

**Movilidad de los estudiantes en la Unión Europea:
¿hacia nuevos obstáculos?**

Student mobility in the European Union: Facing new hurdles?

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ABSTRACT

Even though student mobility has increased a great deal in recent years, especially thanks to a number of EU initiatives, the inter-Member State mobility of student remains low, especially when compared to the United States. There are a number of factors that can explain this relatively situation, such as cultural differences between Member States, the financial costs of mobility, the lack of mutual recognition of degrees and not in the least linguistic differences. Therefore, this paper argues that under the current stance of European law no satisfactory solution can be found. It considers of proposals to improve the current situation in the future.

Keywords: European Union, Lisbon Treaty

JEL Classification: B25.

RESUMEN

A pesar de que la movilidad de los estudiantes ha venido incrementándose en los últimos años, especialmente gracias a las numerosas iniciativas desarrolladas por la UE, todavía sigue siendo relativamente escasa, sobre todo si se compara con la que se produce en Estados Unidos. Varios son los factores que pueden explicarlo, como son las diferencias culturales entre los estados miembros, los costes económicos, la falta de reconocimiento de las licenciaturas entre los estados y, sobre todo, las diferencias idiomáticas. De esta manera, este estudio va a analizar las dificultades legales que las dificultan y se van a presentar una serie de propuestas para que la situación mejore en el futuro.

Palabras Clave: Unión Europea, Tratado de Lisboa.

Clasificación JEL: B25.



1. INTRODUCTION

Student mobility, the movement of students between universities of the different Member States, is a key aspect of the European Union, for a number of reasons. First of all, it fosters European integration since it encourages linguistic pluralism and fosters respect for diversity and a capacity to deal with other cultures¹. Through this it may strengthen a sense of ‘belonging’ to the EU as a whole, rather than just to one’s own Member State and hence enforce the development of a true European Citizenship². In addition, student mobility is pivotal for achieving the so called ‘Lisbon Agenda’, which refers to the EU’s ambitious aim of “becoming the most dynamic and competitive knowledge-based economy in the world”³. One of the fundamental pillars of that agenda is “free movement of knowledge”⁴, which can only be achieved if the best university programmes are able to attract the brightest minds, regardless of the Member State of origin, and a real competition between the universities of the different Member States ensues. Moreover, ‘moving’ students can be expected to be better prepared for employment and active participation in the European-wide labour market⁵, which in turn further strengthens the EU’s competitive position. It should be clear from this that only by creating a more unified and interacting Europe at the University level, the Lisbon goals can be achieved.

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Student mobility has increased a great deal in recent years, *inter alia* thanks to a number of EU initiatives. Most famous are probably the *Erasmus* and *Socrates* programmes of the European Commission, which were recently overtaken by the Lifelong Learning Programme 2007-2013⁶. Other important legal developments that bolster student mobility are the recent EU rules on the recognition of professional qualifications and the creation of a number of European wide teaching and research institutions, such as the European Institute of Innovation and Technology and funding bodies such as the European Research Council.

Very important to mention in this context is also the Bologna process, an intergovernmental form of cooperation outside the EU framework, pursuant to which all EU Member States are now coordinating their higher-education policy⁷. It aims at creating a European Higher Education Area, one of the central aims of which is to increase student mobility⁸, *inter alia* by measures aimed at increasing the compatibility and comparability of the education systems of the participating States.

Yet inter-Member State mobility of student remains low, especially when compared to the United States⁹. According to 2004 Commission estimates the percentage of tertiary education students coming from other EU/EEA countries was just slightly above 2%¹⁰.

European mobility programmes¹¹ in 2006 offered mobility opportunities to around 310,000 young persons only¹². An additional estimated 500,000 young persons moved fully independent of the EU programmes. The most important EU mobility programme by far is the Erasmus programme, of which around 160,000 students benefitted in 2006¹³. It is obvious that the current numbers are too low and should be increased, *inter alia* with a view to achieving the Lisbon Agenda. Not surprisingly, the report of the High Level Expert Forum on Mobility proposes that these numbers be substantially increased: European mobility programmes should be capable of reaching 900,000 young people in 2012, 1,900,000 in 2015 and 2,900,000 in 2020. According to the same report, by 2020 annual mobility should reach just over 6% of university students¹⁴.

There are a number of factors that can explain this relatively low level of student mobility, such as cultural differences between Member States, the financial costs of mobility, the lack of mutual recognition of degrees and not in the least linguistic differences¹⁵. It can readily be understood for instance that many EU students will be discouraged from enrolling in a university programme in one of the smaller Member States, like say Slovenia or Lithuania, since such entails the need to learn a comparatively unimportant language with comparatively few benefits on the labour market¹⁶.

80 But on top of such difficulties, it appears that Member States increasingly impose legal and administrative requirements which further restrain student mobility as they are directed at excluding students from other Member States from enjoying certain benefits which are enjoyed by 'home students' and therefore make it less attractive to study in those Member States.

This paper analyses these legal restrictions from the point of view of EU law. It concentrates on restrictions imposed in recent years by some Member States which have given rise to a lot of controversy and which have been the subject of a number of high profile cases before the European Court of Justice (ECJ). In fact, the restrictions discussed are the symptom of an underlying tension at the heart of European integration. On the one hand, increasing student mobility requires that students are allowed to study under the same conditions, regardless of their Member State of origin. On the other hand, Member States have a real interest in limiting access of foreign students to their university programmes in order to limit the corresponding financial burden.

A satisfactory solution at the EU level must reconcile both these competing interests. This paper argues that under the current stance of European law no satisfactory solution can be found. It considers of proposals to improve the current situation in the future.



