JUDGMENT OF THE COURT (Grand Chamber)

11 September 2007 *

In Case C-76/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Finanzgericht Köln (Germany), made by decision of 27 January 2005, received at the Court on 16 February 2005, in the proceedings

Herbert Schwarz,

Marga Gootjes-Schwarz

v

Finanzamt Bergisch Gladbach,

THE COURT (Grand Chamber)

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur) and K. Lenaerts, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, G. Arestis, A. Borg Barthet, M. Ilešič and J. Malenovský, Judges,

* Language of the case: German.

Advocate General: C. Stix-Hackl,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2006,

after considering the observations submitted on behalf of:

— H. Schwarz and M. Gootjes-Schwarz, by W. Meilicke, Rechtsanwalt,

— the German Government, by M. Lumma and U. Forsthoff, acting as Agents,

— the Commission of the European Communities, by K. Gross and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2006

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 8a(1) of the EC Treaty (now Article 18(1) EC), 48, 52 and 59 of the EC Treaty (now respectively, after amendment, Articles 39 EC, 43 EC and 49 EC).

2 It was submitted in an action between Mr Schwarz and Mrs Gootjes-Schwarz ('the Schwarzes'), German nationals living in Germany, and the Finanzamt Bergisch Gladbach ('the Finanzamt'), concerning the latter's refusal to allow them tax relief on school fees incurred in respect of their children attending schools in other Member States, the German legislation on income tax reserving the grant of that tax relief to taxpayers who have paid school fees to certain German private schools.

National legal context

3 Paragraph 7(4) of the Basic Law of the Federal Republic of Germany of 23 May 1949 (Grundgesetz für die Bundesrepublik Deutschland, 'the Basic Law') provides:

'The right to set up private schools is guaranteed. Private schools as substitutes for public schools need the approval of the State and are governed by statutes of the State. Such approval is to be given if private schools are not inferior to public schools in their teaching aims and arrangements and the training of teachers, and separation of the pupils according to the means of their parents is not promoted. Approval is to be refused if the economic and legal standing of the teachers is not adequately secured.'

4 Paragraph 10(1)(9) of the Law on Income Tax, in the version applicable at the date of the facts in the main proceedings (Einkommensteuergesetz, BGBl. 1997 I, p. 821, 'the EStG') provides:

'Special expenses ["Sonderausgaben"] [which are tax-deductible for income tax purposes] are the following expenses, where they are neither operating expenses nor professional charges:

1. ...

9. 30% of the amount paid by the taxpayer for the attendance by a child, in respect of whom he enjoys tax relief for dependent children or family allowances, of a substitute school approved by the State or authorised by the law of the Land, in accordance with Paragraph 7(4) of the Basic Law, or of a complementary school for general education recognised by the law of the Land, with the exception of the price of lodging, supervision and meals.'

5 In addition, in accordance with Paragraph 33(1) of the EStG, the taxpayer may, at his request, benefit from a reduction of income tax if he is obliged to bear expenses greater than those affecting the large majority of taxpayers having an equivalent income and in a similar financial and family situation.

The dispute in the main proceedings and the question referred

6 At the time of the facts in the main proceedings, the Schwarzes lived in Germany and were assessed jointly to income tax there. According to them, their three children require special schooling. For that reason, they enrolled two of them, born in 1981 and 1986, in a school in Scotland for exceptionally gifted children: the

Cademuir International School ('Cademuir School'), to which they paid school fees in 1998 and 1999.

7 As the Schwarzes did not initially submit tax declarations for those years, the competent authorities made an estimate of their taxable amount. The Schwarzes have lodged an objection before the Finanzamt against the notices of estimated assessment sent to them.

8 In the tax declarations produced in connection with that objection, the Schwarzes principally claimed as exceptional expenses pursuant to Paragraph 33(1) of the EStG various amounts for the years 1998 and 1999, in respect of school fees paid to the private schools attended by their children and the hospitalisation costs of one of them.

9 The referring court states that the Schwarzes have not indicated what part of those amounts was in respect of school fees, independently of lodging, supervision and meals, but that that part amounts to at least DEM 10 000 per year.

