

JUDGMENT OF THE COURT (Second Chamber)

4 October 2012 (*)

(Failure of a Member State to fulfil obligations – Citizenship of the Union – Right to move and reside freely – Articles 20 TFEU and 21 TFEU – Discrimination on grounds of nationality – Article 18 TFEU – Directive 2004/38/EC – Article 24 – Derogation – Scope – Member State in which reduced fares on public transport are granted only to students whose parents are in receipt of family allowances in that Member State)

In Case C-75/11,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 21 February 2011,

European Commission, represented by V. Kreuzschitz and D. Roussanov, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by C. Pesendorfer and M. Fruhmann, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Löhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2012,

gives the following

Judgment

- 1 By its application, the European Commission asks the Court to declare that, by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, the Republic of Austria has failed to fulfil its obligations under the combined provisions of Articles 18 TFEU, 20 TFEU and 21 TFEU, and also Article 24 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 corrigendum OJ 2004 L 229, p. 35).

Legal context

European Union law

Regulation (EEC) No 1408/71

- 2 Article 1(u)(i) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 592/2008 of the European Parliament and the Council of 17 June 1998 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71') defines 'family benefits' as 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h) [thereof]'.
- 3 Article 4(1)(h) of Regulation No 1408/71 provides that that regulation is to apply to all legislation concerning those branches of social security relating to family benefits.
- 4 The first sentence of Article 13(1) of Regulation No 1408/71 provides that, subject to Articles 14c and 14f, persons to whom that regulation applies are to be subject to the legislation of a single Member State only.

Directive 2004/38

- 5 Recitals 1 and 10 in the preamble to Directive 2004/38 state as follows:

'(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the [EC] Treaty and to the measures adopted to give it effect.

...

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.'

- 6 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, and to their family members.
- 7 Article 7(1) of the same directive is worded as follows:

'1. 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; ...'

8 Article 24 of Directive 2004/38, entitled 'equal treatment', reads 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.'

Austrian law

9 There are no federal rules in Austria governing reduced transport fares for students.

10 According to the information provided to the Court, term transport passes at a reduced rate are granted to students on the basis of financing agreements concluded by the Bundesministerium für Verkehr, Innovation und Technologie (Federal Ministry of Transport, Innovation and Technology), the regional municipalities and the relevant transport undertakings. Those agreements not only govern fares, the scope of the reduction and the financial contribution of the federal government, but also establish the categories of beneficiary of the scheme.

11 It is also apparent from the case-file that, in certain Länder, students, as defined in Paragraphs 3 and 4 of the 1992 Law on financial assistance for studies (Studienförderungsgesetz 1992, BGBl. No 305/1992), in the version in force on the date of the dispute ('the 1992 Law'), may be granted the reduced fares only if their registered address or place of study is situated within the area covered by the public transport company in question and if family allowances were received under Paragraph 2 of the 1967 Family Allowance Act (Familienlastenausgleichsgesetz 1967, BGBl. No 376/1967), in the version thereof in force on the date of the dispute ('the FLAG').

12 In other Länder, where the application of the reduced fares is not contingent on the receipt of family allowances, the criteria taken into account, apart from the status of student, are the age and/or residence of the persons concerned.

13 Under Paragraph 2 of the FLAG persons having their registered address or habitual residence in the federal territory are entitled to family allowances for minor children and for adult children under the age of 26 who are following vocational training or further training in a specialised educational establishment in relation to the trade they have learned, provided that that training prevents them from working in their trade. As a rule it is the person whose household includes the child who is entitled to family allowances.

- 14 Paragraph 4 of the 1992 Law provides that the Contracting Parties to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994, L 1, p. 3) or the EC Treaty and nationals of non-member countries are to be equated with Austrian nationals 'in so far as they are so equated as a result of the aforementioned agreements'.
- 15 Paragraph 52 of the 1992 Law defines transport fare grants as coming under 'other measures for promoting studies'. The objective of the grants is to support the recipients of education allowances by assuming their transport costs. The grants are available only to recipients of education allowances in Austria and differ from reduced transport fares.

