with Community law not to award or to cease to award a grant for education or training in another Member State which is not available within the home Member State.

II — Written observations submitted to the Court

A — *The first question (the definition of services within the meaning of Articles 59 and 60 of the EEC Treaty)*

12. The *German Government* considers that the reply to the first part of this question should be in the negative. In Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5384, the Court ruled that courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty, since they are not normally provided for remuneration. While recognizing that this case concerns training at an institute of higher education, the German Government considers that the significance of the judgment in *Humbel* is not limited to technical institutes, but includes all courses provided under the national education system.

13. In view of its proposed answer to the first part of the first question, the German Government considers that there is no need to reply to the second part of that question.

14. By way of introduction, the *United Kingdom* makes a number of general remarks. First, it points out that the main proceedings concern an application by a German national to the authorities of his own Member State for the award of a grant for study in another Member State. This case is therefore fundamentally different from a number of previous cases which concerned applications by nationals of one Member State to the competent authorities of another Member State, the host State, either for exemption from admission fees or for the award of a maintenance grant. Secondly, the United Kingdom considers that it is unclear from the order for reference whether the Hoogeschool voor de Kunsten is financed by the host Member State itself (through central or local government funding), or whether it is financed entirely from private, independent sources and is operated as a commercial institution seeking to make an economic profit from the provision of its courses. Thirdly, the United Kingdom considers that the uncertainty as to whether Mr Wirth was permanently resident within the Federal Republic of Germany or the Netherlands should be resolved by the national court.

15. As far as the first part of the first question is concerned, the United Kingdom takes as its starting point Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, where the Court held that the freedom to provide services includes the freedom, for the recipient of services, to go to another Member State in order to receive a service there without being obstructed by restrictions and that persons travelling for the purpose of education are to be regarded as recipients of services. The United Kingdom considers however that that judgment should not be interpreted as meaning that the provision of education is *ipso facto* the provision of a service within the meaning of Article 60 of the EEC Treaty. The Court specified at paragraph 10 of the judgment in *Luisi and Carbone* that Article 60 fulfils the objective of liberalizing all

*gainful* activity. Subsequently, and particularly in *Humbel*, the Court found that the characteristic of remuneration is absent in the case of courses provided under the national education system because the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity and because the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.

16. The United Kingdom considers that the provision of the course in question would only fall to be considered as the provision of a service within the meaning of Article 60 of the EEC Treaty if the institution in question, in this case the Hoogeschool voor de Kunsten, Arnhem, were entirely financed by private contributions and if the courses in question were only conducted with a view to making an economic profit. It is for the national court to make the appropriate finding of fact to determine whether or not that is true of any particular educational establishment. The United Kingdom considers, however, that only exceptionally is that likely to be the case.

17. Accordingly, the United Kingdom submits that the first part of the national court's first question should be answered in the negative. In the light of that proposed reply, the United Kingdom has not submitted any observations on the answer to be given to the second part of the first question.

18. The *Commission* refers to *Humbel* and considers that the principle it establishes also applies to this case. It concludes that the reply to the first part of the first question can only be in the negative and that, consequently, there is no reason to examine the second part of the first question.

B — *The second question (application of the principle of non-discrimination)*

19. The *German Government* points out that the grant sought by Mr Wirth covers maintenance. As Community law stands, assistance granted to students for maintenance and for training falls in principle outside the scope of the EEC Treaty. There is no question of any derogation from this principle, for example on the basis of Article 12 of Regulation (EEC) No 1612/68, in this case.

20. In the light of the above, the German Government proposes an affirmative answer to the first part of the second question.

21. As regards the second part of the second question, the German Government considers that, since there are no grounds for applying the EEC Treaty in this case, the Member State is entitled to amend legislative provisions concerning educational grants for courses abroad.

22. By way of introduction, the *United Kingdom* makes a number of general remarks. It considers that the expression 'the general principle of equality' used by the national court, refers either by implication to

Article 7 of the Treaty, which prohibits discrimination on the grounds of nationality, or to the fundamental principle of non-discrimination in Community law, which requires that similar situations shall not be treated differently unless differentiation is objectively justified.

23. The United Kingdom considers that the fact that Mr Wirth is claiming an educational grant from his own Member State distinguishes the issues at stake in a fundamental way from those considered by the Court in earlier cases and removes them from the scope of the principle of non-discrimination.

24. As regards the first part of the second question, the United Kingdom considers that the basis upon which a Member State decides whether or not to award a maintenance grant for the pursuit of higher educational studies is, in the present state of Community law, a matter for national law rather than for Community law. It follows from Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, that assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7.

25. The United Kingdom submits, moreover, that no issue of unequal treatment based on nationality arises in the present case. Mr Wirth is not a national of another Member State who is being treated less favourably than a national of the Member State from which the assistance is sought. Rather, his claim is that his own Member State should give him the same award to study in another Member State as it would make available to him in order to study in Germany.

26. The United Kingdom observes that in Case C-357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, the Court held that Article 7(1) of the Treaty applies to financial assistance granted by a Member State to its own nationals to the extent that that assistance is intended to cover the costs of access to professional training. In the United Kingdom's submission, it is clear from the context that the Court there had in mind defining the scope of application of that provision in order to establish the right of *non*-nationals to claim equal treatment with nationals in relation to the payment by the host Member State of fees for access to education. That judgment does not extend to situations such as those of the present reference.

27. In the light of these observations, the United Kingdom proposes that the answer to the first part of the second question should be that it is compatible with Community law for a Member State to award its own nationals educational grants for the pursuit of higher education only if such studies are undertaken within that Member State and to decline to award them if the studies are pursued in another Member State.

28. As regards the second part of the second question, the United Kingdom considers that there is no discrimination on the grounds of nationality nor can it see how the general

principle of non-discrimination can be invoked to assist Mr Wirth.

29. As to whether the general principle of equality can be underpinned by the standstill obligation contained in Article 62 of the Treaty, the United Kingdom recalls that in Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan* [1991] ECR I-4685, the Court held that the provisions of Article 62 are complementary to those contained in Article 59, and do not therefore prohibit restrictions that do not fall within the field of application of the latter.

30. The United Kingdom therefore proposes that the answer to the second part of the second question should be that it is compatible with Community law for a Member State which has previously awarded grants to its own nationals for higher education in another Member State subsequently to discontinue such grants.

31. The *Commission* emphasizes that the general principle of equality, which prohibits any discrimination on the grounds of nationality, is not affected in this case because no-one is placed at a disadvantage because of their nationality. Whilst it is true that a national educational grant awarded in the conditions described by the court of reference is hardly compatible with the spirit of the policy of promoting students' mobility within the Community, which may be discerned in numerous programmes (such as Comett and Erasmus) and in the case-law of the Court, it must nevertheless be recognized that the differentiation made by the Federal Republic of Germany does not, in the current state of Community law, amount to an infringement of the specific provisions of that law. In this case no breach of a concrete rule of Community law and no breach of a superior principle of Community law can be found, since the legislation in question falls exclusively within the discretion of the Member State concerned.

32. The Commission therefore submits that the answer to the second question should be that as Community law stands, legislation under which a Member State pays its nationals educational grants only if the studies take place within the State itself does not constitute an infringement of Community law.

D. A. O. Edward
Judge-Rapporteur