10 In the objection proceedings, the Finanzamt issued revised notices of taxation on 13 September 2001, in which it took account of the taxable amount declared by the Schwarzes, save for the exceptional expenses which they had put forward. The Schwarzes maintained their objection, and the Finanzamt dismissed it as unfounded by a decision of 6 December 2001. It is against that latter decision that the Schwarzes brought an action before the Finanzgericht Köln.

11 In their action, the Schwarzes claim, primarily, that the Finanzamt should reduce the income tax to which they were assessed for 1998 and 1999, by taking into consideration the exceptional expenses which they claim under Paragraph 33(1) of the EStG. In the alternative, they claim that they should be granted relief in relation to the special expenses, on the basis of Paragraph 10(1)(9) of the EStG.

12 The referring court rejects at the outset the Schwarzes' claim that the amount incurred by them by way of exceptional expenses under Paragraph 33(1) of the EstG should be taken into account.

13 It then states that Paragraph 10(1)(9) of the EstG applies only in the case where certain schools in Germany are attended and that, therefore, school fees paid to schools situated in another Member State cannot be taken into consideration as special expenses conferring the right to enjoy a reduction in tax. It expresses doubts as to the compatibility with Community law of the limitation of the tax relief provided for in Paragraph 10(1)(9) of the EStG to costs incurred in certain schools in Germany.

14 In those circumstances, the Finanzgericht Köln decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it contrary to Articles 8a (freedom of movement [for citizens of the Union]), 48 (freedom of movement for workers), 52 (freedom of establishment) or 59 (freedom to provide services) of the EC Treaty to treat payments of school fees to certain German schools, but not payments of school fees to schools in the rest of the European Community territory, as special expenditure leading to a reduction of

income tax, pursuant to Paragraph 10(1)(9) of the EStG as applicable in 1998 and 1999?'

The question referred

15 By its question, the referring court effectively asks whether Articles 8a(1), 48, 52 and 59 of the Treaty preclude legislation of a Member State which enables taxpayers to claim school fees paid to certain private schools established in national territory as special expenses giving a right to reduction of income tax, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

16 It should be observed at the outset that, since the facts at the origin of the dispute relate to the years 1998 and 1999, the provisions on the free movement of citizens of the Union, the freedom of establishment, the free movement of workers and the freedom to provide services come under different versions of the EC Treaty according to whether the legal situation at issue in the main proceedings was before or after 1 May 1999, the date on which the Treaty of Amsterdam entered into force (Articles 8a(1), 48, 52 and 59 of the EC Treaty concerning the legal situation before 1 May 1999; Articles 18(1) EC, 39 EC, 43 EC and 49 EC concerning the legal situation after that date.

17 Since, however, as the Advocate General has pointed out in point 16 of her Opinion, the content of the articles concerned has not been essentially altered by the Treaty of Amsterdam, the relevant provisions will be designated in their version in force after 1 May 1999.

The relevant EC Treaty provisions

Observations submitted to the Court

18 The Schwarzes first argued at the hearing that, as regards Articles 18 EC, 39 EC, and 43 EC, they agree with the position expressed by the Commission of the European Communities in Case C-318/05 *Commission* v *Germany*, in which judgment is given today, to the effect that those provisions must be applied to legislation such as that at issue in the main proceedings.

19 They then argue that the principle of the freedom to provide services applies to the situation in this case, since, first, foreign private schools wishing to offer their services to the children of German taxpayers are hindered in their offer by legislation such as that at issue here, and, secondly, German taxpayers who envisage enrolling their children in a private school established in another Member State are deterred by that legislation.

20 The Schwarzes consider that private schools established in another Member State, such as Cademuir School, carry on a remunerated activity as suppliers of services and that one cannot exclude the possibility that the German schools subsidised pursuant to Paragraph 10(1)(9) of the EStG have the capacity of providers of services. They argue that the amounts paid in reality to those German schools by the parents who enjoy tax relief for 30% of school fees in the strict sense may be higher than those paid to a school situated in another Member State, such as Cademuir School.

21 The German Government begins by arguing that Articles 18 EC, 39 EC and 43 EC do not apply to a situation such as that at issue in the main proceedings.

