



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

20 June 2013 *

(Freedom of movement for persons — Equal treatment — Social advantages — Regulation (EEC) No 1612/68 — Article 7(2) — Financial aid for higher education studies — Condition of residence in the Member State granting the assistance — Refusal to grant the aid to students, who are European Union citizens not residing in the Member State concerned, whose father or mother, a frontier worker, works in that Member State — Indirect discrimination — Justification — Objective of increasing the proportion of residents with a higher education degree — Whether appropriate — Proportionality)

In Case C-20/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal administratif (Luxembourg), made by decision of 11 January 2012, received at the Court on 16 January 2012, in the proceedings

Elodie Giersch,

Benjamin Marco Stemper,

Julien Taminiaux,

Xavier Renaud Hodin,

Joëlle Hodin

v

État du Grand-Duché de Luxembourg,

intervening parties:

Didier Taminiaux,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 28 November 2012, after considering the observations submitted on behalf of:

- Ms Giersch, by S. Coï, avocat,
- Mr Stemper, by S. Jacquet, avocate,
- Mr J. Taminiaux, by P. Peuvrel and V. Wauthoz, avocats,
- Mr and Ms Hodin, by G. Thomas, avocat,
- Mr D. Taminiaux, by P. Peuvrel and V. Wauthoz, avocats,
- the Luxembourg Government, by P. Frantzen and C. Schiltz, acting as Agents, and by P. Kinsch, avocat
- the Danish Government, by M. Wolff and C. Vang, acting as Agents,
- the Greek Government, by G. Papagianni, acting as Agent,
- the Austrian Government, by C. Pesendorfer and G. Eberhard, acting as Agents,
- the Swedish Government, by A. Falk, C. Stege and U. Persson, acting as Agents,
- the European Commission, by G. Rozet and M. Van Hoof, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475), as amended by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 158, p. 77 and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34) ('Regulation No 1612/68').
- 2 The request has been made in proceedings between the ministre de l'Enseignement supérieur et de la Recherche luxembourgeois (Luxembourg Minister for Higher Education and Research) ('the Minister') and students who have requested financial aid from the State for higher education studies in order to pursue such studies in a Member State other than the Grand Duchy of Luxembourg.
- 3 In addition, the European Commission commenced, in April 2011, infringement proceedings against the Grand Duchy of Luxembourg, which remain at the pre-litigation stage. By reasoned opinion of 27 February 2012, the Commission requested that Member State to end discrimination against migrant workers and members of their families in relation to the grant of financial aid by the State for higher education studies, the grant of monthly assistance to young volunteers and the grant of so-called 'boni pour enfant' allowances.

Legal context

European Union law

- 4 Article 7 of Regulation No 1612/68 is in the following terms:

‘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.

...’

Luxembourg legislation

- 5 Financial aid from the State for higher education studies is governed by the Law of 22 June 2000 on State financial aid for higher education (*Mémorial* A 2000, p. 1106), as amended by the Law of 26 July 2010 (*Mémorial* A 2010, p. 2040) (‘the amended Law of 22 June 2000’).

- 6 That financial aid is granted in the form of a grant and a loan and may be applied for irrespective of the State in which the applicant proposes to pursue his higher education studies.

- 7 The initial version of the Law of 22 June 2000 on State financial aid for higher education studies defined the persons entitled to receive that aid, in Article 2, as follows:

‘A student admitted to higher education studies shall be entitled to receive financial aid from the State for higher education studies where he or she satisfies one of the following conditions:

(a) he or she is a Luxembourg national, or

(b) he or she is a national of another Member State of the European Union, is domiciled in the Grand Duchy of Luxembourg and falls within the scope of the provisions of Articles 7 and 12 of Regulation [No 1612/68], ...

...’

