



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

2 June 2016*

(Failure of a Member State to fulfil obligations — Articles 18 TFEU, 20 TFEU and 21 TFEU — Citizenship of the Union — Right to move and reside freely — Discrimination on grounds of nationality — Financial support for travel costs awarded to national students — Directive 2004/38/EC — Article 24(2) — Derogation from the principle of equal treatment — Maintenance aid for studies consisting in student grants or student loans — Scope — Formal requirements of the application initiating proceedings — Coherent statement of the pleas in law)

In Case C-233/14,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 12 May 2014,

European Commission, represented by C. Gheorghiu and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by M. Bulterman and C. Schillemans, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, A. Arabadjiev, J.-C. Bonichot, C.G. Fernlund and E. Regan (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 25 November 2015,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2016,

gives the following

* Language of the case: Dutch.

Judgment

- 1 By its application, the European Commission claims that the Court should:
 - declare that, by restricting access to fares at preferential rates on public transport for students who pursue their studies in the Netherlands to Netherlands students who are registered with a private or public educational establishment in the Netherlands and to students from other Member States who, in the Netherlands, are economically active or have obtained the right of permanent residence, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 18 TFEU, in conjunction with Articles 20 TFEU and 21 TFEU, as well as under Article 24 TFEU of 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 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), and
 - order the Kingdom of the Netherlands to pay the costs.

Legal context

EU law

- 2 Recitals 20 and 21 of Directive 2004/38 state:
 - ‘(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.
 - (21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.’
- 3 Article 3(1) of Directive 2004/38 provides that that directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national.
- 4 Article 7 of Directive 2004/38, under the heading ‘Right of residence for more than three months’, provides in paragraph 1 thereof:

‘All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

...

(c)

- are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; ...'

5 Article 24 of Directive 2004/38, entitled 'Equal treatment', is worded as follows:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

Netherlands law

The Wet studiefinanciering 2000

6 Article 2.1 of the Wet studiefinanciering 2000 (Law on the Financing of Studies 2000, the 'WSF 2000'), which sets out the conditions for the award of funding for studies, including the basic grant and financial support for travel costs ('the financial support for travel costs'), is worded as follows:

'The present law governs the funding of studies and shall be applicable to students who fulfil the conditions relating to:

- (a) nationality, as set out in Article 2.2, and
- (b) age, as set out in Article 2.3, and
- (c) the type of education, as set out in paragraphs 2.2 to 2.4.'

7 Article 2.2 of the WSF 2000 provides:

'1. Those eligible for funding for studies are:

- (a) students who are Netherlands nationals;
- (b) students who are non-Netherlands nationals but who, in respect of funding for studies, are to be treated as Netherlands nationals pursuant to a treaty or a decision of an international organisation, or

(c) students who are non-Netherlands nationals but who reside in the Netherlands and are part of a group of persons, to be established by regulation, who are to be treated for funding purposes as Netherlands nationals.

2. Without prejudice to paragraph 1(b), a regulation may designate groups of persons whose treatment as Netherlands nationals, as referred to in paragraph 1(b), relates only to the provision of an amount covering the costs of access to education. The regulation may lay down rules relating to the amount and form of that provision.'

8 Article 3.1 of the WSF 2000 provides:

'1. Funding for studies shall be composed of a basic grant, a basic loan, and an additional grant or additional loan as well as a college tuition credit.

2. Funding for studies may be granted wholly or partly in the form of:

(a) a contribution,

(b) a grant, or

(c) a loan.'

9 Article 3.2(1) of the WSF 2000 provides that the grant includes a monthly fixed payment covering maintenance costs, a contribution to the costs of tuition and financial support for travel costs.

10 Article 3.29 of the WSF 2000 lays down the conditions under which compensation may be obtained in the event the recipient did not use the whole of the funds provided for travel costs.

11 Article 3.6(2) of the WSF 2000 states that:

'The basic grant includes an amount for travel costs, unless otherwise provided.'

12 Article 3.7 of the WSF 2000, which sets out the manner in which financial support for travel costs is provided, is worded as follows:

'1. For students studying in the Netherlands, financial support for travel costs shall consist of a travel card valid for a fixed period of the week, which the transport companies shall provide to the student free of charge or at a reduced rate.

