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Students as subject of EU law

The role of the European Court of Justice in the enhancement of students' rights and the impact of ECJ case law on the national systems of tuition fees and educational grants

by

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Abstract

Judicial activism is a concept that has mainly been studied in the United States and in relation to the US Supreme Court. The operationalization of the concept has been tuned so as to fit the American legal system and to allow for the analysis of the Supreme Court's jurisprudence. In Europe, however, only few scholars have investigated the concept of 'judicial activism'. The study at hand applies the concept 'judicial activism' in a European context, namely to the case law of the European Court of Justice (ECJ) in the domain of students' rights. It aims to find out which role the ECJ played in the enhancement of students' rights and whether the jurisprudence in this field can be characterized in a way from which it can be concluded that the Court of Justice engages in judicial activism in this domain. To be able to do so, the concept 'judicial activism' is operationalized in a way that especially fits the European context. Afterwards, the study also investigates into the impact which the ECJ's case law has on the national systems of the Member States dealing with tuition fees and educational grants.

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1. Introduction

Over the last years, the issue of student mobility has come to receive massive attention. Educational institutions, policy-makers and companies alike have started to recognize the importance of students gaining international experience in order to facilitate their self-development, developing their language skills and preparing for an international work environment. Studying abroad has come to be regarded as a normal, maybe even a nearly obligatory element in students' careers.

European Union law as in its current state facilitates such mobility tremendously. So can students derive from it a Community-wide right to non-discriminatory access to higher education institutions. Moreover they can claim access to financial assistance from the host state in order to cover their costs of access to that state's educational institution. In order to live and pursue studies in another Member State and claim educational grants there, students cannot even be required to possess a residence permit.

However, things have not always been this way. Only 30 years ago, higher and university education have not even been included within the scope of the Treaties. Student mobility simply was not that much of a topic back then. Only as late as 1986 did the European Community began to launch programs "aiming to provide support for European cooperation in education"¹. One of these was the famous European Community Action Scheme for the Mobility of University Students, shortly ERASMUS. It was established to enhance the mobility of students by granting financial support for the study at a university located in another Member State for up to one year. Over the last two decades ERASMUS has proven a highly successful measure of encouraging students to spend a part of their study time in a country other than their home country. Two million students have participated in the ERASMUS program since it has been started².

Yet, regularly problems arose for those, who did not want to spend only a couple of months abroad within the framework of ERASMUS, but decided to pursue a complete study in another Member State. They encountered huge problems for example in gaining equal access to educational institutions and financial assistance in other Member States. Not willing to accept discriminatory provisions and practices of the respective host states, they have appealed to them before the national courts. Time and again these courts stayed proceedings in order to refer to the European Court of Justice (ECJ) questions for a preliminary ruling, seeking to learn about the exact meaning of Community law provisions. Therefore the European Court of Justice can be expected to have played a role in the enhancement of students' rights.

¹ Teichler (2009), p.8

² Retrieved March 25, 2010 from http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm

This study aims to find out which role the European Court of Justice played in the enhancement of students' rights and how ECJ jurisprudence did affect the national systems of the Member States in this respect.

To reach this objective, the study has been structured as follows. The following part will introduce the reader to the methodology which is employed in this study in order to provide an answer to the general research question. The third part will then offer to the reader an overview of both students' rights and Member States obligations in the area of higher education under Community law. Afterwards, the fourth part will find out which new rights and obligations have been established or recognized for students by the ECJ, and to which extent the ECJ can thus be said to engage in judicial activism in the domain of students' rights. The fifth part will then make clear the impact which the ECJ's case law has on the national systems of tuition fees and educational grants. Part six then presents a conclusion and the answer to the general research question. The study will be rounded off with a short summary.

2. Methodological issues

This part of the text will familiarize the reader with the methodology which is employed in this study in order to be able to provide an answer to the general research question, which reads as follows:

What was the role of the European Court of Justice in the enhancement of students' rights and how did ECJ jurisprudence affect the national systems in this respect?

In order to be able to answer the general research question, several sub-questions have to be solved. Each sub-question will provide part of the answer which is necessary to answer the general research question in the end. Only when all three sub-questions are answered it will be possible to provide an answer to the general research question. The following three sub questions have been developed:

1. *Which rights and obligations do students have on the basis of the EU Treaties and EU legislation?*
2. *Which new rights and obligations have been established or recognized for students by the ECJ? To which extent can this be seen as judicial activism?*
3. *What is the impact of ECJ case law concerning students' rights on national systems?*

Sub-question 1 will be answered in part three of this study. That part will offer to the reader an overview of both students' rights and Member States obligations in the area of higher education under Community law. It will especially shed light on the provisions governing students' right of residence, the conditions of access to educational institutions, the height of tuition fees and the eligibility for educational grants. This is necessary to clear the ground and be able to judge in the fourth part of the study whether the ECJ indeed has established new rights and obligations with its case law.

An answer to the second sub-question will then be provided in part four. That part will find out which new rights and obligations have been established or recognized for students by the ECJ, and to which extent the ECJ can thus be said to have engaged in judicial activism in the domain of students' rights. In order to do so, the reader will first of all be introduced to the meanings that are currently attached to the concept 'judicial activism'. As much of the literature on judicial activism has been published in the United States and in relation to the US Supreme Court, the operationalization of the concept offered by American scholars cannot be taken over one by one. Rather it is necessary to develop an operationalization of the concept that makes possible its application in the European context of this study. Building on the literature from the field, the concept 'judicial activism' will be operationalized in exactly such a way.

Afterwards, the concept 'judicial activism' will be applied to fifteen judgments which the European Court of Justice has delivered in the domain of students' rights from the mid-1980's until now. The

case collection is purposive. This, however, does not imply that the study will be biased. Purposive sampling is logically necessary, because I will have to investigate those cases in which the ECJ “makes new law” in order to assess how far the ECJ goes with its jurisprudence and whether it goes so far that this activities can be called ‘judicial activism’. Therefore, especially the so-called atypical and landmark cases will be included in the case analysis. The following cases have been chosen:

- Case 293/83 (Gravier)
- Case 24/86 (Blaziot)
- Case 39/86 (Lair)
- Case 197/86 (Brown)
- Joined cases 389/87 and 390/87 (Echternach and Moritz)
- Case C-308/89 (Di Leo)
- Case C-357/89 (Raulin)
- Case C-3/90 (Bernini)
- Case C-109/92 (Wirth)
- Case C-337/97(Meeusen)
- Case C-184/99 (Grzelcyk)
- Case C-209/03 (Bidar)
- Case C-147/03 (Commission vs. Austria)
- Joined cases C-11/06 and C-12/06 (Morgan and Bucher)
- Case C-158/07 (Förster)

From the review and analysis of the ECJ’s case law it will become clear whether and in how far the ECJ has established new rights and obligations for students through its jurisprudence and whether or not the ECJ has engaged in judicial activism.

Sub-question 3 will then be answered in the fifth part of this study. That part will make clear the impact which the ECJ’s case law has had on the national systems of tuition fees and educational grants. It will deal with both the direct implications for national regulations resulting from ECJ judgments as well as the broader implications that can be observed as a result of the Court’s activities.

The conclusion will then bring together the findings of the three parts and provide an answer to the general research question. It will also point out the limitations of this study and provide recommendations for further research.

3. An overview of students' rights according to European Union law

This part of the study offers to the reader an overview of both students' rights and Member States obligations in the area of higher education under Community law. By reviewing the relevant Treaty articles and secondary law provisions it will be explained which rights students can derive from Community law when they decide to pursue studies in a Member State of which they are not a national. Also it will be laid out which obligations consequently follow for the host state. Attention will especially be paid to the provisions governing students' right of residence, the conditions of access to educational institutions, the height of tuition fees and the eligibility for educational grants.

Beforehand however, in order to provide for the necessary theoretical background, the first two sections will provide some information on the Community's legal policy instruments and its competencies in the domain of higher education.

3.1 EU legal policy instruments

It is common ground that the European Union possesses various different policy instruments in order to pursue its objectives. Van Vught – “in accordance with the literature on policy-analysis”³ – differentiates between three categories: legal instruments, financial instruments and information and communication instruments⁴. Subsidies, loans and warranties are mentioned as examples of financial instruments, whereas the Open Method of Coordination and the communications published by the European Commission are pointed out as the most important instruments for information and communication⁵. For the aims of this research however, only the legal instruments are of further importance. They are generally divided into primary legislation, secondary legislation, and the jurisprudence of both the European Court of Justice and the Court of First Instance.

Primary European legislation is made up of the Treaties, their annexes and protocols – and it is legally binding. Secondary European legislation supplements primary legislation and is used by the European Union “to develop and implement its policies”⁶. Depending on the policy field in question and the objective(s) pursued, the Union can choose from an array of five different instruments in order to adopt a measure. These instruments are defined in Art. 288 TFEU (former Art. 249 EC) which reads as follows:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

³ Van Vught (2006), p. 29

⁴ Ibid.

⁵ Ibid., pp. 30f.

⁶ Ibid., p. 29

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Next to primary and secondary legislation, the third type of policy instruments is constituted by the judgments of the European Court of Justice and the Court of First Instance. The case law regarding students' rights and Member States obligations will be addressed in detail the next part of this paper⁷.

3.2 EU competencies in the field of higher education

For the longest time, the Community lacked competencies in the field of education. The Treaty establishing the European Economic Community, commonly referred to as EEC Treaty, did not contain any provisions on education at all. Consequently the EEC did not have any competencies with regard to education. Change was to come about only in 1992. With the Treaty of Maastricht, which turned the European Economic Community into the European Union, also the first provisions on education were included into the Treaties. The legal basis which provided the Union with competencies in the field of education were Art.149 EC (now Art.165 TFEU), which provided the following:

- 1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.*
- 2. Community action shall be aimed at:*
 - developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,*
 - encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,*
 - promoting cooperation between educational establishments,*

⁷ See p.20ff.

- *developing exchanges of information and experience on issues common to education systems of the Member States,*
- *encouraging the development of youth exchanges and of exchanges of socioeducational instructors,*
- *encouraging the development of distance education.*

[...]

As becomes very clear from the wording of that article, the competencies assigned to the Union were only marginal. The role of the Community in the domain of education was limited to the stimulation of co-operation between Member States and the support of their political activities. A harmonization of the laws and regulations of the Member States was even explicitly forbidden⁸. The contents of teaching and the design of the educational system thus remained competencies of the Member States⁹. The subsequent Treaty revisions have not changed much in this respect. “Amsterdam did introduce a new preamble to the Treaty of Rome, noting the determination of the High Contracting Parties to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating”¹⁰. And the Treaty on the Functioning of the European Union added to Art. 149 that the “Union shall contribute to the promotion of European sporting issues”¹¹. These amendments of the Treaties however did not have any significant influence on the Union’s competencies in the field of education. Still, the Union is only allowed to play a complementary role. Therefore also the subsidiarity principle remains to be applicable¹². According to that principle the Union shall abstain from taking action in fields which do not belong to its exclusive competencies unless “such action would be justified by the fact that the Member States cannot themselves sufficiently achieve the intended results”¹³.

From the foregoing it can thus be concluded that the Union’s competencies in the field of education, and therefore also in the domain of higher education, are very limited. The Union’s scope of action in the domain of higher education is both legitimated as well as limited on the one hand by the sovereignty of the Member States in this respective policy field and on the other hand by the principle of subsidiarity¹⁴.

⁸ See Art.149(4) EC

⁹ Ibid.

¹⁰ Dougan (2005), p.950

¹¹ See Art.165 TFEU

¹² See Bode (2005), p. 103

¹³ Van Vught (2006), p. 8

¹⁴ See Huisman & Van der Wende (2004), p. 1

3.3 Students' rights to move and reside freely within the territory of the Member States

This section of the text will present the rights that students can derive from primary and secondary EU law when it comes to free movement to and the residence within a Member State of which they are not a national.

Generally, students can be divided into two groups – on the one hand those who have the status of a worker either because they are economically active or because they have retained the status of a worker, and on the other hand those who are economically inactive. This distinction between the two groups was especially important before the Treaty of Maastricht came into effect. Back then, free movement of persons and the rights attached to it were reserved to economically active Community nationals¹⁵. That means that only persons belonging to this group could deduce from the Treaty directly a right to free movement as well as the right of residence in the host state where they were either employed or self-employed. Article 10(1) of Regulation 1612/68 EEC extends that right of residence in the host state to the migrant worker's spouse and his children. All other Community nationals, however, had to fulfill the criteria and conditions of the national legislation of the host state in order to be allowed to reside within its territory.

Since most students belonged to the group of Community nationals that were neither economically active nor the spouse or child of a migrant worker, only a very limited number of potential students was able to rely on the free movement and residence rights which Community legislation provided for¹⁶. Therefore, in order to “to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State”¹⁷ the Council adopted Directive 93/96 EEC of 29 October 1993 on the right of residence of students. According to that directive, “the Member States shall recognize the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children”¹⁸, if the following three conditions are fulfilled: the student is enrolled at an accredited educational institution in order to follow a vocational training course, he/she is covered by an all-risk health insurance, and can prove by means of a declaration or some equivalent measure that he/she has “sufficient resources to avoid becoming a burden on the social assistance system of the host Member State”¹⁹ during the stay. With the adoption of the so-called Students Directive, the Member States

¹⁵ See De Waele (2009), p. 261

¹⁶ See Jöllenbeck (2005), p.140

¹⁷ Directive 93/96 EEC, Art.1

¹⁸ Directive 93/96 EEC, Art.1

¹⁹ Ibid.

have granted a right of residence to economically inactive Community nationals directly for the first time. Even though the rights have been made conditional upon the fulfillment of the three criteria mentioned above, the directive has extended considerably the rights of students with regard to free movement and residence.

Three days after the adoption of the Students Directive, the Treaty of Maastricht entered into force. It contained the newly inserted 'Chapter on Citizenship', whose "central provision"²⁰, Art.17 EC (now Art.20 TFEU), stated the following:

1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.*
2. *Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.*

The rights which EU citizens could enjoy on the basis of that article were set out in Art.18 to 21 EC (now Art.21 to 24 TFEU) as well as secondary legislation based on Art.22 EC (now Art.25 TFEU)²¹. In the light of this study, the most important new right conferred on the nationals of the Member States was provided for by Art.18 EC (now Art.21 TFEU), which stipulated that:

1. *Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.*

[...]

As becomes clear from the wording of the article, it provides every Union citizen with a universal right to move and reside freely within the territory of the European Union, however limited in so far as that it is valid only with reservation to secondary law provisions. The criteria on which the right of residence was made conditional in the Students Directive therefore remain applicable even after the introduction of Union citizenship.

Even though the Treaty of Maastricht contained – with the new Art.18 EC – a universal freedom of movement provision, the special provisions for economically active Community nationals were kept within the Treaties. Therefore, Art.39 EC (now Art.45 TFEU) still granted to migrant workers a right to move and reside freely within the territory of the Member States, as did Art.43 EC (now Art.49 TFEU) for self-employed Community nationals and Art.49 EC (now Art.56 TFEU) for service providers. It can therefore be concluded that Art.18 EC was not intended to replace the special freedom of movement provisions, but rather to complement them. Consequently, Art.18 EC could serve as a *lex generalis*

²⁰ Chalmers et al. (2006), p. 567

²¹ Ibid.

provision, which applies only in those cases that the *lex specialis* conditions of Art. 39, 43, and 49 EC could not be invoked²².

On the 29th of April 2004 the European Parliament and the Council adopted Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which amended Regulation 1612/68 EEC and repealed Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, commonly referred to as the Citizenship Directive. The new directive thus brought together in one piece of legislation the “complex body of legislation”²³ that had emerged over the years. Up to a period of three months, Art.6 of Directive 2004/38/EC provides every Union citizen with an unconditional right of residence in another Member State. For a stay of more than three months Art.7 however makes a distinction between economically active and economically inactive Union citizens. Whereas an unconditional right of residence is granted to workers and self-employed persons according to Art.7, economically inactive Union citizens have to “have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay”²⁴ or “be following vocational training as a student and have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay”²⁵. Family members of Union citizens falling within one of the foregoing categories are also granted a right of residence²⁶. After five years of uninterrupted residence in the host state a Union citizen acquires an unconditional right of permanent residence in that state according to Art.16.

