Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 February 2013 [1]

Case C-20/12

Elodie Giersch,
Benjamin Marco Stemper,
Julien Taminiaux,
Xavier Renaud Hodin,
Joëlle Hodin
v
État du Grand-Duché de Luxembourg

(Request for a preliminary ruling from the tribunal administratif of the Grand-Duchy of Luxembourg (Luxembourg))

(Freedom of movement for workers — Equal treatment — Social advantages — Financial aid for higher education studies — Residence condition — Indirect discrimination — Objective of increasing the proportion of persons with a higher education degree — Appropriate and proportionate nature of the residence requirement)

1. The Court has been asked to give a ruling on the compatibility with European Union (EU) law of a residence requirement imposed in Luxembourg on the children of frontier workers as a condition for obtaining aid for higher education studies, irrespective of the place where they propose to study.

2. Although the subject-matter of the present reference has already been the subject of consistent case-law, the special feature of the case is that, first, the dispute in the main proceedings has arisen in a Member State whose employment market is characterised by the presence of a large number of frontier workers and, secondly, the question of the right to financial assistance for higher education studies has arisen precisely in relation to the rights which those workers, and not the students as such, derive from EU law.

1 — Original language: French.

I – The legal context

A – *EU law*

3. Article 7(1) and (2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community,[2] which was applicable at the material time,[3] provides as follows:

‘1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.’

B – *Luxembourg law*

1. The system of aid for higher education in Luxembourg

4. The Law of 26 July 2010[4] on which the present Luxembourg system of aid for higher education studies is based changed the previous system in various respects. Aid may be applied for irrespective of the State in which the applicant proposes to pursue his or her higher education studies.

5. It should be noted that, since the Law of 22 June 2000,[5] only Luxembourg nationals and residents of Luxembourg were eligible for the aid. Originally, the 2000 Law required Luxembourg nationals to prove their nationality,[6] whereas non-Luxembourg Union citizens had to be domiciled in Luxembourg and covered by Articles 7 or 12 of Regulation No 1612/68. Such discrimination was rectified by a Law of 2005,[7] which required Luxembourg nationals to reside in Luxembourg territory in order to be able to claim the aid in question. Frontier workers who, by definition, did not reside in Luxembourg, were excluded from the scope of the Law of 22 June 2000.

6. Under the Law of 22 June 2000, the aid took the form of a grant and a loan, and the proportion in which the financial aid was granted varied ‘according to, first, the financial and social situation of the student and of his or her parents and, second, the enrolment fees payable by the student’.[8] The rules relating to the parents’ financial and social situation had been laid down in the Grand-Ducal Regulation of 5 October 2000,[9] Article 5 of which provided that the basic amount of the aid could be increased if two or more children of the same household were pursuing higher education studies[10] and

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

3 — Regulation No 1612/68 was repealed by Regulation (EC) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1). Article 7(1) and (2) of Regulation No 492/2011 reproduces the provisions of Article 7(1) and (2) of Regulation No 1612/68, the law remaining unchanged.

4 — *Mémorial A* 2010, p. 2040.

5 — *Mémorial A* 2000, p. 1106.

6 — Article 2(a) of the Law of 22 June 2000.

7 — See the single article of the Law of 4 April 2005 amending the Law of 22 June 2000 on financial aid from the State for higher studies (*Mémorial A* 2005).

8 — Article 4 of the Law of 22 June 2000.

9 — *Mémorial A* 2000, p. 2548.

10 — First indent of Article 5(4).

reduced by an amount equivalent to the annual family allowances if such allowances were received for the student.[11] Under the Law of 22 June 2000, the maximum total aid that could be granted was EUR 16 350 for each academic year[12] and it was adjusted annually in proportion to the sliding salary scale.[13]

7. The Law of 26 July 2010 forms the legal basis of the present aid system. It provides that Union citizens residing in accordance with Chapter 2 of the amended Law of 29 August 2008 on the freedom of movement of persons and on immigration to the Grand Duchy of Luxembourg,[14] which implemented in Luxembourg law 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,[15] 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, may apply for aid for higher education studies.[16] Article 6(1) of the amended Law of 29 August 2008 states that Union citizens have the right to reside in the territory of Luxembourg for more than three months provided that, as workers, they are employed or self-employed, or are enrolled at a public or private establishment authorised in Luxembourg in order primarily to study there and if they guarantee that they have sickness insurance and sufficient resources for themselves and the members of their family so as to avoid becoming a burden on the system of social security.[17]

8. As a consequence of the adoption of the Law of 26 July 2010, the proportion in which financial aid is granted in the form of a grant or loan varies only according to the financial and social situation of the student and the enrolment fees to be paid by him or her.[18] Consequently, the Grand-Ducal Regulation of 12 November 2010,[19] adopted pursuant to the Law of 26 July 2010, amended the Grand-Ducal Regulation of 5 October 2000 by deleting all the references in it to the situation of the parents of a student applying for aid. The maximum aid is EUR 17 700 for each academic year.[20] The amount is no longer indexed.[21]