- 8 The Law of 4 April 2005 amending the Law of 22 June 2000 on State financial aid for higher education studies (*Mémorial* A 2005, p. 786) had replaced Article 2(a) of that law by the following wording:

‘(a) he or she is a Luxembourg national and is domiciled in the Grand Duchy of Luxembourg, or ...’

- 9 As a result of the amendments made by Article 1(2) of the Law of 26 July 2010, Article 2 of the amended Law of 22 June 2000 provides:

‘Persons entitled to financial aid

A student admitted to higher education studies shall be entitled to receive financial aid from the State for higher education studies where he or she satisfies one of the following conditions:

(a) he or she is a Luxembourg national or a member of the family of a Luxembourg national and is domiciled in the Grand Duchy of Luxembourg, or

(b) he or she is a national of another Member State of the European Union or of one of the other States which is a party to the Agreement on the European Economic Area or of the Swiss Confederation and resides, in accordance with Chapter 2 of the amended Law of 29 August 2008 on the free movement of persons and on immigration, in the Grand Duchy of Luxembourg as an employed person, a self-employed person, a person who retains that status, or a family member of one of the categories of persons above, or as a person who has acquired the right of permanent residence ...

...'

- 10 The Law of 29 August 2008 on the free movement of persons and immigration (*Mémorial* A 2008, p. 2024) implemented Directive 2004/38 in Luxembourg law. Article 6(1) of that law 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 members of their family so as to avoid becoming a burden on the system of social security.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 11 Using a form drawn up by the Centre de documentation et d'information sur l'enseignement supérieur (Centre of Documentation and Information on Higher Education), which falls under the remit of the Ministry of Higher Education and Research, Elodie Giersch, Joëlle Hodin, Julien Taminiaux and Benjamin Marco Stemper applied, as students, for the 2010/2011 academic year, for the grant of financial aid for higher education studies in connection with the preparation of their degree.
- 12 Ms Giersch and Ms Hodin and Mr Taminiaux reside in Belgium and stated their intention of pursuing their studies in that Member State in the course of the 2010/2011 academic year. Mr Stemper resides in Germany and stated his intention of pursuing studies in the United Kingdom.
- 13 The Minister rejected those applications for financial aid solely on the ground of failure to satisfy the condition of residence provided for under Article 2(b) of the amended law of 22 June 2000.
- 14 The applicants in the main proceedings brought actions before the tribunal administratif (Administrative Court) seeking the alteration or annulment of the Minister's rejection decisions. Each of them relied in particular on the fact that one of their parents works in Luxembourg. Those actions were held to be admissible to the extent that they seek the annulment of the aforesaid decisions.
- 15 600 other similar actions having been brought before it in relation to the academic year 2010/2011 alone, the tribunal administratif decided to join the actions of the applicants in the main proceedings.
- 16 Before that court, those applicants argued that the State financial aid for higher education studies is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, with the result that it is subject to the principle of equal treatment laid down in that provision.
- 17 The condition of residence relied upon against them by the Minister amounts, according to those applicants, to a form of discrimination which, if not direct, is at least indirect in nature.
- 18 It is thus claimed that there is direct discrimination in so far as, in order to be entitled to the State financial aid for higher education studies, a Luxembourg national or a family member of a Luxembourg national must be domiciled in the Grand Duchy of Luxembourg, whereas a national of another Member State of the European Union or of one of the other States which is a party to the European Economic Agreement or of the Swiss Confederation must reside there. If, however, it were

to be held that Luxembourg nationals and nationals of the other Member States are subject to the same requirement of residence in the territory of Luxembourg, the applicants are of the view that that residence requirement would amount to indirect discrimination, being more easily satisfied by Luxembourg nationals than by nationals of other Member States.