2. For students who are entitled to funding for studies for the purpose of following a course of studies outside the Netherlands, financial support for travel costs shall consist of the amount referred to respectively in Article 4.8(2) and Article 5.3(2). By way of derogation from the first sentence, the students referred to in the first sentence may obtain, upon request, in respect of financial support for travel costs, a travel card.'

The Besluit studiefinanciering 2000

13 The Besluit studiefinanciering 2000 (Decision on the Financing of Studies 2000) provides, in Article 3a(1) and (2), as follows:

'1. For persons who have either the nationality of a State which is party to the European Economic Area Agreement [of 2 May 1992, OJ 1994 L 1, p. 3] or Swiss nationality, as well as their family, other than

- (a) employed persons,
- (b) self-employed persons, or
- (c) persons who have retained the status of employed persons, and
- (d) the family members of the persons referred to in subparagraphs (a) to (c),

who have not been granted the right of permanent residence referred to in Article 16 of [Directive 2004/38], treatment as Netherlands nationals on the basis of Article 2.2(2) of the [WSF 2000] relates to the provision of an amount covering the costs of access to education.

2. The amount provided on the basis of paragraph 1 shall be awarded in the form of a grant and consist of the amount of the basic grant referred to in Article 3.6(1) of the [WSF 2000] for a student residing in the family home. The financial support for travel costs and the supplement referred to in Article 3.6(2) and (3) of the [WSF 2000] shall not form part of that amount.'

The Wet op het hoger onderwijs en wetenschappelijk onderzoek

- 14 Article 7.37 of the Wet op het hoger onderwijs en wetenschappelijk onderzoek (Law on Higher Education and Scientific Research) implements Article 2.1(c) de la WSF 2000, which states that the student must be enrolled with a recognised educational establishment. Pursuant to Article 7.37(2) of the Law on Higher Education and Scientific Research:

'A student shall be enrolled only where evidence is produced to show that the enrolment fees and examination fees have been paid or, in the case of enrolment on university evening courses, of the enrolment fees for those courses.'

Pre-litigation procedure

- 15 In November 2008, a complaint was made to the Commission alleging that Netherlands students and students from other Member States of the European Union were not treated equally in respect of access to subsidised public transport in the Netherlands. According to that complaint, Netherlands students may claim an allowance for travel costs, allowing them to use public transport free of charge or at a reduced rate, whereas students pursuing studies under the Erasmus programme have to pay the full fare, which, it was alleged, constitutes an infringement of Article 12 EC.
- 16 Since that view was shared by the Commission, it sent, on 23 March 2009, a letter of formal notice to the Kingdom of the Netherlands requesting it to submit its observations within two months. In that letter, the Commission stated that the provision of financial support for travel costs must be classified, not as a student grant or loan, but as a maintenance aid, with the result that that support did not fall within the derogation under Article 24(2) of Directive 2004/38. Moreover, the Commission not only claimed that the Kingdom of the Netherlands treated unequally students pursuing studies under the Erasmus programme, but also referred to all students from other Member States falling within the scope of Directive 2004/38 pursuing all or part of their studies in the Netherlands.
- 17 In a letter of 15 May 2009, the Kingdom of the Netherlands responded to those complaints by stating that there was no question of discrimination, since financial support for travel costs was granted as a conditional loan and, accordingly, fell within the derogation under Article 24(2) of Directive 2004/38.
- 18 On 29 January 2010, the Commission sent the Kingdom of the Netherlands a reasoned opinion, to which that Member State responded on 28 May 2010, after expounding upon the arguments relied on in its reply to the letter of formal notice.

- 19 On 27 January 2012, the Commission sent the Kingdom of the Netherlands a supplementary reasoned opinion. On 27 March 2012, the Commission received that Member State's response, by which it maintained its position that the financial support for travel costs was not discriminatory.
- 20 As it was still dissatisfied with the Kingdom of the Netherlands' response, on 12 May 2014, the Commission brought the present action.

