Case C-318/05

Commission of the European Communities

v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Articles 18 EC, 39 EC, 43 EC and 49 EC – Income tax legislation – School fees – Tax deductibility limited to school fees paid to national private establishments)

Opinion of Advocate General Stix-Hackl delivered on 21 September 2006

Judgment of the Court (Grand Chamber), 11 September 2007

Summary of the Judgment

1. *Freedom to provide services – Services – Definition*

(Art. 50 EC)

2. *Freedom to provide services – Restrictions – Tax legislation*

(Art. 49 EC)

3. *Freedom of movement for persons – Workers – Freedom of establishment – Tax legislation*

(Arts 39 EC and 43 EC)

4. *Citizens of the European Union – Right of free movement and residence in the territory of the Member States – Tax legislation*

(Art. 18 EC)

1. Courses offered by certain establishments forming part of a system of public education and financed, entirely or mainly, by public funds are excluded from the definition of services within the meaning of Article 50 EC. 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.

However, 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. It is not necessary, in that respect, for that private financing to be provided principally by the pupils or their parents. Article 50 of the Treaty does not require that the service be paid for by those for whom it is performed.

(see paras 68-70)

2. 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, the first Member State fails to fulfil its obligations under Article 49 EC by generally excluding school fees for attending such a school from the tax deduction by way of special expenses conferring the right to a reduction in income tax.

Such legislation constitutes an obstacle to the freedom to provide services guaranteed by Article 49 EC, in that it has the effect of deterring taxpayers resident in the Member State concerned 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 the first Member State.

Refusal to grant the tax advantage in question for school fees paid to schools established in another Member State cannot be justified by the objective of ensuring that the operating costs of private schools are covered without causing an unreasonable burden on the State, since that objective could be achieved by less stringent methods. 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. It appears in any event disproportionate totally to exclude from that tax relief school fees paid to schools established in another Member State 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.

(see paras 80-81, 97-100, 139, operative part 1)

3. A Member State which generally excludes school fees for attending a school situated in another Member State from the tax deduction by way of special expenses conferring the right to a reduction in income tax fails to fulfil its obligations under Articles 39 EC and 43 EC.

Such legislation is particularly disadvantageous towards employees and self-employed persons who have transferred their normal place of residence to the Member State concerned or who work there and whose children continue to attend a fee-paying school situated in another Member State. It is also likely to place nationals in a disadvantageous position where they transfer their normal place of residence to another Member State, in which their children attend a fee-paying school.

(see paras 116, 118, 121, 139, operative part 1)

4. Where the children of taxpayers of a Member State are sent to school in another Member State, at a school the services of which are not covered by Article 49 EC, the first Member State fails to fulfil its obligations under Article 18 EC by generally excluding school fees for attending such a school from the tax deduction for special expenses conferring the right to a reduction in income tax.

Such legislation has the effect of unjustifiably disadvantaging those children in comparison with those who have not made use of their right to freedom of movement by going to school in another Member State, and affects the rights conferred on them by Article 18(1) EC.

(see paras 137, 139, operative part 1)

JUDGMENT OF THE COURT (Grand Chamber)

11 September 2007 (*)

(Failure by a Member State to fulfil its obligations – Articles 18 EC, 39 EC, 43 EC and 49 EC – Income tax legislation – School fees – Tax deductibility limited to school fees paid to national private establishments)

In Case C-318/05,

ACTION for failure to fulfil obligations pursuant to Article 226 EC, brought on 17 August 2005,

Commission of the European Communities, represented by K. Gross and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and U. Forsthoff, acting as Agents,

defendant,

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. Ileši? and J. Malenovský, Judges,

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

gives the following

Judgment

1 By its action, the Commission seeks a declaration that, by excluding without exception fees for attending a school established in another Member State from the tax deduction for special expenses under Paragraph 10(1)(9) of the Law on Income Tax in the version published on 19 October 2002 (Einkommensteuergesetz, BGBl. 2002 I, p. 4210; ‘the EStG’), the Federal Republic

of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC.

The national legislation at issue

2 Under German legislation, school fees for attending a private school are covered by tax allowances for dependent children and family allowances. In so far as extra costs connected with education are incurred through accommodation in a boarding house, such costs confer entitlement on a flat-rate basis to the tax allowance for education laid down by Paragraph 33a(2) of the EStG. The same applies to additional costs arising from attendance at a school established in another Member State.

3 Concerning the deduction of school fees as special expenses (‘Sonderausgaben’), Paragraph 10(1)(9) of the EStG provides:

‘Special expenses [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 under the law of the Land, with the exception of the price of lodging, supervision and meals.’

4 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’), referred to above, 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.’

Pre-litigation procedure

5 Taking the view that, by excluding without exception fees for attending a school established in another Member State from the tax deduction for special expenses under Paragraph 10(1)(9) of the EStG, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC, the Commission initiated the procedure for failure to fulfil obligations laid down by the first paragraph of Article 226 EC. In accordance with that provision, and having sent the Federal Republic of Germany formal notice on 19 July 2002 to submit its observations, the Commission issued a reasoned opinion on 7 January 2004, calling upon that Member State to take the necessary measures to comply with those obligations within two months from the date of receipt.

6 Being dissatisfied with the German authorities’ reply to that reasoned opinion, the Commission decided to bring the present action.

7 In the meantime, the question of the compatibility with Community law of a system such as that arising from Paragraph 10(1)(9) of the EStG has become the subject-matter of a reference for a preliminary ruling (judgment of even date in Case C?76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-0000).