2. The situation of frontier workers with regard to funding for higher education studies under the Luxembourg system

9. It is common ground that, even under the Law of 22 June 2000, the children of frontier workers did not fulfil the conditions for receiving aid for higher education studies because that Law laid down a requirement for residence in Luxembourg. However, frontier workers who were covered by the Luxembourg social security system received 'family allowances' for each child aged 18 and over who was pursuing higher education studies in Luxembourg or abroad.[22] In addition, recipients of family allowances were also entitled to a bonus for each child (EUR 76.88 per month on 1 January 2009). The family allowances for higher education studies, that is to say, those which continued to be paid after the child reached 18, could be paid direct to the child on request by the child.

11 — Second indent of Article 5(4).

12 — Article 3 of the Law of 22 June 2000. That amount includes aid in the form of a loan.

13 — Article 5(3) of the Grand-Ducal Regulation of 5 October 2000.

14 — *Mémorial A* 2008, p. 2024 (for the coordinated text, see *Mémorial A* 2012, p. 874)

15 — OJ 2004 L 158, p. 77.

16 — Article 2 of the Law of 26 July 2010.

17 — Points 1 and 3 of Article 6(1) of the Law of 29 August 2008.

18 — Article 4 of the Law of 26 July 2010.

19 — *Mémorial A* No 207, 18 November 2010, p. 3430.

20 — Article 3 of the Law of 22 June 2000, as amended by the Law of 26 July 2010. That amount includes aid in the form of a loan.

21 — Article 4 of the Grand-Ducal Regulation of 12 November 2010 repealed Article 5 of the Grand-Ducal Regulation of 5 October 2000.

22 — See Article 3(2) of the Law of 19 June 1985 concerning family allowances and establishing the National Family Allowances Fund (*Mémorial A* 1985, p. 680).

10. However, the Law of 26 July 2010 changed the law in force and Article 271(3) of the Social Security Code in so far as, thereafter, the right to family allowances for children aged 18 and over was retained only for those pursuing studies at secondary or technical secondary level (and not higher level),[23] irrespective of the place chosen for study. With regard to the bonus for each child, this is now paid only to students receiving aid for higher education studies, of which it is deemed to form an integral part, provided that the students are still part of their parents' household.[24] However, it seems to be recognised that children who have received neither a bonus nor financial aid from the State for higher education studies are entitled to a tax reduction.

II – The main proceedings and the question referred

11. Elodie Giersch, Joëlle Hodin and Julien Taminiaux are Belgian nationals. They reside in Belgium and have at least one parent who is a frontier worker in Luxembourg. Benjamin Marco Stemper is a German national residing in Germany. His father works in Luxembourg, but does not reside there.

12. Ms Giersch, Ms Hodin and Mr Taminiaux wish to pursue their studies in Belgium, that is to say, their State of residence, whereas Mr Stemper wishes to study in the United Kingdom. Each of those four children of frontier workers in Luxembourg submitted an application for financial aid for higher education studies in September and October 2010.

13. The Luxembourg Minister for Higher Education and Research rejected their applications on the ground that they were not resident in Luxembourg, which was a necessary condition for claiming the aid provided for by the Law of 26 July 2010.

14. They then lodged applications, primarily or in the alternative, for the annulment of the Minister's decisions before the tribunal administratif (Administrative Court) of the Grand Duchy of Luxembourg, which states that the four actions are examples of some 600 other similar actions pending.

15. Before the referring court, the applicants in the main proceedings submit that there is direct discrimination on the ground that Luxembourg law requires Luxembourg nationals to have their domicile in Luxembourg, whereas non-Luxembourg nationals are required to reside there. In the alternative, they submit that there is unjustified indirect discrimination, inter alia contrary to Article 7(2) of Regulation No 1612/68, because it is easier for Luxembourg nationals to meet the residence requirement, which was put into effect solely in order to exclude frontier workers from the benefit of the aid.

16. Also before the referring court, the State of the Grand-Duchy of Luxembourg denies that there is any discrimination whatsoever and contends that, for the purpose of Luxembourg law, the concepts of domicile and residence are equivalent. The State of the Grand-Duchy of Luxembourg is likewise opposed to the classification of the State aid for higher education studies as a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 in so far as it is granted only to students, regarded as independent adults, irrespective of their parents' personal situation. In any case, the objective of the Luxembourg system of aid for higher education studies, which is to increase significantly the proportion of persons resident in Luxembourg who have a higher education degree, that proportion being less than the European average, justifies the fact that only residents can claim the aid. If the residence requirement were removed, the result would be that any student, without any

23 — See Article V(2) of the Law of 26 July 2010. The family allowance for one child is EUR 234.12 per month, or EUR 2 809.44 per year (see Article 272(1)(a) and Article 272(2) of the Social Security Code).