Pre-litigation procedure

- 16 The Commission was informed, through a complaint lodged by a person acting on behalf of the Green party, that numerous students who were nationals of Member States other than the Republic of Austria and pursuing their studies in Austria had to pay higher fares than Austrian students in order to use public transport. In certain Länder, only students from families in receipt of Austrian family allowances may avail themselves of reduced transport fares.
- 17 Taking the view that such a selective system gives rise to an infringement of the principle of non-discrimination laid down in Article 12 EC, the Commission, by letter of 13 February 2008, requested the Republic of Austria to provide it with a detailed description of the reduced transport fare scheme applicable in Austria.
- 18 By letter of 18 April 2008, the Austrian authorities described the different fares applicable Land by Land and according to the specific situation of the persons concerned.
- 19 By letter of formal notice of 23 March 2009, the Commission requested the Republic of Austria to submit, within two months, its observations on the selective manner of granting reduced transport fares for students. According to the Commission, the selective manner of applying the fares amounted to an infringement of the principle of non-discrimination laid down in Article 12 EC, henceforth found in Article 18 TFEU following the entry into force of the Treaty of Lisbon, and also in Article 24 of Directive 2004/38.
- 20 In its reply of 25 June 2009 to that letter of formal notice, the Republic of Austria questioned the relevance of Article 24 of Directive 2004/38. In its view, the reduced transport fares for students are supplementary family benefits coming within the system of family allowances granted in Austria and must therefore be categorised as social security benefits for the purposes of the European Union legislation applicable in the area of coordination of social security schemes. It is not the students themselves who benefit from the reduced fares, but rather the parents who provide for their children for as long as they retain their status as students.
- 21 On 28 January 2010, the Commission issued a reasoned opinion to the Republic of Austria, in which it reiterated its position that the Austrian scheme for reduced transport fares for students infringes Articles 18 TFEU and 24 of Directive 2004/38, without the exception provided for in Article 24(2) being applicable. The Commission stated, first, that, contrary to the arguments put forward by the Austrian authorities, the mere fact that a measure lightens parents' costs of providing for their children does not mean that the measure is not a maintenance aid for studies; otherwise Article 24(2) would be divested of its meaning. Secondly, it may be inferred from the wording of Article 24(2) that host Member States may refuse to grant maintenance aid to nationals of other Member States who do not have a

permanent right of residence in the territory of the host Member State only where that aid is in the form of student grants or loans.

- 22 In its reply of 29 March 2010 to that reasoned opinion, the Republic of Austria stated that the reduced transport fares amount to a family benefit granted as part of a private law arrangement. There is no discrimination on grounds of nationality, since the reduced rates are granted to all insured parents, irrespective of their nationality.
- 23 In those circumstances the Commission decided to bring the present action.

The action

- 24 It should be observed by way of preliminary point that, by its action, the Commission criticises the Republic of Austria for granting reduced transport fares only to students in respect of whom family allowances are granted in Austria, such a condition being imposed by the Länder of Vienna, Upper Austria, Burgenland and Styria and the City of Innsbruck.
- 25 Regarding the City of Innsbruck, although it is apparent from the case-file that since the university year 2010-2011 students have been able to have term transport passes at a reduced rate irrespective of whether their parents receive Austrian family allowances, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion, in this case 28 March 2010. The Court cannot take account of any subsequent changes (see, *inter alia*, Case C-147/00 *Commission v France* [2001] ECR I-2387, paragraph 26; Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7; and Case C-565/10 *Commission v Italy* [2012] ECR I-0000, paragraph 22).
- 26 It is moreover common ground that this new scheme of term passes in the City of Innsbruck was not yet in effect at the end of the period laid down in the reasoned opinion.
- 27 It should also be observed that since the Commission does not have sufficient information about the scheme applicable in the Land of Lower Austria, the scheme applicable there is not covered by the present action.