From the foregoing it can thus be concluded that, at the current state of European Union law, economically active students derive their right to move and reside freely within the territory of the Union directly from Art.45, 49, and 56 TFEU as well as from Art.7 of Directive 2004/38/EC. Their spouse and children receive the right of residence from Art.10 (1) of Regulation 1612/68 EEC and Art.7 of Directive 2004/38/EC. Economically inactive students can derive their right to move and reside freely within the territory of the Member States from Art.20 TFEU in conjunction with the provisions of Directive 2004/38/EC.

²² See Armbrecht (2005), pp. 181f.; Jöllenbeck (2005), pp. 138f.

²³ Retrieved August 17, 2010, from

http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/l33152_en.htm

²⁴ Ibid.

²⁵ Ibid.

²⁶ Regulation 2004/38/EC, Art.7

3.4 Students' right to equal access to educational institutions in the host state

A right of residence in the host state is the precondition for a student to be able to pursue his/her studies in that other Member State. Once that right of residence is established, in order to be able to actually attend courses, the student has to be admitted to an educational institution. This section of the text describes the rights which students can derive from primary and secondary EU law when it comes to questions of access to educational institutions in another Member State.

As far as primary law is concerned, students could base their claims to equal access to educational institutions in another Member State on the non-discrimination provision of Art.18 TFEU (former Art.12 EC, before Art.7 EEC), if access to educational institutions would be within the scope of the Treaties. Whether or not this is the case, is a highly discussed issue in the academic world.

The provisions of Regulation 1612/68 EEC and Directive 2004/38/EC shed more light on the issue. As far as Regulation 1612/68 EEC on the freedom of movement of workers is concerned, its Art.7(3) states that a migrant worker shall "by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres". Workers are thus granted direct access to educational institutions which deliver vocational training or retraining. Article 12 of the very same regulation stipulates that "[t]he children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as nationals of that State, if such children are residing in its territory". That means that migrant workers' children are granted equal access to all educational institutions of the host state which deliver primary and secondary education, apprenticeship courses or vocational training. However, Regulation 1612/68 EEC does not contain any provisions for self-employed persons or service providers.

Art.24(1) of Directive 2004/38/EC closes that gap by stipulating that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that member State within the scope of the Treaty". This right is extended those family members that do not possess the nationality of a Member State of the Union, but do have the right of residence or hold a residence permit. It follows that since 2004 all Union citizens, whether or not economically active, as well as certain family members can claim a right to equal access to educational institutions in the host state on the basis of Art.24 of the Citizenship Directive. Supplementary entrance conditions or additional enrolment fees for non-nationals are thus to be considered as illegal.

3.5 Students' right to be charged equal tuition fees

Once admitted to an educational institution in another Member States, students pursuing an education in a Member State that charges tuition fees will be required to pay these fees as well. The question that arises is whether a host state may charge higher tuition fees from non-nationals than from its own nationals. This section will deal with the rights that students can derive from primary and secondary EU law when it comes to the height of tuition fees.

As far as migrant workers are concerned, they are granted equal treatment to the nationals of the host state by Art.7 of Regulation 1612/68 EEC. Migrant workers' children can claim equal treatment on the basis of Art.12 of the very same regulation. Consequently neither migrant workers nor their children may be charged higher tuition fees than the nationals of the host state.

When it comes to economically inactive migrant students, no primary or secondary law provision granted to them the right of equal treatment directly. Again, Art.18 TFEU (former Art.12 EC, before Art.7 EEC) could be invoked in order to claim equal treatment with regard to the height of tuition fees, if such fees would be within the scope of the Treaties. However, the Treaties do not contain any clear provisions on that matter. Therefore, only if the European Court of Justice would find the matter to fall within the scope of the Treaty, these students could invoke a right to equal treatment.

3.6 Students' right to receive educational grants

Many countries support their students by making available some sort of educational grants such as student grants and loans in order to help their students cover the costs of training and maintenance. But do foreign students that reside and study in another Member State have a right to claim equal treatment with regard to nationals of the host state in order to receive those grants? Or are Member States allowed to treat their own nationals preferentially and refuse to non-nationals the access to educational grants? This section will reveal which rights students can derive from primary and secondary EU law concerning the eligibility for educational grants.

The Treaties do not contain any articles dealing explicitly with educational grants. All provisions regulating the issue are contained in Regulation 1612/68 EEC, Directive 93/96/EEC and Directive 2004/38/EC. Migrant workers and their children were the first who received the right to be treated equally to nationals of the host state. Migrant workers received their right from Art.7(2) of Regulation 1612/68 EEC according to which they were to "enjoy the same social and tax advantages as national workers". Their children could deduce their right to educational benefits from Art.12 of the same regulation – as long as they were resident in the host state. No provisions were however made with regard to self-employed people and service providers, and also the spouse of the migrant

worker was not considered. As Regulation 1612/68 EEC deals with the freedom of movement of workers, provisions on economically inactive Community nationals were also absent.

The situation of economically inactive migrant students was dealt with by Directive 93/96/EEC, which explicitly ruled out any entitlement of those students to maintenance grants paid by the host state²⁷. Consequently, such students could only claim equal treatment to nationals of the host state with regard to educational grants covering the costs of access to the educational institution, such as enrollment and tuition fees.

Currently Directive 2004/38/EC governs the matter. According to its Art.24(2) the only persons entitled to claim from the host state educational benefits such as students grants and students loans are workers, self-employed persons, persons who retain such status and members of their families. In order to retain the status of worker as a student, the education pursued has to be related to the previous employment²⁸. As family members are considered the spouse or registered partner of the migrant worker, his children under the age of 21 and dependent direct relatives in the ascending line. Thus, at the current stage of EU law, only economically inactive migrant students that cannot invoke the status of a worker are excluded from equal treatment with regard to the nationals of the host state when it comes to maintenance grants. However, all Union citizens can claim from the host state educational benefits intended to cover the costs of access to education.

²⁷ See Directive 93/96/EEC, Art.3

²⁸ See Directive 2004/38/EC, Art.7(3)(d)

4. The role of the European Court of Justice in the enhancement of students' rights

In the previous part of this study van Vught's distinction between the different EU policy instruments has been introduced. Next to financial as well as information and communication instruments, he has pointed to the EU's legal policy instruments. These were further distinguished into primary law, secondary law and the case law of the European Court of Justice and the Court of First Instance. While the foregoing part has presented the primary and secondary law provisions which govern students' rights, this part will deal with the case law of the European Court of Justice. It aims to find out which new rights and obligations have been established or recognized for students by the ECJ, and to which extent the ECJ can thus be said to engage in judicial activism.

4.1 The concept 'judicial activism'

The following sections will introduce the reader to the concept 'judicial activism' and provide an operationalization which makes possible its application in the European context of this study.

4.1.1 Origin of the concept

Judicial activism is a concept which was developed by scholars of the political and social sciences in the United States of America²⁹. It "emerged from a complex tradition of judicial critique"³⁰ during the 19th and 20th centuries. Especially during "the first half of the twentieth century a flood of scholarship discussed the merits of judicial legislation"³¹, however, it was not until 1947 that the term 'judicial activism' was actually coined by Arthur M. Schlesinger Jr. in his *Fortune* magazine article called "The Supreme Court: 1947". In that article Schlesinger portrayed the nine sitting Supreme Court justices and identified each Justice to belong to either the group of "Judicial Activists" or the camp of "Champions of Self Restraint" or the middle group in between. Schlesinger tried to give content to the two contrary approaches with the following words:

"This conflict may be described in several ways. The Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint. One group is more concerned with the employment of the judicial power for their own conception of the social good; the other with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn. One group regards the Court as an instrument to achieve desired social

²⁹ See De Waele (2009), p. 45

³⁰ Green (2009), p. 1209

³¹ Kmiec (2004), p. 1445

*results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse*³².

Thus, whereas the activists are characterized as giving meaning to laws by interpreting provisions through their very own social preferences lens, the self-restrained judges are described as clinging to the fixed meaning of legal provisions, leaving it to the other branches of government to make law. The problem with Schlesinger's article however is that a clear and precise definition of what the term 'judicial activism' really means is missing³³. Instead of providing for clear and measurable features of what would make a judge's decision activist, Schlesinger's activism concept remains vague actually because he "ascribes so many attributes to the Judicial Activists and the Champions of Self Restraint that it is impossible to determine which ones are necessary, sufficient, or superfluous"³⁴.

4.1.2 Current meanings of the concept

The concept 'judicial activism' was imprecise from its very beginning onwards. Schlesinger did not provide a clear definition when he introduced the term, and in subsequent years scholars were unable to agree on a single definition for the concept. Therefore now, more than 60 years after the term 'judicial activism' has been coined, the concept remains to be vague. Over time, it has come to embrace various meanings and multiple dimensions, and was "defined in a number of disparate, even contradictory, ways"³⁵. It therefore does not come as a surprise that only recently the concept has been referred to as "notoriously slippery"³⁶. This section aims at providing an overview of the different meanings which are currently connected with the concept 'judicial activism', before in the next section the concept will be operationalized for the purposes of this specific study.

In general, 'judicial activism' is a concept that is strongly tied to the review and evaluation of a court's exercise of its judicial role. It is often employed to show disagreement with a court's ruling and used as a "key framework for criticizing judges' conduct"³⁷. Usually 'judicial activism' carries the criticism that a court is "inappropriately interfering in matters outside its proper sphere"³⁸ and that the "judiciary is acting like a legislature instead of a court"³⁹. 'Judicial activism' thus "alludes to judges overstepping constitutional boundaries, taking over and even accepting the role of the legislator"⁴⁰.

³² Schlesinger (1947) in Kmiec (2004), pp. 1446f.

³³ See e.g. Kmiec (2004) and Green (2009)

³⁴ Kmiec (2004), p. 1450

³⁵ Ibid., p.1443

³⁶ Easterbrook (2002) in Kmiec (2004), p. 1442

³⁷ Green (2009), p. 1198

³⁸ Brown (2002), p. 1259

³⁹ Cross & Lindquist (2007), p. 1756, internal quotations omitted

⁴⁰ Micklitz (2009), p. 4

This phenomenon is commonly referred to as “legislating from the bench”; a notion coined by George W. Bush when he said: “I want people on the bench who don’t try to use their position to legislate from the bench. We want people to interpret the law, not try to make law and write it”⁴¹.

Next to this generally shared understanding of the concept ‘judicial activism’, activism is assumed to embrace various dimensions. Those are however highly discussed among academics. Different scholars have come up with various dimensions, so trying to describe the concept’s meaning more clearly and determine which actions can be counted as ‘activist’. In his 1983 article “Defining the Dimensions of Judicial Activism” Bradley C. Canon has identified the following six dimensions of judicial activism:

(1) Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated.

(2) Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered.

(3) Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used.

(4) Substance/Democratic Process Distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of democratic processes.

(5) Specificity of Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other [governmental actors].

(6) Availability of an Alternate Policymaker—the degree to which a judicial decision supersedes serious consideration of the same problems by other [political actors].⁴²

In 2002 also Ernie Young published a list of characteristics of ‘judicial activism’. It contained the following six items:

(1) second-guessing the federal political branches or state governments;

(2) departing from text and/or history;

(3) departing from judicial precedent;

(4) issuing broad or “maximalist” holdings rather than narrow or “minimalist” ones;

(5) exercising broad remedial powers; and

(6) deciding cases according to the partisan political preferences of the judges⁴³

⁴¹ Public Papers of the Presidents of the United States, Administration of George W. Bush, 2002; p.521f.; see also Kmiec (2004), p.1471

⁴² Canon (1983) in Cross & Lindquist (2007), p.1762f.

⁴³ Young (2002) in Cross & Lindquist (2007), p.1763

According to Keenan D. Kmiec 'judicial activism' comprises the following "five core meanings"⁴⁴:

- (1) *Invalidation of the arguably constitutional actions of other branches*
- (2) *Failure to adhere to precedent*
- (3) *Judicial "legislation"*
- (4) *Departures from accepted interpretive methodology*
- (5) *Result-oriented judging*⁴⁵

Whereas the dimensions attributed to the concept 'judicial activism' differ from scholar to scholar, some similarities can be identified between the various conceptualizations presented above. Firstly, all three authors consider a court's decision as activist when the court invalidates a policy that has been adopted by a democratically elected branch. Secondary, invalidating or ignoring precedent is as well considered to be "activist" by all three scholars. What however becomes especially clear from the foregoing examples is that 'judicial activism' generally comes along with a bad connotation.

Yet, "[n]ot all forms of judicial activism are universally condemned"⁴⁶. Invalidating an unconstitutional act and thereby safeguarding the rights of citizens or minorities living in a country would probably not be called 'activist' but rather be praised⁴⁷. This reasoning is shared by Brown. She holds her very own view on the matter:

*"I understand activism to be a court's willingness to apply its best understanding of the Constitution's requirements even if that means invalidating the acts of more accountable governmental bodies and even if it means alienating large sectors of the public. In my view, that is the purpose of an independent judiciary in the constitutional system that we have. Alexander Hamilton referred to the judiciary as "the citadel of the public justice;" I am inspired by any Court that seeks to live up to that description"*⁴⁸

According to her, it is not important whether a court engages in judicial activism, but rather whether and in how far it can give good reasons for its activism and thus defend its ruling⁴⁹.

⁴⁴ Kmiec (2004), p. 1444

⁴⁵ Ibid.

⁴⁶ Cross and Lindquist (2007), p. 1753

⁴⁷ See De Waele (2009), pp. 34f.

⁴⁸ Brown (2002), p. 1271,

⁴⁹ Ibid., p. 1270

4.1.3 Operationalization of the concept

As becomes clear from the above overview of the current meanings attached to the concept 'judicial activism' the "debate and the parameters are very much dominated by American scholars who discuss judicial activism in the context of the American Constitution and the role of the Supreme Court"⁵⁰. Only in the 1970's the concept crossed the Atlantic and entered the European academic scene⁵¹. Meanwhile it has become more popular with European scholars who especially employ the concept when reviewing the judgments of the European Court of Justice⁵². This study, too, wants to apply the concept to the ECJ. By reviewing its case law in the domain of student's rights it shall be established whether or not the European Court of Justice engages in judicial activism in this special domain. At first, however, the concept 'judicial activism' has to be clearly operationalized for the purposes of *this* study, because only when the concept "is clearly defined, it can function as an instrument for constructive discussion"⁵³.

A tool for measuring judicial activism that is especially popular with US scholars is the conventional standard of social science, which is "the extent to which judges invalidate legislative enactments"⁵⁴. Accordingly, judicial activism is measured by counting the number of votes of a Supreme Court judge brought in favor of invalidating a statute, because he/she considered it as unconstitutional. The legitimate question arising at this stage is then why we cannot simply take over that operationalization used by American scholars. The answer to this question is manifold. First of all, the European context is very different from the American one. Whereas the United States is a nation state with an own constitution, the European Union is neither a single state, nor does it have a constitution or anything that could be compared to the Constitution of the United States. Rather, the EU is often seen as *sui generis* phenomenon with a unique legal order. Following from that distinct legal order of the Union, also the role of the European Court of Justice is often considered to be a special one⁵⁵. Therefore, the ECJ cannot be compared to the US Supreme Court. Unlike the Supreme Court, the ECJ cannot invalidate constitutional enactments of the Member States – that is the task of the national Constitutional courts. It is only allowed to give interpretations on European Union law for provisions that are not sufficiently clear. Obviously, applying the constitutional standard is therefore practically impossible. Finally, the judgments issued by the Court of Justice are so-called consensus judgments in which the single opinions of the various judges are not included⁵⁶. It is

⁵⁰ Micklitz (2009), p. 4

⁵¹ See De Waele (2009), p. 45

⁵² See e.g. Cartabia (2009), Micklitz (2009), Tryfonidou (2009)

⁵³ Kmiec (2004), p. 1444

⁵⁴ Cross & Lindquist (2007), p. 1759

⁵⁵ See Micklitz (2009), p. 4; for a critique on that view see De Waele (2009), pp. 70 ff.