24 — Article II(1) of the Law of 26 July 2010.

connection with Luxembourg society, could obtain aid in order to study in any country whatever. That would encourage study grant forum shopping and would be an intolerable burden on the State of the Grand Duchy of Luxembourg, which would have to go back on the very principle of the portability of aid.

17. The referring court, for its part, finds that aid for higher education studies is a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68. It is an aid for maintenance granted directly to students who are dependent on their parents. However, according to the Court's case-law, the equal treatment required by Article 7(2) of Regulation No 1612/68 also covers descendants who are dependent on a migrant or frontier worker. [25]

18. Following the State of the Grand Duchy of Luxembourg's argument the referring court denies the existence of direct discrimination on the ground that, in national law, the concepts of domicile and residence are equivalent, but concludes that the aid system is based on indirect discrimination prohibited by EU law, because, in effect, it is easier for nationals to fulfil the residence requirement, as stated in the Court's case-law. The referring court observes then that such a difference in treatment can be justified if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions. However, the referring court is in doubt precisely with regard to the legitimacy of the justifications put forward by the State of the Grand Duchy of Luxembourg.

19. Thus faced with a difficulty relating to the interpretation of EU law, the tribunal administratif of the Grand Duchy of Luxembourg decided to stay the proceedings and, by order received at the Court Registry on 16 January 2011, to refer the following question to the Court for a preliminary ruling on the basis of Article 267 TFEU:

'In the light of the Community principle of equal treatment set out in Article 7 of Regulation No 1612/68, do the considerations relating to education policy and budgetary policy put forward by the State [of the Grand Duchy of Luxembourg], namely seeking to encourage an increase in the proportion of people with a higher education degree, which is currently inadequate compared with other countries as far as the resident population of Luxembourg is concerned – considerations which would be seriously threatened if the State [of the Grand Duchy of Luxembourg] had to give financial aid for higher education studies to every student, without any connection with the society of the Grand Duchy, to carry out their higher education studies in any country in the world, which would lead to an unreasonable burden on the budget of the State [of the Grand Duchy of Luxembourg] – constitute considerations, in terms of the Community case-law … which are capable of justifying the difference in treatment resulting from the residence requirement imposed both on Luxembourg nationals and on nationals of other Member States in order to obtain aid for higher education studies?'

III – The procedure before the Court

20. Ms Giersch, Ms Hodin and Mr Taminiaux, the governments of Luxembourg, Denmark, Greece, Austria and Sweden and also the European Commission have submitted written observations to the Court.

21. At the hearing of 28 November 2012, the oral observations of Ms Giersch, Mr Stemper, Ms Hodin and Mr Taminiaux and of the governments of Luxembourg, Denmark, Greece, Austria and Sweden, and also of the European Commission, were heard.

25 — The referring court refers, inter alia, to Case C-3/90 *Bernini* [1992] ECR I-1071.

IV – Legal assessment

22. In order to give the referring court a helpful reply, I suggest reconsidering briefly the classification of aid for higher education studies as a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 and the fact that the residence requirement for the children of frontier workers constitutes indirect discrimination. I shall then carry out the classic test used by the Court where there is a difference in treatment and shall reply to the question from the referring court by addressing not only the compatibility with EU law of the grounds of legitimation put forward by the Luxembourg Government, but also the question whether the residence clause is appropriate and proportionate.

A – *The scope of Article 7(2) of Regulation No 1612/68 and the existence of discrimination*

23. As a preliminary point, it is essential to observe that the question from the referring court refers to Article 7(2) of Regulation No 1612/68. According to the Court's case-law, that article is 'the particular expression, in the specific area of the grant of social advantages, of the principle of equal treatment enshrined in Article [45(2) TFEU] and must be accorded the same interpretation as that provision'.[26] Consequently, the referring court asks the present Court to assess the situation in the main proceedings by the yardstick of the freedom of movement for workers.[27]

1. The aid for higher education studies received by the children of frontier workers constitutes a social advantage

24. Before the referring court and in the course of the present proceedings, the Luxembourg Government questioned whether aid for higher education studies granted in accordance with the rules laid down by the Law of 26 July 2010 falls within the concept of 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68.

25. The referring court proceeded on the assumption that, under Article 203 of the Luxembourg Civil Code, the applicants in the main proceedings must be regarded as dependent on their frontier worker parent. The referring court has clearly reached that conclusion on the basis of two factors: (a) the fact that Article 203 provides that 'the spouses contract together, by the sole fact of marriage, the obligation to feed, maintain and bring up their children' and (b) according to national case-law, while the obligation of maintenance and education comes to an end, in principle, when the children come of age, the parents nevertheless remain bound, after the children come of age, to give them the means of pursuing studies intended to prepare them for the occupation which they propose to take up, provided however that they are shown to be qualified to do so.[28]

26. It is not possible, for the purpose of the following assessment, to agree a priori with the referring court's idea because, according to the principles of private international law, a question of that kind must be resolved on the basis of the law establishing the personal status of the individual concerned. Therefore Article 203, as interpreted in Luxembourg case-law, may apply to Luxembourg nationals or residents by reason of the choice of that country's jurisdiction in favour of a criterion of citizenship, domicile or residence which it makes in order to determine that status.