Arguments of the parties

- 28 The Commission argues that making the granting of reduced transport fares subject to the receipt of Austrian family allowances gives rise to indirect discrimination against students from Member States other than the Republic of Austria who are pursuing their studies in Austria, thereby infringing Articles 18 TFEU, 20 TFEU and 21 TFEU and also Article 24 of Directive 2004/38.
- 29 The Austrian scheme at issue in the present case places students who are nationals of those other Member States at a disadvantage by providing for a condition for the granting of reduced transport fares which is more easily accessible to Austrian nationals.
- 30 The Republic of Austria states that the reduced transport fares, which are subject to the receipt of Austrian family allowances, are a family benefit provided in the context of a private law arrangement. Under Austrian law, family allowances cannot be collected automatically by any Austrian student, but the grant of same is contingent on the parents' being required to provide for the student. The reduced transport fares serve essentially to alleviate the burden on the family budget and, like family allowances, are no longer granted once the student has income which exceeds the threshold laid down by the Austrian legislature. In the Republic of

Austria's submission, such reduced fares must be categorised as a family benefit for the purposes of Regulation No 1408/71, even though they are linked to studies and courses and fulfil a twofold function. Unlike a transport grant offered to a socially disadvantaged student, the reduced transport fares are not tested against the parents' income and are not paid directly to the bank account held by the student.

- 31 The Republic of Austria considers that, in its notification relating to Regulation No 1408/71, it made a very general reference to the FLAG, from which the reduced transport fares in question are derived. That notification is of declaratory and constituent effect.
- 32 The Republic of Austria submits that its scheme satisfies fully the requirements of Regulation No 1408/71, without infringing Directive 2004/38. It adds that the Court does not refer to the principles of primary law, such as that laid down in Article 18 TFEU, in order to assess the benefits that come within the scope of that regulation (see Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095, paragraph 84 et seq.).
- 33 The Commission submits that the argument relied on by the Republic of Austria, based on the nature of the reduced transport fares as a social security benefit, is irrelevant. First of all, such reduced fares do not serve to cover family expenses as required by Article 1(u)(i) of Regulation No 1408/71, but help with the public transport expenses incurred by students at universities and other institutions of higher education. The reduced transport fares benefit students directly, not their parents. Next, the description of the reduced transport fares provided by the Republic of Austria does not show that they fulfil the conditions for being considered a social security benefit for the purposes of Regulation No 1408/71. It should be noted in that regard that students have no legal entitlement to those benefits. Lastly, it is not logical to categorise the transport grant provided for by the 1992 Law as maintenance aid when the reduced transport fares at issue in the present case are considered a family benefit. According to the Commission, the fact that, in certain Länder, the grant of reduced transport fares is not contingent on the receipt of Austrian family allowances is an additional indication that the reduced fares in no way resemble a family benefit.
- 34 As to the derogation from the principle of equal treatment in Article 24(2) of Directive 2004/38 relied on by the Republic of Austria, the Commission submits that it must be interpreted restrictively. That derogation applies only to 'maintenance aid for studies, including vocational training, consisting in student grants or student loans'. Contrary to the arguments put forward by the Republic of Austria, the principle of equal treatment, provided for in Article 24(1), extends to all benefits for students which are not granted in the form of a student grant or student loan. Given their form, the reduced transport fares do not come within the scope of the derogation provided for in Article 24(2). The interpretation of that derogation advocated by the Republic of Austria cannot be upheld as it is contrary to the primary law and the Court's case-law on Articles 18 TFEU and 21 TFEU.
- 35 The Republic of Austria submits that, in any event, the reduced transport fares contribute to the financing of education and, consequently, must not be considered independently of other measures that the Member State of origin is required to take in the field of education aid. Until a student has been integrated into education in the host Member State, it is for the Member State of origin to grant sufficient assistance to its students, taking into account potential maintenance obligations. The host Member State is not obliged to make up for potentially 'weaker' assistance granted by other Member States.

Findings of the Court

- 36 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.