2. RESTRICTING THE INFLOW OF FOREIGN STUDENTS

2.1. Overview

Today it is well accepted that, while Member States remain responsible for determining the content and structure of education, the conditions governing access to education squarely fall within the scope of EU law¹⁷. The main consequence of this is that the rules governing access to education have to be in accordance with the principle of equal treatment laid down in Article 18 TFEU (*ex* Article 12 TEC). Consequently, in the absence of compelling justification, Member States have to grant students from other Member States access to their universities under the same conditions as their own nationals. They may not, for instance, charge higher tuition fees to students who obtained their secondary school diploma in another Member States¹⁸. This effectively obliges Member States to open up their higher education system to all EU students, regardless of their nationality.

That obligation has proven very sensitive, in particular because of its financial consequences. Increasing numbers of incoming students confront the Member States with a high burden on State finances. The reason is obvious: education is expensive and mostly funded out of State resources. The cost of the education enjoyed by incoming students will largely be borne by the taxpayer of the host Member State. Admittedly, incoming students will normally¹⁹ have to pay tuition fees, but tuition fees typically cover only a fraction of the total cost of education²⁰. Apart from that, students will contribute to a limited extent only to the economy of the home Member State, unlike economic migrants²¹. Of course, students who after their studies enter the employment market of the host Member State provide a ‘return on investment’ for the latter. By contrast, students who immediately after their studies return to their Member State of origin present a clear net to-cost for the host Member State and can be earmarked as ‘free riders’ from the point of view of that State. It appears that in the EU the large majority of students fall under the second category.

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All of this would not be problematic if student migration flows between the different Member States were more or less balanced. If, for each Member State, the number of incoming students more or less equalled the number of nationals studying in other EU Member States, student mobility would *not* entail a higher financial burden for the Member States. The higher cost for incoming students would be cancelled out by the lower budget needed for ‘own students’. The problem, however, is that the distribution of migrating EU students between the different Member States is not balanced. It is well documented that some Member States receive a much larger inflow of students than others. Some Member States can truly be earmarked as ‘student importers’, whereas other Member States are ‘net exporters’ of students²². It is understandable that the first category of Member States, in particular, have taken measures to restrict access for students from other Member States in order to limit the corresponding financial burden.

The first part of this paper will closely consider the situation in two of the EU's smaller Member States: Belgium and Austria. Both states are in a particular situation since they have a system of unrestricted university access and are bordered by a large Member State²³ with the same (or a shared) official language in which access to certain university programmes is subject to restrictive entrance conditions. The combination of these factors makes it attractive for students failing admission to university in the larger Member State to enrol at university in the smaller bordering Member State. Not surprisingly, both Belgium and Austria have taken measures in recent years to reduce the inflow of students from other Member States.

2.1.1. *Belgium*

Belgium is a federal state with three official languages. French is the official language in the southern part of Belgium, which borders France. Recent years have seen an enormous rise in the number of French students who cross the border and enrol in Belgian francophone universities. This is true in particular for two types of studies: veterinary studies on the one hand, and physiotherapy on the other hand. The reason is clear: in France, students need to pass a competitive exam first to be admitted to veterinary schools and physiotherapy studies are subject to a *numerus clausus*. As a consequence, many students failing admission turn to Belgium where the same courses are also taught in French and where admission is not restricted. Some figures may highlight the problem²⁴. For the two university programmes just mentioned, the number of students enrolled with a diploma from another Member State (mainly France) was between 41% and 75% in the academic year 2004/05 and between 78% and 86% in the academic year 2005/06. For other programmes it was less than 10%. Telling is also that during those years nearly one third of the veterinarians establishing themselves in France had obtained their diploma in Belgium²⁵.

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The problem of a potential influx of foreign students was initially remedied by way of special rules on granting equivalence to foreign diplomas and certificates of study. A royal Decree of 20 July 1971²⁶ declared that the grant of equivalence was under no circumstance to have the effect of giving the recipient access to studies to which he does not have access in the country in which the diploma or certificate was awarded. Accordingly, if the applicant could not prove that he qualified for admission in his country of origin, he had to pass an aptitude test in order to enrol at a Belgian University. Since this test was not required for holders of a Belgian secondary school diploma, these rules were clearly discriminatory, as was confirmed in by an ECJ judgment of 2004²⁷. Prior to this judgment already, the French Community of Belgium, the federated entity responsible for education in the southern part of the country, had abolished the aforementioned rule on equivalence for qualifications awarded in other Member States²⁸. In addition, in 2003, 2004 and 2005 the French Community organised an entry exam in the area of veterinary studies. However, the outcome of this system



was not judged satisfactory, as it resulted in a very limited number of holders of Belgian secondary school diplomas gaining entry²⁹.

In 2006 the French Community took specific measures to address this situation. A 2006 Decree³⁰ limits the total number of students that can enrol for veterinary studies and physiotherapy³¹ and further provides that only a limited number of these students may be students “non-resident” in Belgium³². Essentially, only students who both have their principal residence in Belgium and have a right of permanent residence in Belgium are considered to be ‘resident’ for the purposes of the Decree³³. The French Community justifies this restriction on three grounds. First, it is said to safeguard the French Community against an excessive burden on public finances, since it can arguably not support the large influx of students from abroad who enrol in the (state-funded) Belgian universities. Second, it is said to be necessary to safeguard the quality of education, as Belgian universities can arguably not accommodate the large numbers of students in a satisfactory manner for a lack of sufficient staff, budget and material. Third, the restriction is said to serve the quality of the public health system in the French Community: if too few students residing in the French Community obtain diplomas in certain specialities, over the long term there may not be sufficient qualified medical personnel to serve the needs of that Community.