26 — Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 53 and the case-law cited.

27 — For that reason the present case differs clearly from the situation at issue in Case C-209/03 *Bidar* [2005] ECR I-2119 and Case C-158/07 *Förster* [2008] ECR I-8507, because in those cases it was a matter of determining the rights of citizens who were not economically active.

28 — See point 3 of the commentary to Article 203 of the Luxembourg Civil Code.

27. Secondly, and in line with the foregoing, it is not possible to conclude that the applicants in the main proceedings are not dependent on their frontier worker parent by reason of the fact that the Law of 26 July 2010 provides that the aid is payable directly to students, that the parents' income is not relevant for the purpose of determining the amount of the aid and that the aim is to make young adults independent of their parents so that they can themselves decide alone on their future career path.

28. It follows that the referring court will be able to consider the problem which it has put to the Court only if it (the referring court) finds not only that the students concerned in the main proceedings form part of the household of the frontier worker concerned, but also that the frontier worker keeps them at their expense by continuing to support them, and the referring court must also ascertain whether those students benefit, actually or potentially in their country of residence, from a measure similar to that put into effect by the Law of 26 July 2010.

29. Should that assessment by the referring court lead to the conclusion that the applicants in the main proceedings are indeed dependent on their frontier worker parents, in the first place, it must be observed briefly – the Court's position in this respect being settled – that 'assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes a social advantage for the purposes of Article 7(2) of Regulation No 1612/68'[29] and that 'study finance granted by a Member State to the children of workers constitutes, for the migrant worker, a social advantage for the purposes of Article 7(2) of Regulation No 1612/68, where the worker continues to support the child'.[30]

30. Secondly, while, under Article 7 of Regulation No 1612/68, a worker who is a national of a Member State other than that in which he works enjoys the same social advantages as those granted to nationals of that State, the concept of 'worker' in that provision covers *frontier* workers who have the same entitlement to rely on it as any other worker targeted by that provision.[31] When interpreting Article 7(2) of Regulation No 1612/68, the Court has made no distinction between the concepts of migrant worker and frontier worker precisely because Regulation No 1612/68, unlike other measures of secondary law,[32] does not treat those two categories of worker differently when they exercise their freedom of movement.

31. Third, the fact that aid is granted directly to the student with a frontier worker parent does not affect the classification as a social advantage since the Court has held that the members of the family of a migrant or frontier worker 'are the indirect beneficiaries of the equal treatment accorded to the migrant worker', provided that they are supported by him[33] and that, 'where the grant of financing to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may itself rely on Article 7(2) [of Regulation No 1612/68] in order to obtain that financing if under national law it is granted directly to the student'.[34]

32. Consequently, the referring court correctly took the view that aid for higher education studies is a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 and that children supported by frontier workers are entitled to rely on the principle of non-discrimination which it enshrines.

29 — Case C-542/09 *Commission v Netherlands* [2012] ECR, paragraph 34 and the case-law cited.

30 — *Commission* v *Netherlands*, paragraph 35 and the case-law cited.

31 — *Hendrix* (paragraph 47 and the case-law cited). See also recital 4 in the preamble to Regulation No 1612/68.

32 — See, for example, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

33 — *Bernini*, paragraph 26.

34 — *Bernini*, paragraph 26; Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 22, and Case C-206/10 *Commission* v *Germany* [2011] I-3573, paragraph 36.

2. The residence requirement is indirectly discriminatory

33. It is clear from settled case-law that Article 7(2) of Regulation No 1612/68, like Article 45 TFEU, prohibits not only overt discrimination based directly on nationality, but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result. [35]

34. According to the referring court, the residence requirement applies without differentiation to Luxembourg nationals and nationals of other Member States since the referring court found, when interpreting its own national law, that the domicile and residence requirements were, in fact, equivalent. Therefore, in relation to nationals of other Member States, the residence requirement is not directly discriminatory.