- 19 Before the tribunal administratif, the Luxembourg Government denied that that financial aid is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, on the ground that the person entitled to it is an autonomous adult student forming a household of their own and is not dependent on his or her parents.
- 20 That government contended that the intended objective of the Luxembourg aid provision justifies restricting the category of beneficiaries to residents alone. The law establishing that financial aid aims to encourage an increase in the proportion of residents with a higher education degree such that it attains 40% by the year 2020, the figure in 2010 having been only 28%. The latter percentage is considerably lower than the percentage of persons holding such a degree in States comparable to the Grand Duchy of Luxembourg.
- 21 According to the Luxembourg government, if there were no residence requirement, any student, even one lacking any kind of link with Luxembourg society, could receive financial aid from the State in order to carry out higher education studies in any country in the world, giving rise to 'study grant forum shopping' unsustainable by the national budget.
- 22 According to the Luxembourg Government, there is neither direct nor indirect discrimination. The residence condition, which applies equally to nationals and non-nationals, is a legitimate criterion for the grant of the aid at issue in the main proceedings in the light of the aim of public interest pursued by the amended Law of 22 June 2000.
- 23 The tribunal administratif rejects, first, the Luxembourg Government's argument contesting the classification of State financial aid for higher education studies as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, on the ground that the person entitled to it is an autonomous adult student who is not dependent on his or her parents.
- 24 In that regard, the tribunal administratif states that that financial aid granted by the Law in order to facilitate access to higher education consists of a basic amount and, if appropriate, increases which can vary according to, first, the student's financial and social situation and, second, the enrolment fees to be borne by the student. That court considers that the assessment of the student's financial and social situation makes it necessary to establish whether, apart from the legislative fiction employed, the student really is autonomous or, on the contrary, is supported by his or her parents.
- 25 Finding that, in the cases in the main proceedings, the applicants were all full-time students and did not have any income during the 2010/2011 academic year, and that they were part of the household of their respective fathers and mothers, the tribunal administratif held that they had to be considered as dependent on their parents, who are migrant workers. The national court also states that all the applicants rely on the fact that their father or mother works in Luxembourg.
- 26 Referring to paragraph 23 of Case C-3/90 *Bernini* [1992] ECR I-1071, the tribunal administratif notes in addition that, according to the case-law of the Court, aid granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes for the student who benefits therefrom a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.
- 27 Equally, according to the referring court, which refers to paragraph 24 of Case C-212/05 *Hartmann* [2007] ECR I-6303, the financing of studies granted by a Member State to the children of workers constitutes, for a migrant worker, or for a frontier worker, a social advantage within the meaning of

Article 7(2) of Regulation No 1612/68, where the worker continues to support the child concerned. In such a case, the national courts point out that, in conformity with paragraph 28 of *Bernini*, that child may rely upon Article 7(2) of Regulation No 1612/68 in order to obtain study finance under the same conditions as are applicable to the children of national workers, equal treatment pursuant to Article 7(2) of Regulation No 1612/68 also being intended to prevent discrimination to the detriment of descendants dependent on the worker.

- 28 Therefore, according to the tribunal administratif, the applicants in the main proceedings may rely on Article 7(2) of Regulation No 1612/68 in order to obtain the financing of studies under the same conditions as are applicable to the children of national workers.
- 29 Second, that court rules out the existence of direct discrimination. The concepts of ‘domicile’ and ‘residence’ within the meaning of Article 2 of the amended Law of 22 June 2000 cover, according to it, the same factual concept, that is to say the place where the person concerned actually, lawfully and continuously lives. That identity of meaning is confirmed by Article 3 of the Grand-Ducal Regulation of 12 November 2010 amending the Grand-Ducal Regulation of 5 October 2000 on State financial aid for higher education studies (*Mémorial A* 2010, p. 3430), which states that the students referred to in Article 2 of the amended Law of 22 June 2000, that is to say both Luxembourg nationals or members of the family of a Luxembourg national, and nationals of another Member State, are required to present a certificate of residence in order to receive that aid.
- 30 Third, in so far as the existence of indirect discrimination is concerned, the tribunal administratif notes that the principle of equal treatment prohibits all forms of covert discrimination which, by applying other criteria of differentiation, in fact lead to the same result. Referring to paragraph 53 of Case C-209/03 *Bidar* [2005] ECR I-2119, the tribunal administratif states that a residence requirement, since it may primarily place nationals of other Member States at a disadvantage, because it is likely to be more easily satisfied by Luxembourg nationals could, in that context, be regarded as discriminatory.
- 31 A difference in treatment can be justified only if it is based on objective considerations distinct from the nationality of the persons concerned and is proportionate to the legitimate aim pursued under national law.
- 32 Considering that it is necessary, in the present case, to establish whether such indirect discrimination is justified in the light of the principle of equal treatment, the tribunal administratif decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘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 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 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 Luxembourg – constitute considerations, in terms of the Community case-law cited above, 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?’