However, the restrictions may be invalid under EU law since they clearly discriminate on the basis of nationality and since they restrict the free movement of students. The validity of the Decree has been challenged before the Belgian Constitutional Court, which has referred the questions on the validity under EU law to the ECJ. The case is currently pending, although AG Sharpston has already delivered her opinion, in which she concludes that the contested rules violate EU law³⁴. It remains to be seen whether the justifications advanced will find mercy in the eyes of the ECJ (cf the discussion *infra*).

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2.1.2. Austria

Austria has been confronted with problems very similar to the ones of the French Community of Belgium. While Austria has a system of unrestricted university access, a number of studies in Germany, medicine in particular, are subject to a stringent *numerus clausus*. One can readily see that this difference potentially leads to a large influx of German medicine students who, after failing to fulfil the German requirements, opt to enrol in Austrian universities. This potential problem was initially countered by paragraph 36 of the Universitäts-Studiengesetz (UniStG)³⁵, which provided that “In addition to possession of a general university entrance qualification, students must demonstrate that they meet the specific entrance requirements for the relevant course of study, including entitlement to immediate admission, applicable in the State which issued the general qualification”.

For German medicine students coming to Austria this meant that they would have to prove that they qualified under the German *numerus clausus*. As a consequence, the provision effectively frustrated the purpose of the majority of German medicine students coming to Austria, namely circumventing the strict entry requirements in Germany. Austria estimated that without this restriction the number of foreign, mainly German, applicants would exceed fivefold the places available³⁶.

The Commission, however, considered that the provision constituted an unjustified discrimination and brought an action against Austria for infringement of EU law. The ECJ eventually upheld the Commission's arguments in a judgment of 2005, thereby rejecting Austria's arguments to justify the restriction³⁷. Austria had put forward two main justifications. In the first place, it had argued that the restriction was necessary to safeguard the homogeneity of its higher or university education system. This referred in particular to Austria's policy aim to guarantee unrestricted public access to higher education for Austrians in order to improve the percentage of Austrian citizens with a higher education qualification. Austria submitted that if it had to grant such unrestricted access to all EU students, its education system would be flooded by foreign, mainly German students, and that that would pose a risk to the financial equilibrium of the system.

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The ECJ pointed out, first, that excessive demand for access to specific courses could be met by non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade. Second, it emphasised that Austria had not put forward any hard evidence to support its claim that in the absence of the restriction concerned the Austrian education system would be jeopardised. One might conclude from this that the aim of preserving the homogeneity of the higher education system, including unrestricted public access, could be considered a legitimate one under EU law. However, measures restricting access for students from other Member States will presumably only be found to be proportionate to this aim if their necessity is sufficiently corroborated by hard statistical evidence. I will come back to this point below.

Austria's second argument was that the restriction prevented abuse of Community law. This is the familiar 'free rider argument' referred to above: it was argued that German students come to Austria to reap the benefits of the Austrian education system without contributing to its financing³⁸. The Court swiftly dismissed this justification as being unfounded, in line with earlier case law where the free rider argument was advanced³⁹. It merely observed that the right for EU nationals to study in other Member States under equal conditions constitutes the very essence of the principle of the free movement for students guaranteed by the Treaties, and cannot therefore be labelled as an abuse of that right.



After the judgment, a new provision was inserted in the *Universitätsgesetz*, stating that, generally, all secondary diplomas were to be regarded as equal to Austrian diplomas⁴⁰. This effectively led to a large influx of German medicine students⁴¹. In reaction to this phenomenon, the Austrian legislator, on 1 March 2006, adopted new rules to regulate university admission. Under the new rules, a contingent of 95% of study places is allotted to EU citizens. 75% of these, however, are reserved for students holding an Austrian secondary diploma⁴². This scheme applies to medicine studies, but can be extended to other studies which are subject in Germany to a *numerus clausus*⁴³. It is not readily clear why the new law would, in contrast to the former rules, be consistent with EU law, since it also indisputably has a discriminatory effect. The new quota based system resembles the solution adopted by the 2006 Decree of the French Community. Both are aimed at reserving a large percentage of available university places for their own nationals, although the percentage of the share and the distinguishing criterion used are different. In the following it will be assessed whether these systems can be justified under EU law.

2.2. Assessment

The ECJ has not yet pronounced itself on the validity of the Belgian and the Austrian scheme, but, as has already been noted, a case regarding the validity of the 2006 French Community Decree is currently pending before the Court. It must also be noted that the Commission, a mere few months after the new laws were adopted, already sent letters of formal notice to Belgium and Austria for infringement of Community Law⁴⁴. However, on the basis of the replies given by both Member States, the Commission considered that there was *prima facie* evidence that without the restrictions, problems could arise of the Belgian and Austrian health systems.

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The Commission therefore decided to suspend the case for five years in order to give both Member States the opportunity to provide more complete and detailed data to justify the restrictions⁴⁵. It is a public secret that the Commission decision to suspend the cases was in fact the outcome of strong political pressure exerted by Austria during the negotiations leading to the adoption of the Lisbon Treaty⁴⁶. Of course, this pact with the Commission did not preclude the matter from being brought before the ECJ by way of a preliminary ruling.

In the following I start from the assumption that the Belgian and Austrian system constitute an indirect discrimination on grounds of nationality and are, therefore, *prima facie* in violation of Articles 18 TFEU, possibly in combination with Articles 21, 165 and 166 TFEU⁴⁷. It must be considered then whether these discriminations can be justified. Five possible justifications can be distinguished: 1) the abuse of EU law (free rider) argument; 2) the need to keep the costs of higher education under control; 3) the need to maintain the quality of education; 4) preserving an affordable system of

unrestricted public access to higher education; 5) the need to maintain a functioning public health system. The ECJ's final judgment will further clarify this matter.