⁵⁶ See De Waele (2009), p.371f.

therefore impossible to know, which judge has expressed what particular opinion. The conventional standard is however focused on individual judges. Again, it is therefore practically impossible to apply it to judgments of the European Court of Justice.

Since the conventional standard cannot be applied to the case law of the ECJ, there is a need for an operationalization of the concept 'judicial activism' that fits the European context of *this* study. The remaining part of this section will present the measurement criteria that will be applied in this study in order to measure judicial activism. Hence, an ECJ ruling will be regarded as activist, if at least one of the following measurement criteria is satisfied:

- (1) Departure from precedent – the degree to which the ECJ ignores or departs from judicial precedent
- (2) Unnecessarily broad opinion – the degree to which the ECJ makes statements that exceed the questions of the referring judge or are applicable beyond the unique circumstances of the case
- (3) Deviation from accepted interpretative methodology⁵⁷ - the degree to which the ECJ violates the basic principle of law that rights come into existence only when they are explicitly awarded, not when they are not excluded
- (4) Maximalist interpretation – the degree to which the ECJ interprets Treaty Articles or secondary law provisions reflationary or applies a *lex generalis* Article to a case instead of the applicable *lex specialis* Article
- (5) Interpretive fidelity⁵⁸ - the degree to which the ECJ interprets Treaty Articles or secondary law provisions “contrary to the clear intentions of their drafters or the clear implications in the language used”⁵⁹
- (6) Ignorance of applicable Treaty articles or secondary law provisions – the degree to which the ECJ fails to apply the appropriate Treaty Articles or relevant secondary law provisions to a case
- (7) Legislating from the bench – the degree to which the ECJ intervenes into the policy-making process by creating its own criteria and doctrines or re-writing the law

⁵⁷ Following Kmiec (2004)

⁵⁸ Following Canon (1983)

⁵⁹ Canon (1983) in Cross & Lindquist (2007), p.1762f.

4.2 Judicial analysis of ECJ case law in the domain of students' rights

The following sections will provide a chronological review and analysis of the ECJ's case law in order to assess whether or not the European Court of Justice has engaged in judicial activism in the domain of students' rights.

4.2.1 Gravier⁶⁰

The Gravier judgment represents the first important ruling of the ECJ concerning the topic of cross-border student mobility. It constitutes the starting point of a series of judgments on the rights of EEC and – later – EU students studying in a Member State other than their country of origin.

Françoise Gravier, a French national, enrolled at the Belgian Académie Royal des Beaux Arts in 1982 in order to follow a four-year course on strip cartoon art. In 1983 an enrolment fee called *minerval* was introduced by the Belgian Minister of Education “for pupils and students who are not of Belgian nationality and who attend an institution of full-time artistic education organized or subsidized by the state”. Exempted were children of migrant workers and migrant workers themselves as well as students of Luxembourg nationality. Belgium justified the introduction of the *minerval* with the imbalance of its higher education budget, which was said to be a result of the imbalance between the number of Belgian students studying in other Member States and the number of foreign students studying in Belgium. These foreign students, it was argued, should contribute to the costs of their education in Belgium by paying the *minerval*. Gravier, however, felt discriminated against on the basis of her nationality and challenged the legality of the *minerval* by arguing that it was in breach with the non-discrimination principle of Article 7 EEC (later Article 12 EC, now Article 18 TFEU).

In its judgment, the ECJ came to the conclusion that “the imposition on students who are nationals of other Member States, of a charge, a registration fee or the so-called *minerval* as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the [EEC] Treaty”⁶¹.

This finding might in itself not be very surprising, as the non-discrimination principle is a basic principle of Community law. However, the Court was only able to declare the Belgian measure to be in breach with Community law, because it found the matter of the case to fall within the scope of application of the (EEC) Treaty. This was only possible, because the Court attached a very broad meaning to the term ‘vocational training’, which was defined as “any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the

⁶⁰ Case 293/83 (Gravier)

⁶¹ *Ibid.*, para.15

necessary training and skills for such a profession, trade or employment ... whatever the age and the level of training of the pupils or students, and even if the training program includes an element of general education”⁶². Following this statement, it was possible for the ECJ to include higher education into the ambit of the Treaty and to declare the Belgian measure invalid.

The extension of Art.128 EEC through the attachment of such a broad meaning to the term ‘vocational training’ is however highly questionable and was probably not intended by the Member States. That the ECJ interpreted the article contrary to the clear intentions of the drafters as well as contrary to the clear implications of the wording used becomes obvious through the use of the term ‘vocational training’ as opposed to and clearly to be distinguished from the term ‘general education’⁶³. Next to interpretive fidelity, the Court also engaged in maximalist interpretation when it “interpreted Art.128 EEC as a source of individual rights, despite the fact that it merely provided for the establishment of general principles for a common vocational training policy”⁶⁴. Moreover did the ECJ heavily intervene into the policy-making process, and thus engaged in legislating from the bench, by establishing a Community-wide right to equal access to vocational training institutions⁶⁵. From the foregoing it can thus be concluded that in *Gravier* the Court went beyond the boundaries of proper legal practice by engaging in judicial activism.

4.2.2 Blaizot⁶⁶

Following the *Gravier* ruling, Vincent Blaizot and 16 other French nationals studying veterinary medicine at various Belgian universities requested – from their respective universities – the repayment of the supplementary enrolment fees which they had paid every year. Their requests, however, were refused and so they initiated proceedings against the Belgian state. At the same time, also reacting to the *Gravier* ruling, Belgium implemented a new law in order to regulate the payment of the *minerval*. For Belgium, the term “vocational training” as it was defined in *Gravier* did not include university studies. Therefore, according to the new rules, migrant workers and their spouses as well as non-Belgian nationals coming to Belgium in order to pursue vocational training courses

⁶² Ibid., para.30

⁶³ See Bode (2005), p.43f: “Allerdings entsprach diese weite funktionale Betrachtungsweise des EuGH sicherlich nicht der ursprünglichen Auffassung der Vertragsparteien über den Begriff der Berufsausbildung in Art.128 EWGV. Bereits die Verwendung des Begriffs „Berufsausbildung“ zeigte, dass ein Unterschied zur „allgemeinen Bildung“ beabsichtigt war.“

⁶⁴ Golyner (2006), p.3

⁶⁵ Bode (2005), p.266f: “Die Auffassung des Gerichtshofs in der *Rs. Gravier* lässt sich daher kaum mit den Grenzen des EG-Vertrages vereinbaren. Für den gleichberechtigten Zugang zu Bildungseinrichtungen innerhalb der EG hat der EuGH damit allerdings rechtsverbindliche Vorgaben geschaffen, von denen die Mitgliedsstaaten nicht abweichen konnten. Studierenden kommt seitdem ein gemeinschaftsweites Recht auf diskriminierungsfreien Zugang zu den Bildungseinrichtungen der Mitgliedsstaaten zu.“ (original emphasis)

⁶⁶ Case 24/86 (Blaizot)

were exempted from having to pay the *minerval*, whereas non-Belgian students coming to Belgium in order to pursue university studies were required to pay the supplementary enrollment fee every academic year. Consistent with that reasoning, the new law also stipulated that only students that had followed vocational training courses between 1976 and 1984 were able to claim back their *minerval* payments if they have initiated proceedings before the date that the Gravier judgment was issued. The Belgian court referred to the European Court of Justice the question whether the “financial conditions governing the access to university courses ... fall within the scope of application of the Treaty, within the meaning of article 7 thereof”⁶⁷. This comes down to question whether or not the term ‘vocational training’ does embrace university studies.

After referring to its ruling in Gravier, the ECJ went on to state that “neither the provisions of the Treaty, in particular Article 128, nor the objectives which these provisions seek to achieve, ..., give any indication that the concept of vocational training is to be restricted so as to exclude all university education”⁶⁸. The Court then determined, that the term vocational training would not only embrace university studies “where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide scientific training and skills, that is to say where a student needs the knowledge so acquired for the pursuit of a profession, trade or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose”⁶⁹. The ECJ only excluded those university studies, that were designed to develop the general knowledge of its students rather than to prepare students for an occupation⁷⁰.

In Blaizot the Court thus extends, but to a certain amount also clarifies, the judgment which it had delivered in Gravier. Since Blaizot also university education is included in the term ‘vocational training’. Therefore the matter in Blaizot fell within the scope of the Treaty and the *minerval* as a supplementary enrolment fee was declared invalid by the European Court of Justice, because it constituted discrimination within the meaning of Art.7 EEC. Again the Court engaged in maximalist interpretation, through attaching an even broader meaning to the term ‘vocational training’, and in interpretive fidelity, by interpreting Art.128 EEC contrary to both the intentions of its drafters and the wording of the article itself. Since Blaizot, students enjoyed equal access rights to even more educational institutions, namely higher education institutions and universities. That way the ECJ once again intervened into the policy-making process, and engaged in legislating from the bench, by

⁶⁷ Ibid., para.7

⁶⁸ Ibid., para.17

⁶⁹ Ibid., para.19

⁷⁰ Ibid., para.20

creating legally binding provisions for the Member States which considerably enhanced the rights of students. Also in *Blaizot* the Court went beyond the boundaries of proper legal practice.

4.2.3 *Lair*⁷¹

In *Lair*, the court – for the first time – had to deal with the question whether or not community nationals could claim access to educational grants offered by the host state to its own nationals. The issue was raised by Sylvie *Lair*, a French national, who came to Germany in 1979. After having worked as a bank clerk for two and a half years, she found herself in phases of retraining, unemployment and employment between July 1981 and September 1984. In October 1984 she started a full-time study of Romance and Germanic languages and literature at the University of Hannover. She claimed a maintenance and training grant, which however was refused because she was not considered to have fulfilled the conditions to be eligible for such assistance. Germany granted maintenance and training grants only to foreigners “who have resided and been engaged in regular occupational activity in the Federal Republic for a total period of five years prior to the commencement of the part of the training course for which assistance is available”⁷². Germany justified this additional condition applied only to foreigners with the argument that it is the taxes and social security contributions of workers which enable it to pay maintenance and training grants in the first place.

The Court of Justice referred to its judgments in *Gravier* and *Blaizot*, repeating that conditions of access to vocational training fall within the scope of the Treaty and that university studies generally fulfill the conditions to be included into the concept of vocational training⁷³. On the basis of these statements, the Court concluded that only assistance “intended to cover registration and other fees, in particular tuition fees, charged for access to education”⁷⁴ could be deemed to fall within the scope of the Treaty because they were related to conditions of access. Maintenance and training grants, however, were “at the present stage of development of Community law”⁷⁵ considered to fall outside the scope of the Treaty, because they belong to matters of educational and social policy, and therefore fell into the competences of the Member States⁷⁶.

This distinction between the different grants does not follow logically. Both access conditions to educational institutions as well as educational grants are matters of educational policy. In *Gravier* the Court found conditions of access to education to fall within the scope of the Treaty, “although educational organization and policy are not as such included in the spheres which the Treaty had

⁷¹ Case 39/86 (*Lair*)

⁷² *Ibid.*, para.3

⁷³ *Ibid.*, para.12

⁷⁴ *Ibid.*, para.14

⁷⁵ *Ibid.*, para.15

⁷⁶ *Ibid.*

entrusted to the Community institutions”⁷⁷. The exclusion of educational grants from the scope of the Treaty therefore seems somehow arbitrary⁷⁸. But for all that, this first part of the judgment cannot be regarded as departure from precedent.

In the second part of its judgment in *Lair*, the Court ruled that maintenance and training grants for university studies that lead to a professional qualification are a social advantage within the meaning of Article 7(2) of Regulation 1612/68 EEC⁷⁹. Furthermore it declared that a Community national who has ceased to work in order to engage in full-time studying in the state where he has worked retains the status of a worker, if there is a connection between the previous occupation and the studies⁸⁰. Continuity is not expected for migrants that have become unemployed involuntarily and have to engage in retraining as a consequence⁸¹. Since the concept of migrant worker has already been defined by the ECJ, the Court declared invalid the restriction of access to maintenance and training grants for migrant workers by additional criteria such as the German five year provision⁸². With this second part of the judgment, the ECJ has expanded the concept of migrant worker to the time period that a Community national stopped working and is no longer economically active. Furthermore, by assigning training and maintenance grants to the category of social advantages covered by Regulation 1612/68 EEC, the ECJ also expanded the rights of migrant workers by granting them access to training and maintenance grants for studies in the host state under the same conditions as national workers. By broadening the meaning attached to the concept of migrant worker, the ECJ engaged in maximalist interpretation. It can also be assumed that the Member States did not intend to grant the status of migrant worker to a person that has ceased all economic activities. Therefore, the Court can also be said to have engaged in interpretive fidelity. Again the Court intervened in the policy-making process, and thus engaged in legislating from the bench, by increasing the rights of students. The decision to facilitate the studies of former migrant workers that have decided to pursue studies in the host state should have been a political decision of the Member States, not a decision of the European Court of Justice. In *Lair* the Court has once more exceeded the boundaries of proper legal practice.

⁷⁷ Case 293/83 (*Gravier*), para.19

⁷⁸ See Bode (2005), p.266f.

⁷⁹ Case 39/86 (*Lair*), para.28

⁸⁰ *Ibid.*, para.37

⁸¹ *Ibid.*

⁸² *Ibid.*, para.44

4.2.4 Brown⁸³

On the same day that the ECJ gave its judgment in *Lair*, it also ruled on *Brown*. Steven Malcom Brown, Community citizen possessing dual French and British nationality, was raised in France and came to Edinburgh at the beginning of 1984 in order to work there for a company for eight months. At that point in time he had already arranged everything to start full-time studies at Cambridge University from October 1984 onwards. He applied for a student's allowance which consisted of a maintenance grant and the direct payment of his tuition fees by the Scottish Education Department. His application was however refused and so Brown initiated proceedings against the Secretary of State for Scotland. He based his claims on Articles 7 and 128 EEC as well as on Regulation 1612/68 EEC.

The Court first had to establish whether Brown could be considered a migrant worker. It referred to its former case law and held that "any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a worker"⁸⁴ and that the "essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration"⁸⁵. It also referred to former case law where it prohibited Member States to come up with further criteria⁸⁶. It then concluded that it made no difference that Brown was only employed by his employer because he had already been accepted at the university. Brown was therefore to be regarded as a migrant worker⁸⁷.

The Court then however restricted the access to maintenance grants by ruling that "it cannot be inferred from that finding that a national of a Member State will be entitled to a grant for studies in another Member State by virtue of his status as a worker where it is established that he acquired that status exclusively as a result of his being accepted for admission to university to undertake the studies in question. In such circumstances, the employment relationship, which is the only basis for the rights deriving from Regulation No 1612/68, is merely ancillary to the studies to be financed by the grant"⁸⁸.

In *Brown* the Court thus restricted the access of migrant workers to maintenance and training grants in order to ensure the proper functioning of the Treaty and prevent the exploitation of Community law. That the measures it took to reach this aim can be regarded as being completely proportionate

⁸³ Case 197/86 (*Brown*)

⁸⁴ Case 197/86 (*Brown*), para.21

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, para.22

⁸⁷ *Ibid.*, para.23

⁸⁸ *Ibid.*, para.27

becomes very clear if one imagines the consequences that would have occurred if the ECJ would not have restricted the access. Actually then every Community national could have worked for a short period in the country where he or she planned to pursue her studies, and could then have claimed maintenance and training grants from the host state. This would have had massive implications for the financial budgets of the Member States and would surely have evoked massive protest of the Member States. In *Brown*, no indications for an activist ruling can be found.