The action

The scope of the action

- 21 At the outset, it is appropriate to determine the scope of the present action.
- 22 In that regard, it is important to note that, in considering an action brought under Article 258 TFEU, regard must be had only to the form of order sought in the original application (see judgment of 22 October 2014 in *Commission v Netherlands*, C-252/13, EU:C:2014:2312, paragraph 28 and the case-law cited).
- 23 In the present case, formal note should be taken of the partial withdrawal of the present action by the Commission. In its reply, the Commission states that it no longer considers that Netherlands students who reside abroad but who enroll on a full-time course of study with an accredited educational establishment in the Netherlands are discriminated against. At the hearing before the Court, in response to a question put by it, the Commission stated that it also intended to withdraw its action in so far as it related to Netherlands students who live abroad and who pursue studies in the Netherlands as part of the Erasmus programme.
- 24 Accordingly, the cause of action of the present case must be regarded as the alleged discrimination, by the Kingdom of the Netherlands, against non-Netherlands students who are studying in the Netherlands, including students taking part in the Erasmus programme and those not taking part in that programme.

Admissibility

Arguments of the parties

- 25 The Kingdom of the Netherlands contends that the Commission's complaint alleging indirect discrimination does not fulfil the requirements of the case law of the Court that, (i) the Commission must present its complaints coherently and with precision at the pre-litigation stage and in the application, and (ii) that the complaints set out in the application may not deviate from those raised at the pre-litigation stage.
- 26 In particular, the Kingdom of the Netherlands notes that, in paragraph 44 of its application, the Commission claims that there is indirect discrimination against students who are from the Netherlands, have enrolled on a full course of study abroad and choose to do part of their studies under the Erasmus programme at an accredited educational establishment in the Netherlands. However, in paragraphs 75, 81 and 82 of the application, the Commission alleges indirect discrimination against non-Netherlands students who take part in that programme.
- 27 The Kingdom of the Netherlands explains that it is uncertain as to which group of students is indirectly discriminated against, compared to whom, and what that indirect discrimination consists of.

- 28 The documents exchanged at the pre-litigation stage do not provide any enlightenment in that regard.
- 29 In particular, in paragraphs 31 and 32 of the reasoned opinion of 28 January 2010, the Commission, without addressing the applicability of Article 24(2) of Directive 2004/38, complains that the Kingdom of the Netherlands requires students from other Member States to be economically active or to have a permanent right of residence in the Netherlands, and in so doing would appear to formulate a new complaint alleging indirect discrimination.
- 30 Moreover, the link between, on the one hand, the Commission's position set out in paragraphs 31 and 32 of the reasoned opinion and, on the other, its position as described in paragraphs 44 and 75 to 83 of the application initiating proceedings is not clear. The considerations set out in that application relate, in particular, to the students studying as part of the Erasmus programme, whereas the position adopted by the Commission at the pre-litigation stage in respect of the alleged indirect discrimination appears to be more general.
- 31 The Commission submits that the complaint alleging indirect discrimination is admissible. It is apparent from paragraphs 32 and 33 of the reasoned opinion and paragraphs 52, 54 and 56 of the supplementary reasoned opinion that, during the pre-litigation stage, the Commission did not exclude the possibility that the Netherlands legislation led not only to direct discrimination but also, possibly, to indirect discrimination. The Commission's position as set out in the application in respect of indirect discrimination is therefore but a further elaboration of its position during the pre-litigation stage.

Findings of the Court

– The complaint alleging indirect discrimination

- 32 In accordance with Article 120(c) of the Rules of Procedure of the Court of Justice and the case-law relating to that provision, an application initiating proceedings in respect of direct actions must state the subject-matter of the proceedings and set out a summary of the pleas in law on which the application is based; that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself (see, to that effect, judgment of 22 October 2014 in *Commission v Netherlands*, C-252/13, EU:C:2014:2312, paragraph 33 and the case-law cited).
- 33 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court may ascertain exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (see judgment of 22 October 2014 in *Commission v Netherlands*, C-252/13, EU:C:2014:2312, paragraph 34 and the case-law cited).
- 34 Those complaints must be set out unambiguously so that the Court does not rule ultra petita or indeed fail to rule on one of them (see, to that effect, judgment of 30 September 2010 in *Commission v Belgium*, C-132/09, EU:C:2010:562, paragraph 37 and the case-law cited).
- 35 In particular, the Commission's action must contain a coherent and detailed statement of the reasons which have led it to conclude that the Member State in question has failed to fulfil one of its obligations under the Treaties (see judgment of 6 September 2012 in *Commission v Belgium*, C-150/11, EU:C:2012:539, paragraphs 27 and the case-law cited). Accordingly, a contradiction in the heads of claim put forward by the Commission in support of its action for failure to fulfil obligations

does not satisfy the requirements imposed (see, to that effect, judgments of 1 February 2007 in *Commission v United Kingdom*, C-199/04, EU:C:2007:72, paragraph 25, and of 28 June 2007 in *Commission v Spain*, C-235/04, EU:C:2007:386, paragraph 47).