The action

8 In its action, the Commission maintains that the system under Paragraph 10(1)(9) of the EStG, which limits the tax-deductibility of school fees to those arising from attendance at certain German schools, leads to a more favourable tax position for the taxpayers concerned, since it causes a reduction in their taxable amount and thus a lessening of their tax burden. School fees conferring the right to tax relief are those paid to substitute schools, intended to replace a public establishment already existing or contemplated in the Land in question, which are approved by the State or authorised by the legislation of that Land, and complementary schools, being German establishments different from the substitute schools, and which have to be recognised by the legislation of the Land as complementary schools for general education.

9 The Commission bases its action on the argument that limiting the tax-deductibility of school fees to those for attending certain German schools is incompatible with Community law. Such a limitation, it argues, is contrary to freedom of movement for workers and freedom of establishment (first part of the first plea) and, moreover, to the general right to freedom of movement for German citizens and other citizens of the Union (second part of the first plea). It also hinders the freedom to provide services of private schools established in another Member State and that of the parents concerned living in Germany (second plea). Finally, it unjustifiably restricts the freedom of establishment of private schools established in another Member State (third plea).

10 In its defence, the Federal Republic of Germany argues that the system under Paragraph 10(1)(9) of the EStG is compatible with Community law. That system, which applies only to private schools which satisfy certain conditions laid down by the Basic Law and the legislation of the Land in question and which are, for that reason, approved, authorised or recognised, does not, it submits, affect the freedom to provide services either of private schools established in other Member States or of parents. It does not in any way affect freedom of movement for workers, freedom of establishment or the general right to freedom of movement of parents. Nor, it argues, does the system affect the freedom of establishment of private schools established in another Member State.

11 In its reply, the Commission maintains all the claims made in its application.

12 It points out that the defence of the Federal Republic of Germany is concerned almost entirely with potential infringement of the principle of the freedom to provide services. As regards the free movement of workers, freedom of establishment or the general right to free movement of the parents concerned, and the freedom of establishment of private schools established in other Member States, the possibility of the corresponding provisions of the EC Treaty being infringed is denied without any justification being given. The Commission, arguing that, in accordance with Article 50 EC, the freedom to provide services constitutes a subsidiary freedom in relation to the other fundamental freedoms, considers that such an argument is not conclusive and refers to the points in its application where it sets out in detail the infringement of the other rights to free movement.

13 Concerning the freedom to provide services, the Commission states that, in its application, it acknowledged that the amount of school fees charged by approved, recognised or authorised schools in Germany might be too small for the services provided by those schools to be capable of

being regarded as provided for remuneration. It nevertheless raised the possibility that a private body might bear the whole of the costs not covered by school fees.

14 In that context, it indicates that, in a judgment of 12 August 1999 (BSTBl. 2000, II, p. 65), the Bundesfinanzhof held that aid given by parents to a support association in favour of a private school constituted remuneration for a service and not a deductible gift contribution. That, it argues, is the case where, by reason of the low level of the school fees, the school can be managed only with the help of aid from a support association. It is thus impossible to establish a distinction between school fees paid to the management of the school and gifts received by that association.

15 The Commission infers that, if such an association maintains a German private school, assessment whether the services offered by that school are offered for remuneration must take into account not only school fees in the strict sense but also contributions paid to that association. Courses provided by that private school are capable of constituting services provided for remuneration by reason of the cumulative amount of the school fees and the aid paid to the support association, the latter being potentially considerable since the obligation to avoid a selection of pupils based on wealth does not apply to them.

16 The Commission then maintains that the arguments put forward by the Federal Republic of Germany in an attempt to justify the legislation in question are not conclusive. In particular, it considers that private schools established in another Member State and German schools are not so different from each other that the school fees which they charge must systematically receive different tax treatment.

17 In its rejoinder, the German Government maintains the position expressed in its defence. In its submission, the heart of the dispute concerns the freedom to provide services. The Federal Republic of Germany is not required to subsidise private schools situated outside its territory, a Member State being empowered to grant public support only within its own area of responsibilities. Private schools established in other Member States are not being discriminated against where a State does not extend a public subsidy on the European scale.

18 It should be noted that, in its pleadings and subsequently at the hearing, the German Government mentioned the existence of specific features peculiar to school fees paid to German schools and to schools for the children of officials and other servants of the European Communities (‘European schools’) situated in other Member States, to which Paragraph 10(1)(9) of the EStG also applies.

19 Thus, in a judgment of 14 December 2004 (XI R 32/03), the Bundesfinanzhof acknowledged that school fees incurred at a German school established in another Member State and recognised by the permanent conference of the Ministers of Education and Culture of the Länder are deductible as special expenses in accordance with Paragraph 10(1)(9) of the EStG. Similarly, it is apparent from the judgment of the Bundesfinanzhof of 5 April 2006 (XI R 1/04) that European schools established in other Member States have a status corresponding to that of a school approved by the German State, so that taxpayers who have paid school fees to such schools may benefit from the tax relief provided for by that same provision of the EStG, as an exception to the rule that school fees paid to private schools situated in other Member States do not have to be regarded as special expenses conferring a right to such relief.

20 It is thus inaccurate to argue, as does the Commission, that school fees linked to attendance at all schools established in other Member States are excluded from the tax-deductibility for special expenses under Paragraph 10(1)(9) of the EStG.