4.2.5 Echternach and Moritz⁸⁹

Echternach and Moritz were two German nationals studying in the Netherlands. Their application for study finance was rejected by the Dutch authorities on the grounds that both students were not considered as children of a migrant worker. Due to this similarity their cases were joined. Especially important for this study is the situation of Moritz, who completed his primary and secondary education in the Netherlands, while his father was employed at the Dutch branch of a Dutch-German company. After Moritz began his studies at a Dutch technical college, his father was transferred to the German branch of his company. Since the German college at Münster did not recognize Moritz' Dutch diplomas, he re-enrolled at the Dutch college to finish his studies there. As, however, his father was not employed in the Netherlands anymore the Dutch authorities refused Moritz' application for study assistance because according to them he could not be considered the child of a migrant worker any longer⁹⁰. Moritz appealed to this decision. Accordingly, in the joined cases *Echternach and Moritz* the court had to deal with the question "whether a child of a worker of a Member State who has been employed in another Member State may be regarded as a member of a worker' s family within the meaning of Regulation No 1612/68 when that child, after leaving the territory of the host country with his family in order to live in the country of origin, returns alone to the host country in order to continue his studies, which he could not pursue in the country [of] origin"⁹¹.

The Court in its judgment explicitly upheld the arguments expressed by the European Commission and the Portuguese government, who both argued that Regulation 1612/68 EEC grants rights to the children of a migrant worker who "is or has been employed" in the host state⁹². It also agreed with

⁸⁹ Joined cases 389/87 and 390/87 (*Echternach and Moritz*)

⁹⁰ *Echternach* was not regarded as a child of a worker because his father worked for an international organization within the Netherlands, and the Dutch authorities argued that therefore the rights linked to freedom of movement of workers was not applicable to him. As however the concept of migrant worker is not the main topic of interest in this study, the Court's discussion of whether *Echternach's* father can or cannot be regarded as a migrant worker will not be discussed here any further. The interested reader is referred to the text of the Court's judgment as well as to the relevant literature.

⁹¹ Joined cases 389/87 and 390/87 (*Echternach and Moritz*), para.16

⁹² *Ibid.*, para.19

the two parties that the social advantages which are granted through Regulation 1612/68 EEC to migrant workers' family members are intended to promote the integration into the society of the host country⁹³. It added that the regulation "expressly"⁹⁴ provides for the right of the child of a Community worker to attend school and pursue further education in the host country⁹⁵. From this the court concluded that if, after a family's return to their home state, the child of a migrant worker "cannot continue his studies there because there is no coordination of school diplomas and has no choice but to return to the country where he attended school in order to continue studying, he retains the right to rely on the provisions of Community law as a child "of a national of a Member State who is or has been employed in the territory of another Member State""⁹⁶ according to Art.12 of Regulation 1612/68 EEC. However, in order to be able to rely on its rights after returning to the host country, the child's pursuit of education in the host state has to be continuous⁹⁷.

Following this conclusion the question arose of whether or not children of migrant workers were entitled to receive training and maintenance grants from the host state under the same conditions as nationals of that state. The Court referred to its judgment in *Lair*, where it had ruled that training and maintenance grants constitute social advantages within the meaning of Article 7(2) of Regulation 1612/68 EEC⁹⁸. It then extended this principle to the children of migrant workers that are admitted to educational institution of the host state⁹⁹.

As far as the first part of the judgment is concerned, the ruling cannot be said to be completely in line with the intentions and wording of Art.12 of Regulation 1612/68 EEC. The ECJ has pointed out that the article explicitly refers to the children of a migrant worker "who is or has been employed" in the host state. The ECJ's conclusion that the children of migrant workers retain the status of a family member even if the migrant worker does not live in the host state anymore therefore follows clearly from the provisions of Regulation 1612/68 EEC. That the Court however limits this finding to cases in which the education has been continuous does not follow logically. There are no indications in the wording of Art.12 that suggest such an intention of the drafters. According to Art.12 all children of a migrant worker who are resident in the host state have to be admitted to that states educational system. The article even asks Member States to "encourage all efforts to enable such children to attend these courses". The only condition attached is the residency requirement. Thus, when the ECJ came up with its condition of continuous education, not only did it interpret Art. 12 of Regulation

⁹³ Ibid., para.20

⁹⁴ Ibid., para.21

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid., para.22

⁹⁸ Ibid., para.34

⁹⁹ Ibid., paras.34f.

1612/68 EEC contrary to the clear implications in the language used, but it also engaged in legislating from the bench by attaching an own criterion to Art. 12. However, to put these findings into perspective, it has to be noted that the implications of the supplementary requirement are probably not very serious.

In the second part of its judgment the ECJ extended the right to receive maintenance and training grants from the group of migrant workers also to the group of children of migrant workers. This extension can be backed by the last part of Art.12 according to which Member States shall promote the inclusion of children of migrant workers into their educational systems “under the best possible conditions”. The payment of maintenance and training grants can surely be said to facilitate the inclusion into the educational system as well as the success of students, because they are financially secured and can focus on their studies. Therefore, it can be stated that only in the first part of the judgment the ECJ the Court was judicially active, as it engaged in both interpretive fidelity and legislating from the bench. However, as has already been indicated above, as the implications can be anticipated to be rather marginal the Courts behavior can be rated as minor judicial activism.

4.2.6 Di Leo¹⁰⁰

Di Leo can be regarded as a follow-up case to Echernach and Moritz. Whereas in the latter case the Court had decided that children of migrant workers are eligible for maintenance and training grants from the host state if they are also resident in that state, in Di Leo the Court had to answer the question whether children of migrant workers also would have to be paid educational grants by the host state if they pursued their education or training in another Member State, in particular their home state.

The question was raised by Carmina di Leo, an Italian national, whose father had been employed in Germany for the past 25 years. Di Leo herself had received her primary and secondary education in Germany. After finishing school, she decided to study medicine at the University of Sienna in Italy. She applied for a German educational grant which the German authorities refused on the grounds that she was no longer resident in Germany and therefore did not fulfill the residency requirement of Art.12 of Regulation 1612/68 EEC.

According to the Court, however, Regulation 1612/68 aims at promoting “the best possible conditions for the integration of the Community worker’s family in the society of the host country”¹⁰¹. The child therefore should have the same opportunities in choosing his course of study

¹⁰⁰ Case C-308/89 (Di Leo)

¹⁰¹ Ibid., para.13

as nationals of that host state¹⁰². The right to equal treatment cannot, therefore, depend on the place where the child attends his courses¹⁰³. This reasoning of the Court is clearly contrary to the intentions of the drafters of Regulation 1612/68 EEC as well as contrary to the implications of the language used in Art.12 of that regulation. With Regulation 1612/68 EEC the Member States aimed at facilitating the integration of a migrant worker and his family into the society of the host state. They agreed that in order to reach that aim it is important to include the children of migrant workers into the educational system of the host state. However, they clearly restricted the measures to promote such inclusion to children that are actually resident in the host state. Here, the ECJ thus undoubtedly engaged in interpretive fidelity when it interpreted Art.12 of Regulation 1612/68 EEC contrary to the clear intentions of the drafters and the wording of the article.

The Court then went on by stating that as migrant workers have to be treated equally to nationals of a host state according to Art. 7(2) of Regulation 1612/68 EEC, so have their children a right to equal treatment according to Art.12 of the same regulation¹⁰⁴. As a result, “where a Member State gives its nationals the opportunity to obtain a grant in respect of education or training provided abroad, the child of a Community worker must enjoy the same advantage if he decides to pursue his studies outside the host State”¹⁰⁵. According to the ECJ, that argumentation remains valid even if a child decides to follow courses in his state of origin, because “[n]either the condition of residence laid down by Article 12 nor the objective pursued by Regulation No 1612/68 justifies such a restriction”¹⁰⁶. Without doubt, at this point the ECJ thus deviated from accepted interpretative methodology by violating the basic principle of law that rights come into existence only when they are explicitly awarded, not when they are not excluded.

In no way can the reasoning of the Court be upheld. Both Art.12 as well as the intention of Regulation 1612/68 EEC are in conflict with the Court’s judgment. Firstly, Art.12 is clearly restricted to children that are resident in the host state. And secondly, the aim of Regulation 1612/68 EEC is to facilitate the integration of the migrant worker’s family into the society of the host state. That such integration is to be facilitated if the child studies in another Member State, or even in its own home state, can only be doubted. Especially if the child decides to study in his home state, that state should be responsible for the financial support of its student. It does not seem logical that Germany has to pay maintenance and training grants to an Italian national, studying in Italy, only because the parent(s) of the child are economically active in Germany.

¹⁰² Ibid.

¹⁰³ Ibid., para.12

¹⁰⁴ Ibid., para.14f.

¹⁰⁵ Ibid., para.15

¹⁰⁶ Ibid., para.16

Both from the provisions of Regulation 1612/68 EEC and from the Court's former case law it would have followed more logically that a child of a migrant worker that

- decides to study in the host state itself would be supported by the host state, as is provided in Art 12 of Regulation EEC.
- decides to study in its home state is supported by its home state, because as a national of that state the child is eligible to receive all educational grants made available by his state to the nationals of that state (and people that have to be treated equally).
- decides to study in a Member State other than his host or home state in that country can apply for a grant covering registration and other fees, such as tuition fees, which are charged for access to education, as was established in Lair.

The Court's argumentation can thus be described as illogical and contrary to the clear intention of the drafters of Regulation 1612/68 as well as contrary to the wording of Art.12 of that regulation. In Di Leo the Court engaged in interpretive fidelity and deviated from accepted interpretative methodology. It can thus be concluded that in Di Leo the Court engaged in judicial activism.

4.2.7 Raulin¹⁰⁷

When Miss Raulin, a French national, came to live in the Netherlands at the end of the year 1985, neither did she register with the relevant Dutch authorities nor did she apply for a residence permit. In March 1986 she worked 60 hours as a waitress under an on-call contract, before in August she started a full-time study in visual arts and applied for study finance. Her application was however refused for the period from October 1986 to December 1987 on the grounds that she did not possess a residence permit and therefore could not be treated equally to Dutch nationals. She challenged that decision, arguing that she should be regarded as a worker within the meaning of Article 48 EEC (later Art. 39 EC, now Art.45 TFEU). Alternatively she claimed that proportion of the Dutch study assistance which was intended to cover the costs of access to the course.

The Court thus had to rule on the questions (1) whether a right of residence in the host state can be derived from the admission to a vocational training course in that state, (2) whether that right may be exercised irrespective of whether or not a residence permit has been issued, and (3) whether the payment of study assistance may be made conditional on the possession of a residence permit.

Concerning the first question, the ECJ found that "[t]he right to equality of treatment regarding the conditions of access to vocational training applies not only to the requirements laid down by the educational establishment in question, such as enrolment fees, but also to any measure that may

¹⁰⁷ Case C-357/89 (Raulin)

prevent the exercise of that right"¹⁰⁸. According to the Court a student that was admitted to a course must not be unable to attend that course, only because he lacks the right of residence in the host state¹⁰⁹. Therefore, the ECJ concluded that a student admitted to a course of vocational training derives his right of residence for the duration of the course from the equal treatment principle with regard to the conditions of access to vocational training as enshrined in Art.7 EEC (later Art.12 EC, now Art.18 TFEU) and 128 EEC (later Art.128 EC, now Art.148 TFEU)¹¹⁰.

The Court then went on to state, by referring to its existing case law, that the right of entry to and residence in the host country cannot be made conditional on the issuing of a residence permit, as "the issue of such a permit does not create the rights guaranteed by Community law and the lack of a permit cannot affect the exercise of those rights"¹¹¹.

Finally, as an answer to the third question, the ECJ declares that it follows from the foregoing argumentation that also the payment of study assistance cannot be made conditional on the possession of a residence permit, as the right to receive grants covering the costs for access to vocational training courses stems directly from Article 7 EEC (later Art.12 EC, now Art.18 TFEU)¹¹².

In *Raulin* the argumentation of the ECJ appears logically as well as in line with the Treaty and the relevant secondary law provisions. In this case the ECJ did thus fulfill its task properly and within the acceptable boundaries.

4.2.8 Bernini¹¹³

Bernini continues the Courts case law established in *Di Leo*. Bernini was the child of an Italian migrant worker employed in the Netherlands. After completing her primary and secondary education in the Netherlands, she followed an occupational training as a paid trainee at a Dutch company for ten weeks. Some months later she started studying architecture at the University of Naples in Italy. One year later, in 1986, she applied for Dutch study assistance, which was rejected on the grounds that she was not resident in the Netherlands anymore. Bernini challenged the decision by arguing that not only did she possess the status of a migrant worker herself, but also that as a child of a migrant worker she was eligible for study finance under Art.12 of Regulation 1612/68 EEC and that the payment of study finance to her must be regarded as a social advantage of her father according to Art.7 (2) of Regulation 1612/68 EEC. At that point the national court stayed the proceedings in order

¹⁰⁸ *Ibid.*, para.34

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, paras.36f.

¹¹² *Ibid.*, paras.42f.

¹¹³ Case C-3/90 (*Bernini*)

to refer questions for a preliminary ruling to the ECJ. At the time that the judgment was given, the Court had already ruled on Di Leo. That judgment contributed to a large amount to the solution of the national Court's questions in Bernini. The issue which remained was however "whether the child of a migrant worker has an independent right to grants and scholarships"¹¹⁴.

By referring to its case law, the Court found that the grant of study finance is a social advantage for the migrant worker within the meaning of Art.7 (2) of Regulation 1612/68 EEC, as long as the migrant worker continues to support his child¹¹⁵. The Court then argued that, because the child is an indirect beneficiary of the equal treatment granted to the migrant worker, it "may itself rely on Article 7(2) in order to obtain that financing if under national law it is granted directly to the student"¹¹⁶. Finally the ECJ determined that a residency requirement may not be imposed on migrant workers' children if the same requirement is not applicable to children of national workers¹¹⁷.

In Bernini the Court confirmed its earlier case law, especially the judgment it gave in Di Leo. Furthermore, the Court extended the legal basis on which the children of migrant workers could claim educational grants from the host state when leaving the host state in order to pursue vocational training in another Member State. Whereas before Bernini they could only rely on Art.12 of Regulation 1612/68 EEC, since Bernini they can also rely on Art.7 (2) of the same regulation, as long as they are supported by their parents. As O'Keeffe has correctly observed, "[i]t is striking that the child, although only an indirect beneficiary of the right, nevertheless can claim the national study grant directly and have it paid to himself and not to the parent from whom he derives his rights if it is paid to students directly under national law"¹¹⁸. As becomes very clear from Regulation 1612/68 EEC the Member States aimed at facilitating the integration of the migrant worker and his family within the host state. It can therefore be doubted that they intended Art.7 (2) and Art. 12 to function as a legal basis on which the children of migrant workers could base their claims to export study grants from the host state to another Member State, especially not their home state. Once again the ECJ has thus extended the rights of migrant workers and their children by interpreting the Articles of Regulation 1612/68 EEC contrary to their intention. Thus, as in Di Leo, also in Bernini the Court has engaged in judicial activism in order to develop further the rights of the children of migrant workers and the possibility to export national study grants from the host state to other Member States.

¹¹⁴ O'Keeffe, 1992, p. 1227

¹¹⁵ Case C-3/90 (Bernini), para.24f.

¹¹⁶ *Ibid.*, para.26

¹¹⁷ *Ibid.*, para.28

¹¹⁸ O'Keeffe, 1992, p. 1226

4.2.9 Wirth¹¹⁹

In Wirth the Court had to deal with the question “whether courses given in an establishment of higher education must be described as services within the meaning of Article 60 of the [EEC] Treaty [later Art.50 EC, now Art.57 TFEU]”¹²⁰. The question was raised in proceedings initiated by German national Stephan Max Wirth. He had applied for a German study grant to be able to attend a jazz saxophone course at the Dutch Hoogeschool voor de Kunsten at Arnhem. The German authorities however refused to pay the grant on the grounds that Wirth did not meet the conditions to be eligible for a grant under German law at the material time. Since Wirth would have been eligible for a German study grant under the former version of the German law, the national Court doubted whether the new German provisions were compatible with Community law and referred questions for a preliminary ruling to the ECJ.