- 36 In the present case, the Kingdom of the Netherlands submits that the application does not fulfil those requirements inasmuch as the Commission makes confused claims alleging possible indirect discrimination.
- 37 The Court finds that the presentation of the complaint alleging indirect discrimination clearly fails to meet the requirements laid down in the case-law referred to in paragraphs 32 to 35 above.
- 38 In particular, it is not apparent from the application which class of students may be disadvantaged or by comparison with which other category. In one part of its application, the Commission submits that indirect discrimination flows from the national legislation at issue in respect only of students who are Netherlands nationals studying in the Netherlands under the Erasmus programme. However, in another part of the application, the Commission seems to take the view, while formulating it in a somewhat ambiguous manner, that students from other Member States participating in that programme in the Netherlands are the subject of indirect discrimination, since they are disadvantaged in comparison to students who are Netherlands nationals studying in another Member State and taking part in that programme in the Netherlands.
- 39 Moreover, as observed by the Advocate General in point 70 of her Opinion, the Commission did not identify the criterion, other than that of nationality, giving rise to the alleged indirect discrimination. Admittedly, the Commission refers to the requirement that, in order to be eligible for study finance in the Netherlands, including financial support for travel costs, students must be enrolled with an accredited educational establishment and have paid the enrolment fees. However, in its application, the Commission relies on that enrolment requirement in order to demonstrate, first, that students from other Member States participating in the Erasmus programme in the Netherlands are in an objectively comparable situation to that of Netherlands students studying in that Member State and, secondly, that the alleged discrimination does not fall within the derogation under Article 24(2) of Directive 2004/38. However, the Commission made no mention of the enrolment requirement in the first part of its application, which sought to establish different treatment constituting discrimination under Article 18 TFEU, in conjunction with Articles 20 TFEU and 21 TFEU.
- 40 Finally, as correctly argued by the Kingdom of the Netherlands, it should be noted that the very foundation of the Commission's complaint alleging indirect discrimination is flawed from the outset. The Commission takes as the basis for its action infringement of Articles 18 TFEU, 20 TFEU and 21 TFEU as a result of direct discrimination, 'since citizens of the [European Union] who are not Netherlands nationals are treated less favourably than Netherlands nationals'. However, it is only in the context of its assessment of whether financial support for travel costs is covered by the derogation in Article 24(2) of Directive 2004/38 that the Commission puts forward an argument relating to possible indirect discrimination, thus failing to distinguish the existence of a possible justification from the submission of an entirely separate complaint.
- 41 It should be added that, in its reply, the Commission merely states that, during the pre-litigation stage, it 'did not exclude' the possibility that the Netherlands regulation might constitute indirect discrimination without, however, specifying what that discrimination entailed.
- 42 In those circumstances, the complaint alleging indirect discrimination must be rejected as inadmissible.

– The complaint alleging direct discrimination

- 43 As a preliminary point, it should be noted that, although the Kingdom of the Netherlands has not raised a plea of inadmissibility in respect of the present complaint, the Court may of its own motion examine whether the conditions laid down in Article 258 TFEU for bringing an action for failure to fulfil obligations are satisfied in so far as it is concerned (see, by analogy, judgment of 19 December 2012 in *Commission v Italy*, C-68/11, EU:C:2012:815, paragraph 49 and the case-law cited).
- 44 In the present case, in response to a question raised by the Court at the hearing, the Commission stated that, its action related not only to vocational training students, but also those which it termed higher education and science students. However, the Commission was not able to identify any specific provision of national law giving rise to the alleged discrimination against students other than those considered by that law as falling within the category of students undergoing vocational training.
- 45 Moreover, as noted by the Advocate General in point 79 of her Opinion, although the national legislation at issue in the present case does not refer only to citizens of the European Union, but also refers to people who are either nationals of a State that is party to the European Economic Area (EEA) or Swiss nationals, it is not apparent from the application initiating proceedings that, by its complaint alleging direct discrimination, the Commission intended to cover all those people. Furthermore, it is apparent from certain specific points of that application that the Commission alleges that the Kingdom of the Netherlands discriminated on grounds of nationality only in respect of students who are citizens of the European Union.
- 46 In those circumstances, it must be held that the present action is admissible only inasmuch as it seeks to demonstrate that the Netherlands legislation at issue in the present case gives rise to direct discrimination against citizens of the European Union, other than those who are Netherlands nationals, who are pursuing vocational education in that Member State, as that legislation treats those citizens less favourably than Netherlands citizens who pursue such studies.