35. Nevertheless, that residence requirement 'primarily operates to the detriment of migrant workers and frontier workers who are nationals of other Member States, in so far as non-residents are usually non-nationals.' [36] It is 'immaterial whether, in some circumstances, the measure [in question] affects, as well as nationals of other Member States, nationals of the Member State in question who are unable to meet such a criterion'. [37] Finally, the Court found, regarding access to portable funding, that the situation of a frontier worker employed in the State granting the finance, but residing in another Member State, is comparable to that of a national of the State granting the finance who both resides and works in that State. [38]

36. The unequal treatment arising from the residence requirement imposed on students who are children of frontier workers constitutes indirect discrimination which is in principle prohibited, unless objectively justified and of such a nature as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose. [39]

B – *The legitimacy of the objective pursued*

37. First of all, in order to justify the difference in the treatment of frontier workers regarding aid for higher education studies, the Luxembourg Government claims that such aid has the objective, which it describes as 'political' or 'social', of significantly increasing the proportion of Luxembourg residents with a higher education degree. That proportion is at present 28%, [40] which is much less than the percentage of people with such a degree in comparable States. The Luxembourg Government considers it necessary to achieve a percentage of 66% of persons in the resident population aged from 30 to 34 holding higher education degrees, as that will enable the Government to meet the increasingly urgent need for a transition of the Luxembourg economy to a knowledge-based economy.

38. The class of recipients of the aid is confined to Luxembourg residents because they have a connection with Luxembourg society justifying the assumption that, after benefiting from the opportunity offered by the Luxembourg system of aid to finance their studies, which in some cases may be pursued abroad, they will return to Luxembourg to apply the knowledge thereby acquired for the benefit of the development of its economy as mentioned above.

35 — *Commission* v *Netherlands*, paragraph 37 and the case-law cited.

36 — *Commission* v *Netherlands*, paragraph 38.

37 — *Commission* v *Netherlands*, paragraph 38.

38 — *Commission* v *Netherlands*, paragraph 44.

39 — *Commission* v *Netherlands*, paragraph 55.

40 — In its written observations, the Luxembourg Government gives the figure of 39.5% of persons aged from 24 to 29 years (the percentage of those with higher education degrees among Luxembourg nationals is of the order of 22%, all age groups considered).

39. Secondly, the Luxembourg Government submits that that objective, in conjunction with national education policy, cannot be considered separately from the economic objective. Aid for higher education studies must be limited to Luxembourg residents in order to ensure the funding of the system. According to the Luxembourg Government, the Court has already recognised that a Member State may ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which might be granted by that State. The Luxembourg Government relies on *Bidar*,[41] which it considers relevant to the present case, and submits that, if the residence requirement had to be abolished, it would have to pay the aid to every student with no personal connection with Luxembourg society, which would be an unreasonable burden for the Government.

40. I, for my part, am sure that the two objectives may be considered separately. No doubt, deciding who are to be the beneficiaries of a social advantage logically affects the economic burden for the State granting that advantage. An education policy (because that is what appears to be at issue here) is necessarily implemented by various means which also necessarily entail a cost. However, it is not enough to argue that a policy entails considerable cost if it is then found to be discriminatory. It must be shown that the policy is essential and that the cost is so great that it would be impossible to put it into effect.

1. The objective of raising to 66% the proportion of Luxembourg residents with a higher education degree

41. I note that this objective is not, as such, disputed by the interested parties concerned who have intervened in the present case.

42. The objective of increasing the number of persons with a higher education degree is clearly a matter of public interest. The EU institutions have themselves undertaken a number of initiatives in that connection and have stressed the correlation between the educational level of individuals, access to employment and the economic growth of the EU. In its communication entitled 'EUROPE 2020: A strategy for smart, sustainable and inclusive growth,[42] the Commission stated that the target for 2020 is that the proportion of early school leavers should be under 10%, and at least 40% of the younger generation should have a tertiary degree.[43] In particular, the Commission proposed that the Member States should make that a national objective.[44] The achievement of that objective should contribute to the modernisation of labour markets, an increase in labour participation and a better match between labour supply and demand. The Commission considers that these are priority targets for a rapid and effective exit from the period of crisis the EU is experiencing.[45]

43. The Council of the European Union had already adopted that objective in the context of its Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2000'),[46] in defining the reference level of European average performance, with regard to higher education degrees, as at least 40% of 30 to 34 year olds.[47]

41 — Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 56.

42 — COM(2010) 2020 final, 3 March 2010.

43 — Communication cited above, pp. 5 and 12.

44 — Communication cited above, p. 5.

45 — Communication cited above, p. 5. See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'An Agenda for new skills and jobs: A European contribution towards full employment', COM(2010) 682 final, 23 November 2010.

46 — 'Education and training 2020'; OJ 2009 C 119, p. 2.

47 — Annex I to the Council's conclusions of 12 May 2009.