It can already be seen, however, that the first three justifications cannot be accepted under EU law. The first justification is clearly not valid under EU law since EU students studying in another Member State cannot be considered to abuse the free movement provisions of EU law (cf *supra* on the *Commission v Austria* Judgment). Purely financial arguments, on which the second justification is based, will not suffice to justify the discriminations concerned either, especially since non-discriminatory measures can equally well achieve the aim to reduce the financial burden of higher education. Austria and Belgium could very well opt to introduce a *numerus clausus* combined with entry exams or the requirement of a minimum average grade applicable for all students. Such a system would not discriminate on the basis of nationality. At the same time, it would effectively guard these Member States from being flooded by French or German students and, therefore, be apt to preserve the financial equilibrium of the education system. The third justification is closely linked to the second one. It essentially holds that the host Member State does not have enough (financial and other⁴⁸) resources to provide an adequate educational framework to the increased numbers of students in the university programmes targeted.

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This is said to jeopardise the quality of education. While that statement as such is convincing, it must immediately be remarked that, again, non-discriminatory measures like the one suggested above would be perfectly capable to stem the overflow of students. Such measures are obviously more proportionate to the aim pursued than the current restrictions in place. Moreover, it could be objected that, where the aim is to improve the quality of education, national borders should be opened up to attract talent from other Member States rather than closed.

However, while non-discriminatory measures such as the one mentioned could adequately counter concerns of inadequate resources, they would also defeat one of the aims central to the Belgian and Austrian systems, namely that of guaranteeing the widest possible public access to higher education. In Austria, this aim is coupled to the policy of increasing the percentage of Austrians with a higher education qualification, since that is among the lowest in the EU and the OECD⁴⁹. In Belgium, plans to introduce more stringent entry restrictions are often met with scepticism since they are felt to favour elitisms and reduce the social character of the Belgian welfare state. The French Community legislator states in this connection⁵⁰:

“Those who pass an entrance exam are either those students who have enjoyed the best secondary school education or those students who have followed a post-secondary school formation in a field closely linked to that for which the exam is organised.



Accordingly, students who, because of their social background or otherwise, do not have sufficient baggage when finishing secondary school to pass the entrance exam, or students who cannot afford preparatory years of studies will be excluded from studies for which an entrance exam is organised”.

It follows from the foregoing that the fourth justification will be the crucial argument for Belgium and Austria. The Court can do one of two things. On the one hand, it can dismiss the aim of reserving unrestricted higher education access for nationals (or residents or holders of a secondary school diploma) of a Member State as an aim which is inherently discriminatory and cannot be accepted as a legitimate aim capable of justifying restrictions. The consequence of this point of view in practice may be that Belgium and Austria have to give up their system of unrestricted public access to higher education, at least under EU law as it currently stands. On the other hand, the ECJ may be sympathetic towards the aim of preserving unrestricted access and accept it as a possible justification.

Whether it will accept this aim as justifying the restrictions in question, will much depend on whether sufficient evidence is put forward to prove that without them the Belgian and Austrian education systems would be flooded by foreign students and that such would entail an unreasonable financial burden jeopardising the quality of these education systems. The ECJ in *Commission v Austria* rejected a similar argument, but, as I pointed out, this was the case precisely because Austria did not come up with sufficient evidence corroborating the need for the restriction at hand in that case.

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The fifth justification provides another argument why the non-discriminatory measures suggested above, namely introducing a *numerus clausus* for the programmes targeted, would not have a satisfactory outcome. It holds that the adoption of such measure would endanger the quality of public healthcare, as it would lead to too few students qualifying with a link to the host Member State and willing to practice the profession in that State after graduating⁵¹. As was pointed out above, the Commission has accepted this argument as a *prima facie* capable of justifying the restrictions that were introduced in Belgium and Austria⁵². However, it was also pointed out that this statement may have come about as the result of political pressure rather than substantive assessment by the Commission.

In any event, claims of a potential shortage would need to be corroborated by convincing evidence and must not be based on mere presumptions. In the case of Belgium, figures are available for veterinary studies. As pointed out above, the French Community organised an entrance exam in 2003, 2004 and 2005, which only a small percentage of students who obtained their secondary school diploma in Belgium passed⁵³.

Yet, even if the problem could be corroborated by convincing evidence, like in Belgium with regard to veterinary studies, it is far from sure that a system of quotas is a justified reaction, for two reasons, which were convincingly set out by AG Sharpston⁵⁴. First, it cannot be seen why German and French students would not, as a matter of principle, want to practice their profession in Austria and Belgium, respectively, after graduating. If there were to be a real shortage of veterinarians in the French Community of Belgium, the government - if not the market - could intervene to make local job prospects more attractive and encourage foreign students qualified in Belgium to enter the Belgian employment market. Second, the problem could also be addressed at the level of pre-university education. If it appears that too few nationals of the host Member State satisfy the entry criteria of a *numerus clausus*, that Member State could either adjust the level of secondary school education or introduce a preparatory year of study. Admittedly, this implies that the Member State in question would lose some of its autonomy in deciding how to organise its education system, but such may be an inevitable consequence of imperatives deriving from EU law.