The Court first repeated its judgment in Humbel¹²¹, where it had ruled that courses provided under the national educational system could not be regarded as services for two reasons. Firstly, because “the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but fulfilling its duties towards its own population in the social, cultural and educational fields”¹²², and secondly, because such a system is funded by the public rather than by pupils and their parents¹²³. That they possibly had to pay enrolment or teaching fees was considered by the Court as a “contribution to the operating expenses of the system”¹²⁴ and could therefore not be considered to affect the nature of the activity¹²⁵.

The Court then simply stated that the considerations from its Humbel judgment were “equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds”¹²⁶. However, the Court went on, courses attended at institutions which are in essence funded privately and seek to make an economic profit would have to be regarded as services within the meaning of the Treaty¹²⁷. Yet, having regard to the question referred to it by the national court, the ECJ limited its ruling to the statement that “courses given in an establishment of higher

¹¹⁹ Case C-109/92 (Wirth)

¹²⁰ Ibid., para.13

¹²¹ Case 263/86 (Humbel)

¹²² Ibid., para.15

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid., para.16

¹²⁷ Ibid., para.17

education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty”¹²⁸

With its judgment in *Wirth*, the Court has not engaged in any of the activities which were above defined as activist. Rather it adhered to precedent and interpretive methodology, restricted its answer to the question of the referring judge, and included all applicable legal provisions of Community law in the way intended by their drafters. In the *Wirth* judgment the Court thus fulfilled its task properly and completely stayed within the acceptable boundaries of legal practice.

4.2.10 Meeusen¹²⁹

Miss Meeusen was a Belgian national resident in Belgium at the material time. Also both her parents were of Belgian nationality and resident in Belgium. Her father, the director and only shareholder of an enterprise established in the Netherlands, employed her mother in that company for two days per week. Therefore, when Miss Meeusen commenced her studies at the Provincial Higher Technical Institute for Chemistry at Antwerp in August 1993, she applied for Dutch study finance. Whereas in the first place her application was approved and she did receive study finance from November 1993 until March 1994, her application was rejected at a later stage and she was required to repay the grants which she had obtained. She filed a protest, claiming that the payment of study finance “could not be made subject to the requirement that the child live or be resident in the territory of the Member State where his parents are employed”¹³⁰. The Dutch authorities however argued that the child’s parents could not be considered to be migrant workers, because they were not resident in the Netherlands but in Belgium. The national court therefore referred to the ECJ questions for a preliminary ruling.

The first question which the Court had to solve was whether or not Miss Meeusen’s mother could be regarded as a migrant worker within the meaning of Art.39 EC (now Art.45 TFEU), because only then Miss Meeusen could rely on the status of child of a migrant worker. The Court found that there is nothing that precludes Miss Meeusen’s mother from being regarded as a migrant worker, as long as the working relationship with her husband is one of subordination¹³¹. As a result, Miss Meeusen had acquired the status of child of a migrant worker.

¹²⁸ *Ibid.*, para.19

¹²⁹ Case C-337/97 (*Meeusen*)

¹³⁰ *Ibid.*, para.10

¹³¹ *Ibid.*, para.17

The next question which thus had to be answered was whether Miss Meeusen could rely on Art.7 (2) of Regulation 1612/68 EEC even though her mother was a frontier worker. The Court therefore referred to its ruling in Meints¹³², where it had stated “that a Member State may not make the grant of a social advantage within the meaning of Article 7 of the Regulation dependent on the condition that the beneficiaries be resident within its territory”¹³³. It consequently concluded that also the child of a frontier worker can rely on Art.7 (2) of Regulation 1612/68 EEC in order to claim study finance under the same conditions as the children of national workers of that state¹³⁴. It furthermore stated that unless national law would stipulate a residency requirement for the children of its own nationals, it must be regarded as discriminatory if the children of migrant workers must fulfill such an obligation in order to become eligible for study finance¹³⁵.

The third and also final question was whether also a child of a national who pursues activities as a self-employed person in another Member State can claim study finance by relying on Art.7 (2) of Regulation 1612/68 EEC. In order to provide an answer to this question the ECJ referred to Art.52 EEC (later Art.43 EC, now Art. 49 TFEU) which grants to self-employed persons in another Member State equal treatment to nationals of the host state and prohibits discrimination on the basis of nationality that hampers Community nationals to take up or pursue self-employed activities¹³⁶. The Court of Justice then went on to state that “[t]he principle of equal treatment thus laid down is also intended to prevent discrimination to the detriment of descendants who are dependent on a self-employed worker”¹³⁷. Therefore, the Court regards as discriminatory a residency requirement which is only imposed on the children of self-employed workers of another Member State but not on the children of the state’s own nationals¹³⁸. Consequently, the ECJ ruled “that the dependent child of a national of one Member State who pursues an activity as a self-employed person in another Member State while maintaining his residence in the State of which he is a national can obtain study finance under the same conditions as are applicable to children of the state of establishment, and in particular without any further requirement as to the child’s place of residence”¹³⁹.

Thus, since Meeusen children of a frontier worker as well as children of a national of one Member State who pursues an activity as a self-employed person in another Member State can rely on Art.7 (2) of Regulation 1612/68 EEC in order to claim equal treatment with the children of nationals of the host state when it comes to the conditions of application for a study grant paid by the host state. The

¹³² Case C-57/96 (Meints)

¹³³ Case C-337/97 (Meeusen), para.21

¹³⁴ *Ibid.*, para.25

¹³⁵ *Ibid.*, paras.23, 25

¹³⁶ *Ibid.*, para.27

¹³⁷ *Ibid.*, para.29

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, para.30

equal treatment principle is neither affected by the fact that the child has never been resident in the host state nor that it chooses to pursue studies in the state of which it is a national.

That these were indeed the intentions of the Member States when they drafted Regulation 1612/68 EEC can be doubted. The aim of that regulation is to facilitate the freedom of movement of workers and their integration into the host state. If, however, neither the worker nor his child is resident in the host country, integration into the society of the host country will not take place. It is therefore striking that a child that has never lived in the host country, and which thus can be expected not to have any link with that country's society, can claim from that country the payment of a study grant in order to pursue studies elsewhere, only because his parent(s) are economically active in the host country. It is even more striking, that the child can base its claim on Art.7 (2) of Regulation 1612/68 EEC if the parents are also not resident in the host country, clearly not willing to integrate into that state's society either. Obviously the ECJ's ruling was thus contrary to the intentions of the drafters of Regulation 1612/68 EEC. By engaging in interpretive fidelity the European Court of Justice extended the legal basis on which students could base their claims against the host state, and thus enhanced students' rights once more. With its ruling in *Meeusen* the Court thus went beyond the boundaries of proper legal practice and engaged in judicial activism.

4.2.11 Grzelczyk¹⁴⁰

In *Grzelczyk* the Court was for the first time asked to provide a preliminary ruling on a matter in the domain of students' rights with having regard to the newly introduced Union citizenship.

Rudy Grzelczyk was a French national who commenced his studies in physical education at the Catholic University of Louvain-la-Neuve in Belgium in 1995. Over a period of three years he financed both his studies and his maintenance by jobbing and obtaining credit facilities. Since during his fourth year he had to perform an internship and write his dissertation, he assumed that he would not be able to perform side jobs anymore and applied for the Belgian social welfare benefit called *minimex*. Whereas initially he was granted the *minimex* from 5 October 1998 until 30 June 1999 by the local authorities, the responsible federal minister refused the application to reimburse the local authorities which consequently withdrew the *minimex* from Grzelczyk from 1 January 1999. According to the minister Grzelczyk did neither fulfill the nationality principle, nor could he be considered as a migrant worker due to his student status. Grzelczyk appealed to that decision, claiming that the *minimex* was a social advantage which he could claim on the basis of Art.7 (2) of Regulation 1612/68 EEC. With regard to Art.12 and 18 EC (now Art. 18 and 21 TFEU) and the ECJ's

¹⁴⁰ Case C-184/99 (*Grzelczyk*)

judgment in *Martinez Sala*¹⁴¹ the national court referred to the European Court of Justice the questions (1) whether it is in accordance with Community law to restrict the payment of the *minimex* to those persons to whom Regulation 1612/68 EEC does apply, and (2) whether it is in accordance with Art.12 and 18 EC and the provisions of the Students Directive to refuse to a student whose right of residence is acknowledged the payment of non-contributory social benefits.

The ECJ started by providing some preliminary remarks¹⁴² concerning the status of Grzelczyk. It referred to the observations submitted by various Member States and the Commission and summarized that all of them found Grzelczyk to be a worker within the meaning of Community law. It then went on that, because the national court did not consider Grzelczyk as a worker, it would respond to the questions of the referring judge within those limits set by the national court. Then the ECJ left it to the national Court to possibly reconsider its perception concerning the status that should be granted to Grzelczyk. With these remarks, it seems, the ECJ tried to persuade the national court to reconsider and even change its view regarding the status of Grzelczyk. These statements, however, clearly exceeded the questions of the referring judge and are therefore unnecessary.

The Court then began to provide its findings on the first question referred to it. Immediately it found that “a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the *minimex*”¹⁴³. Thus it concluded that the payment of the *minimex* was refused only because Grzelczyk was non-Belgian, and therefore constituted discrimination on the basis of nationality. Yet the Court had missed an important point, namely that the *minimex* was granted to both Belgian nationals and as a social advantage within the meaning of Regulation 1612/68 EEC to migrant workers. “The fact that the *minimex* is a social benefit within Regulation 1612/68 could logically be of no help to Grzelczyk if he was not a worker, as his status as a student or EU Citizen would not enable him to claim the benefit on the basis of the *lex specialis* of Regulation 1612/68”¹⁴⁴. Thus, Grzelczyk could not claim a right to the *minimex*, because he was neither Belgian nor was he considered as a migrant worker. However, the Court did not consider that point at all. Therefore it seems that rights which were granted to migrant workers in the first place, can now also be invoked by persons who do not have such status, persons such as Grzelczyk¹⁴⁵. That extension of students’ rights was surely contrary to the intentions of the drafters of the Treaty and Regulation 1612/68 EEC.

¹⁴¹ Case C-85/96 (*Martinez Sala*)

¹⁴² Case C-184/99 (*Grzelczyk*), paras.15-18

¹⁴³ *Ibid.*, para.29

¹⁴⁴ Iliopoulou & Toner (2002), p.615

¹⁴⁵ See De Waele (2009), pp.272f.

The Court then went on to consider the principle of non-discrimination as enshrined in Art.12 EC (now Art.18 TFEU) in the face of Art.18 EC (now Art.21 TFEU). According to the European Court of Justice “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those 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”¹⁴⁶. This statement came as a surprise. Only in the Treaty of Amsterdam Member States had amended Art.17 EC (now Art.20 TFEU) so as to make clear that Union citizenship is only complementary national citizenship. The ECJ’s statement that Union citizenship is the fundamental status of EU citizens was therefore clearly contrary to the intentions of the Member States¹⁴⁷. One could even go so far as to allege that the ECJ attempted to rewrite EU law with such a statement.

The Court then referred to the judgments it gave in *Martinez Sala* as well as *Bickel and Franz*¹⁴⁸, according to which a Union citizen who is lawfully resident in the territory of another Member State can rely on the non-discrimination principle of Art.12 EC whenever a situation falls within the material scope of the Treaties, and that such situations include the exercise of the fundamental freedoms as well as the right to move and reside freely within the territory of the Union.

What then followed was a deliberate breach with the precedent established in *Brown*, where the ECJ had ruled that, at the stage of development of Community law at the material time, maintenance and training grants fell outside the scope of Community law. But, according to the Court, times had changed, because of the introduction of Union citizenship and the insertion of a new chapter dedicated to education and vocational training. The Court found that “[t]here is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union”¹⁴⁹. Furthermore the Court pointed to Directive 93/96/EEC, from which students could derive a right of residence in another Member State if they fulfill certain conditions. Yet there are commentators who doubt that the situation at the time of *Grzelczyk* was really that different than at the time that the Court ruled on *Brown*¹⁵⁰. They argue that Art.149 and 150 EC (now Art.165 and 166 TFEU) conferred upon the Union only supplementary competencies, which is not enough to bring either education or maintenance and training grants within the scope of the Treaties¹⁵¹. Moreover they criticize the argument that Union citizenship has brought about much

¹⁴⁶ Case C-184/99 (*Grzelczyk*), para.31

¹⁴⁷ See De Waele (2009), p. 274

¹⁴⁸ Case C-274/96 (*Bickel and Franz*)

¹⁴⁹ *Ibid.*, para.35

¹⁵⁰ See De Waele (2009), pp.275f.; Hailbronner (2005), p.1250; Bode (2005), p.186

¹⁵¹ Hailbronner (2005), p.1250: “[T]he reference in *Grzelczyk* and *Bidar* to some extremely limited competences by the European Union in the area of education and vocational training does not convincingly support the

change, because – they say – Art.18 EC (now Art.21 TFEU) merely provides students with a right of residence if they fulfill the criteria laid down in secondary law¹⁵². Finally, they point out that the Court’s finding “that there is nothing in the Treaty to suggest that students who are citizens of the Union lose the rights which the Treaty confers on citizens of the Union when they move to another Member State to study there, does not provide sufficient reasoning to explain the inclusion of rights which so far have previously not existed”¹⁵³. From these arguments it can be concluded that the Court’s departure from precedent is neither based on a firm legal basis nor is it justified by a logical and convincing argumentation.

Finally the Court turned to the provisions of Directive 93/96/EEC. It recognized that according to Art.1 of the directive students were to have sufficient resources in order to not become a burden on the host state’s social assistance system, that they had to be covered by an all-risk health insurance, and that a student had to be enrolled at an accredited educational institution in the host state. It then pointed out that according to Art.3 students did not have any right to receive maintenance and training grants from the host state. That, in the view of the Court, could not deprive them of receiving social security benefits, as these were not explicitly excluded by the directive¹⁵⁴. As the primary intention of the directive actually was to avoid students to become a burden of the social security system of the host Member State through receiving welfare benefits, the Courts reasoning is illogical and cannot be upheld¹⁵⁵.

In the following the Court however admitted that a Member State is allowed to withdraw from a student his residence permit or choose not to renew it, if a Member State takes the position that a student who has recourse to social assistance does not anymore fulfill the criteria on which his right of residence is conditional. However, the Court warns the Member States, “in no case may such measures become the automatic consequence”¹⁵⁶. This statement is clearly against Art.4 of Directive 93/96/EEC, according to which the right of residence is granted only for as long as the student fulfills the criteria laid down in Art.1 of the directive. Thus, if a student does not have enough resources anymore and consequently applies for social assistance, he has lost his right of residence. Obviously the Courts statement is contrary to both the intentions of the drafters of Directive 93/96/EEC and the

assumption that education and the associated maintenance aid fall within the application of the scope of the Treaty, since the Treaty provided for Community action contributing to the development of quality education by encouraging cooperation between Member States.” (original emphasis)

¹⁵² De Waele (2009), p.276; Hailbronner (2005), p. 1250: “It is at least far from being evident that the legal situation which the Court has described in *Brown* has changed fundamentally as a result of the introduction of Union citizenship – since the movement rights attached to it were made dependent on the fulfillment of certain *conditions...*” (original emphasis)

¹⁵³ Hailbronner (2005), p.1250

¹⁵⁴ Case C-184/99 (Grzelczyk), paras.38f.

¹⁵⁵ See also De Waele (2009), p. 277

¹⁵⁶ Case C-184/99 (Grzelczyk), para.43

clear implications of the wording of that directive. Here, the Court did not only engage in interpretive fidelity, but also in legislating from the bench by rewriting Community law.