The question referred for a preliminary ruling

- 33 By its question, the referring court asks, in essence, whether Article 7(2) of Regulation No 1612/68 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which makes the grant of financial aid for higher education studies conditional on residence by the student and which differentiates between persons residing in the Member State concerned and those who, not being resident in that Member State, are children of frontier workers carrying out an activity in that Member State, with the aim of bringing about an increase in the proportion of residents who hold a higher education degree while avoiding an excessive financial burden which the grant of such aid to every student would entail.

The existence of discrimination

- 34 In that regard, it must be borne in mind that Article 45(2) TFEU expressly provides that freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
- 35 Article 7(2) of Regulation No 1612/68 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 (Case C-287/05 *Hendrix* [2007] ECR I-6909, paragraph 53).
- 36 Under Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers.
- 37 That provision equally benefits both migrant workers resident in a host Member State and frontier workers employed in that Member State while residing in another Member State (Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 15, and Case C-542/09 *Commission v Netherlands* [2012] ECR, paragraph 33).
- 38 According to settled case-law, assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 (Case 39/86 *Lair* [1988] ECR 3161, paragraph 24, and *Commission v Netherlands* paragraph 34).
- 39 The Court has also held that study finance granted by a Member State to the children of workers constitutes, for the migrant worker, a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, where the worker continues to support the child (*Bernini*, paragraphs 25 and 29; Case C-337/97 *Meussen* [1999] ECR I-3289, paragraph 19; and *Commission v Netherlands*, paragraph 35).
- 40 The members of a migrant worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation No 1612/68. Since the grant of funding for studies to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may himself rely on that provision in order to obtain that funding if, under national law, such funding is granted directly to the student (Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 12 and 13; *Bernini* paragraph 26; and *Commission v Netherlands*, paragraph 48).
- 41 The Court has also consistently held that the equal treatment rule laid down both in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing

criteria, lead in fact to the same result (see Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44; C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 41; Case C-269/07 *Commission v Germany* [2009] ECR I-7811, paragraph 53; and *Commission v Netherlands*, paragraph 37).

- 42 In the present case in the main proceedings, the referring court, when interpreting national law, considered the conditions of domicile and residence required by the amended Law of 22 June 2000 to be equivalent, with the result that the condition of residence applies equally to Luxembourg nationals and to nationals of other Member States.
- 43 Accordingly, the requirement, in relation to nationals of other Member States, that they reside in Luxembourg, does not amount to direct discrimination.
- 44 By contrast, in so far as it provides for a distinction based on residence, a measure such as that at issue in the main proceedings is liable to operate mainly to the detriment of nationals of others Member States, as non-residents are in the majority of cases foreign nationals (see, *inter alia*, Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14; Case C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 34; and *Commission v Netherlands*, paragraph 38).
- 45 In that context, it is immaterial whether, in some circumstances, the contested measure affects, as well as nationals of other Member States, nationals of the Member State in question who are unable to meet such a criterion. In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing all the nationals of the Member State in question at an advantage or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (see, to that effect, Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 14; *Commission v Netherlands*, paragraph 38; and Case C-172/11 *Erny* [2012] ECR, paragraph 41).
- 46 The difference in treatment which arises from a condition of residence being imposed on students who are the children of frontier workers thus constitutes indirect discrimination on the ground of nationality which is in principle prohibited, unless it is objectively justified. In order to be justified, it must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective (see, to that effect, Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraphs 47 and 48, and *Commission v Netherlands*, paragraph 55).