Substance

Arguments of the parties

- 47 In its application, the Commission submits that the Netherlands legislation gives rise to direct discrimination on grounds of nationality.
- 48 First of all, the Commission claims that there is direct discrimination under Article 18 TFEU, read in conjunction with Articles 20 TFEU and 21 TFEU, because the national provisions at issue preclude, on the basis of the sole criterion of nationality, non-Netherlands students from receiving financial support for travel costs, thus treating less favourably citizens of the European Union who are not Netherlands nationals. That conclusion is in no way called into question by the fact that it is necessary to fulfil two other objective requirements, namely the requirement, first, that the student should be less than 30 years old and, secondly, that the student should be enrolled on a full-time accredited course.
- 49 Next, the Commission submits that the direct discrimination alleged is not covered by the derogation set out in Article 24(2) of Directive 2004/38. In that regard, the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605), in particular, paragraphs 43, 49 to 56, 59 to 62, 64 and 65 thereof, apply *mutatis mutandis* to the present case.
- 50 In the Commission's opinion, the fact that, under Netherlands law, students participating in the Erasmus programme are not deemed to be officially registered in the host Netherlands educational establishment is irrelevant. Under that programme, each student is entitled to expect to be treated by

the host university in the same way as it treats its own students, which is, moreover, what happens in practice. Such a student is thus *de facto* registered with the host establishment in the Netherlands and therefore meets the third requirement laid down by the Netherlands legislation for entitlement to financial support for travel costs.

- 51 It is more than likely that a Netherlands national studying outside the Netherlands who wishes to take part in the Erasmus programme will choose a Member State other than the Kingdom of the Netherlands to study under that programme. In the rare cases where such a student chooses to pursue studies under that programme in the Netherlands, it is normal for that Member State not to award him the financial support for travel costs, since he already receives corresponding financial compensation.
- 52 Finally, in respect of a complaint entitled ‘Students other than foreign Erasmus students — regular foreign students, including Netherlands students living abroad’, the Commission submits that the financial support for travel costs is maintenance aid, within the meaning of Article 24(2) of Directive 2004/38, in a form other than that of a student grant or loan.
- 53 The fact that, unlike the situation that gave rise to the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605), the student is required to repay the economic benefit obtained from financial support for travel costs if he does not graduate within 10 years does not mean that that benefit is covered by the concept of ‘student grants or student loans’ in Article 24(2) of Directive 2004/38. As it is linked to the requirement to obtain a diploma within 10 years, that assistance is a conditional grant rather than a loan.
- 54 In its defence, the Kingdom of the Netherlands disputes the alleged infringement.
- 55 First of all, with respect to the Netherlands legislation relating to the financial support for travel costs, the Kingdom of the Netherlands notes that that support forms part of the funding provided by the Netherlands for studies, as is apparent from the WSF 2000 and the origin of that support.
- 56 In particular, Article 3.6(2) of the WSF 2000 provides that the financial support for travel costs is part of the basic grant, which is part of the funding provided for studies on the basis of Article 3.1(1) of that legislation. Previously, the basic grant was entirely composed of a sum of money intended to cover the cost of living. Part of the amount of the grant was converted into financial support for travel costs from 1 January 1991. The Kingdom of the Netherlands purchased the travel cards covered by that support from transport companies, on the basis of a contract, which made it possible to buy them at low cost and to provide access to affordable transport for all students entitled to funding for studies.
- 57 The Kingdom of the Netherlands states that the basic grant and the financial support for travel costs are awarded in the form of a conditional loan. Where the student completes his studies within a period of 10 years, the loan becomes a grant. If the student fails to complete his studies within that period, the loan is to be repaid with interest.
- 58 Since the financial support for travel costs forms part of the basic grant and, therefore, of the funding for studies, the requirements for the award of that support are the same as those applicable to the award of funding for studies. In particular, in order to be eligible for funding for studies in the Netherlands, it is necessary, under Article 2.1 of the WSF 2000, to fulfil the conditions as to nationality, age and type of education.
- 59 Next, as regards Article 24(2) of Directive 2004/38, the Kingdom of the Netherlands intends to rely on the derogation under that provision in respect of all non-Netherlands students who are nationals of a Member State of the European Union, the EEA or Switzerland. In respect of non-Netherlands