21 The Commission takes note of the exceptions arising from the case-law of the

Bundesfinanzhof referred to by the German Government. That case-law removes the detriment suffered by German and European schools by reason of the fact that they are established outside German territory, but the discrimination against private schools established in other Member States remains.

Preliminary observations concerning Article 18 EC and the general right of citizens of the Union to freedom of movement

Arguments of the parties

22 According to the Commission, the system under Paragraph 10(1)(9) of the EStG infringes the rights of the parents concerned in the matter of freedom of movement, particularly the general right of citizens of the Union to freedom of movement.

23 First, that system is likely to affect the right of parents originating in other Member States to establish themselves in a private capacity in Germany. The unfavourable tax treatment which they would risk being subjected to, if they wished their children to remain at school in their State of origin, might deter them from becoming established in Germany. Their establishment in that Member State would in any event be made more difficult.

24 The same disadvantageous treatment might be suffered, in so far as they remain wholly subject to tax in Germany when establishing themselves in another Member State, by German nationals deciding to send their children to a local private school, a German school or a European school situated in that other State.

25 Finally, the Commission submits that German nationals living in Germany sending their children to private schools situated in other Member States may also rely on the general right to free movement. The Commission considers that such parents have made use of that right through the intermediary of their children and that nothing prevents the latter from staying regularly in another Member State for that purpose.

26 It follows from the combined provisions of the first paragraph of Article 12 EC and Article 18(1) EC that, where they have used their right of free movement, at least indirectly through their children, the German citizens concerned may rely on their right to enjoy treatment identical to that reserved for other nationals.

27 The Commission considers that these infringements of Article 18 EC are not justified.

28 It maintains in that regard that Paragraph 10(1)(9) of the EStG does not establish an objective criterion allowing determination of the cases in which school fees paid to German schools and schools established in other Member States are deductible from income tax. That provision makes deductibility subject to the sole fact of the private school concerned being approved or recognised in Germany. The determining condition for deductibility relates to the fact that the private school concerned is situated in Germany. Any school established in another Member State is automatically excluded from the benefit of the tax deduction, whatever the amount of the school fees they charge, even if their operating methods are largely identical to those of a private school recognised or approved in Germany.

29 There is, the Commission argues, no objective reason to make the grant of a tax advantage subject to attendance at a private school situated in the territory of the Federal Republic of Germany, that Member State retaining the liberty, in accordance with Community law, to limit the deductibility of school fees to certain types of establishment or to a certain amount. In order to do that, it is necessary only that that deductibility be granted by reference to objective criteria and not

depend on the location of the school.

30 The Commission concludes that Paragraph 10(1)(9) affects the general right to freedom of movement which German citizens and other citizens of the Union derive from Article 18 EC.

31 The German Government challenges the argument that Paragraph 10(1)(9) of the EStG infringes the general right to free movement of the parents concerned. Even if the area of application of that right were to be affected, that would in any event be justified, having regard to the objective differences existing between the German private schools referred to by that provision of the EStG and private schools situated in other Member States.

Findings of the Court

32 Concerning the applicability of Article 18 EC to the national legislation at issue, it should be recalled that, in accordance with consistent case-law, Article 18 EC, which lays down in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, is specifically applied 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-0000, paragraph 64).

33 Therefore, if the national legislation at issue 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).

34 There is therefore no need to rule on Article 18(1) EC save in so far as the legislation at issue does not fall within the scope of Article 49 EC.

35 Similarly, Article 18 EC, which sets out in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 43 EC with regard to freedom of establishment and in Article 39 EC with regard to freedom of movement for workers (Case C?345/05 *Commission* v *Portugal* [2006] ECR I-10633, paragraph 13, and Case C?104/06 *Commission* v *Sweden* [2007] ECR I-0000, paragraph 15).

36 Therefore, if the national legislation at issue falls within the scope of Article 39 EC or Article 43 EC, it will not be necessary for the Court to rule on the interpretation of Article 18 EC.

37 It therefore needs to be examined first whether Article 49 EC, the provision with which the essential part of the parties' observations has been concerned, precludes the national legislation under Paragraph 10(1)(9) of the EStG (second plea), and, secondly, whether Articles 39 EC and/or 43 EC preclude such legislation (first part of the first plea, and third plea).

The second plea, alleging an obstacle to the freedom to provide services

Arguments of the parties

38 According to the Commission, the system under Paragraph 10(1)(9) of the EStG infringes the freedom to provide services in relation both to taxpayers resident in Germany wishing to send their children to a private school situated in another Member State and to private schools situated in other Member States wishing to offer their services to taxpayers resident in Germany.

39 First, the system at issue hinders the so-called ‘passive’ freedom to provide services (the use of services), which has long been recognised by the case-law. The situation envisaged is that in which the recipients of the service, namely the children of taxpayers resident in Germany, go to the provider, in this case a private school situated in another Member State.

40 The so-called ‘active’ freedom to provide services, enjoyed by private schools established in other Member States, is also involved. By reason of the existence of the disputed deduction system, the Commission argues, taxpayers who send their children to a private school established in another Member State are disadvantaged in comparison with those who opt for a German private school. Private establishments established in other Member States thus have greater difficulty in effectively offering their services to German clients. Cross-border teaching and education services are thus placed at a disadvantage in comparison with purely national services.

41 The Commission argues that the education and training of young persons may constitute provisions of services, as the case-law of the Court of Justice demonstrates.