44. Since then, the Council has continuously referred to the importance of that objective. In 2010, it noted that 'raising aspirations and increasing access to higher education for students from disadvantaged backgrounds requires strengthening financial support schemes and other incentives, and improving their design. Affordable, accessible, adequate and portable student loans as well as means-tested grants can successfully increase participation rates for those who cannot afford the costs of higher education'. [48] Anticipating the development of the labour market at EU level, the Council has also pointed out that '[i]n the coming years, increasing numbers of jobs will require high-level qualifications, yet the EU currently has a lower percentage of people with a tertiary or equivalent level qualification than its competitors'. [49] That finding applied to all the Member States, that is to say, those where the labour market is characterised by the presence of a large number of frontier workers, and the others. Finally, in its European agenda for adult learning laying down the priority areas for 2012-2014, the Council specified what the Member State are required to do in order to ensure that 'at least 40% of young adults complete tertiary or equivalent education'. [50]

45. The initiatives that I have just described for promoting more general access to higher education are, in any case, matters for only the supporting competence of the Union in the field of education and vocational training. [51] In other words, where there is no harmonisation at the European level, the Member States retain considerable freedom to decide the objectives pursued by their education policy and to lay down the conditions under which aid for higher education studies is granted. [52]

46. In my opinion, the transition to a knowledge-based economy, referred to by the Luxembourg Government in its written observations, [53] is one of the objectives left to the discretion of the Member States. Luxembourg's economic situation is historically atypical. From being an economy based on the mining and steel industries, Luxembourg effected a transformation, once those industries disappeared, by developing employment in the banking and financial sector. Therefore, and even before the financial crisis, that sector was seriously threatened as a result of the steps taken at Union level to drastically diminish the advantageous position enjoyed by the Luxembourg banking system by comparison with the banking systems of other Member States. It is perfectly understandable that a Member State should put into effect an education policy aiming to improve the skills level of the available human resources with a reasonable prospect of contributing to the restructuring of the national economy which aims to attract and offer more diverse forms of services in its territory.

47. Consequently it can hardly be doubted that steps taken by a Member State to provide a high level of education for its resident population pursue a legitimate objective which may be regarded as an overriding reason in the public interest.

2. The objective of avoiding an unreasonable burden affecting he overall level of aid for higher education

48. With regard to the economic objective, so far as the parallel justification based on the risk of overburdening the financial capacity of the system is concerned, it must be said that that is an argument which is repeatedly used by the Member States before the Court. Furthermore, it is not convincing to seek support in the *Bidar* case.

48 — Council conclusions of 11 May 2010 on the social dimension of education and training, OJ 2010 C 135, p. 2.

49 — Council conclusions of 19 November 2010 on the 'Youth on the Move' initiative –an integrated approach in response to the challenges young people face, OJ 2010 C 326, p. 9.

50 — Annex to the Council Resolution on a renewed European agenda for adult leaning, OJ 2011 C 372, p. 1.

51 — Articles 6 and165 TFEU.

52 — See, to that effect, the Opinion of Advocate General Sharpston in *Commission* v *Netherlands*, point 139.

53 — Paragraph 28.

49. I merely wish to point out that the situation in the main proceedings is examined here in the light of the freedom of movement of workers and that it is necessary to determine whether the national legislation affects the rights which frontier workers derive from EU law. In the *Bidar* case, the Court was asked to give a ruling on the compatibility of a residence requirement in relation to the grant of funding for studies, which was imposed on European citizens who were not economically active. That is a fundamental difference to which the Court did not fail to draw attention in *Commission* v *Netherlands*.[54]

50. When the Court considered the justifications put forward by the Kingdom of the Netherlands, it began by stating that 'although [budgetary] considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination.'[55] The Court nevertheless went on to consider the objective of avoiding an unreasonable burden (economic objective). The defendant also thought that it could be inferred from the *Bidar* and *Förster* judgments that the Member States could legitimately require the recipients of aid for higher education studies to demonstrate a 'certain degree of integration'. However, the Court insisted on pointing out the fundamental difference between *Bidar* and *Förster* and the *Commission* v *Netherlands* case, the difference arising from the fact that, in the first case, the nationals in question were not economically active and were not members of a worker's family within the meaning of Union law and, in the second case, the situation was considered from the viewpoint of a migrant or frontier worker supporting a child who wished to pursue higher education studies and who applied for a grant of aid for higher education studies paid by the State employing his parent.

51. The Court held that '[a]lthough the Member States' power – which the Court has recognised, subject to the respect of certain conditions – to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages, such as financial assistance for education, is not limited to situations in which the applicants for assistance are economically inactive citizens, the existence of a residence requirement [of three years out of the six preceding the application for assistance for higher education studies] to prove the required degree of integration is, in principle, *inappropriate* when the persons concerned are migrant workers or frontier workers.'[56] With regard to the latter, 'the fact that they have participated in the employment market of a Member State establishes, *in principle*, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages.'[57] The Court concluded from this reasoning that the objective of avoiding an unreasonable burden, relied on in relation to the grant of a social advantage to frontier workers, could not constitute a legitimate objective.

52. For that reason, the budgetary objective relied upon by Luxembourg is not, in itself, a legitimate justification for unequal treatment as between Luxembourg workers and workers from other Member States. In any case, as indicated in paragraph 38 above, the problem is not to justify the discrimination alleged by the applicants in the main proceedings by reference to the considerable cost involved in removing the discriminatory requirement, but to ascertain that the economic objective – the transition to a knowledge-based economy – for which the State of the Grand Duchy of Luxembourg instituted that discriminatory practice is not only seriously, but also effectively, pursued and that the cost of avoiding that practice would be so great as to make the attainment of the objective impossible. It is clearly for the referring court to examine both points in order to show, if necessary, that there is a factor which ultimately strengthens the justification constituted by the social objective.