22 It then argues that the teaching activity carried out by the Cademuir School does not fall within the scope of Article 49 EC. The freedom to provide services presupposes the existence of an economic activity, as is shown by the words 'Services ... normally provided for remuneration' appearing in Article 50 EC.

23 In the view of the German Government, a school does not exercise an economic activity. The activities carried out by teaching establishments are not normally provided for remuneration, and do not therefore constitute services within the meaning of Article 50 EC (see, to that effect, Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 18).

24 According to that government, even if courses given by higher education establishments which are essentially financed by private funds become services within the meaning of Article 50 EC (Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 17), it cannot be deduced merely from the private character of Cademuir School that it carries on an economic activity. Nor can such a conclusion be drawn from the fact that the parents pay school fees. The fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system has no effect on the classification of the activity carried out as a provision of services (see, to that effect, *Humbel and Edel*, paragraph 19, and *Wirth*, paragraph 15). In addition, the German Government points out that the order for reference does not indicate whether Cademuir School is exclusively or essentially financed by private funds (parental contributions for example) or whether it constitutes a profit-making establishment.

25 The Commission, like the German Government, considers that there is no question here of there being an obstacle to the freedom of workers laid down in Article 39 EC or the freedom of establishment laid down in Article 43 EC.

26 The Commission maintains, as its primary argument, that Article 49 EC applies, and that it precludes legislation such as that at issue in the main proceedings.

27 What is applicable to this case, the Commission argues, is the principle of 'passive' freedom to provide services, in the context of which the beneficiaries of the service, namely the Schwarz children, go to a provider of services established in another Member State, in this case the private school situated in that other Member State.

28 In the Commission's view, the education and training of young persons can constitute services. It is clear from the judgments in *Humbel and Edel* and *Wirth* that the essential characteristic of teaching services provided for remuneration is the payment, by the pupil or another person, of fees corresponding more or less to the economic cost of the teaching. In such a case, the offer of the teaching service constitutes an economic activity.

29 By contrast, the Commission argues, in the case of public teaching, whereby the State seeks to accomplish its task in the social, cultural and educational fields, and the costs of which are largely supported by the State, there is no service provided for remuneration (see, to that effect, *Wirth*, paragraphs 15 and 16). The fact that the pupil may, in some cases, contribute to the financing of public teaching by paying an entry fee is not sufficient to make that teaching a service provided for remuneration (see, to that effect, *Humbel and Edel*, paragraph 19).

30 The Commission considers that the applicability of the principle of the freedom to provide services to facts such as those in the main proceedings cannot be called into question, since assessment of the remuneratory nature of the services cannot be based exclusively on an examination of the situation of private schools favoured by the German system. Rather, it argues, assessment should be based on the situation of private schools established in another Member State excluded from the tax advantage provided for in Paragraph 10(1)(9) of the EStG.

31 Given that, in certain Member States, there are private schools which supply their needs without any State aid and are run as profit-making businesses, legislation of a Member State such as that in Paragraph 10(1)(9) of the EStG, by generally excluding sums paid to schools established in another Member State from the tax advantage it provides for, is likely to hinder the cross-border offer of services by private schools with a commercial vocation which are established in another Member State.

32 In the alternative, should the Court consider that, in the main proceedings, the principle of the freedom to provide services does not apply, the Commission argues that the combined provisions of the first paragraph of Article 12 EC and of Article 18(1) EC apply and preclude such legislation.

The reply of the Court

33 It should first be noted that, as the Advocate General has pointed out in point 25 of her Opinion, in order to determine the provisions of the EC Treaty applicable to facts such as those in the main proceedings, there is no cause to examine those facts in the light of Articles 39 EC and 43 EC. Parents who, like the Schwarzes, are subject to income tax in one Member State and send their children to a private school

established in another, where they themselves are neither employed nor carry on any economic activity, do not thereby make use of their right to be employed in another Member State or to establish themselves there as self-employed persons, with the result that Articles 39 EC and 43 EC do not apply to their situation.