42 It follows from Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 18 and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 17 that the essential feature of a provision of services for remuneration consists in the payment by the pupil or a third party of school fees covering a major part of the cost of the education. If that is the case, the offer of education services will constitute a commercial activity.

43 By contrast, the Commission argues, public education in the context of the social and political tasks of the State, most of the cost of which is borne by the State, cannot be classified as a provision of services for remuneration. The fact that the pupil may contribute to expenses by paying school fees is not sufficient to entail such a classification.

44 The Commission considers that the assessment as to whether services are provided for remuneration must not be based exclusively on an examination of the private schools favoured by German legislation, and that account must also be taken of the situation of private schools established in other Member States which are excluded from the advantage provided for in Paragraph 10(1)(9) of the EStG.

45 In other Member States, the organisation of private schools may differ considerably from the German model. Private schools exist which meet their needs without State aid or which are managed as commercial undertakings. Those establishments undeniably provide services for remuneration. The Commission argues that, since the system under Paragraph 10(1)(9) of the EStG generally excludes schools established in other Member States from the tax advantage which it confers, it is likely to hinder the cross-border offer of services by those commercially-oriented schools.

46 It is, the Commission maintains, irrelevant whether or not a private school established in another Member State meets the requirements imposed by German legislation. Since none of those private schools can fulfil the conditions laid down in Paragraph 10(1)(9) of the EStG, the Commission considers that there is no useful purpose in establishing a distinction between private establishments situated in other Member States according to whether or not, in theory, they are comparable with German private schools, in order to determine whether or not they are being discriminated against.

47 In any event, the schools disadvantaged by the system at issue include establishments whose financing is based exclusively on school fees and ancillary economic activities, and which therefore undeniably provide services for remuneration. The discrimination which they suffer is, the

Commission submits, an infringement of the freedom to provide services.

48 The infringement of the freedom to provide services is, the Commission submits, unjustified. The Commission refers in that respect to its arguments concerning freedom of movement in general, adding that the failure to fulfil obligations under Article 49 EC is all the more serious since dissemination of the languages of the Member States and the promotion of mobility amongst students are expressly included amongst the European Community's objectives by virtue of the first and second indents of Article 149(2) EC.

49 The German Government argues, as its principal argument, that there is no obstacle to the freedom to provide services in this case because the conditions for the freedom to provide services are not fulfilled. In the alternative, it argues that any obstacle to the freedom to provide services that there may be is in any event justified.

50 First, the Government argues, the conditions for the freedom to provide services are not fulfilled because schools satisfying the requirements in Paragraph 10(1)(9) of the EStG do not provide services within the meaning of the Treaty.

51 The freedom to provide services presupposes the existence of an economic activity, as is apparent from the words 'for remuneration' used in Article 50 EC. In *Humbel and Edel*, the Court held that the essential characteristic of remuneration, which lies in the fact that it constitutes consideration for the service in question, is absent in the case of courses provided under the national education system.

52 According to the German Government, it cannot be inferred merely from its private character that a school carries on an economic activity and provides services within the meaning of Articles 49 EC and 50 EC. The case-law of the Court shows that the fact that parents pay school fees in order to contribute, in some measure, to the costs of the functioning of the system has no impact on the classification of the activity carried out with regard to the concept of the provision of services (see, to that effect, *Humbel and Edel*, paragraph 19, and *Wirth*, paragraph 15).

53 Having regard to the principles expressed in the Court's case-law, the German Government submits that the Court should hold that the German schools referred to in Paragraph 10(1)(9) of the EStG do not provide services within the meaning of Articles 49 EC and 50 EC and that education provided by schools established in other Member States which correspond to those schools does not constitute a provision of services within the meaning of those articles either.

54 Secondly, the German Government argues that an obstacle to the freedom to provide services is justified in a number of respects.

55 It argues that the freedom to provide services cannot generate an obligation to finance educational establishments falling within the educational system of another Member State. Educational policy is one of the essential tasks of each State, and the structure of those tasks differs widely from one Member State to another.

56 Since the Federal Republic of Germany exercises no influence over the organisation of private schools established in other Member States, and in particular over the educational programmes which they pursue, the Government argues that it cannot be required to subsidise the operation of those schools by waiving tax receipts which are its due.

57 The Government also argues that the principle of the freedom to provide services does not oblige the Federal Republic of Germany to extend the tax advantage granted by Paragraph 10(1)(9) of the EstG to school fees paid to private schools situated in another Member State. The

difference in tax treatment resulting from that absence of obligation is, the Government argues, justified because schools established in other Member States which provide services within the meaning of Articles 49 EC and 50 EC are objectively distinct from German schools attendance at which confers the right to that tax advantage.

58 First, it argues that those latter schools do not function as commercial companies, contrary to what is the case with private schools situated in another Member State if they benefit from the freedom to provide services. Such private schools situated in other Member States correspond precisely to those German private schools which are not aided under Paragraph 10(1)(9) of the EStG. The decision of the Federal Republic of Germany to aid under that provision only schools which, by their offer of education, implement the task of education devolved upon the State, are integrated into the national educational system and thus do not operate in a commercial context, cannot be circumvented by recourse to the principle of the freedom to provide services.

59 Secondly, the German Government considers that the system under Paragraph 10(1)(9) of the EStG corresponds to a State aid designed to compensate, in part, for the costs borne by the schools referred to in that provision. The Basic Law requires the State to aid those schools financially in order to compensate for the demands which are imposed upon them. That aid largely takes the form of direct subsidies. The schools in question 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 by allowing the German State indirectly to support those schools by means of financial advantages granted in relation to school fees.