54 — *Commission* v *Netherlands*, paragraph 60 et seq.

55 — *Commission* v *Netherlands*, paragraph 57 and the case-law cited.

56 — *Commission* v *Netherlands*, paragraph 63 (emphasis added).

57 — *Commission* v *Netherlands*, paragraph 65 (emphasis added).

C – *The appropriate and proportionate nature of the residence requirement*

53. A measure which is liable to restrict the freedom of movement for workers, as provided for by Article 45 TFEU and implemented by Article 7(2) of Regulation No 1612/68, can be justified only if it is appropriate for securing the attainment of the legitimate objective pursued and does not go beyond what is necessary in order to attain it,[58] which it is necessary to verify.

54. The test of whether the criterion used by the Luxembourg Government is appropriate and proportionate for pursuing the legitimate objective is the most delicate one to apply. In that connection, two series of problems arise in the present case. First, the different parties which have intervened in the course of the present proceedings have drawn opposite conclusions from the *Commission* v *Netherlands* case, in particular regarding the degree of integration which it may be open to the Member States to require from recipients of aid for higher education studies. Therefore I wish to clarify that judgment on this point. Second, certain information which seems to me essential is missing from the file, so that it will, I think, be difficult for the Court to give a final ruling on whether the national legislation is appropriate and proportionate. In the context of the present case, a number of points merit more thorough examination precisely in order to take account of the specific features of the Luxembourg system and, above all, the Luxembourg labour market. It is therefore important to draw the attention of the referring court to that point.

1. The *Commission* v *Netherlands* judgment

55. When, in *Commission* v *Netherlands*, the Court examined what is known as the 'social' ground of justification in relation to the objective of increasing student mobility, the Court indeed found that it constituted an overriding reason relating to the public interest.[59] The defendant then attempted to prove that the requirement of residence for three years out of the last six years preceding the application that it imposed was appropriate and proportionate by citing the fact that it was necessary to ensure that the funding would benefit only students whose mobility had to be encouraged: the State granting the aid expected that students benefiting from the aid scheme would return there after completing their studies, in order to reside and work there.[60] The Court therefore accepted that those aspects 'reflect the situation of most students'[61] and, in doing so, held that the requirement of residence for three years out of the last six years preceding the application was appropriate for the purpose of attaining the objective of promoting student mobility.[62] However, that same requirement of eligibility for the portable funding for higher education studies granted by the Netherlands was, according to the Court, 'too exclusive', and the Court held that, 'by requiring specific periods of residence in the territory of the Member State concerned, the [requirement of residence for three years out of the last six years preceding the application] prioritises an element which is not necessarily the sole element representative of the *actual degree of attachment* between the party concerned and that Member State'.[63] The Court concluded that it had not been established that the rule in question did not go beyond what was necessary for the purpose of attaining the objective sought.

56. Therefore it is clear from an attentive reading of that judgment that the Court takes a different view of the criterion of a 'certain degree of integration' according to whether it is assessed in relation to a legitimate objective of an economic nature[64] or in relation to a legitimate objective of a social nature.

58 — *Commission* v *Netherlands*, paragraph 73.
59 — *Commission* v *Netherlands*, paragraph 70 et seq.
60 — *Commission* v *Netherlands*, paragraphs 76 and 77.
61 — *Commission* v *Netherlands*, paragraph 78.
62 — *Commission* v *Netherlands*, paragraph 79.
63 — *Commission* v *Netherlands*, paragraph 86 (emphasis added).
64 — See point 50 et seq. above.

57. Where it is a matter of limiting the recipients of aid for higher education studies on economic grounds by claiming that funding that aid is a tolerable burden, the Court bases its assessment on the concept of migrant or frontier workers, finds that they are by nature, by virtue of the mere fact of having entered the labour market of the State granting the aid, economically integrated in the society of that State, that they participate in funding its social policies and that, consequently, it is not appropriate to impose a residence requirement of three years in order for them to benefit from a social advantage.