34 Secondly, it should be noted that Article 18 EC, which lays down generally the right for every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in the provisions guaranteeing the freedom to provide services (Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18, and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 64). If, therefore, the case in the main proceedings falls under Article 49 EC, it will not be necessary for the Court to rule on the interpretation of Article 18 EC (*Stylianakis*, paragraph 20, and *ITC*, paragraph 65).

35 It is therefore necessary to rule on Article 18(1) EC only in so far as the case in the main proceedings does not fall within the scope of Article 49 EC.

36 In that regard, it should first be noted that, whilst the third paragraph of Article 50 EC refers only to the active provision of services, where the provider moves to the beneficiary of the services, well-established case-law shows that the freedom to provide services includes the freedom of the persons for whom the services are intended to go to another Member State, where the provider is, in order to enjoy the services there (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16). In the main proceedings here, the issues are the refusal to grant tax relief on the ground that the private school attended is established in another Member State and, hence, the possibility of taking advantage of offers of education emanating from such a school.

37 It needs to be examined, however, whether those offers of education have the supply of services as their subject-matter. To that end, it needs to be examined whether courses offered by a school such as Cademuir School constitute, in accordance with the first paragraph of Article 50 EC, 'services ... normally provided for remuneration'.

38 The Court has already held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (*Humbel and Edel*, paragraph 17; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 26; Case C-355/00 *Freskot* [2003] ECR I-5263, paragraph 55; and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 23).

39 The Court has thus excluded from the definition of services within the meaning of Article 50 EC courses offered by certain establishments forming part of a system of public education and financed, entirely or mainly, by public funds (see, to that effect, *Humbel and Edel*, paragraphs 17 and 18, and *Wirth*, paragraphs 15 to 16). The Court thus held that, by establishing and maintaining such a system of public education, financed as a general rule by the public budget and not by pupils or their parents, the State did not intend to involve itself in remunerated activities, but was carrying out its task in the social, cultural and educational fields towards its population.

40 However, the Court has held that courses given by educational establishments essentially financed by private funds, notably by students and their parents, constitute services within the meaning of Article 50 EC, since the aim of those establishments is to offer a service for remuneration (*Wirth*, paragraph 17).

41 It should be noted here that it is not necessary for that private financing to be provided principally by the pupils or their parents. According to consistent case-law, Article 50 EC does not require that the service be paid for by those for whom it is performed (see, for example, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56; *Smits and Peerbooms*, paragraph 57; and *Skandia and Ramstedt*, paragraph 24).

42 The information from the referring court shows that the school fees paid by the Schwarzes to Cademuir School for the two children were estimated in themselves at DEM 10 000 per year at least. According to the German Government, that amount is significantly higher than that charged by private schools established in Germany and benefiting from Paragraph 10(1)(9) of the EStG.

43 Since the decision to refer contains no precise information on the financing and operating methods of Cademuir School, it is in any event for the national court to assess whether that school is essentially financed by private funds.

44 It should be added that, for the purposes of determining whether Article 49 EC is applicable to facts such as those at issue here, it is irrelevant whether or not schools established in the Member State of the beneficiary of the service — here the Federal Republic of Germany — which are approved, authorised or recognised in that State for the purposes of Paragraph 10(1)(9) of the EStG, provide services within the meaning of the first paragraph of Article 50 EC. All that matters is that the private school established in another Member State may be regarded as supplying services for remuneration.

45 In Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 90, which concerns medical services, which constitute supplies of services, the Court held that Article 49 EC

applies to the situation of a patient living in the United Kingdom, whose state of health required hospital treatment and who, having gone to another Member State to receive the services in question for payment, then applied for reimbursement from the National Health Service, even though services identical in nature were supplied free by the National Health Service of the United Kingdom.

46 In paragraph 91 of that judgment, the Court held that, without there being any need to determine in that case whether the provision of hospital treatment in the context of a national health service such as the NHS was in itself a service within the meaning of the EC Treaty provisions on the freedom to provide services, a situation such as that which gave rise to the dispute in the main proceedings, in which a person whose state of health necessitates hospital treatment goes to another Member State and there receives the treatment in question for consideration, falls within the scope of those provisions.