60 A link between the demands imposed by that State and the corresponding public support does not exist in the case of private schools established in other Member States which provide services within the meaning of Articles 49 EC and 50 EC. Since the German State does not impose any burden on those schools, nor is it under any obligation to support them financially.

61 Thirdly, if the Federal Republic of Germany were required to grant the tax advantage under Paragraph 10(1)(9) of the EStG irrespective of the amount of school fees claimed, it would be favouring schools which, by reason of their high school fees, selected pupils by reference to the wealth of the parents. It would moreover, have to grant those schools aid which was higher than that enjoyed by the schools attendance at which confers the right to that tax advantage, since those school fees are considerably higher than those charged by the latter schools.

62 Fourthly, an obligation to grant a tax advantage for school fees paid to private schools established in other Member States would lead to a net increase in the overall amount of the tax relief provided for in Paragraph 10(1)(9) of the EStG.

63 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 did not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State. The German Government considers that, similarly, it is legitimate for a Member State to make the granting of a tax advantage subject to criteria permitting the avoidance of a situation in which that advantage is taken beyond a level which the Member State considers to be necessary.

64 Fifthly, the Government argues, the tax advantage granted in relation to school fees paid to certain private schools situated in Germany is justified by the fact that those schools are approved, authorised or recognised. In principle, no corresponding authorisation, approval or recognition exists in relation to private schools situated in other Member States (save for the specific case of German schools and European schools situated in other Member States). The supervision exercised by the German educational authorities is in principle limited to schools situated in

German territory.

Findings of the Court

65 As regards the applicability to the disputed tax legislation of the Treaty provisions relating to freedom to provide services, it should first be noted that, whilst the third paragraph of Article 50 EC refers only to the active freedom to provide services, where the provider goes to the recipient, it is clear from well-established case-law that the freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive those services there (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16). In this case, application of the national legislation at issue leads the Member State in question to refuse tax relief because the school attended is a private school situated in another Member State. What is concerned therefore, by the principle of the freedom to provide services, is the possibility of having recourse to offers of education emanating from a private school established in another Member State.

66 It must, however, be examined whether those offers of education have the provision of services as their subject-matter. For that purpose, it needs to be examined whether courses provided by a private school established in another Member State constitute, within the meaning of the first paragraph of Article 50 EC, ‘services ... normally provided for remuneration’.

67 It has already been 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).

68 The Court has thus excluded from the concept of services within the meaning of Article 50 EC courses provided 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 has thus stated that, by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas.

69 By contrast, the Court has held that courses provided by establishments financed essentially by private funds, particularly by pupils and their parents, constitute services within the meaning of Article 50 EC, the aim of such establishments being to offer a service for remuneration (*Wirth*, paragraph 17).

70 It is important to note in that context that it is not necessary for such private financing to be provided mainly 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, in particular, 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).

71 It is undisputed that, in parallel with schools belonging to a public educational system whereby the State performs its task in the social, educational and cultural areas, the financing of which is essentially from public funds, there are schools in certain Member States which do not belong to such a system of public education and which are financed essentially from private funds.

72 The education provided by such schools must be regarded as a service provided for remuneration.

73 It should be added that, for the purposes of determining whether Article 49 EC applies to the national legislation at issue, it is irrelevant whether or not the schools established in the Member State of the user of the service – in this case the Federal Republic of Germany – which are approved, authorised or recognised in that Member State within the meaning of that legislation, 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 providing services for remuneration.

74 Along the same lines, in its judgment in Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 90, concerning the provision of medical services, the Court held that Article 49 EC applied 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 relevant treatment there for remuneration, then applied for reimbursement from the National Health Service, even though identical services were provided free of charge by the national health system of the United Kingdom.

75 In paragraph 91 of that judgment, the Court held that, without there being any need to determine 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 Treaty provisions on the freedom to provide services, a situation in which a person whose state of health necessitated hospital treatment went to another Member State and there received the treatment in question for consideration fell within the scope of those provisions.

76 It follows that Article 49 EC applies to the national legislation at issue where the private school to which taxpayers of the Member State in question send their children is established in another Member State and may be regarded as providing services for remuneration, that is to say is financed essentially by private funds.

77 It needs to be examined whether, in such circumstances, as the Commission argues, the tax legislation in question constitutes an obstacle to the freedom to provide services.

78 In that regard, it should be noted that that legislation makes the granting of tax relief subject to the condition that school fees be paid to private schools approved by the German State or authorised or recognised by the law of the Land in question, which presupposes that they are established in Germany.

79 That legislation generally excludes the possibility of taxpayers in Germany deducting from the taxable amount a part of the school fees for sending their children to a private school established outside German territory, save for school fees paid in another Member State to German schools recognised by the permanent conference of the Ministers of Education and Culture of the Länder or to European schools, whereas that possibility does exist for school fees paid to certain German private schools. It thus results in a larger tax burden for those taxpayers if they send their children to a private school situated in another Member State rather than to a private school established in national territory.

80 The provisions of 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. Moreover, it also hinders the offer of education emanating from private educational establishments established in other Member States directed towards the children of taxpayers resident in

Germany.

81 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, in particular, 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-0000, paragraph 25).

82 The existence of a restriction on the freedom to provide services having been established, it needs to be examined whether it can be objectively justified.