The ECJ justified its decision with the “certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States”¹⁵⁷ which it deduced from the preamble of the Students Directive. That preamble however only states that Member States want to avoid the beneficiaries of the right of residence to become an unreasonable burden to their public finances. To derive from that a “certain degree of financial solidarity” can at best be called adventurous and creative.

Finally, the ECJ thus concluded that a Union citizen can claim a non-contributory social benefit such as the Belgian *minimex*, if he is legally resident in the host state¹⁵⁸. Grzelczyk was thus declared to be eligible to receive the *minimex*¹⁵⁹. That ruling stood in severe contrast to the secondary law provisions laid down in the Students Directive. Even though Grzelczyk did not fulfill the residency requirements he was granted the right of residence by the ECJ. On top he was admitted to receive a non-contributory social benefit from the host state, only because Directive 93/96/EEC did not explicitly rule out students’ eligibility for such benefits. That is a clear matter of deviation from accepted interpretative methodology. As, however, has become clear throughout the analysis of this judgment, the Court has also departed from precedent, ignored applicable secondary law provisions, provided an unnecessarily broad opinion, and engaged in interpretive fidelity and in legislating from the bench. It can thus be concluded that in Grzelczyk the Court engaged in excessive judicial activism.

4.2.12 Bidar¹⁶⁰

In 1998 Frenchman Dany Bidar moved to the United Kingdom together with his mother, because she was to undergo medical treatment there. In the UK, where Bidar lived with his grandmother, he attended secondary school and completed his secondary education. During that time he has never had recourse to social assistance. However, when he commenced to study economics at University College London in September 2001, Bidar applied for study finance. Whereas he was granted financial support with regard to the tuition fees he had to pay, he was refused to receive a student loan which was intended to help cover students’ maintenance costs. The relevant authorities argued that Bidar was not settled in the UK and therefore was not eligible for a student loan. Bidar appealed to that decision, arguing that the criterion to be settled in the UK created discrimination within the

¹⁵⁷ *Ibid.*, para.44

¹⁵⁸ *Ibid.*, para.46

¹⁵⁹ As the second question was put in the alternative, due to its answer to the first question the Court did not have to answer the second question anymore.

¹⁶⁰ Case C-209/03 (Bidar)

meaning of Art.12 EC (now Art.18 TFEU). Alternatively he argued that even if study grants would fall outside the scope of the Treaties, this would not be the case for student loans.

The national Court decided to refer to the European Court of Justice several questions. Firstly, it wanted to know whether either subsidized loans or grants continued to fall outside the scope of the Treaty given on the one hand the Court's rulings in *Lair and Brown*, and on the other hand the new developments in Community law and the introduction of Union citizenship. Secondly, if either subsidized grants or loans were to be found to fall within the scope of Art.12 EC, the national court asked the ECJ for criteria to be used in determining whether the conditions governing access to such financial support are based on objectively justifiable arguments independent of nationality.

At first the Court referred to its existing case law according to which Union citizenship should be the fundamental status of EU nationals and that those who found themselves in the same situation should be subject to the same treatment irrespective of their nationality¹⁶¹. Furthermore the Court repeated that an EU citizen that is lawfully resident in one Member State can rely on Art.12 EC (now Art.18 TFEU) in all situations falling within the material scope of Community law¹⁶². The ECJ then declared that an EU citizen like *Bidar*, who lives in another Member State where he has also pursued and finished his secondary education, can base his right of residency in that country on Art.18 EC (now Art.21 TFEU) and Directive 90/364/EEC¹⁶³.

Subsequently, the Court pointed out that in *Lair and Brown* it had found assistance with regard to students' maintenance and training to fall outside the scope of the EEC Treaty¹⁶⁴. However, due to the Maastricht Treaty's introduction of Union citizenship and a chapter on education and vocational training the Court concluded that meanwhile "the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidized loan or a grant, intended to cover his maintenance costs"¹⁶⁵. The ECJ backed its decision by referring to Art.24 of the new Citizenship Directive arguing that because Community law allowed access to maintenance grants to some EU citizens but excluded from eligibility others "[Community law] took the view that the grant of such aid is a matter which, in accordance with Article 24(1), now falls within the scope of the Treaty"¹⁶⁶. To round off its argumentation, the ECJ finally admitted that students who come to another Member State to pursue their studies there are

¹⁶¹ Case C-209/03 (*Bidar*), para.31

¹⁶² *Ibid.*, para.32

¹⁶³ *Ibid.*, para.36

¹⁶⁴ *Ibid.*, para.38

¹⁶⁵ *Ibid.*, para.42

¹⁶⁶ *Ibid.*, para.43

resident on the basis of Directive 93/96/EEC and do not derive any rights from that directive to claim maintenance assistance from the host country¹⁶⁷. Yet, the ECJ went on, that directive would not exclude students already resident in the host country on the basis of Art.18 EC and Directive 90/364/EEC to rely on the principle of equal treatment¹⁶⁸. Thus, the European Court of Justice ultimately concluded that “the answer to Question 1 must be that assistance, whether in the form of subsidized loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty for the purpose of the prohibition of discrimination laid down in the first paragraph of Article 12 EC”¹⁶⁹.

This argumentation of the Court cannot be upheld. As has already been pointed out in the analysis of Grzelczyk, it can be doubted that the insertion of Art.149 and 150 EC (now Art.165 and 166 TFEU) as well as the introduction of Union citizenship and the rights connected to it are sufficient to justify the breach with the precedent established in *Lair and Brown*. In *Bidar* the Court additionally referred to the provisions of Art.24 of the new Citizenship Directive, from which it deduced that maintenance aid was from that moment onwards included into the scope of the Treaty. Clearly that interpretation was contrary to both the intentions as well as the wording of Art.24, an article with which Member States obviously aimed to exclude economically inactive Union citizens without a right of permanent residence from being able to claim maintenance aid rather than open up for them the possibility of receiving maintenance aid by relying on the non-discrimination principle of Art.12 EC (now Art.18 TFEU). “How the wording of the new Directive and the intention of the Member States to clarify by the Union citizens’ Directive that in principle there is no right to claim equal treatment for maintenance aid for students with exception of cases of permanent residence, can be used as a confirmation of a theory of general equal treatment, remains a mystery”¹⁷⁰. From the foregoing it can be concluded that the Court’s decision to include maintenance and training grants into the scope of the Treaties is neither convincing, nor is it based on a firm legal basis. Rather, by departing from precedent and engaging in interpretive fidelity, the Court once again widened the scope of the Treaties by exceeding the boundaries of proper legal practice.

At least equally questionable is the Court’s distinction of students that base their right of residence on Directive 90/364/EEC and those who base their right of residence on Directive 93/96/EEC. Since Directive 93/96/EEC ruled out the payment of maintenance grants only to students that based their right of residence on this directive, but not for those that were lawfully resident on the basis of Directive 90/364/EEC and Art.18 EC (now Art.21 TFEU), the latter group was granted by the ECJ the

¹⁶⁷ *Ibid.*, para.45

¹⁶⁸ *Ibid.*, para.46

¹⁶⁹ *Ibid.*, para.48

¹⁷⁰ Hailbronner (2005), p.1256

right to receive maintenance assistance from the host state. Apparently the Court deviated from accepted interpretative methodology with that decision and once more granted rights to students only because they were not explicitly excluded by Community law. Yet, it is noteworthy that in the Citizenship Directive the position of both student groups is equalized¹⁷¹. The Court's decision can thus be called artificial and temporary¹⁷², as Member States were to implement the Citizenship Directive until 30 April 2006, only 13 months after the Court's judgment in Bidar.

Coming then to the second question, the European Court of Justice first repeated that the principle of equal treatment prohibits both overt as well as covert forms of discrimination between nationals of the host state and nationals of other Member States¹⁷³. The Court then reaffirmed that such different treatment "can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the initial provisions"¹⁷⁴. The Court then stated that even though a certain financial solidarity of the host state with nationals of other Member States is required, Member States are allowed to make sure that maintenance grants for migrant students do not become an unreasonable burden with consequences for the overall level of financial support granted by the country¹⁷⁵. Therefore the ECJ recognized it as legitimate that Member States grant maintenance assistance only to students "who have demonstrated a certain degree of integration into the society of the host State"¹⁷⁶. Whereas according to the Court residence in the host Member State for a certain length of time might be regarded as a criterion to measure the link with the host society¹⁷⁷, the British requirement that a student be settled in the UK to be eligible for maintenance assistance was disapproved because it was impossible for students from another Member State to reach that status¹⁷⁸.

By inventing the criterion "certain degree of integration", the Court limited the implications of its judgment enormously. Even though training and maintenance grants had from that day on to be regarded as falling within the scope of the Treaties, the Member States were granted the right to limit the payment of maintenance assistance to those economically inactive students that could demonstrate to have established a genuine link with the society of the host country. The criteria applied to measure the "certain degree of integration" must however be proportionate and unrelated to the nationality of a student. Clearly, however, the European Court of Justice ignored the provisions of the Students' Directive. Both Directive 90/364/EEC and Directive 93/96/EEC require the

¹⁷¹ See Directive 2004/38/EC, Art.24; see also De Waele (2005), p.125

¹⁷² De Waele (2005), p.125

¹⁷³ Case C-209/03 (Bidar), para.51

¹⁷⁴ *Ibid.*, para.54

¹⁷⁵ *Ibid.*, para.56

¹⁷⁶ *Ibid.*, para.57

¹⁷⁷ *Ibid.*, para.59

¹⁷⁸ *Ibid.*, para.61

proof of sufficient means and limit the right of residence until the point in time that this condition is not fulfilled anymore. “The right of residence is not made dependent upon a somewhat vague clause “unless a citizen becomes an unreasonable burden upon the social system”¹⁷⁹, nor is it dependant on an unclear criterion as “certain degree of integration”. It remains unclear why the ECJ ignored the applicable secondary law provisions, why it came up with a new criterion, and from where it derived that criterion¹⁸⁰. What however becomes clear is that in *Bidar*, again, the Court engaged in excessive judicial activism by departing from precedent, deviating from accepted interpretative methodology, engaged in interpretive fidelity and legislating from the bench, and ignored applicable secondary law provisions.

4.2.13 Commission v. Austria¹⁸¹

In *Commission v. Austria* the European Court of Justice had to deal with an action brought by the European Commission against the Republic of Austria for the failure to fulfill its obligations under Art.12, 149 and 150 EC (now Art.18, 165 and 166 TFEU). At the material time, students who wanted to pursue their university studies at an Austrian university and possessed a secondary education diploma from a Member State other than Austria had to produce that diploma and show that they would have fulfilled the entry conditions to university in the country which had issued the diploma. Therefore the Commission claimed that Austria did not “take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organized by it under the same conditions as holders of secondary education diplomas awarded in Austria”¹⁸².

At first the Court had to establish whether the Commission’s action was admissible. Austria argued that the Commission had on the one hand changed the subject matter between the pre-litigation phase and the action brought before the ECJ and on the other hand had also added a new complaint. For this reason Austria demanded the action to be declared inadmissible. The Court however found that the Commission had neither changed the subject matter, nor had it added a new complaint. Therefore it declared that the action was admissible¹⁸³.

Secondly, the Court had to figure out whether the subject matter actually fell within the scope of the Treaties. Austria argued that the matter falls outside the scope of the Treaties, as it was about the

¹⁷⁹ Hailbronner (2005), p.1257

¹⁸⁰ Hailbronner (2005), p.1257: “At least the Court should explain how its conclusions can be derived from secondary Community law”.

¹⁸¹ Case C-147/03 (*Commission v. Austria*)

¹⁸² *Ibid.*, para.1

¹⁸³ *Ibid.*, para.27

recognition of diplomas enabling the pursuit of higher education. The Court however joined the Commission and found that the issue was about the conditions of access to higher education and university studies¹⁸⁴. Therefore, it declared that the matter had to be examined in the light of the Treaties, and especially Art.12 EC (now Art.18 TFEU)¹⁸⁵. This reasoning of the Court can be upheld. As students did not only have to produce their diplomas in order to show that they fulfilled the general requirement for access to a higher education institution, but also had to prove that they would have fulfilled the specific entry requirements for the chosen program in the Member State where they had received their diploma, it is obvious that the matter concerned the conditions of access to university education. That access conditions to higher and university education indeed fall into the scope of the Treaties had been established by the Court already in *Gravier and Blaizot*.

Thirdly, the European Court of Justice had to find out whether the Austrian law actually constituted an infringement of Community law. The Commission argued that once a diploma issued by another Member State is regarded as equivalent, the holder of such a diploma must not be required to fulfill additional conditions in order to get access to Austrian higher or university education if such additional conditions are not imposed on the holders of an Austrian diploma. According to the Commission these additional requirements constituted indirect discrimination, because they affected nationals of other Member States more than Austrian nationals. Austria, on the contrary, contended that access to its universities was only “subject to proof of general aptitude and of specific aptitude for university studies and no condition other than academic recognition of the qualification giving access to university studies is required”¹⁸⁶. The ECJ started its investigation by referring to its settled case law, according to which both direct as well as indirect discrimination are prohibited¹⁸⁷. It then declared that the Austrian system allowed “not only differential treatment of students who have obtained their secondary education diplomas in a Member State other than the Republic of Austria, but also between those same students according to the Member State in which they obtained their secondary education diploma”¹⁸⁸. The Court concluded from this, that the access conditions to Austrian higher education institutions were different for holders of Austrian and non-Austrian diplomas, and that this placed holders of non-Austrian diplomas at a disadvantage¹⁸⁹. It then went on to state that even though the Austrian law was applied equally to all students – thus also too Austrians who have received their diploma in another Member State – it could nonetheless be assumed that the Austrian system would have greater effects on nationals of other Member States

¹⁸⁴ *Ibid.*, para.34

¹⁸⁵ *Ibid.*, para.35

¹⁸⁶ *Ibid.*, para.40

¹⁸⁷ *Ibid.*, para.41

¹⁸⁸ *Ibid.*, para.43

¹⁸⁹ *Ibid.*, para.46

than on nationals from Austria¹⁹⁰. Therefore, the ECJ found the Austrian law to be indirectly discriminatory¹⁹¹. This argumentation of the Court is logical and convincing, it can be upheld.

According to settled case law, such differential treatment “could be justified only if it were based on objective considerations independent of nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions”¹⁹². That is why the Court had to provide an answer to the fourth and final question, namely whether there is any justification for the discriminatory character of the Austrian system. Austria submitted three reasons to justify the discrimination inherent in its system. Firstly, it referred to the necessity of safeguarding the homogeneity of the Austrian higher education and university system. The country argued that another system would result in a large inflow of foreign students, which in turn would create structural, financial, and staffing problems. The Court however referred to the fact that other Member States have to cope with the same problem¹⁹³ and pointed out that Austria had failed to provide enough evidence to convince the Court that the measures taken are really necessary to reach its aim¹⁹⁴. Therefore the ECJ concluded that the law in question is not compatible with the Treaty objectives¹⁹⁵. The second reason which Austria submitted in order to justify its system was the aim to prevent the abuse of Community law by students. To that the Court responded by stating that both abuse and fraudulent conduct must be investigated on a case-to-case basis¹⁹⁶ and that Art.149 and 159 EC (now Art.165 and 166 TFEU) explicitly provide for the encouragement of mobility of young people, students and teachers¹⁹⁷. It then concluded that “the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right”¹⁹⁸. As a third reason, Austria argued that its law complied with the international conventions concluded by the Council of Europe in 1953 and 1997. The Court pointed out that it is settled case law that Member States may, according to Art.307 EC (now Art.351 TFEU), observe obligations which they entered under international agreements before signing the Treaty, but that Art.307 EC “does not authorize them to exercise rights under such agreements in intra-Community

¹⁹⁰ *Ibid.*, para.47

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, para.48

¹⁹³ *Ibid.*, para.62

¹⁹⁴ *Ibid.*, paras.64f.