2.3. Solutions

The ECJ's ruling can be expected to bring clarity to the matter by deciding whether quota based systems such as the one in place in Belgium and Austria are valid under EU law. Yet, whatever the ECJ decides, the outcome will be problematic. To see this, it must be recognised that two conflicting interests are at stake here: the interests of the Member States in giving shape to an affordable education system on the one hand and the interests of the EU in promoting student mobility on the other hand. If the ECJ strikes down the restrictions, the interests of the Member States may not be sufficiently taken into account. Admittedly, Member States could address their financial concerns by introducing a *numerus clausus*, but that would mean the end of the strongly embraced policy of unrestricted access to higher education. That, in turn may cause a serious political backlash, as is clear from the high level politics Austria played in the negotiations leading up to the Lisbon Treaty and the political deal that was struck with the Commission.

If the ECJ upholds the restrictions, it delivers a serious blow to student mobility, the promotion of which is one of the EU's central aims (*cf supra*). The bottom-line, this paper argues, is that no satisfactory solution, adequately reconciling these conflicting interests, exists under EU law as it currently stands. It seems desirable to find a solution which adequately safeguards the interests of the Member States, while at the same time not or only minimally restricting student mobility between Member States. In the following some proposals to improve the situation in the future will be briefly considered.



2.3.1. European funding

An obvious solution to reconcile both interests would be some measure of European funding for student mobility. If European universities were funded by the European taxpayer, this would take away the disproportionate burden which is now born by some Member States. As a consequence, Member States would no longer have a strong incentive to restrict access to their education system for incoming students.

Of course, whether unrestricted access to higher education would be guaranteed would still be a matter for debate, as European resources would inevitably be limited and entry restrictions could be envisaged in order to guarantee the quality of higher education. In any event, this first proposal is problematic for a number of reasons. First, the EU lacks to competence to enact such a scheme⁵⁵, since its competence in the field of education is limited. Article 165 and 166 TFEU merely confer the competence to support and supplement action of the Member States, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems. Furthermore, the EU does not have the competence to levy ‘European wide’ taxes which would give it sufficient resources to fund the Universities of the Member States. Second, the proposal is not in line with subsidiarity. Arguably EU funding for universities would go further than necessary to solve the problems encountered, since they only concern ‘moving students’. Third, EU funding for universities would presumably take away in some measure the competition between universities, while the EU aims at promoting this competition in the framework of the Lisbon strategy. Even leaving these issues aside, it seems unlikely that Member States will ever agree to leave university funding to the EU. The option is, in other words, not politically feasible. For all these reasons, the first proposal is not a realistic one.

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2.3.2. Common fund

By contrast, a more limited degree of funding at the European level, specifically aimed at ‘moving students’ might be envisaged. It has been suggested that Member States could set up a common fund for students who study in another Member State, similar to the system for financial compensation in the field of higher education developed in the Nordic countries⁵⁶. Member States would pay lump sums into this fund, which would in turn be used to compensate ‘net importing’ Member States, i.e. Member States which host more students from Member States than they send out to other Member States. This option is certainly more in line with the subsidiarity principle as it is specifically directed towards ‘moving students’. Yet, it seems difficult to argue that the EU’s limited competence in the field of education would allow it to set up such a fund. Still, Member States could decide to set up a fund for moving students on an intergovernmental basis. After all there is a precedent: the Bologna process, which constitutes a form of intergovernmental cooperation outside the framework of the EU⁵⁷. Given the large degree of disparity between the Member States as regards the organisation of education

– which is presumably less significant between the Nordic countries -, this would inevitably entail important practical difficulties. It would be difficult for instance to calculate what a ‘just compensation’ would be given the differences in terms of cost of the education, quality of the education and the degree to which it is financed by private or public funds.

If, for instance, Member States would agree on a fixed amount of compensation per student, the danger would be that some Member States (for example those with higher tuition fees and more private funding) would be overcompensated, while others would not be adequately compensated. Besides, it is likely that many Member States would resist the system proposed as it would have the consequence that Member States would subsidise education in other Member States without having any supervision over it. Yet, that consideration should not be prohibitive: since many students will return to their home Member State after graduating, the ‘sending’ Member State will on a whole receive a return on its investments. Moreover, within a framework of real competition between establishments of higher education, ‘net importing’ Member States will likely be the ones with the highest quality of education.

2.3.3. Home Member State Funding

90 A third proposal, which is akin to the previous one, is that of ‘home Member State’ funding: the home Member State should pay the host Member State for educating its nationals. Inspiration for this system could be drawn from the system set up between the Swiss cantons⁵⁸. Under that system, cantons compensate each other for the education of their resident students⁵⁹. If the number of students resident in canton A and studying in canton B exceeds the number of students resident in canton B but studying in canton A, the latter will have to pay a contribution to canton B. In this way, equal access for all Swiss students is guaranteed, regardless of their canton of residence, while at the same time net-importing cantons are safeguarded against unreasonable financial burden.

It has been suggested that in the EU this system could take the form of portable vouchers⁶⁰. Students willing to enrol in a university in another Member State would have to apply for a voucher with the competent authority of their home Member State. They would present this voucher to the higher education system where they are accepted. That would entitle the latter institution, or the Member State in which it is located, to receive compensation from the issuing Member State.

The avenue of home State funding has been advocated in legal literature in particular with regard to loans and maintenance grants⁶¹. It has been argued that, under certain circumstances, a refusal of the home Member State to allow the exportability of study financing would constitute a barrier to the exercise of free movement rights under Article 21 TFEU (*ex* Article 18 TEC). This has been accepted by the ECJ in the



circumstances of a particular case⁶². However, it cannot be taken to mean that Member States are obliged to grant study financing to outgoing students⁶³. Moreover, what is relevant for the purposes of the analysis carried out in this paper is not so much the aid students may get from their home Member State but rather the compensation the host Member State may obtain for educating students from the home Member States.