The pursuit of a legitimate objective

- 47 In order to justify the different treatment of frontier workers concerning the grant of State financial aid for higher education studies, the Luxembourg Government relies on two arguments, one based on social considerations, the other on budgetary considerations, maintaining that they are inextricably linked.
- 48 The objective referred to as ‘social’ by that government aims to significantly increase the proportion of Luxembourg residents holding a higher education degree. That figure is, at 28%, considerably lower than the percentage of persons holding such a degree in States comparable to the Grand Duchy of Luxembourg, and the Luxembourg Government considers it necessary to achieve a figure of 66% of Luxembourg residents holding a higher education degree so as to satisfy the increasingly urgent need for Luxembourg to make the transition to a knowledge-based economy.
- 49 The Luxembourg Government asserts that the entitlement to State financial aid is confined to persons resident in Luxembourg because in its view only they have an attachment with Luxembourg society of such a kind as to justify the assumption that, having benefited from the possibility offered by the

system of aid concerned in order to finance their studies – undertaken as the case may be abroad – they will return to Luxembourg in order to apply their knowledge for the benefit of that country's economic development.

- 50 According to that government, because of budgetary constraints it cannot be more generous towards non-resident students without putting the entire system of financial aid into question. The aim from a budgetary point of view is to prevent the unreasonable burden on State finances which would result from the extension of the grant of financial aid to those non-resident students, who are children of frontier workers.
- 51 As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers (see *Commission v Netherlands*, paragraph 57 and case-law cited).
- 52 To accept that budgetary considerations may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of European Union law as fundamental as the principle of non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of the Member States (see *Commission v Netherlands*, paragraph 58 and case-law cited).
- 53 With regard to the social objective, it should be pointed out that the promotion of higher education is an objective in the public interest, acknowledged at the level of the European Union, as stated inter alia by the Austrian and Luxembourg Governments.
- 54 Thus, in the Commission Communication of 3 March 2010 entitled 'Europe 2020: a strategy for smart, sustainable and inclusive growth' (COM(2010) 2020 final), increasing the share of the population aged 30-34 having completed tertiary education from 31% to at least 40% in 2020 is listed as one of the headline targets agreed at European Union level. That document encourages each Member State to adopt specific measures implementing those headline targets at national level.
- 55 In addition, in the context of its Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2020') (OJ 2009 C 119, p. 2), the Council of the European Union had already adopted that objective of increasing the number of persons with a higher education degree. In the Council Conclusions of 11 May 2010 on the social dimension of education and training (OJ 2010 C 135, p. 2), the Member States are called upon on, in relation to higher education, to develop policies aimed at increasing completion rates.
- 56 It follows that an action undertaken by a Member State in order to ensure that its resident population is highly educated and to promote the development of the economy pursues a legitimate objective which can justify indirect discrimination on grounds of nationality.

The appropriateness of the residence condition

- 57 The Luxembourg Government maintains that the rules to the effect that aid is reserved for persons residing in Luxembourg are appropriate for ensuring the attainment of the legitimate social objective of increasing the number of Luxembourg residents holding a higher education degree.
- 58 That government claims, in that regard, that it is probable that, after undertaking higher education studies abroad, the students concerned will return to their State of residence to live and work there. It considers that there is no particular reason why students who reside abroad – even if they are also the

children of frontier workers carrying out an activity in Luxembourg – would make themselves available to the Luxembourg labour market after completing their studies or integrate themselves in Luxembourg society. That government considers that it is justified in restricting the grant of the aid at issue in the main proceedings to students resident in Luxembourg when they are about to undertake higher education, since they are already integrated in Luxembourg society and, after completing their studies, would be more than likely to make themselves available to the Luxembourg employment market.