students studying as part of the Erasmus programme, however, that article provides an alternative ground of defence. Primarily, that Member State argues that those students are not in an objectively comparable situation to that of Netherlands students.

- 60 The Kingdom of the Netherlands notes that the derogation provided in Article 24(2) of Directive 2004/38 is consistent with the legitimate interest of the Member State concerned to limit the social benefits paid from public finance to those who are able to demonstrate a minimum connection with that State. The difference in treatment established by the Netherlands legislation — in that it requires students from the European Union, the EEA or Switzerland, if they are to be entitled to receive funding for their studies, including financial support for travel costs, to have obtained a permanent right of residence or to be economically active — is entirely consistent with that derogation.
- 61 The Kingdom of the Netherlands submits that it is irrelevant whether financial support for travel costs must be classified as a conditional grant rather than a conditional loan, since that support is, at any time, either a loan or a grant, and, as such, is covered by the derogation under Article 24(2) of Directive 2004/38.
- 62 The Netherlands system is inherently different from the situation in the case which gave rise to the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605). In particular, in that case, the reduced fares were granted to students whose parents received family allowances from the Austrian State. As it was not linked to funding for studies, the reduced fares could not be described as a student grant or student loan.
- 63 According to the Kingdom of the Netherlands, in order to be covered by the derogation under Article 24(2) of Directive 2004/38, financial support need not necessarily consist of a sum of money which may be spent freely.
- 64 Finally, with regard to students taking part in the Erasmus programme, the Kingdom of the Netherlands observed, relying on paragraphs 41 and 42 of the judgment of 14 June 2012 in *Commission v Netherlands* (C-542/09, EU:C:2012:346), that the criterion by reference to which the situations are to be compared must be based upon factors which are objective and easily identifiable. The objective difference between non-Netherlands students participating in the Erasmus programme and Netherlands students pursuing studies unconnected with that programme who are in receipt of financial support for travel costs is that the former do not receive funding for their studies from the Kingdom of the Netherlands under the agreements relating to that programme.
- 65 According to the Kingdom of the Netherlands, the Commission's assertion, that students studying under the Erasmus programme are *de facto* enrolled in the Netherlands and must therefore be deemed to satisfy the third requirement laid down by Netherlands legislation for the award of financial support for travel costs is irrelevant.
- 66 In its reply, the Commission submits that it follows from the general scheme of Article 3.2(1) of the WSF 2000 that the maintenance costs and the financial support for travel costs are separate and distinct elements of the grant. The intrinsic properties of those two elements are also different, one being an amount that the student can use as he sees fit and the other a card entitling the student to reduced fares on public transport.
- 67 The Commission contends that the concept of 'student grants or student loans' as used in Article 24(2) of Directive 2004/38 may not be interpreted differently according to the law of each Member State, but has an independent meaning, specific to EU law.
- 68 According to the Commission, it follows from paragraphs 61 to 64 of the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605) that the Kingdom of the Netherlands was not entitled to rely on Article 24(2) of Directive 2004/38 to justify the fact that it requires students who

are nationals of the European Union, the EEA and Switzerland to have a right of permanent residence or to be economically active. In that judgment, the Court held that the existence of a genuine link between the student and the host Member State could be ascertained, as regards the student's eligibility for a benefit consisting of reduced transport fares, where it is established that the student is enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training.