- 37 Students from Member States other than the Republic of Austria who follow a course of study in Austria have that status, provided that they hold the nationality of a Member State.
- 38 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, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28).
- 39 Every citizen of the Union may therefore rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope *ratione materiae* of European Union 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 Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 63; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 32 and 33; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraphs 36 and 37; and Case C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 31).
- 40 In addition, 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 (*Bressol and Others*, paragraph 32).
- 41 It follows that a national of a Member State who is studying in Austria may rely on the right, enshrined in Articles 18 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 their nationality (*Bressol and Others*, paragraph 33).
- 42 Regarding the issue whether reduced transport fares such as those granted by certain Länder in Austria come within the scope of the Treaties for the purposes of Article 18(1) TFEU, it should be observed that, in holding that access to training comes within the scope of European Union law, the Court has held previously that national aid granted to students to cover their maintenance costs, social benefits provided for by a national, non-contributory scheme and so-called tideover allowances provided for by national legislation intended for unemployed youth seeking their first employment all come within the scope thereof (see *Bidar*, paragraph 42; *Grzelczyk*, paragraph 46, and *D'Hoop*, paragraphs 34 and 35).
- 43 It follows that a scheme providing for reduced transport fares for students comes within the scope of the FEU Treaty in so far as it enables them, directly or indirectly, to cover their maintenance costs.
- 44 As to the Republic of Austria's argument to the effect that the reduced transport fares should be considered a family benefit for the purposes of Regulation No 1408/71, it should be observed that, even if the conflict rules laid down in that regulation do apply to citizens of the Union pursuing their studies in a Member State other than their Member State of origin and whose parents have no link with the host Member State, categorising the reduced fares in this manner still does not justify unequal treatment on grounds of nationality in respect of those citizens.
- 45 It should be borne in mind, first of all, that certain benefits coming within the specific scope of Regulation No 1408/71 have been held by the Court also to constitute social benefits or advantages subject to the principle of equal treatment on grounds of nationality under other

provisions of European Union law relating to the free movement of persons (see, to that effect, *Martínez Sala*, paragraph 27).

- 46 Second, it must be pointed out that Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist. Its sole objective is to ensure the coordination of those schemes (Case C-503/09 *Stewart* [2011] ECR I-0000, paragraph 75 and the case-law cited).
- 47 Although Member States retain the power to organise their social security schemes, with the result that, in the absence of harmonisation at European Union level, it is for them to determine the conditions concerning the right or duty to be insured with a social security scheme as well as the conditions for entitlement to benefits, in exercising those powers, they must none the less comply with the law of the European Union and, in particular, with the provisions of the FEU Treaty giving every citizen of the Union the right to move and reside within the territory of the Member States (*Stewart*, paragraphs 75 to 77 and the case-law cited).
- 48 The Republic of Austria's argument relating to the categorisation of reduced transport fares as a family benefit for the purposes of Regulation No 1408/71 does not, therefore, rule out the existence, alleged by the Commission, of discrimination on grounds of nationality against students from other Member States pursuing their studies in Austria.
- 49 It should be recalled in that regard that 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 not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see *Bressol and Others*, paragraph 40).
- 50 In the present case, making the reduced transport fares subject to the grant of Austrian family allowances, as provided for by certain Länder, gives rise to unequal treatment as between Austrian students pursuing their studies in Austria and students from other Member States pursuing their studies there as well, since such a condition is more easily fulfilled by Austrian students because their parents as a rule receive those allowances.
- 51 Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, referred to in paragraph 38 of this judgment, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom of movement (*D'Hoop*, paragraph 35).
- 52 According to settled case-law, indirect discrimination on grounds of nationality 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 objective of the national provisions (see *D'Hoop*, paragraph 36; Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 48; and *Bressol and Others*, paragraph 41).
- 53 In the present case, before even considering whether there is such an objective justification, it is appropriate, in the first place, to examine the Republic of Austria's argument to the effect that reduced transport fares for students come within the scope of the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38.
- 54 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.