It is not impossible to draw a parallel between the two situations and apply the Article 21 TFEU based argument to the system of compensation suggested higher. Indeed, a student of a Member State in which education is more heavily subsidised could argue that he would lose this subsidy if he went to study in a Member State in which this is the case to a lesser extent only and argue that the higher costs of study in a second Member State constitute a barrier to the exercise of his or her free movement rights. However, that argument is obviously farfetched, since accepting it would mean that differences in tuition fees between universities of the different Member States would henceforth be caught by Article 21 TFEU and would need to be justified.

It is submitted, therefore, that home Member State funding cannot be enforced under current EU law, but requires an initiative on part of the Member States within or outside the framework of EU law. This runs up against the same problems as mentioned in relation to proposal two, in addition to a number of practical issues⁶⁴. Still, despite these difficulties, a system of home Member State funding would mean a considerable improvement compared to the existing situation, as it would more adequately reconcile the conflicting interests of the Member States on the one hand and the EU on the other hand.

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3. CONCLUSIONS

Student mobility is of paramount importance to the success of European integration and the competitiveness of the European internal market. If Europe wants to become the most dynamic and competitive knowledge-based economy in the world, the existing levels of student mobility have to be increased drastically and existing barriers have to be overcome. The current provisions on the free movement of students are not adequate to reach this goal, since they cannot guarantee an equitable spread of the financial burden over the different Member States.

Recent controversial cases in Austria and Belgium have exposed the limits of the current regulatory framework and clearly demonstrate that it cannot be a satisfactory basis for increased student mobility. New systems of funding should therefore be envisaged. The most fruitful option seems to be a system of home Member State funding for outgoing students.

BIBLIOGRAPHY

- BARNARD, C. (2007): *The substantive law of the EU: the four freedoms*, Oxford.
- BIFFL, G. and ISAAC, J. (2002): "Should Higher Education Students Pay Tuition Fees?", in: *European Journal of Education*, 37, pp. 433-455.
- CHEVALIER, C. y GÉRARD, M. (2008): *Financing higher education and student mobility across Europe*, in: <http://www.enseignement.be>
- DAVIES, G. (2005): "Higher education, equal access, and residence conditions: does EU law allow Member States to charge higher fees to students not previously resident?", in: *Maastricht Journal of European and Comparative law*, Vol. 12, pp. 227-240.
- DOUGAN, M. (2005): "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?", *Common Market Law Review*, Vol. 42, pp. 943-986.
- DOUGAN, M. (2008): "Cross-border educational mobility and the exportation of student financial assistance (Case Comment)": *European Law Review*, Vol. 33, pp. 723-738.
- 92
- GARBEN, S. (2008): The Belgian/Austrian Education Saga, in: [http:// www.law.harvard.edu/students/orgs/hela/workingpaper2008.html](http://www.law.harvard.edu/students/orgs/hela/workingpaper2008.html)
- GÉRARD, M. (2007): "Financing Bologna: Which Country will Pay for Foreign Students?": *Education Economics*, Vol. 15, pp. 441-454.
- GOLYNKER, O. (2006): "Student Loans: The European Concept of Social Justice according to Bidar": *European Law Review*, Vol. 31, pp. 390-401.
- RIEDER, C. (2006): "Case C-147/03, Commission of the European Communities v. Republic of Austria, Judgment of the Court (Second Chamber) 7 July 2005 (Case note)": *Common Market Law Review*, Vol. 43, pp. 1711-1726.
- SCHWARZ, S. and REHBURG, M. (2004): "Study Costs and Direct Public Student Support in 16 European Countries - Towards a European Higher Education Area?": *European Journal of Education*, Vol. 39, pp. 521-532
- SPAVENTA, E. and DOUGAN, M. (2005): *Social welfare and EU law*, Oxford .
- TERRY, L. S. (2008): "The Bologna process and its impact in Europe: it's so much more than degree changes": *Vanderbilt Journal of Transnational Law*, Vol. 41, pp. 107-227.



VAN DER MEI, A. P. (2003): *Free movement of persons within the European Community : cross-border access to public benefits*, Oxford.

REFERENCES

- 1 Communiqué of the Conference of European Ministers Responsible for Higher Education, Leuven and Louvain-la-Neuve, 28-29 April 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/675&format=HTML&aged=0&language=EN&guiLanguage=en>, 4. The need to increase mobility was confirmed in the conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2020') [2009] O.J. L 97/1.
- 2 On the creation of a European identity through the status of European citizen, see WEILER (1997), "The European Union belongs to its Citizens: Three Immodest Proposals", 22, *E.L. Rev.*, pp. 150-156; WEILER,(1997) "To be a European Citizen- Eros and Civilization", 4, *Journal of European Public Policy*, pp. 495-519; MAGNETTE (2007), "How can one be European? Reflections on the Pillars of European Civic Identity", 13, *European Law Journal*, pp. 664-679.
- 3 The 'Lisbon Agenda' or 'Lisbon Strategy' was launched during the meeting of the European Council in Lisbon in March 2000. See the European Commission's website on the Lisbon Strategy: http://ec.europa.eu/growthandjobs/index_en.htm.
- 4 Terminology borrowed from the Report of the High Level Expert Forum on Mobility, June 2008, available at http://ec.europa.eu/education/doc/2008/mobilityreport_en.pdf.
- 5 Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the follow-up to the Recommendation of the European Parliament and the Council of 10 July 2001 on mobility within the Community of students, persons undergoing training, volunteers and teachers and trainers, COM(2004)21 final , 7.
- 6 Decision No 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning, [2006] O. J. L 327/45. For an overview of the different EU programmes and initiatives in this connection, see the Green Paper on promoting the learning mobility of young people, COM(2009) 329 final.
- 7 The Bologna process started of as an intergovernmental forum launched by France, Germany, Italy and the UK and now embraces 46 European countries (See the official website: <http://www.ond.vlaanderen.be/hogeronderwijs/Bologna/>). For an extensive overview, see TERRY (2008), "The Bologna process and its impact

in Europe: it's so much more than degree changes", 41, *Vand. J. Transnat'l L.*, pp. 107-227.