- 69 The Commission argues that it follows from paragraph 61 of the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605) that there are circumstances in which students participating in the Erasmus programme may be regarded as being in an objectively comparable situation to that of Netherlands students in receipt of financial support for travel costs, that is, where there is a genuine link between the student participating in that programme and the host Member State. Such a link exists in the present case in respect of that support, since non-Netherlands students taking part in that programme should be regarded *de facto* as registered in the Netherlands for the grant of that support.
- 70 In its rejoinder, the Kingdom of the Netherlands argues that the Commission fails to have regard for the wording and meaning of Article 24(2) of Directive 2004/38. The existence of a genuine link between the person concerned and the host Member State, brought about by the enrolment of that person with an educational establishment, does not constitute an additional or alternative requirement in that context. Given that the Court held that Article 24(2) of Directive 2004/38 was not applicable in the case giving rise to the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605), paragraphs 61 to 64 of that judgment do not give any indication as to the scope of that provision.
- 71 The Kingdom of the Netherlands contends that the Commission's conclusion that, because of their *de facto* enrolment with the host university, students studying under the Erasmus programme are, none the less, a category which is objectively comparable to that of Netherlands students who are in receipt of financial support for travel costs, is based on a false premise. The key issue is whether those categories are in an objectively comparable situation with respect to the national legislation at issue.
- 72 The Kingdom of the Netherlands points out that paragraphs 61, 62 and 64 of the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605) relate to the justification for the indirect discrimination found to exist in that case, whereas the question whether students studying under the Erasmus programme are in an objectively comparable situation to that of Netherlands students who are in receipt of financial support for travel costs relates to the very existence of discrimination. The Commission is thus taking the requirement of a genuine link out of context.

Findings of the Court

- 73 It should be observed as a preliminary point that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union.
- 74 Students from Member States other than the Kingdom of the Netherlands who follow a course of study in the Netherlands have that status, provided that they hold the nationality of a Member State.
- 75 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the FEU Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that

regard (see, to that effect, judgments of 20 September 2001 in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31, and of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 38).

- 76 Article 18 TFEU, which prohibits any discrimination on grounds of nationality, is applicable in all situations falling within the material scope of EU law, and those situations include the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States (see, to that effect, judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 39 and the case-law cited).
- 77 It is apparent from that case-law that that prohibition also covers situations concerning the conditions of access to vocational training, and that both higher education and university education constitute vocational training (judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 40 and the case-law cited).
- 78 A national of a Member State of the European Union who is studying in another Member State is entitled, under Articles 18 TFEU and 21 TFEU, to move and reside freely within the territory of the host Member State, without being subject to direct or indirect discrimination on grounds of nationality (see, to that effect, judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 41 and the case-law cited).
- 79 As to the question whether financial support for travel costs falls within the scope of the treaties, for the purposes of the first paragraph of Article 18 TFEU, it should be noted that the Court has previously held that a scheme providing for reduced transport fares for students falls within the scope of the FEU Treaty in so far as it enables them, directly or indirectly, to cover their maintenance costs (see judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 43).
- 80 Furthermore, as the Court has previously held, the principle of non-discrimination on grounds of nationality, enshrined as a general principle in Article 18 TFEU and laid down specifically in respect of Union citizens coming within the scope of Directive 2004/38 in Article 24 thereof, prohibits, inter alia, direct discrimination on grounds of nationality (see, to that effect, judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 49 and the case-law cited).
- 81 Although it is true that the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject matter of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right (judgment of 5 May 2011 in *McCarthy*, C-434/09, EU:C:2011:277, paragraph 33).
- 82 In particular, it must be recalled that, so far as concerns access to financial assistance, such as financial support for travel costs, a Union citizen may claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of that State complies with the conditions of that directive (see, to that effect, judgment of 15 September 2015 in *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 49 and the case-law cited).
- 83 In the present case, the Commission confirmed, in answer to a question raised by the Court at the hearing, that its action related to discrimination against students who have a right of residence under Article 7(1)(c) of Directive 2004/38. The Kingdom of the Netherlands also maintained that non-Netherlands students covered by the present action have a right of residence in the Netherlands under that provision.
- 84 In those circumstances, it must be held that Article 24(1) of Directive 2004/38 applies, in principle, to the non-Netherlands students referred to by the Commission in its application.