47 It follows that Article 49 EC is applicable to facts such as those in the main proceedings, where taxpayers of a given Member State send their children to a private school established in another Member State which may be regarded as providing services for remuneration, that is to say which is essentially financed by private funds, which it is for the national court to verify.

The existence of an obstacle to the freedom to provide services

Observations submitted to the Court

48 According to the Schwarzes, legislation such as that at issue in the main proceedings is contrary to Article 49 EC and is not justified.

49 The German Government considers that any possible obstacle to the freedom to provide services is justified in this case.

50 First it argues that there is no obligation under Article 49 EC for a Member State to support, by way of a tax advantage for school fees, educational establishments which fall under the education system of another Member State. If the Federal Republic of Germany were to allow the deductibility of school fees paid to establishments situated outside its territory, that would have the effect of granting the latter the same assistance as granted to German private schools, which would be contrary to the allocation of competences envisaged by the EC Treaty. Article 149 EC provides that the Community is to carry out its responsibility in the area of education while respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

51 In that regard, the German Government maintains that, since education policy is one of the essential tasks of each State and the structure of those tasks varies widely from one Member State to another by reason of historical and cultural traditions, the possibility of control and financing by the State in this area is essential. Paragraph 7 of the Basic Law lays down the basic principles on education, which moreover belongs to the exclusive competence of the Länder. That provision, which establishes an obligatory framework for private schools, guarantees the right to found such schools, thereby enabling the existence of a dualist educational system offering freedom of choice.

52 According to that government, since the German State does not exercise any influence over the organisation of the Cademuir School, particularly over its educational courses, neither can it be required to subsidise the functioning of that school by waiving tax receipts which are due to it.

53 Secondly, the German Government argues that refusal to extend the tax advantage in question to school fees paid to private schools established in another Member State is justified by the fact that the German schools covered by Paragraph 10(1)(9) of the EstG and private schools established in another Member State such as Cademuir School are not in an objectively comparable position.

54 According to that government, Paragraph 10(1)(9) of the EStG establishes indirect State aid in favour of certain private schools on which particular burdens are imposed. The schools in question are private substitute schools approved by the State, schools authorised by the law of the Land, and complementary schools for general education recognised by the law of the Land.

55 In compensation for the very high qualitative and financial requirements which are imposed on approved substitute schools by virtue of Paragraph 7(4) of the Basic Law, German constitutional law provides a corresponding public financing obligation. According to the German Government, the State has a discretion in carrying out its obligation to aid private substitute schools pursuant to that provision. In large measure, that aid takes the form of direct subsidies. Private schools thus receive about 80% of the sums paid to a comparable public school. Paragraph 10(1)(9) of the EStG concretises that constitutional obligation to assist and indirectly supports the approved schools, by means of tax advantages granted for school fees.

56 The same applies to schools authorised by the law of the Land or complementary schools for general education recognised by that same law. The German Government concedes that the specific requirements imposed by the Basic Law do not apply to those schools and a financing obligation cannot be inferred from it. However, authorisation of the Land or recognition by the law of the Land places

those schools in fact under the same legal regime as the approved schools. By reason of the burdens arising from such authorisation or recognition, there is an obligation on the State to aid those schools, even if it merely arises from a simple law.

57 The German Government argues that such a link between the requirements imposed by the State, on the one hand, and the corresponding public support, on the other, does not exist in the case of the Cademuir School. In particular, such an establishment is not under the obligation to avoid a selection of pupils according to the means of their parents, implying the payment of school fees necessarily insufficient to cover the costs. Thus a decisive factor of the burden on the schools covered by Paragraph 10(1)(9) of the EstG, justifying the aid given to them by the State, disappears.

58 Finally, according to the German Government, extension of the tax advantage to school fees paid to Cademuir School would not only run counter to the requirement in the third sentence of Paragraph 7(4) of the Basic Law that selection based on parental means should be avoided, but could also lead to a significant increase in the overall amount of tax relief granted pursuant to Paragraph 10(1)(9) of the EStG.

59 The school fees of the private schools covered by Paragraph 10(1)(9) of the EStG are fixed at a low level in order to prevent selection of pupils according to parental means, with the result that the amount of indirect aid given by the State to those schools, in the form of deductibility of special expenses incurred by the parents of pupils, is modest. That does not apply to a school such as the Cademuir School, the school fees of which are considerably higher than those charged by the said schools.