- 59 The Luxembourg government adds that there is, in addition, a strong ‘turnover rate’ of persons carrying out a professional activity as a frontier worker, those persons working in that capacity for only a limited period, with the result that employment as a frontier worker cannot be regarded as an integration factor in the society of the State of employment similar to residence in that Member State and sufficient to exercise an influence on the choice of residence of the children of frontier workers, once their studies are over.
- 60 The applicants in the main proceedings dispute the appropriateness of the residence condition. Such a condition does not guarantee that the objective of increasing the number of persons resident in Luxembourg holding a higher education degree, so as to cover the needs of the Luxembourg employment market, will be attained. The grant of the aid in question only to students residing in Luxembourg when they make the application for financial aid will not result in their making themselves permanently available to the Luxembourg labour market after finishing their studies. Moreover, because the University of Luxembourg lacks a broad-based academic curriculum, a large number of those student residents will be inclined to pursue their studies outside Luxembourg and become integrated in the State where they are studying rather than in Luxembourg, thus benefiting from professional opportunities which go far beyond its territory.
- 61 Those applicants contend that, contrary to what is claimed by the Luxembourg government, non-resident students who are the children of frontier workers have specific reasons to make themselves available to the Luxembourg labour market when their studies are over. Thus, first, the fact that one of the parents of the student works in Luxembourg implies that there is a certain geographic proximity to Luxembourg territory of the household to which that student belongs. Second, because of the economic crisis severely affecting the Member States which border upon Luxembourg, the children of frontier workers will be inclined, once they have finished their studies, to look for stable employment, like that of their parents, who have been working in that Member State for a number of years.
- 62 According to the Commission, frontier workers not only have links with but are integrated in Luxembourg society because of their employment there. Since such a link exists, a condition of residence is neither necessary nor appropriate for ensuring that the children of such workers, whose studies would be financed by the financial aid at issue in the main proceedings, have a close link with the Member State which grants that aid.
- 63 In that regard, it should be noted that the Court has already held that migrant and frontier workers, since they have participated in the labour market of a Member State, have in principle created a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment, as compared, respectively with national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant and frontier workers also contribute to the financing of the social policies of that State (see, to that effect, Case C-379/11 *Caves Krier Frères* [2012] ECR, paragraph 53).

- 64 However, it must be held that, with regard inter alia to frontier workers, the Court has allowed certain grounds of justification concerning legislation which distinguishes between residents and non-residents carrying out a professional activity in the State concerned, depending on the extent of their integration in the society of that Member State or their attachment to that State (see, to that effect, *Hartmann*, paragraphs 35 and 36; *Geven*, paragraph 26; and *Hendrix*, paragraphs 54 and 55).
- 65 In that regard, it must be noted that the frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State.
- 66 In the cases at issue in the main proceedings, as stated by the Advocate General in point 59 of his Opinion, it must be examined whether the imposition of a condition of residence on the children of frontier workers by Luxembourg law in order to be entitled to receive financial aid for higher education studies could make it reasonably likely that the student will return to Luxembourg, after completing his or her studies, such a return being regarded by the Luxembourg Government as necessary in order to attain the legitimate objective pursued.
- 67 In that regard, admittedly, students who are resident in Luxembourg when they are about to embark on their higher education studies may be more likely than non-resident students to settle in Luxembourg and become integrated in the Luxembourg labour market after completing their studies, even if those studies were undertaken abroad.
- 68 It must therefore be held that the condition of residence provided for under the amended Law of 22 June 2000 is appropriate for attaining the objective of promoting higher education and of significantly increasing the proportion of Luxembourg residents who hold a higher education degree.
- 69 It remains however necessary to determine whether that condition does not go beyond what is necessary to attain that objective.