8 See the Communiqué of the Conference of European Ministers cited in footnote 1, at 4.

9 See the Communication from the Commission - The role of the universities in the Europe of knowledge, COM (2003)58 final . See also DOUGAN (2005), "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?", 42, *CML Rev.*, 956. For a detailed comparison of the legal regime surrounding student mobility in the EU and the USA, see VAN DER MEI (2003), *Free movement of persons within the European Community : cross-border access to public benefits* (Oxford, Hart), Chapter 5.

10 Report from the Commission, cited in footnote 5.

11 See the overview in Annexes A and I to the Report of the High Level Expert Forum on Mobility, June 2008, available at http://ec.europa.eu/education/doc/2008/mobilityreport_en.pdf.

12 See the Green Paper cited in footnote 6. This corresponds to a mere 0,3 % of the age cohorts of 16-29 year olds in the EU: *Ibid.*

94 13 See the yearly statistics on the website of the European Commission: http://ec.europa.eu/education/programmes/llp/erasmus/stat_en.html.

14 Report cited in footnote 11.

15 See the Green Paper Education - Training - Research. The obstacles to transnational mobility, COM(96) 462 final; Report from the Commission, cited in footnote 5.

16 Of course this argument does not apply for the many English taught university programmes which are offered in smaller Member States like the Netherlands.

17 This was established in cases like ECJ, Case 293/83 *Gravier* [1985] E.C.R. 593. For a discussion, see VAN NUFFEL and CAMBIEN (2009), "De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren, 57, *SEW*, pp. 144-154.

18 ECJ, Case 24/86 *Blaizot* [1988] E.C.R. 379.

19 In some Member States, the Nordic countries in particular, tuition fees do not exist. See SCHWARZ and REHBURG (2004), "Study Costs and Direct Public Student Support in 16 European Countries - Towards a European Higher Education Area?" 39 *European Journal of Education*, 524, cited by GOLYNKER



- (2006), "Student Loans: The European Concept of Social Justice according to Bidar", *E.L. Rev.*, 399.
- 20 SCHWARZ and REHBURG (2004), "Study Costs and Direct Public Student Support in 16 European Countries - Towards a European Higher Education Area?" 39 *European Journal of Education*, 524; DAVIES (2005), "Higher education, equal access, and residence conditions: does EU law allow Member States to charge higher fees to students not previously resident?", 12, *MJ*, 228.
- 21 As AG JACOBS notes, even though students may not contribute directly to the tax system of the State in which they pursue their university studies, they are a source of income for local economies where the university is located, and also, to a limited extent, for the national treasuries via indirect taxes (Opinion of AG JACOBS in Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969, para. 36.
- 22 See the figures presented by CHEVALIER and GÉRARD, "Financing higher education and student mobility across Europe" *ARPEGE Research paper*, available at www.enseignement.be, 8, which clearly show that Belgium, Austria and the United Kingdom are the biggest net importers, while Luxembourg, the Slovak Republic and Greece are the most clear-cut net exporters.
- 23 Belgium has a population of approximately 10, 7 million people whereas bordering France has a population of about 65 million. Austria has a population of approximately 8,4 million people whereas Germany has a population of about 82 million.
- 24 Figures taken from Opinion of AG SHARPSTON in Case C-73/08 *Bressol and Others et Chaverot and Others* [2009] nyr, para. 20.
- 25 Opinion of AG SHARPSTON , cited in footnote 24, para. 24.
- 26 Royal Decree of 20 July 1971 laying down the conditions and procedure for granting equivalence to foreign diplomas and certificates of study (*Moniteur belge* of 5 August 1971, p. 9254).
- 27 ECJ, Case C-65/03 *Commission v Belgium* [2004] E.C.R. I-6427. Belgium did not put forward any arguments to justify the rules. For a discussion of the judgment, see Garben, "The Belgian/Austrian Education Saga" *Harvard European Law Working Paper no. 01/2008*, available at <http://www.law.harvard.edu/students/orgs/hela/workingpaper2008.html>.
- 28 See the decree of the Government of the French Community of 3 April 2003 amending the 1971 decree (*Moniteur belge* of 16 May 2003, p. 26867).

- 29 See Opinion of AG SHARPSTON, cited in footnote 24, para. 115: “In the 2005 competition, only 192 candidates out of a total of 795 had obtained their secondary school diploma in the French Community. Of the 250 successful candidates (a number fixed by the legislator), 216 obtained their secondary school diploma abroad. That implies that only 34 home-grown candidates were able to start their studies in veterinary medicine.”
- 30 See the Décret régulant le nombre d’étudiants dans certains cursus de premier cycle de l’enseignement supérieur, *Moniteur belge* of 6 July 2006, 34 055 (*hereinafter*: “Decree”). The relevant provisions are set out in Opinion of AG SHARPSTON, cited in footnote 24, paras 12-18.
- 31 And, since the academic year 2009-2010 also for studies in logopaedics (*logopédie*) (see new Article 3(3) of the Decree).
- 32 More exactly if the number of non-resident students reaches 30% of the total number of students enrolled in the previous academic year, the academic authorities are to refuse further registrations of non-resident students (Article 4 of the Décret, which provides for an exception where the European average of non-resident students is above 10%). Where the number of non-resident students enrolled before the start of the academic year exceeds this percentage, the priority as between those students is determined by drawing lots (Article 5).
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- 33 See Article 1 of the Decree.
- 34 Opinion of AG SHARPSTON, cited in footnote 24
- 35 BGB1. I Nr. 48/97, replaced by the Universitätsgesetz 2002, BGB1. I Nr. 120/2002.
- 36 Opinion of AG JACOBS in Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969, 27.
- 37 ECJ, Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969. For a detailed discussion of the case, see RIEDER, "Case C-147/03, Commission of the European Communities v. Republic of Austria, Judgment of the Court (Second Chamber) 7 July 2005 (Case note)" (2006) *CML Rev.*, 1711-1726.
- 38 See the discussion in Opinion of AG JACOBS in Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969, 36-42. See further: VAN DER MEI (2003), *Free movement of persons within the European Community : cross-border access to public benefits* (Oxford, Hart,), 442 *et seq.*; DOUGAN (2005), "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?" 42 *CML Rev.*, 943-986.