- 85 Even before determining whether there is direct discrimination within the meaning of Article 24(1) of Directive 2004/38, it is necessary in the present case to examine, first, the argument of the Kingdom of the Netherlands that financial support for travel costs falls within the scope of the derogation from the principle of equal treatment under Article 24(2) of that directive.
- 86 Since Article 24(2) is a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, it must be interpreted narrowly (judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 54).
- 87 Although, as is apparent from paragraph 79 of the present judgment, financial support for travel costs constitutes maintenance aid for the students concerned, only maintenance aid for studies ‘consisting in student grants or student loans’ falls within the scope of the derogation from the principle of equal treatment under Article 24(2) of Directive 2004/38 (see, to that effect, judgment of 4 October 2012 in *Commission v Austria*, C-75/11, EU:C:2012:605, paragraph 55).
- 88 In that regard, it should be noted that, unlike the case which gave rise to the judgment of 4 October 2012 in *Commission v Austria* (C-75/11, EU:C:2012:605), in which the Member State concerned, as a rule, granted reduced fares on public transport only to students whose parents received family allowances in that State, in the present case, as is apparent from the documents before the Court, the award of financial support for travel costs to Netherlands students, who in the Commission’s view, are placed at an advantage by the national legislation in question, depends specifically on whether those students are studying in the Netherlands and whether they are entitled to funding for their studies under Netherlands legislation.
- 89 Under that legislation, the student is given a travel card granting him free access to public transport or access at a reduced rate. If the student successfully completes his studies within 10 years, he is not required to repay that financial assistance. If the student fails to complete his studies within that period, the grant must be repaid. Thus, financial support for travel costs, as provided for by the Netherlands legislation, has the characteristics of and is akin to a student grant or a loan, depending on whether or not the student successfully completes his studies within a period of 10 years.
- 90 It follows that financial support for travel costs, such as that at issue in the present case, must be regarded as ‘consisting in student grants or student loans’ within the meaning of Article 24(2) of Directive 2004/38.
- 91 In that regard, as noted by the Advocate General in point 97 of her Opinion, the question whether that financial support is a conditional grant or loan is wholly irrelevant, since Article 24(2) of Directive 2004/38 relates both to ‘student grants’ and ‘student loans’ and since financial support for travel costs is covered, in any event, by one or other of those concepts.
- 92 Similarly, it is also irrelevant that, in principle, financial support for travel costs is granted in the form of a travel card, that is to say not in cash, but in kind. It is apparent neither from the wording of Article 24(2) of Directive 2004/38 nor the legal framework of which that provision forms part that Member States should be required to grant maintenance aid for studies only in the form of cash. On the contrary, as noted by the Advocate General in point 93 of her Opinion, the grant of such a benefit in kind makes it possible for the Member State concerned, where appropriate, first, to reduce the costs relating to the provision of that benefit by negotiating prices with the service provider and, secondly, to ensure that the economic advantage provided by that benefit is used for the purpose for which it was intended.
- 93 Finally, the Court finds that, contrary to what the Commission suggests, the Kingdom of the Netherlands is not obliged, in those circumstances, to award financial support for travel costs solely on account of the fact that the student is enrolled with a public or private establishment accredited or

financed by that Member State on the basis of its legislation or administrative practice for the principal purpose of following a course of studies. Such an interpretation not only misconstrues the wording of Article 24(2) of Directive 2004/38 but also renders nugatory the derogation relating to maintenance aid for studies laid down in that provision, since it amounts, in actual fact, to requiring Member States to comply with the principle of equal treatment, when granting such aid, in respect of all students who are covered by Article 7(1)(c) of Directive 2004/38.

- 94 Consequently, it must be concluded that financial support for travel costs is covered by the concept of ‘maintenance aid for studies ... consisting in student grants or student loans’ in Article 24(2) of Directive 2004/38 and that the Kingdom of the Netherlands may rely on the derogation in that regard in order to refuse to grant such support, before the person concerned has acquired the right of permanent residence, to persons other than employed persons, self-employed persons, persons who retain such status or their family members.
- 95 The complaint alleging direct discrimination must therefore be rejected as unfounded.
- 96 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

- 97 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Kingdom of the Netherlands has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]