The necessity of the residence condition

- 70 According to the Luxembourg Government, the adoption of a residence condition does not go beyond what is necessary in order to attain the objective sought. That condition is justified by budgetary reasons and is directly linked to the economic objective relied upon. Because of budgetary constraints, it is not possible to be more generous towards non-resident students without putting the whole system of financing in question. In addition, the adoption of another criterion for the grant of aid, that is, in particular, that based on the fact that one of the parents of the non-resident student is employed in Luxembourg, would run directly counter to the twin combined objectives of the rules governing the aid at issue in the main proceedings.
- 71 In that regard, it must be examined whether only a condition of prior residence can ensure with reasonable probability for the Luxembourg State that the recipients of that aid will return to settle in Luxembourg and make themselves available to the Luxembourg labour market in order to contribute to its economic development, or whether other criteria exist which would also ensure that probability without excluding all non-resident children of frontier workers.
- 72 The Court has already accepted that a condition of residence may be disproportionate if it is too exclusive in nature because it favours an element which is not necessarily representative of the real and effective degree of connection and excludes all other representative elements (see Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 46 and case-law cited, and Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 95 and case-law cited).

- 73 In paragraphs 86 and 87 of the judgment in *Commission v Netherlands*, the Court thus considered that the Member State had not convincingly explained why the objective pursued could not be attained, in a less restrictive fashion, either by a more flexible rule than the ‘three out of six years’ rule or by taking into account other elements which represent a similar degree of attachment, such as employment. It therefore held that, by requiring specific periods of residence in the territory of the Member State concerned, that rule favoured an element which is not necessarily the sole representative element of the actual degree of attachment between the party concerned and the Member State, and is too exclusive in nature. The ‘three out of six years’ rule thus went beyond what was necessary in order to attain the objective pursued.
- 74 The Luxembourg system of State financial aid for higher education studies excludes all non-residents from entitlement to that aid, an exclusion which concerns only non-resident students.
- 75 Consequently, the child of a migrant worker who resides with his parents in a Member State bordering upon the Grand Duchy of Luxembourg and who would like to study in Luxembourg is not entitled to receive State financial aid for higher education studies. In addition, even if their parents reside in Luxembourg, students who are not resident there when they make their application for aid are not entitled to receive that aid even if their parents continue to support them. Furthermore, the effect of the system of financial aid at issue in the main proceedings is to exclude the children of non-residents workers who have been working in Luxembourg for a significant period of time from receipt of that aid.
- 76 In that regard, it must be stated that the system of financial aid at issue in the main proceedings is too exclusive in nature. By requiring the student to reside in the territory of the Member State concerned, the law favours an element which is not necessarily the sole representative element of the actual degree of attachment between the party concerned and that Member State (see, to that effect, *Commission v Netherlands*, paragraph 86).
- 77 In particular, to the extent that State financial aid for higher education studies is intended to encourage the pursuit of such studies both in Luxembourg and in any other country, the existence of a reasonable probability that the recipients of that aid will return to settle in Luxembourg and make themselves available to the labour market of that Member State, in order to contribute to its economic development, may be established on the basis of elements other than a prior residence requirement in relation to the student concerned.
- 78 A sufficient attachment of the student in question with the Grand Duchy such as to make it possible to conclude that that probability exists may also be derived from the fact that that student resides alone or with his parents in a Member State which borders upon the Grand Duchy of Luxembourg and that, for a significant period of time, his parents have worked in Luxembourg and live near to that Member State.
- 79 With regard to the possibilities open to the Luxembourg legislature, it can be observed, in line with the Commission’s submission at the hearing, that where the aid granted consists in, for example, a loan, a system of financing which made the grant of that loan, or even the outstanding balance thereof, or its non-reimbursement, conditional on the student who receives it returning to Luxembourg after his or her studies abroad in order to work and reside there, could attain the objective pursued, without adversely affecting the children of frontier workers. In addition, the risk of duplication with equivalent financial aid paid in the Member State in which the student resides, with or without his parents, could be avoided by taking that aid into account in the grant of the aid paid by the State of the Grand Duchy of Luxembourg.⁸⁰ Above all, in order to avoid the risk of ‘study grant forum shopping’ referred to by all the governments which submitted observations to the Court, and to ensure that the frontier worker who is a taxpayer and who makes social security contributions in Luxembourg has a sufficient link with Luxembourg society, the financial aid could be made conditional on the frontier worker, the parent of the student who does not reside in Luxembourg, having worked in that Member State for a