- 39 See, for instance, ECJ, Case C-200/02 *Zhu and Chen* [2004] E.C.R. I-9925
- 40 Paragraph 124a of the *Universitätsgesetz* 2002, which refers to the *Universitätsberechtungsverordnung* 1998.
- 41 See the figures cited by RIEDER, 1715.
- 42 See Paragraph 124b (5) of the *Universitätsgesetz* 2002.
- 43 See Paragraph 124b (5) of the *Universitätsgesetz* 2002. In fields of study which are in Germany subject to *numerus clausus*, universities are allowed to introduce entrance exams (paragraph 124(1)).
- 44 Press Release Free movement of students: the Commission sends letters of formal notice to Austria and Belgium, 24 January 2007, IP/07/76 .
- 45 Press Release Access to higher education: the Commission suspends its infringement cases against Austria and Belgium, 28 November 2007, IP/07/1788 .
- 46 For a more detailed account, see GARBEN, "The Belgian/Austrian Education Saga" *Harvard European Law Working Paper no. 01/2008*, num. 13-14.
- 47 These articles replace *ex* Articles 12, 18, 149 and 150 TEC. 97
- 48 The French Community invokes limited personnel, budget and opportunities for practical training (see paragraph B.12.1 of the judgment of the Belgian Constitutional Court).
- 49 See Austria's submission in Case 147/03 (referred to by Opinion of AG JACOBS in Case C-147/03 *Commission v Austria* [2005] E.C.R. I-5969, 26).
- 50 *Doc. parl.*, Parlement de la Communauté française, 2005-2006, n° 263/1, 9-11, cited by the Cour Constitutionnelle, *Arrêt n° 12/2008 du 14 février 2008*, Numéros du rôle: 4034 et 4093 para. B.12.5.2. [*my translation*].
- 51 For the sake of completeness it must be pointed out that the influx of foreign students can affect the quality of public health care in another way too: it may jeopardise the quality of education, and, as a consequence, the formation and expertise of the medical personnel trained. That argument, centred on the quality of education, was dealt with higher.
- 52 See Press Release Access to higher education: the Commission suspends its infringement cases against Austria and Belgium, 28 November 2007, IP/07/1788 .

- 53 The French Community has argued, moreover, that such will always be the case where a small country, which guarantees equal access, introduces a *numerus clausus* and a large neighbouring country in which the same language is spoken also employs restrictive conditions which eliminate a large number of candidates, unless the restrictive conditions in both countries are the same and the *numerus clausus* in both countries stands in the same proportion to the overall population. see paragraph B.12.5.2 of the judgment of the Belgian Constitutional Court.
- 54 Opinion of AG SHARPSTON, cited in footnote 24, 114-126.
- 55 See BARNARD (2005), "Case note to Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills" *CML Rev.*, 1487.
- 56 GOLYNKER (2006), "Student Loans: The European Concept of Social Justice according to Bidar", *E.L. Rev.*, 400, referring to BIFFL and ISAAC (2002), "Should Higher Education Students Pay Tuition Fees?", 37, *European Journal of Education*, 435 and 445.
- 57 See DOUGAN (2005), "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?" 42 *CML Rev.*, 976.
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- 58 See the Accord Intercantonal Universitaire of 20 February 1997, RO 1999, 1503.
- 59 See CHEVALIER and GÉRARD, "Financing higher education and student mobility across Europe" *ARPEGE Research paper*, available at www.enseignement.be, 12.
- 60 CHEVALIER and GÉRARD, "Financing higher education and student mobility across Europe" *ARPEGE Research paper*, available at www.enseignement.be, 9 *et seq*; GÉRARD (2007), "Financing Bologna: Which Country will Pay for Foreign Students?" 15 *Education Economics*, 441-454.
- 61 DOUGAN (2005), "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?" 42 *CML Rev.*; DOUGAN (2008), "Cross-border educational mobility and the exportation of student financial assistance (Case Comment)" 33 *E.L. Rev.*, 723-738; GOLYNKER (2006), "Student Loans: The European Concept of Social Justice according to Bidar" *E.L. Rev.*, 400.
- 62 ECJ, Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] E.C.R. I-9161.



- 63 The ECJ merely held that *where* a Member State provides for a system of education or training grants which enables students to receive such grants if they pursue studies in another Member State, the detailed rules for the award of those grants must not create an unjustified restriction of the right to move and reside within the territory of the Member States (ECJ, Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] E.C.R. I-9161, 28; italics added).
- 64 For example, the definition of the notion of ‘home Member State’ and the unpredictability of the financial impact of the system (GOLYNKER (2006), "Student Loans: The European Concept of Social Justice according to Bidar" *E.L. Rev.*, 400).