83 The German Government puts forward several arguments to justify that restriction.

84 First, it argues that a potential obstacle to the freedom to provide services is justified by the fact that the principle of the freedom to provide services cannot be taken to imply an obligation to extend privileged tax treatment granted to certain schools under the educational system of a Member State to schools of another Member State (see paragraph 55 of this judgment).

85 In that regard, it should be noted that Paragraph 10(1)(9) of the EstG concerns the tax treatment of school fees. According to well-established case-law, whilst direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law (see, in particular, *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-0000, paragraph 25).

86 Similarly, whilst it is undisputed that Community law does not affect the competence of the Member States as regards the content of teaching and the organisation of education systems and their cultural and linguistic diversity (Article 149(1) EC) or the content and organisation of vocational training (Article 150(1) EC), the fact remains that, when exercising that competence, Member States must comply with Community law, especially the provisions on the freedom to provide services (see, by analogy, *Watts*, paragraphs 92 and 147).

87 Moreover, as regards the argument of the German Government that a Member State cannot be required to subsidise schools falling within the educational system of another Member State, it is sufficient to point out that Paragraph 10(1)(9) of the EStG provides not for the granting of a direct subsidy by the German State to the schools concerned, but for the granting of a tax advantage to parents in relation to the school fees paid to those schools.

88 Secondly, according to the German Government, the refusal to extend the tax advantage under Paragraph 10(1)(9) of the EStG to school fees paid to private schools established in other Member States is justified by the fact that the German schools referred to in that article and private schools established in other Member States which provide services within the meaning of Articles 49 EC and 50 EC are not in an objectively comparable situation (see paragraph 57 of this judgment).

89 The schools referred to in Paragraph 10(1)(9) of the EStG are, it argues, subject to the obligation under Paragraph 7(4) of the Basic Law to avoid a selection of pupils on the basis of parental means, with the result that school fees are fixed at a level not covering those schools' costs, and that there is a corresponding obligation on the German State to support those schools financially. That link between the requirements imposed by the State and the corresponding public

support does not exist in the case of private schools established in other Member States providing services within the meaning of Articles 49 EC and 50 EC (see paragraph 60 of this judgment). To extend the tax advantage to school fees charged for attending schools which do not satisfy the requirements of Paragraph 10(1)(9) of the EStG would be contrary to the requirement under Paragraph 7(4) of the Basic Law to avoid a selection of pupils on the basis of parental means (see paragraph 61 of this judgment).

90 Those arguments cannot be accepted. Paragraph 10(1)(9) of the EStG makes deductibility of part of the school fees subject to the approval, authorisation or recognition of the private school concerned in Germany, without establishing any objective criterion enabling it to be determined which types of school fees charged by the German schools are deductible.

91 It follows that any private school established in another Member State, merely by reason of the fact that it is not established in Germany, is automatically excluded from the tax advantage in question, whether or not it complies with criteria such as charging school fees in an amount not allowing a selection of pupils based on parental means.

92 In order to justify the obstacle to the freedom to provide services constituted by the national legislation at issue, the German Government also argues, referring to the judgment in *Bidar*, that it is legitimate for a Member State to link the grant of an aid or a tax advantage to criteria intended to avoid those aids or advantages being taken beyond a level which the Member State considers necessary (see paragraphs 62 and 63 of this judgment).

93 The German Government maintains that the arguments in that judgment concerning the granting of aid designed to cover the maintenance costs of students and the freedom of movement of citizens of the Union should be placed in a general context inasmuch as, where public funds are limited, the extension of the benefit of a tax advantage necessarily implies a diminution of the amount of the individual advantages granted to individuals in order to arrive at a fiscally neutral operation. The Government argues that extending the application of Paragraph 10(1)(9) of the EstG to the payment of school fees to certain schools situated in other Member States would cause extra burdens for the State budget.

94 Such an argument cannot be accepted for the following reasons.

95 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 nor can it be regarded as an imperative reason in the public interest.

96 Next, as regards the argument of the German Government that any Member State is free to ensure that the grant of aid for school fees does not become an unreasonable burden which might have consequences on the overall level of aid which may be granted by that State, it appears from the information supplied by that government that the excessive financial burden which it says extending the benefit of the tax relief to school fees paid to certain schools situated in other Member States would represent arises from the fact that the aid indirectly granted to those schools would be much higher than that paid to educational establishments approved, authorised or recognised in Germany because schools established in other Member States have to finance themselves by means of high school fees.

97 Even if reasoning identical to that followed in *Bidar* were to apply to the granting of a tax advantage in relation to school fees, it should be noted in that respect that, as the Commission has argued, the objective pursued by the refusal to grant the tax relief in question for school fees paid to schools established in other Member States, namely ensuring that the operating costs of private schools are covered without causing an unreasonable burden for the State, in accordance with the

analysis followed in *Bidar*, could be achieved by less stringent means.

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

99 Finally, 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 from the tax relief in question school fees paid by those taxpayers to schools established in another Member State, irrespective of whether those schools fulfil objective criteria laid down on the basis of principles proper to each Member State and allowing it to be determined what types of school fees confer the right to that tax relief.

100 In the light of the above considerations, this Court finds the Commission's second plea in support of its action well founded, and holds that, in situations in which income tax payers in Germany send their children to a school situated in another Member State financed essentially by private funds, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC by generally excluding school fees for attending such a school from the tax deduction by way of special expenses under Paragraph 10(1)(9) of the EStG.