- 55 Although, as evidenced by paragraph 43 of the present judgment, the reduced transport fares granted to the students concerned constitute maintenance aid for them, only maintenance aid for studies 'consisting in student grants or student loans' come within the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38.
- 56 Any other interpretation of that provision would run counter to not only its wording but also to the Court's obligation to interpret that derogation in accordance with the provisions of the Treaty, including those relating to Union citizenship (see, to that effect, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 44).
- 57 In the second place, regarding the question whether there are objective considerations which might justify the unequal treatment established, as evidenced by paragraph 35 of this judgment, the Republic of Austria argues that the reduced transport fares contribute towards the financing of studies and must therefore not be considered in isolation from other measures which the Member State of origin is required to take in the area of education aid. Some Member States offer education grants which are considerably more generous than those offered in Austria, with the result that students from other Member States can more easily meet the costs of living, including transport costs, than Austrian students. If other Member States have a less generous grants scheme for students than the one in place in Austria, it is not for the host Member State to assist students from those States.
- 58 It should be noted in that regard that, as observed by the Advocate General in point 62 of her Opinion and according to the information provided to the Court, although the reduced transport fares are no longer granted once the student himself has income over a certain threshold, the granting of the reduced fares does not, as a rule, presuppose insufficient resources. Similarly, if the objective pursued by the Republic of Austria is to prevent a student from another Member State from receiving two sets of financial aid, there is nothing in the information provided by the Austrian Government indicating that, when the reduced fares are granted to students whose parents receive Austrian family allowances, the competent Austrian authorities take into account any benefits received by those students in another Member State.
- 59 In so far as the Republic of Austria's argument is intended to question whether there is an obligation on a host Member State to finance students who are not integrated there, it should be borne in mind that the Court has held previously, in respect of the provisions relating to Union citizenship, that it is legitimate for a host Member State to wish to ensure that there is a genuine link between a claimant to a benefit and the competent Member State (see, to that effect, *D'Hoop*, paragraph 38; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 67; *Bidar*, paragraph 57; and *Vatsouras and Koupatantze*, paragraph 38).
- 60 Although EU law relating to the free movement of persons and, in particular, students, allows for a certain degree of financial solidarity as amongst nationals of the host Member State and nationals of other Member States (see, to that effect, *Grzelczyk*, paragraph 44), as stated in recital 10 in the preamble to Directive 2004/38, persons exercising their right of residence, including students, should not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, under Article 21 TFEU and the provisions of Directive 2004/38, the right of residence for Union citizens and their family members for periods in excess of three months is subject to conditions.
- 61 Accordingly a national scheme requiring a student to provide proof of a genuine link with the host Member State could, in principle, reflect a legitimate objective capable of justifying

restrictions on the right to move and reside freely in the territory of the Member States provided for in Article 21 TFEU.

- 62 It should be observed, however, first, that the proof required to demonstrate the genuine link must not be too exclusive in nature or unduly favour an element which is not necessarily representative of the real and effective degree of connection between the claimant to reduced transport fares and the Member State where the claimant pursues his studies, to the exclusion of all other representative elements (see, to that effect, *D'Hoop*, paragraph 39, and *Stewart*, paragraph 95).
- 63 Second, as the Advocate General has noted in point 76 of her Opinion, the genuine link required between the student claiming a benefit and the host Member State need not be fixed in a uniform manner for all benefits, but should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes. The objective of the benefit must be analysed according to its results and not according to its formal structure (see, to that effect, *Vatsouras and Koupatantze*, paragraphs 41 and 42).
- 64 As regards reduced transport fares for students, the existence of a genuine link between the student pursuing his studies in the host Member State could actually be ascertained for the purposes of the reduced transport fares, inter alia, by checking whether the person in question 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, in accordance with the first indent of Article 7(1)(c) of Directive 2004/38.
- 65 The conclusion must therefore be that the Republic of Austria has not established that the Austrian scheme of reduced transport fares for students applicable in certain Länder is objectively justified.
- 66 In the light of all the foregoing considerations, the Court finds that, by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, the Republic of Austria has failed to fulfil its obligations under the combined provisions of Articles 18 TFEU, 20 TFEU and 21 TFEU and also Article 24 of Directive 2004/38.

Costs

- 67 Under Article 69(2) 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 Commission has applied for costs and the Republic of Austria has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby

- 1. Declares that, by granting reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances, the Republic of Austria has failed to fulfil its obligations under the combined provisions of Articles 18 TFEU, 20 TFEU and 21 TFEU and also Article 24 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.

2. Orders the Republic of Austria to pay the costs.

[Signatures]

***** Language of the case: German.