certain minimum period of time. In another context, Article 24(2) of Directive 2004/38 provides that, by derogation from Article 24(1) – according to which all Union citizens residing on the basis of that directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State – the host Member State is not to be obliged to grant maintenance aid for studies before the acquisition of a right of permanent residence which, under Article 16(1) of Directive 2004/38, is subject to a condition of residence of five years in the territory of the Member State concerned.

- 81 It should be noted that, in the cases in the main proceedings, such a risk can be ruled out in so far as it is common ground that Ms Giersch, Mr Stemper, Mr Taminiaux and Ms Hodin each has a mother or father who has been working in Luxembourg for 23 years, 32 years, 28 years and 23 years respectively.
- 82 Accordingly, a law such as that at issue in the main proceedings, which makes the grant of financial aid for higher education studies conditional on residence by the student and gives rise to a difference in treatment between residents and non-residents of that Member State who are the children of frontier workers carrying out an activity in that Member State, goes beyond what is necessary in order to attain the legitimate objective of increasing the proportion of the resident population with a higher education degree, so as to promote the development of the national economy.
- 83 It follows from all the above considerations that the answer to the question referred is that:
- Article 7(2) of Regulation No 1612/68 must be interpreted as precluding, in principle, legislation of a Member State such as that at issue in the main proceedings, which makes the grant of financial aid for higher education studies conditional upon residence by the student in that Member State and gives rise to a difference in treatment, amounting to indirect discrimination, between persons who reside in the Member State concerned and those who, not being residents of that Member State, are the children of frontier workers carrying out an activity in that Member State;
 - While the objective of increasing the proportion of residents with a higher education degree in order to promote the development of the economy of that same Member State is a legitimate objective which can justify such a difference in treatment, and while a condition of residence, such as that provided for by the national legislation at issue in the main proceedings, is appropriate for ensuring the attainment of that objective, such a condition nevertheless goes beyond what is necessary in order to attain the objective pursued, to the extent that it precludes the taking into account of other elements potentially representative of the actual degree of attachment of the applicant for the financial aid with the society or with the labour market of the Member State concerned, such as the fact that one of the parents, who continues to support the student, is a frontier worker who has stable employment in that Member State and has already worked there for a significant period of time.

Costs

- 84 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, as amended by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, must be interpreted as precluding, in principle, legislation of a Member State such as that at issue in the main proceedings, which makes the grant of financial aid for higher education studies conditional upon residence by the

student in that Member State and gives rise to a difference in treatment, amounting to indirect discrimination, between persons who reside in the Member State concerned and those who, not being residents of that Member State, are the children of frontier workers carrying out an activity in that Member State.

While the objective of increasing the proportion of residents with a higher education degree in order to promote the development of the economy of that same Member State is a legitimate objective which can justify such a difference in treatment and while a condition of residence, such as that provided for by the national legislation at issue in the main proceedings, is appropriate for ensuring the attainment of that objective, such a condition nevertheless goes beyond what is necessary in order to attain the objective pursued, to the extent that it precludes the taking into account of other elements potentially representative of the actual degree of attachment of the applicant for the financial aid with the society or with the labour market of the Member State concerned, such as the fact that one of the parents, who continues to support the student, is a frontier worker who has stable employment in that Member State and has already worked there for a significant period of time.

[Signatures]