The first part of the first plea and the third plea, respectively alleging an obstacle to the free movement of workers and a restriction on the freedom of establishment

Arguments of the parties

101 According to the Commission, the system under Paragraph 10(1)(9) of the EStG affects the rights which the taxpayers concerned derive from the freedom of movement for workers and the freedom of establishment (first part of the first plea).

102 First, that system is likely to hinder the right of parents originating from other Member States from taking up employment in Germany (Article 39 EC) or establishing themselves there as self-employed persons (Article 43 EC). The less favourable tax treatment that they risk incurring if they wish to continue sending their children to school in their State of origin might deter them from establishing themselves in Germany or becoming cross-border workers. In any event, the Commission argues, it is more difficult for those parents to establish themselves or work in Germany.

103 In addition, German nationals remaining fully subject to tax in Germany when establishing themselves in another Member State are also disadvantaged if they decide to send their children to a local private school situated in that other Member State.

104 The Commission maintains that these infringements of Articles 39 EC and 43 EC are not justified.

105 It argues in that respect that Paragraph 10(1)(9) of the EStG does not establish an objective criterion allowing determination of the cases in which school fees paid to German schools and to those established in other Member States are deductible. That provision makes deductibility of those costs subject to the sole condition that the private school concerned be approved or recognised in Germany. The determinant condition for deductibility thus relates to the fact that the private school concerned is situated in Germany. Any school established in another Member State

is automatically excluded from the tax deduction, whatever the amount of school fees it charges, that is to say even if its operating methods are largely identical to those of a private school approved or recognised in Germany.

106 The Commission argues that there is no objective reason for making the grant of a tax advantage subject to attendance at a private school situated in the Federal Republic of Germany, that Member State retaining the liberty, under Community law, to limit the tax deductibility of school fees to certain types of establishment or a certain amount. In order to do that, the Commission submits, it is necessary only that that deductibility be granted by reference to objective criteria and not depend on the location of the school.

107 Similarly, the Commission argues in its third plea that the system under Paragraph 10(1)(9) of the EStG restricts the freedom of establishment of private schools established in other Member States. It argues that that system forces those schools to establish themselves in Germany, at least by creating a branch in that Member State. Those schools cannot obtain the status of substitute school approved by the State or authorised by the legislation of the Land in question, or that of a complementary establishment for general education recognised by the Land unless they offer their services from German territory. In order not to suffer, in terms of competition, in comparison with German private establishments, those schools have to be established in that territory.

108 That restriction on the choice of the place of establishment is, the Commission submits, a difference in treatment contrary to Article 43 EC, which is not justified.

109 The Commission concludes that Paragraph 10(1)(9) of the EStG constitutes an obstacle to the freedom of movement for workers provided for by Article 39 EC and the freedom of establishment provided for by Article 43 EC.

110 The German Government denies that Paragraph 10(1)(9) of the EStG affects the free movement of workers and the freedom of establishment. If the scope of those freedoms were to be affected, that would in any event be objectively justified having regard to the objective differences, which have already been explained, existing between the German private schools referred to in that provision of the EStG and private schools situated in other Member States.

111 Similarly, the Government denies that there has been an infringement of the freedom of establishment of schools established in other Member States. It does not see in what way that freedom is supposed to be affected by the deduction system in question. If, however, that freedom were to be shown to have been affected, that would in any case be objectively justified having regard to the differences, referred to above, between the German private schools referred to in Paragraph 10(1)(9) of the EStG and private schools situated in other Member States.

Findings of the Court

112 It needs to be examined whether Articles 39 EC and 43 EC preclude the rules under Paragraph 10(1)(9) of the EStG.

113 In the first part of its first plea, the Commission argues that such legislation, which places the taxpayers concerned at a tax disadvantage, affects both employees coming from another Member State and self-employed taxpayers, who have established themselves in Germany for private reasons and want their children to continue attending school in their State of origin, and German taxpayers who, by reason of the transfer of their normal place of residence to another Member State, have enrolled their children in a private school there. In that respect, the Commission argues, those rules are contrary to Articles 39 EC and 43 EC.

114 The provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 34 and the case-law cited; *Commission* v *Portugal*, paragraph 15; and *Commission* v *Sweden*, paragraph 17).

115 Rules which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (*Commission* v *Denmark*, paragraph 35; *Commission* v *Portugal*, paragraph 16; and *Commission* v *Sweden*, paragraph 18).

116 In this case, as the Advocate General has pointed out in point 83 of her Opinion, Paragraph 10(1)(9) of the EStG is particularly disadvantageous towards employees and self-employed persons who have transferred their normal place of residence to Germany or who work there and whose children continue to attend a fee-paying school situated in another Member State. Pursuant to the first sentence of Paragraph 1(1) of the EStG, workers resident in German territory are fully liable to income tax. Under Paragraph 1(3) of the EStG, cross-border workers who carry on their activity in Germany without living there may, at their request, also be subject to income tax without limitation. Paragraph 10(1)(9) of the EStG does not allow any of these workers the benefit of tax relief for part of the school fees paid, whereas it would allow it to them if their children attended a school situated in Germany.

117 That difference in treatment is likely to make it more difficult for those workers to exercise their rights under Articles 39 EC or 43 EC.

118 Paragraph 10(1)(9) of the EStG is also likely to place German nationals in a disadvantageous position where they transfer their normal place of residence to another Member State, in which their children attend a fee-paying school.