58. On the other hand, where it is a matter of limiting the recipients of aid for higher education studies rather on social grounds, the Court examines the situation by taking into account as the reference point not a worker who, like the members of his family, is entitled to equal treatment with regard to social advantages, but the student himself. In other words, the economic integration of the parent frontier worker is not necessarily and automatically the same as the social integration of his family members. In addition, the Court does not use the same terminology, it no longer refers to 'a certain degree of integration',[65] but speaks of an 'actual degree of attachment'.[66] The point of reference is no longer the worker and his connections with the society of the State of employment, but the student himself. Therefore, just as the three-year residence requirement was judged inappropriate with regard to establishing a frontier worker's economic integration, the same requirement was considered appropriate by the Court with regard to verifying a student's social attachment. The Court also appears to have accepted that aid could be limited to students likely to return and to reside in the State granting the funding, and accordingly accepted that there is a connection between the student's residence at the time when he or she applies for aid and the prospect of 'return' it offers. Finally, however, the Court held that the three-year residence requirement was contrary to EU law as it was disproportionate, precisely because to require three years residence out of the last six years preceding the application – and only that – was a condition too rigid to establish an actual degree of attachment.

2. The appropriate nature of the residence requirement

59. Therefore the question is whether, in the light of what is said above, the imposition of a condition of residence on the children of frontier workers by the State of the Grand Duchy of Luxembourg in order to be entitled to receive aid for higher education studies could make the student's return reasonably likely, a return which Luxembourg considered necessary for the attainment of the legitimate objective pursued.

60. The reply is found in the actual formulation of the objective. If the Court accepts, as I have suggested, that the Luxembourg State may legitimately take measures to encourage its resident population to take up higher education studies, with the prospect that they, more than any other persons, will be likely to enter and thus enrich the Luxembourg employment market after completing their studies, it must consequently be accepted that a residence requirement is appropriate for securing that objective in that it limits the aid to Luxembourg residents.

3. The proportionate nature of the residence requirement

61. The residence requirement in question in *Commission* v *Netherlands*, which was imposed only for funding higher education studies outside the Netherlands,[67] was considered to have been met if the applicant could prove three years' continuous residence out of the last six years preceding the application. As I have said, it is clear from the judgment in *Commission* v *Netherlands* that the Court

65 — Or a certain *level* of integration (*Commission* v *Netherlands*, paragraphs 61 and 63).

66 — *Commission* v *Netherlands*, paragraph 86.

67 — Opinion of Advocate General Sharpston in that case, point 14.

did not intend to exempt the children of frontier workers from the obligation to show an attachment to the society of the State in which their parent is employed when those children apply, in that State, for portable funding for higher education. However, the Court made it clear that a three-year residence requirement was not to be construed by the States as the *only* factor constituting that attachment.

62. Consequently the residence requirement imposed by the Grand Duchy of Luxembourg must be considered in the light of that assessment. The central question is whether a prior residence requirement *alone* can ensure for the State of the Grand Duchy of Luxembourg a minimum 'investment return', if I may express it that way, a reasonable probability that the recipients of funding will return to reside in Luxembourg and make themselves available to its labour market in order to contribute to the new economic dynamics of that country. For the purpose of that assessment, I think it would be helpful to set out two lines of enquiry for the referring court.

63. The first point to be considered by the referring court is to ascertain whether the test carried out by the national authorities, when they have to give a decision on a residence application where no minimum duration is imposed, is not purely formal but sufficient to give rise to a reasonable probability that the applicant will be available to become integrated in the economic and social life of Luxembourg.

64. The second enquiry which I suggest the referring court should make is connected with the fact that the assistance for higher education studies provided for under Luxembourg legislation is a portable aid and that, as such, it may be used outside the country which grants it, with the result that the students receiving it may be attracted by the employment market of the country where they study. That means that being resident at the time of applying for funding for higher education studies, considered in itself, does not constitute a sufficient reasonable probability that the student will return to the State which granted the aid. If the use of the criterion in question is to be considered proportionate to the objective pursued, it is necessary to ascertain whether the aim of transforming the Luxembourg economy into a knowledge-based economy – that is to say, an economy offering services in the widest sense – has actually been accompanied by Government measures aiming specifically to develop new prospects for employment in that regard, and not only in the sectors for which the Grand Duchy of Luxembourg offers superior opportunities for training, but also in other sectors, because, in order to establish that the criterion of proportionality has been met, it is not sufficient to establish the characteristics of the specific measure and of the objective pursued, but consideration must be also given to the exact way in which attainment of that objective is pursued.

65. Consequently, for all the reasons set out above, I consider that it will be for the referring court to determine, after assessing all the necessary and relevant matters on which the Court has no information at present, whether the residence requirement imposed by the Law of 26 July 2010 on the children of frontier workers applying for aid for higher education studies is appropriate and proportionate.

V – Conclusion

66. Therefore I suggest that the Court reply as follows to the question referred by the tribunal administratif of the Grand Duchy of Luxembourg:

The objective of increasing the proportion of people with a higher education degree is a legitimate objective capable of justifying indirect discrimination, having regard to Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community and Article 45 TFEU. It will be for the referring court to establish, after assessing all the necessary and relevant matters for that purpose – and in particular those to which its attention is

drawn above – that the residence requirement imposed by the Law of 26 July 2010 on the children of frontier workers applying for aid for higher education studies is appropriate and does not go beyond what is necessary to attain the legitimate objective pursued.