¹⁹⁵ *Ibid.*, para.66

¹⁹⁶ *Ibid.*, para.68

¹⁹⁷ *Ibid.*, para.69

¹⁹⁸ *Ibid.*, para.70

relations”¹⁹⁹. Consequently the Court declares that Austria may neither invoke the 1953 Convention nor the 1997 Convention²⁰⁰.

Having considered and responded to all three reasons submitted by the Republic of Austria to justify its system in place, the Court finally concluded that Austria had failed to fulfill its obligations under Art.12, 149 and 150 EC (now Art.18, 165 and 166 TFEU), because it had not ensured that the holders of secondary education diplomas issued by other Member States could get access to Austrian higher and university education under the same conditions as holders of a secondary education diploma issued by Austria²⁰¹. That ruling follows logically from the considerations of the Court. No indications for judicial activism can be found in the judgment. Therefore it can be concluded that the Court stayed completely within the boundaries of proper legal practice.

4.2.14 Morgan and Bucher²⁰²

In the joined cases Morgan and Bucher the Court had to decide on the compatibility of the German Federal Training Assistance Act, the so-called BAföG, with Art.17 and 18 EC (now Art.20 and 21 TFEU). At the material time, Germany provided an education or training grant for studies pursued in another Member State only to those students that fulfilled the criteria of the first-stage studies conditions. According to that condition, students first had to attend the chosen program at a German education institution for at least one year and then had to continue that same program at an educational institution in another Member State. Furthermore, an education and training grant for studies in another Member State was paid to those who on a daily basis commuted between their permanent German residence and the educational institution abroad for study purposes.

Rhiannon Morgan, a German national, began to study applied genetics at the University of the West of England in Bristol in September 2004. She applied for a portable education or training grant from Germany, indicating that the chosen study program was not offered in Germany. The responsible German authorities however refused her application on the grounds that she did not fulfill the criteria for the first-stage studies condition. Iris Bucher began studying ergotherapy at the Dutch Hogeschool Zuyd in Heerlen. Before starting with her studies she moved to Düren, a city close to the Dutch border, in order to be able to commute between her accommodation in Germany and the educational institution in the Netherlands. She registered this as her permanent residence and applied for a portable education and training grant from Germany. The responsible authorities

¹⁹⁹ Ibid., para.73

²⁰⁰ Ibid., para.74

²⁰¹ Ibid., para.75

²⁰² Joined cases C-11/06 and C-12/06 (Morgan and Bucher)

however refused the payment of such a grant, because Bucher did not fulfill the criteria of first-stage studies condition and because she had established her residence in the border region only for educational purposes.

Both Morgan and Bucher appealed to the decisions of the relevant German authorities, arguing that their chosen study programs were not offered in Germany and that therefore they had to give up the opportunity to receive a portable education or training grant from Germany. At that point the national court decided to refer to the European Court of Justice the question whether the first-stage studies condition was actually compatible with Art.17 and 18 EC (now Art. 20 and 21 TFEU). Next to that question which was common to both cases, the national court also sought to know whether it was compatible with Art.17 and 18 EC that a Member State refused to pay an education or training grant to one of its own nationals who pursues studies in a neighboring state and resides in a border region of the home state, which however cannot be recognized as the permanent residence.

The European Court of Justice began its answer to the first question with the statement that both Morgan and Bucher possessed the status of Union citizens and therefore could rely on the rights connected to that status²⁰³, including the freedom to move and reside freely within the territory of the Union²⁰⁴. The Court then went on by recalling that national legislation which placed at a disadvantage those citizens who enjoyed their freedom of movement rights amounted to a restriction on the freedom of movement that Art.18 EC (now Art.21 TFEU) granted to every Union citizen²⁰⁵. From this followed 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, it must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States”²⁰⁶. The Court then found that the first-stage studies condition can be expected to discourage students to pursue their studies in another Member State due to “the personal inconvenience, additional costs and possible delays which it entails”²⁰⁷.

According to settled case law, such a restriction can only be justified if on the one hand it is motivated by objective considerations which are in the public interest but independent of nationality requirements, and on the other hand it is proportionate to the pursued aims²⁰⁸. Therefore five reasons were submitted by Germany, the Commission and several supporting Member States in

²⁰³ *Ibid.*, para.22

²⁰⁴ *Ibid.*, para.23

²⁰⁵ *Ibid.*, para.25

²⁰⁶ *Ibid.*, para.28

²⁰⁷ *Ibid.*, paras.30f.

²⁰⁸ *Ibid.*, para.33

order to back the German system in place. The first was the aim to pay an education or training grant only to those students that are also capable of succeeding in their studies. Secondly, Germany argued that the first-stage studies condition provided students with the opportunity to rethink whether they have made the right choice. As a third reason for justification Germany pointed out that its system was actually intended to promote the pursuit of studies in other Member States. Fourthly Germany argued that educational or training grants which were provided for studies completely pursued in another Member State could become an unreasonable burden and lead to a general reduction of German financial support. Finally, several other Member States and the Commission pointed to the general absence of coordination provisions between Member States with regard to the payment of education or training grants. According to them the abolition of the first-stage studies condition could possibly lead to the duplication of students' entitlements.

The ECJ responded to all five reasons submitted. With regard to the first reason, the Court stated that the first-stage studies condition could not at all ensure that students would finish their studies and that it rather contributed to an increase in the duration of studies. Therefore the Court found the first-stage study condition inconsistent with and inappropriate for achieving the aim which it pursued²⁰⁹. As far as the second reason is concerned, the ECJ argued that the continuity requirement was incompatible with the intention to provide students with the opportunity to rethink whether they have made the right decision²¹⁰. Furthermore, it placed at a disadvantage students that had chosen to pursue a study program not offered in Germany²¹¹. As a result the Court declared that the condition was not proportionate to the objective pursued²¹². Coming then to the third reason submitted, the European Court of Justice found that the restriction of the right of freedom of movement as conferred by Art.18 EC (now Art.21 TFEU) could not be justified by the entitlements which Germany granted to students once they have fulfilled the first-stage studies condition²¹³. Having regard to the fourth reason, the ECJ argued that Germany that the first-stage studies condition is not a representative means to measure an applicant's the degree of integration into the German society and therefore had to be regarded as going beyond what is necessary to reach the objective pursued²¹⁴. Concerning the fifth reason, the Court found that it was no intention of the first-stage studies condition to prevent the duplication of students' entitlements²¹⁵. Consequently,

²⁰⁹ *Ibid.*, para.36

²¹⁰ *Ibid.*, para.38

²¹¹ *Ibid.*, para.39

²¹² *Ibid.*

²¹³ *Ibid.*, para.41

²¹⁴ *Ibid.*, para.46

²¹⁵ *Ibid.*, para.50

the first-stage studies condition could neither be regarded appropriate nor necessary to prevent such duplication²¹⁶. The Court's argumentation is convincing and logical. It can be upheld.

Following from the foregoing consideration was the ECJ's final judgment that the first-stage studies condition was incompatible with Art.17 and 18 EC (now Art.20 and 21 TFEU)²¹⁷. In *Morgan and Bucher* the Court no indications for an activist ruling can be found. It can therefore be concluded in *Morgan and Bucher* the Court stayed within the boundaries of proper legal practice.

4.2.15 Förster²¹⁸

In the year 2000 German national Jacqueline Förster moved to the Netherlands and enrolled for training as a primary school teacher and a course in educational theory at the Hogeschool van Amsterdam. Since she took several side jobs, the Dutch authorities recognized her as being a migrant worker within the meaning of Art.39 EC (now Art.45 TFEU) and approved her application for a maintenance grant. Between October 2002 and June 2003, Förster completed a paid internship. After that, and for the remaining time of her studies, she did not take up any new employment. In the middle of 2004, when she had received her bachelor's degree, she immediately accepted a post as social worker. After a check, the Dutch authorities found that Förster had not been gainfully employed between July and December 2003 and therefore could not be regarded a migrant worker during that time period. Having lost the status of migrant worker, Förster was no longer eligible to receive the Dutch maintenance grant. Consequently, the Dutch authorities asked her to repay the sums which she had received during these months. Förster appealed to that decision, arguing that in the second half of 2003 she was already sufficiently integrated into the Dutch society to be eligible for a Dutch maintenance grant. Alternatively she argued that she should be considered a migrant worker for whole 2003. The national Court stayed the proceedings and referred to the Court a number of questions.

The Court firstly dealt with the question whether Förster could be regarded a migrant worker within the meaning of Art.7 of Regulation 1251/70/EEC and could claim a maintenance grant on that basis. Regulation 1251/70/EEC "allows a worker to stay permanently in the host state after his or her employment has stopped"²¹⁹. Therefore it had been invoked by Förster. As, however, none of the cases provided for by this regulation was applicable to Förster's situation, the ECJ concluded that "a student in the situation of the applicant in the main proceedings cannot rely on Art.7 of Regulation

²¹⁶ Ibid.

²¹⁷ Since the first question was answered in the affirmative, the Court did not consider it necessary to deal with the second question referred to it.

²¹⁸ Case C-158/07 (*Förster*)

²¹⁹ Mataija (2009), p.61

No 1251/70 in order to obtain a maintenance grant²²⁰. This decision of the Court is firmly based in Community law. It can therefore be upheld.

Secondly the Court had to provide an answer to the question whether and under what conditions a migrant student could rely on Art.12 EC (now Art.18 TFEU) in order to receive a maintenance grant from the host state. At this point the Court also had to establish whether the Dutch residence requirement of five years could be considered compatible with Art.12 EC and, if so, in individual cases other criteria had to be taken into account in order to measure an applicant's degree of integration. The Court started out by repeating its settled case law according to which a Union citizen lawfully resident in another Member State can rely on Art.12 EC in all situations falling into the material scope of Community law²²¹. With regard to social assistance benefits, the Court recalled that economically inactive Union citizens can rely on the first paragraph of Art.12 EC, if they have been lawfully resident in the Member State for a certain period of time²²². Lastly the ECJ pointed out that it had already held that "[t]he situation of a student who is lawfully resident in another Member State thereby falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining a maintenance grant"²²³. The Court then turned to the question whether the Dutch five year residence requirement could be considered as compatible with Art.12 EC, if it was only applied to non-Dutch students. The Court found the condition both appropriate²²⁴ and proportionate²²⁵ to ensure that the applicant is sufficiently integrated into the Dutch society. Bearing in mind the foregoing considerations, the Court finally ruled that "a student who is a national of a Member State and travels to another Member State to study there can rely on the first paragraph of Article 12 EC in order to obtain a maintenance grant where he or she has resided for a certain duration in the host Member State"²²⁶. Furthermore the Court declared that the five year residence requirement is compatible with the first paragraph of Art.12 EC²²⁷. However, it made clear that Member States were allowed to implement more favorable conditions if they wished to do so²²⁸.

Also in Förster the Court did not engage in any form of judicial activism and stayed completely within the boundaries of proper legal practice. Rather, "the Court seems to abandon its previous approach adopted in *Grzelczyk* and *Baumbast* – which was branded by academic commentators as re-writing

²²⁰ Case C-158/07 (Förster), para.33

²²¹ *Ibid.*, para.36

²²² *Ibid.*, para.39

²²³ *Ibid.*, para.41

²²⁴ *Ibid.*, para.52

²²⁵ *Ibid.*, para.54

²²⁶ *Ibid.*, para.60

²²⁷ *Ibid.*

²²⁸ *Ibid.*, para.59

the rules of secondary Community law by interpreting them liberally in the light of Union citizenship and the principle of proportionality”²²⁹.

4.3 Evaluation

This part of the study aimed to find out which new rights and obligations have been established or recognized for students by the European Court of Justice, and to which extent the ECJ can be said to have engaged in judicial activism in the domain of students’ rights. Therefore, after having introduced the origin and current meanings of the concept ‘judicial activism’, it has been operationalized in a way which made possible its application in the European context of this study. In this study, a judgment of the European Court of Justice is regarded as activist, if at least one of the following measurement criteria has been satisfied:

- Departure from precedent
- Provision of an unnecessarily broad opinion
- Deviation from interpretative methodology
- Maximalist interpretation
- Engaging in interpretive fidelity
- Ignorance of applicable Treaty articles or secondary law provisions
- Legislating from the bench²³⁰.

These criteria were then applied to fifteen judgments delivered by the European Court of Justice in the domain of students rights from the mid-80’s until now. During the analysis of the various rulings, it became clear which new rights and obligations the Court had established or recognized for students, and in which cases it had engaged in judicial activism. The following section provides an overview of the findings.

In *Gravier*²³¹ the European Court of Justice created a Community-wide right to non-discriminatory access to higher education institutions, by including higher education within the term ‘vocational training’ and therefore bringing it within the scope of application of the Treaty. In order to do so, the Court engaged in interpretive fidelity, maximalist interpretation and legislating from the bench, thereby exceeding the boundaries of proper legal practice. *Gravier* can thus be regarded as an activist ruling.

²²⁹ Golyner (2009), p.2025 (original emphasis)

²³⁰ See p.25

²³¹ See p.26f.

In *Blaizot*²³² the Court also included university education into term ‘vocational training’ and so brought (most) university studies within the scope of the Treaty, too. Since *Blaizot* students thus enjoy a Community –wide right of equal access to university programs. Again, however, the Court engaged in interpretive fidelity, maximalist interpretation and legislating from the bench. Therefore, also *Blaizot* has to be classified as an activist ruling.

In *Lair*²³³ the ECJ ruled that assistance that was intended to cover students’ costs of access to education did fall within the scope of the Treaty, whereas maintenance and training grants did not. Since *Lair*, migrant students can thus claim financial assistance to cover their costs of access to education from the host state, if the host state provides such assistance to its own nationals. Concerning the rights of migrant workers, the Court decided that maintenance and training grants leading to a professional qualification where a social advantage within the meaning of Art.7 (2) of Regulation 1612/68 EEC. Moreover the Court declared that a migrant worker that stopped working in order to pursue full-time studies would retain his status of migrant worker if there is a relation between his previous occupation and his studies. According to the Court such continuity could however not be required where a migrant worker has become unemployed involuntarily. In *Lair* the Court thus significantly increased the rights of students to financial assistance. It did so by engaging in interpretive fidelity, maximalist interpretation and legislating from the bench. It follows from this that also the ruling in *Lair* has to be considered as being activist.

In *Brown*²³⁴ the ECJ declared that a worker could not base his claims for a maintenance or training grant on Art.7 (2) of Regulation 1612/68 EEC, where it was established that his employment relationship was merely ancillary to the studies pursued. In *Brown* the Court stayed within the boundaries of proper legal practice and did not engage in judicial activism.

In *Echternach and Moritz*²³⁵ the Court held that a child that left the host state together with his family but then returns alone in order to finish his education there, does retain the status of child of a Community worker and can still rely on the rights conferred by Art.12 of Regulation 1612/68 EEC, if his education in the host state is continuous. Furthermore the ECJ stated that the child can also rely on Art.7 (2) of Regulation 1612/68 EEC to claim the payment of a maintenance grant from the host state. Also *Echternach and Moritz* has to be regarded as an activist ruling, because the Court engaged in both interpretive fidelity and legislating from the bench.

²³² See p.27ff.

²³³ See p.29f.

²³⁴ See p.31f.

²³⁵ See p.32ff.

In *Di Leo*²³⁶ the European Court of Justice ruled that where a Member State provides its nationals with the opportunity to export study grants to pursue studies in another Member State, it has to offer the very same opportunity also to children of migrant workers, even if the child of a migrant worker would take the grant in order to pursue studies in his state of origin. Since *Di Leo* also children of migrant workers can claim the payment of a portable study grant from the host state when they decide to pursue studies in a Member State other than their host state. In *Di Leo* the Court deviated from accepted interpretative methodology and engaged in interpretive fidelity, thereby going beyond the boundaries of proper legal practice. Therefore, also *Di Leo* must be recognized as an activist ruling.