119 It is true that, as a general rule, such German nationals are no longer subject to tax in Germany when they leave that Member State, so that there can be no question of the tax legislation at issue applying to their detriment. However, under Paragraph 1(2) of the EStG, that rule does not apply to officials working in another Member State, and, under Article 14 of the Protocol of 8 April 1965 on the Privileges and Immunities of the European Communities (JO 1967 152, p. 13), nor does it apply to officials of the European Communities. If those officials of German nationality send their children to fee-paying schools situated in another Member State – with the exception, however, of German schools and European schools –, Paragraph 10(1)(9) of the EStG does not permit them to deduct part of the school fees paid from the taxable amount of their income.

120 For the reasons set out in paragraphs 85 to 99 of this judgment, such inequalities in treatment are not justified by the arguments put forward by the German Government for the

purposes of justifying an obstacle to a fundamental freedom.

121 This Court therefore regards the first part of the Commission's first plea as well founded, and finds that, by generally excluding school fees paid to schools established in other Member States from the tax relief granted by Paragraph 10(1)(9) of the EStG, the Federal Republic of Germany has failed to fulfil its obligations under Articles 39 EC and 43 EC.

122 As regards the third plea, alleging infringement of the freedom of establishment of private schools situated in other Member States, the Court finds, as does the Advocate General in point 85 of her Opinion, that the fact that Paragraph 10(1)(9) of the EStG makes the possibility of enjoying tax relief for school fees dependent on the place where the school is situated does not directly affect the freedom of establishment of private schools situated in other Member States. That fact, as such, does not make it more difficult to establish those schools in Germany.

123 The Commission's third plea must therefore be dismissed.

The second part of the first plea, alleging infringement of the general right of citizens of the Union to free movement

124 It remains to examine the national legislation in question in the light of Article 18(1) EC as regards all situations which do not fall within the scope of Articles 39 EC, 43 EC and 49 EC.

125 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 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 *GarciaAvello* [2003] ECR I-11613, paragraphs 22 and 23; and Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 16).

126 Situations falling within the scope of Community law include those involving the exercise of the fundamental freedoms guaranteed by the 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; *GarciaAvello*, paragraph 24; and *Pusa* , paragraph 17)..

127 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 Treaty in relation to freedom of movement (*D'Hoop*, paragraph 30, and *Pusa*, paragraph 18).

128 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 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; and *Pusa*, paragraph 19).

129 By going to another Member State to attend school there, the children of the German nationals concerned make use of their right to freedom of movement. Indeed, it follows from Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 20, that even a young child may use the rights of freedom of movement and residence guaranteed by Community law.

130 The national legislation at issue introduces a difference in treatment between those income tax payers in Germany who have sent their children to a school situated in that Member State and those who have sent their children to a school established in another Member State.

131 By linking the grant of tax relief for school fees to the condition that the latter be paid to a private school fulfilling certain conditions in Germany, and causing that relief to be refused to parents of children attending a school established in another Member State, the national legislation at issue disadvantages the children of certain nationals purely because they have exercised their freedom of movement by going to school in another Member State.

132 According to consistent case-law, national legislation which disadvantages some 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 (Case C?406/04 *DeCuyper* [2006] ECR I?6947, paragraph 39, and Case C-192/05 *Tas-HagenandTas* [2006] ECR I-10451, paragraph 31).

133 A difference in treatment of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (*D'Hoop*, paragraph 36; *DeCuyper*, paragraph 40; and *Tas-HagenandTas*, paragraph 33).

134 In attempting to justify the obstacle to the freedom to provide services which the legislation at issue constitutes, the German Government has put forward the arguments set out in paragraphs 55 to 64 of this judgment. It referred in particular to the analysis by the Court of Justice in *Bidar*, concerning the interpretation of Article 18 EC.

135 In paragraph 56 of that judgment, the Court held it legitimate for a Member State to seek to ensure that the grant of aid to cover the maintenance costs of students from other Member States did not become an unreasonable burden which might have consequences on the overall level of aid which that State was able to grant.

136 However, even if identical reasoning were to be applied in relation to a tax advantage for school fees, the fact remains that the legislation under Paragraph 10(1)(9) of the EStG appears in any case to be disproportionate in relation to the objectives which it pursues, for the same reasons as those set out in paragraph 99 of this judgment when examining that legislation in relation to the principle of the freedom to provide services.

137 It follows that, where the children of taxpayers of a Member State are sent to school in another Member State, at a school the services of which are not covered by Article 49 EC, Paragraph 10(1)(9) of the EStG has the effect of unjustifiably disadvantaging those children in comparison with those who have not made use of their right to freedom of movement by going to school in another Member State, and affects the rights conferred on those children by Article 18(1) EC.

138 In those circumstances, the second part of the Commission's first plea must also be regarded as well founded.

139 In view of all of the above considerations, this Court finds that, by generally excluding school fees for attending a school situated in another Member State from the tax deduction for special expenses under Paragraph 10(1)(9) of the EStG, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC. As for the remainder, namely the plea alleging infringement of the freedom of establishment of schools established in other Member States, the action must be dismissed.

Costs

140 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 Federal Republic of Germany has been essentially unsuccessful, it must be ordered to pay the costs.

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

1. **By generally excluding school fees for attending a school situated in another Member State from the tax deduction for special expenses under Paragraph 10(1)(9) of the Law on Income Tax (Einkommensteuergesetz) in the version published on 19 October 2002, the Federal Republic of Germany has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC.**

2. **The remainder of the action is dismissed.**

3. **The Federal Republic of Germany is ordered to pay the costs.**

[Signatures]

* Language of the case: German.