60 The German Government recalls that, in its judgment in Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 56, the Court held it permissible for a Member State

to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State. It should similarly be legitimate for a Member State to link the granting of a tax advantage to criteria allowing prevention of that advantage being brought below a level which the Member State considers necessary.

61 The Commission considers that the legislation at issue in the main proceedings infringes the freedom to provide services. It argues that Paragraph 10(1)(9) of the EStG does not establish objective criteria allowing it to be determined what types of school fees charged by German and foreign schools are deductible. That provision makes deductibility of fees subject only to approval or recognition of the private school concerned in Germany, so that the determinant condition for that deductibility concerns the fact that the school is established in the territory of that Member State. School fees paid to any private school situated in another Member State are automatically excluded from the tax deduction, whatever their amount. Since none of those private schools are capable of fulfilling the conditions laid down in Paragraph 10(1)(9) of the EstG, no distinction can be established amongst those schools as to whether or not, in theory, they are comparable to German schools.

62 According to the Commission, the schools disfavoured by the system under Paragraph 10(1)(9) of the EStG include at least those that are financed exclusively by the school fees which they charge and by their other economic activities, and which thus undeniably provide services for remuneration. The discrimination which they suffer constitute at least an obstacle to the freedom to provide services guaranteed by Article 49 EC.

63 In the Commission's view, there is no reason to justify this infringement of Article 49 EC, especially since the Federal Republic of Germany retains the freedom, under Community law, to limit the deductibility of school fees to certain types of schools

or certain amounts, provided only that the deductibility rests on objective criteria and is independent of the place of establishment of the school. It regards that infringement as especially serious, because dissemination of the languages of the Member States and encouraging mobility of students and teachers are among the explicit aims of the Community, according to the first and second indents of Article 149(2) EC.

Reply of the Court

64 Tax legislation of a Member State such as that under Paragraph 10(1)(9) of the EStG makes the granting of tax relief subject to the condition that schooling costs be incurred in private schools approved by that Member State, or authorised or recognised by the law of the relevant Land, which presupposes that they are established in that Member State.

65 That legislation generally excludes the possibility for German taxpayers of deducting from their taxable income part of the school fees linked to sending their children to a private school situated in another Member State, whereas that possibility exists as regards school fees paid to certain German private schools. It therefore involves a higher tax burden for those taxpayers who, like the Schwarzes, send their children to a private school situated in another Member State and not to a private school situated in German territory.

66 Legislation such as that under Paragraph 10(1)(9) of the EStG has the effect of deterring taxpayers resident in Germany from sending their children to schools established in another Member State. Furthermore, it also hinders the offering of education by private educational establishments established in other Member States, to the children of taxpayers resident in Germany.

67 Such legislation constitutes an obstacle to the freedom to provide services guaranteed by Article 49 EC. That article precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (see, for example, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23; *Smits and Peerbooms*, paragraph 61; *Danner*, paragraph 29; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 23; *Watts*, paragraph 94; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 25).

68 According to the German Government, any obstacle to the freedom to provide services is justified, first, by the fact that the freedom to provide services does not imply any obligation to extend the privileged tax treatment granted to certain schools under the educational system of one Member State to those of another Member State.

69 It should be noted in that respect that Paragraph 10(1)(9) of the EstG concerns the tax treatment of school fees. According to well-established case-law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (see, for example, *Danner*, paragraph 28; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 25).

70 Similarly, whilst Community law does not detract from the power of the Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity (Article 149(1) EC) and, secondly, the content and organisation of vocational training (Article 150(1) EC), the fact remains that, when exercising that power, Member States must comply with Community law, in particular the provisions on the freedom to provide services (see, by analogy, *Watts*, paragraphs 92 and 147).

71 Moreover, concerning the German Government's argument that a Member State cannot be required to subsidise schools which fall under the educational system of another Member State, it is sufficient to point out that Paragraph 10(1)(9) of the EstG provides not for a direct subsidy by the German State to the schools concerned but for the grant of a tax advantage to parents in respect of school fees incurred on behalf of their children.

72 Concerning the German Government's argument that the refusal to grant the tax advantage under Paragraph 10(1)(9) of the EStG in respect of school fees paid to private schools established in another Member State is justified by the fact that the German schools concerned by that article and private schools established in another Member State such as Cademuir School are not in an objectively comparable situation, it should be noted that that article makes the deductibility of part of the school fees subject to the approval, authorisation or recognition in Germany of the private school concerned, without fixing an objective criterion allowing it to be determined which types of school fees charged by German schools are deductible.

73 It follows that any private school established in a Member State other than the Federal Republic of Germany, merely by reason of the fact that it is not established in Germany, is automatically excluded from the tax advantage at issue in the main proceedings, whether or not it meets criteria such as the charging of school fees of an amount that does not give rise to the selection of pupils according to parental means.

74 In order to justify the obstacle to the freedom to private services which the legislation at issue in the main proceedings constitutes, the German Government further argues, with reference to the judgment in *Bidar*, that it is legitimate for a Member State to link the granting of an aid or a tax advantage to criteria designed to prevent those aids or advantages being brought below a level which the Member State considers necessary.

75 According to that government, the arguments in that judgment concerning the granting of aid designed to cover the maintenance costs of students and the free movement of citizens of the Union should be placed in a general context, in the sense that, where public funds are limited, the extension of the benefit of a tax relief necessarily implies a reduction in the amount of the individual reliefs granted to individuals in order to arrive at a fiscally neutral operation. The German Government argues in that regard that additional charges on the State budget would result from the extension of the application of Paragraph 10(1)(9) of the EstG to the payment of school fees to certain schools situated in another Member State.

76 Such an argument cannot however be accepted for the following reasons.

77 First, according to the consistent case-law of the court, prevention of a reduction in tax receipts is not one of the reasons set out in Article 46 EC, read in conjunction with Article 55 EC, and neither can it be regarded as an imperative reason in the public interest.

78 Secondly, as regards the German Government's argument that any Member State is entitled to ensure that the granting of aid in relation to school fees does not become an unreasonable burden that could have consequences on the overall level of aid which that State can grant, the information supplied by that government shows that the excessive financial burden which, in its submission, extension of the tax relief to school fees paid to certain schools situated in another Member State would represent arises from the fact that the aid indirectly granted in respect of those schools is of an amount far higher than that paid to educational establishments approved, authorised or recognised in Germany because those schools established in another Member State have to finance themselves by means of high school fees.

79 Even if reasoning identical to that followed in the *Bidar* judgment were to apply in a situation such as that which gave rise to the main proceedings, concerning a tax advantage in relation to school fees, it should be noted in that regard that, as the Commission has argued, the objective pursued by the refusal to grant the tax advantage in question for school fees paid to schools established in another Member State, namely to ensure that the operating costs of private schools are covered without causing an unreasonable burden on the State, according to the analysis followed in *Bidar*, could be achieved by less stringent methods.

80 As the Advocate General has pointed out in point 62 of her Opinion, in order to avoid an excessive burden it is legitimate for a Member State to limit the amount deductible in respect of school fees to a given level, corresponding to the tax relief granted by that State, taking account of certain values of its own, for the attendance of schools situated in its territory, which would constitute a less stringent method than refusing to grant the tax relief in question.

81 It appears in any event disproportionate totally to exclude from the tax relief under Paragraph 10(1)(9) of the EStG school fees paid by income tax payers in Germany to schools established in a Member State other than the Federal Republic of Germany. That excludes school fees paid by those taxpayers to schools established in another Member State from the tax relief at issue, whether or not those schools fulfil objective criteria determined on the basis of principles individual to each Member State and allowing it to be determined what types of school fees confer a right to that tax relief.

82 In the light of the above considerations, the answer to the referring court must be that, where taxpayers of a Member State send their children to a school situated in another Member State the financing of which is essentially from private funds, Article 49 EC must be interpreted as precluding legislation of a Member State which

allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

The existence of an obstacle to the free movement of citizens of the Union

83 As indicated in paragraphs 35 and 47 of this judgment, in so far as the referring court might conclude that Article 49 EC does not apply to the facts in the main proceedings, it is necessary to examine legislation such as that at issue in the main proceedings in the light of Article 18 EC.

Observations submitted to the Court

84 The German Government argues that Article 18 EC does not preclude legislation such as Paragraph 10(1)(9) of the EStG.

85 The Commission argues that, should the Court find that Article 49 does not apply, that legislation infringes the rights conferred on the applicants in the main proceedings by the combined provisions of the first paragraph of Article 12 EC and Article 18(1) EC.

Reply of the Court

86 According to settled case-law, 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 enjoy the same treatment in law within the area of application *ratione materiae* of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraphs 22 and 23; and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16).

87 Situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (see, in particular, *Grzelczyk*, paragraph 33; *D'Hoop*, paragraph 29; *Garcia Avello*, paragraph 24; and *Pusa*, paragraph 17).

88 Inasmuch as a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the EC Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30; and *Pusa*, paragraph 18).

89 Those opportunities could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles placed in the way of his

stay in the host Member State by legislation in his State of origin penalising the mere fact that he has used them (see, to that effect, Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 23; *D'Hoop*, paragraph 31; *Pusa*, paragraph 19; and Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39).

90 The Schwarz children, by attending an educational establishment situated in another Member State, used their right of free movement. As is shown by the judgment in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 20, even a young child may make use of the rights of free movement and residence guaranteed by Community law.

91 National legislation such as that at issue in the main proceedings introduces a difference in treatment between taxpayers subject to income tax in Germany who have sent their children to a school in Germany, and those who have sent their children to a school established in another Member State.

92 In so far as it links the granting of tax relief for school fees to the condition that those fees be paid to a private school meeting certain conditions in Germany, and causes such relief to be refused to payers of income tax in Germany on the ground that they have sent their children to a school in another Member State, the national legislation at issue in the main proceedings disadvantages the children of nationals solely on the ground that they have availed themselves of their freedom of movement by going to another Member State to attend a school there.

93 National legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move

and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (*De Cuyper*, paragraph 39; and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 31).

94 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36; *De Cuyper*, paragraph 40; and *Tas-Hagen and Tas*, paragraph 33).

95 In order to justify a possible restriction on the freedom to provide services, the German Government has put forward the arguments set out in paragraphs 58 to 60 of this judgment, referring to the analysis followed by the Court in *Bidar*, concerning the interpretation of Article 18 EC.

96 In paragraph 56 of that judgment, the Court held it permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.

97 However, even if identical reasoning were applicable in a situation such as that giving rise to the dispute in the main proceedings, concerning a tax advantage for school fees, the fact remains that legislation such as Paragraph 10(1)(9) of the EStG appears in any case disproportionate in relation to the objectives it pursues, for the same reasons as those set out in paragraph 81 of this judgment, in the context of the examination of this legislation from the standpoint of the principle of the freedom to provide services.

98 It follows that, where the children of taxpayers of a Member State are sent to school in another Member State, at a school whose services are not covered by Article 49 EC, legislation such as Paragraph 10(1)(9) of the EStG places those children at an unjustifiable disadvantage by comparison with those who have not availed themselves of their freedom of movement by going to school in another Member State, and infringes the rights that are conferred upon them by Article 18(1) EC.

99 The answer to the referring court must therefore be that, where taxpayers of a Member State send their children to school at a school established in another Member State, the services of which are not covered by Article 49 EC, Article 18 EC precludes legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.

Costs

100 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 (Grand Chamber) hereby rules:

1. **Where taxpayers of a Member State send their children to a school situated in another Member State the financing of which is essentially from private funds, Article 49 EC must be interpreted as precluding legislation of a Member State which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.**

2. **Where taxpayers of a Member State send their children to a school established in another Member State, the services of which are not covered by Article 49 EC, Article 18 EC precludes legislation which allows taxpayers to claim as special expenses conferring a right to a reduction in income tax the payment of school fees to certain private schools established in national territory, but generally excludes that possibility in relation to school fees paid to a private school established in another Member State.**

[Signatures]