In *Raulin*²³⁷ the Court held that it is discriminatory to make payment of study assistance to a student lawfully resident on the basis of Community law conditional on the possession of a residence permit. In *Raulin* no indications for judicial activism could be identified.

In *Bernini*²³⁸ the Court found that the child of a migrant worker had an independent right to educational grants. Since *Bernini* the child of a migrant worker can rely on Art.7 (2) of Regulation 1612/68 EEC in order to have study finance paid to himself, if under the national laws such assistance is provided to students directly. In that ruling the Court engaged in interpretive fidelity. Therefore also *Bernini* has to be classified as an activist ruling.

According to the judgment delivered by the European Court of Justice in *Wirth*²³⁹, courses that are provided by a higher education institution that is primarily funded by public funds cannot be considered services within the meaning of Art.60 EEC (later Art.50 EC, now Art. 57 TFEU). In *Wirth*, the Court did not engage in judicial activism and stayed within the boundaries of proper legal practice.

In *Meeusen*²⁴⁰ the Court decided that the children of frontier workers as well as the children of a national of one Member State who pursues an activity as self-employed person in another Member State must receive study finance from the host state under the same conditions as nationals of that state. That decision is neither affected if the child has never been resident in the host state nor if he exports the study finance to his own home state. In *Meeusen* the Court engaged in interpretive fidelity. Therefore, the Court's ruling has to be considered as activist.

²³⁶ See p.34ff.

²³⁷ See p.36f.

²³⁸ See p.37f.

²³⁹ See p.39f.

²⁴⁰ See p.40ff.

In *Grzelczyk*²⁴¹ the Court declared that a Union citizen can claim from the host state the payment of a non-contributory social welfare benefit, if he is lawfully resident in that state. In order to deliver that judgment the ECJ departed from precedent, provided an unnecessarily broad opinion, deviated from accepted interpretative methodology, engaged in interpretive fidelity and legislating from the bench, and ignored applicable secondary law provisions. The ECJ's judgment in *Grzelczyk* must therefore be classified as activist.

In *Bidar*²⁴² the European Court of Justice ruled that financial assistance, be it in the form of a subsidized loan or grant, which is provided to students which are lawfully resident in the host state and intended to cover their maintenance costs falls within the scope of the Treaty, especially the first paragraph of Art.12 EC (now Art.18 TFEU). In order to prevent that the payment of such assistance becomes an unreasonable burden for the host state, it is allowed to restrict the payment of maintenance assistance to those students that show "a certain degree of integration" into the host state's society. In *Bidar* the Court departed from precedent, deviated from accepted interpretative methodology, engaged in interpretive fidelity and legislating from the bench, and ignored applicable secondary law provisions. Consequently *Bidar* must be regarded as an activist ruling.

In *Commission v. Austria*²⁴³ the ECJ found that Austria had failed to fulfill its obligation under the Treaties, because it had not taken the necessary measures to ensure that the holders of secondary education diplomas issued by other Member States did get access to Austrian higher and university education under the same conditions as holders of Austrian secondary education diplomas. According to the Court Austria had failed to provide sufficient evidence to justify the system in place. In this judgment the ECJ stayed within the boundaries of proper legal practice and abstained from engaging in judicial activism.

In *Morgan and Bucher*²⁴⁴ the Court declared the German first-stage studies condition incompatible with Community law, because it was neither appropriate nor necessary to achieve the aims which it was said to pursue. According to the Court, Germany had failed to provide sufficient evidence to justify the system in place. Since the judgment in *Morgan and Bucher*, the German assistance can now be exported to another Member State not only for following a part of the studies there, but also to pursue a complete study program abroad. In *Morgan and Bucher* no indications for judicial activism could be indicated. It is therefore concluded that the Court stayed within the boundaries of proper legal practice.

²⁴¹ See p.42ff.

²⁴² See p.46ff.

²⁴³ See p.50ff.

²⁴⁴ See p.53ff.

In Förster²⁴⁵ the ECJ confirmed the lawfulness of the Dutch requirement that an EU citizen be lawfully resident in the Netherlands for a period of five years, before he can receive a Dutch maintenance or training grant. Also in Förster the Court stayed within the boundaries of proper legal practice and did not engage in judicial activism.

From the analysis of the fifteen ECJ judgments that have been delivered in the domain of students' rights it becomes very clear that the European Court of Justice has significantly enhanced students' rights through its jurisprudence during the last decades. That, in doing so, it has engaged in judicial activism can be concluded without doubt. The following table (Table 1) provides an overview of all fifteen cases that have been analyzed. Case by case it illustrates which measurement criteria have been satisfied and concludes whether or not the Court of Justice has engaged in judicial activism.

Table 1: Judicial activism of the European Court of Justice

		MEASUREMENT CRITERIA							Judicial activism?
		Departure from precedent	Unnecessarily broad opinion	Deviation from accepted interpretative methodology	Maximalist interpretation	Interpretive fidelity	Ignorance of applicable Treaty articles or secondary law provisions	Legislating from the bench	
CASES	Gravier				x	x		x	Yes
	Blaizot				x	x		x	Yes
	Lair				x	x		x	Yes
	Brown								No
	Echternach & Moritz					x		x	Yes
	Di Leo			x		x			Yes
	Raulin								No
	Bernini					x			Yes
	Wirth								No
	Meeusen					x			Yes
	Grzelczyk	x	x	x		x	x	x	Yes
	Bidar	x		x		x	x	x	Yes
	Commission v. Austria								No
	Morgan & Bucher								No
	Förster								No

²⁴⁵ See p.56ff.

The European Court of Justice has been found to have engaged in judicial activism in nine out of fifteen cases. Most often, in all nine cases, the Court did engage in interpretive fidelity because it interpreted Treaty articles and secondary law provisions contrary to the intentions of their drafters and contrary to the implications of the wording of Community law. In as much as six cases the Court engaged in legislating from the bench and thereby intervened into the policy-making process which should actually be left to the Member States of the Union. Only once did the Court deliver an opinion that was unnecessarily broad, making this measurement criterion the least used one. However, the Court can be said to have satisfied each measurement criterion at least once. Together with the observed frequency of other measurement criteria this might be an indication that the chosen criteria are suited to be used in a European context. Nonetheless, more studies will be needed to test the validity and reliability of the measurement criteria.

5. The impact of ECJ case law on the national systems of tuition fees and educational grants

In the forgoing part it has been found that the European Court of Justice has significantly enhanced the rights of EU students, and that it has done so by engaging in judicial activism. This part of the study will now shed some light on the implications of the ECJ's case law on the Member States' national systems of tuition fees and educational grants. The first section will deal with the most obvious impact of ECJ case law – the revision of national legal provisions which often becomes necessary after the delivery of a judgment in the domain of students' rights. The second section will then provide an insight into the current debate dealing with the de-nationalization of the territorial welfare state.

5.1 Central penetration of national legal systems through the revision of national legal provisions

The necessity to revise national legal provisions after the ECJ has delivered a judgment is probably the most obvious implication of ECJ case law. The following examples are intended to make clear which implications some of the judgments had on the national systems of those Member States, whose regulations were under scrutiny in the respective cases.

In *Gravier* the Court provided Community students with a right to equal access to all vocational training institutions in the Community. After the judgment in *Gravier*, Belgium had to change its rules governing the payment of the supplementary enrolment fee called *minerval*. Next to nationals from Belgium and Luxembourg as well as migrant workers and their spouses, Belgium was forced to exempt all other Community nationals who pursued a course at a Belgian higher education institution from the payment of the *minerval*, because the Court had found higher education to constitute a part of vocational training. After the Court's judgment in *Blaizot*, according to which also most university studies did fulfill the criteria to be classified as vocational training, Belgium had change its rules once more, being forced to also exempt Community nationals attending courses at a Belgian university from having to pay the *minerval*.

In *Raulin* the Court declared discriminatory the Dutch legislation, according to which assistance intended to cover the costs of access to education was only paid to Dutch students and Community students who possessed a Dutch residence permit. The Court ruled that the payment of such assistance must not be made conditional on the possession of a residence permit, because students could derive their right of residence from Community law directly. After the ECJ's judgment in *Raulin*, the Netherlands had to change their national law on the payment of study finance. They introduced the so-called *Raulin-vergoeding*, according to which Community students could claim back a certain amount of their yearly tuition fees. Also after the Court's judgment in *Meeusen*, the Netherlands had

to change their legislation on the payment of study finance, making possible the payment of study finance also to Community nationals who are resident in another Member State but economically active in the Netherlands.

In *Bidar* the European Court of Justice invalidated the legislation of the United Kingdom, according to which a student had to be settled in the UK in order to be eligible for maintenance assistance, because it was impossible for Community nationals to fulfill that criterion. However, the ECJ allowed the Member States to make the payment of maintenance or training assistance to a migrant student conditional on the fulfillment of a “certain degree of integration” into the society of the host state. Consequently, the UK had to abolish its existing legislation and replace the old rules for new ones.

In *Commission v. Austria* the ECJ declared the Austrian law governing access to Austrian higher and university education to be discriminatory, because the conditions of access differed for holders of an Austrian secondary education diploma and holders of a secondary education diploma issued by another Member State. As a result, Austria had to change its national rules and replaced its unlawful system with a quota system, according to which 75 per cent of university places are reserved to holders of an Austrian secondary education diploma²⁴⁶.

In *Morgan and Bucher* the Court declared invalid the German first-stage studies condition. According to that condition, students were only eligible to receive a German study grant if they spent the first year of their studies in Germany and afterwards continued the very same course in another member State. Consequently, Germany abolished the first-stage studies condition and allowed students to export their study grant from the first day of their studies.

From these examples it becomes clear, that the Court’s judgments often have immediate implications for the national rules that govern tuition fees and educational grants. When the Court declares a certain national law to be incompatible with EU law, the Member State is left with no other choice than to change its law in question. In most situations that includes the revision of a statute according to the respective national process of law-making. Sometimes however it is possible to subsume the Court’s interpretation of a rule under the wording of the national provisions, so that a change of law is unnecessary. In such a case, implementing agencies are requested to interpret the wording of the legislation in the way stipulated by the European Court of Justice²⁴⁷.

Yet, the implications of ECJ case law are not only limited to the Member State whose national provisions were scrutinized by the Court. Once a judgment is delivered, it can affect the national provisions of all other Member States as well. Firstly, this might be the case, if the European Court of

²⁴⁶ See Rieder (2006), p.1725

²⁴⁷ See Appendix B

Justice extends the scope of the Treaties to include a matter which was not governed by the Treaty provisions before. This was for example the case in *Gravier and Blaizot*. In these judgments higher and university education were included into the scope of the Treaties by the ECJ. As a result, the non-discrimination principle provided for by Art. 18 TFEU (former Art.12 EC, before Art.7 EEC) became applicable to these issues. As a result, Member States were obliged to guarantee equal access to higher and university education in their territory. Thus, after *Gravier and Blaizot* not only Belgium had to revise its national legal provisions, but also all those Member States whose legislation contained provisions that were similarly discriminative and stood in the way of equal access.

However, Member States not involved in a case cannot only be affected by the outcome of that case if the ECJ has expanded the scope of the Treaties. They can as well be affected by an ECJ ruling on the provisions of another Member State, if their rules are similar to that scrutinized by the Court. If the Court disapproves of the legislation of another Member State in its judgments, it is important for the other Member States to check whether their own legislation is so similar that it would also be disapproved of, or whether there are enough differences so that a reaction is not necessary²⁴⁸. If it is however the case, that similar rules are questioned before the Court, Member States whose legislation contains similar provisions often join the case themselves in order to present their opinion on the case, or are invited to present their case in order to support the country whose legislation is under scrutiny²⁴⁹.

Member States are obliged to adhere to ECJ case law. They have to revise their national legal provisions if they are found incompatible with EU law by the European Court of Justice. They can always opt for a revision if they expect their own rules to be incompatible due to their similarity to the provisions of another Member State, which have been invalidated by the Court of Justice. Therefore, it can be said that the Court's case law penetrates the national legal systems of the Member States and thereby leads to a certain degree of Europeanization.

5.2 A de-nationalization of the territorial welfare state?²⁵⁰

In the domain of students' rights a revision of national legal provisions often includes opening up the legal provisions to grant other Community nationals access to certain welfare benefits. Therefore, some commentators fear an upcoming de-nationalization of the territorial welfare state²⁵¹.

²⁴⁸ See Appendix B

²⁴⁹ See Appendix D

²⁵⁰ Following Van der Mai (2005)

²⁵¹ See e.g. Van der Mai (2005)

For the longest time, welfare benefits have been granted by a country exclusively to its own nationals, who were treated preferential to non-nationals. The welfare claim itself was thus based on nationality. Non-nationals did not belong to the preferential group made up of all the nationals of a state, and could therefore not claim any welfare benefits. In the framework of the European integration process, the Member States have started to open up their welfare systems also for non-nationals. Migrant workers, their spouse and children have been granted equal treatment to the nationals of the host state already in 1968 through Regulation 1612/68 EEC. Economically inactive Union citizens were however long refused access to the welfare system of another Member State. As has become clear during the analysis of the ECJ's case law in the foregoing part of this study, the European Court of Justice has brought about change in this respect. Especially the Court's recent case law can be said to "mark the end of an era during which Member States could deny nationals of other Member States access to their welfare state services on the sole ground of their nationality"²⁵². Since nationality criteria may not be used anymore in order to control access to welfare benefits, it is argued that "[i]n principle, Community law demands the de-nationalisation of European welfare states"²⁵³. In practice, however, that de-nationalization is not (yet) realized, as the Member States are left with some possibilities to secure their welfare systems. For example they are not obliged to grant maintenance grants to economically inactive migrant students, unless these have established a genuine link with the society of the host state and fulfill the criteria enacted to measure that the applicant has achieved a "certain degree of integration".

Even though the de-nationalization of the territorial welfare state is not (yet) completed, shifts in the territorial boundaries can be discovered, as more and more non-nationals become eligible for ever more welfare benefits in other Member States. The jurisprudence of the ECJ can thus be said to promote the de-nationalization of the territorial welfare state, making more students eligible for educational grants offered by the host state.

5.3 Study grant tourism and an unbalanced flow of mobility

In the European Union, education is generally recognized as a welfare benefit²⁵⁴. "The Member States spend enormous amounts [of money] on education and accordingly have a great interest in this field. In the eyes of the states themselves, the principles of free movement and non-discrimination on grounds of nationality pose a threat to what is perceived as a State prerogative: the ability to secure a fair allocation of educational resources of the Member State"²⁵⁵. The Member

²⁵² Van der Mai (2005), p.207

²⁵³ Ibid.

²⁵⁴ See Jorgensen (2009), p.1567

²⁵⁵ Jorgensen (2009), p.1567

States fear that they have to pay educational grants to Community students, who then leave the host country as soon as they have finished their studies. This fear is especially shared by those countries that have either a very attractive higher education system or whose financial assistance provisions for students are highly attractive. Whereas such countries generally observe a large inflow of Community students, only few of their own nationals decide to pursue their studies in another Member State. Consequently, these countries face two problems: on the one hand they might suffer from study grant tourism, and on the other hand they have to deal with a huge imbalance in their educational budget due to the large amount of students.

As Member States cannot close their systems for other Community students, it is difficult to solve these problems. Study grant tourism is tried to be confined by Member States by restricting Community students' eligibility to receive a maintenance grant from the host state. The required "certain degree of education" is therefore often difficult to achieve. Some Member States, for example the Netherlands, have taken over the five year residency requirement from Directive 2004/38/EC. For a student who completes his secondary education in his own Member State and then decides to pursue studies in another Member State it is nearly impossible to satisfy that requirement. On the other hand, many Member States have also adopted the philosophy that that as long as all Member States contribute to and promote the mobility of students, every Member State will benefit from this²⁵⁶.

²⁵⁶ See Appendix B and Appendix D

6. Conclusion

This study aimed to find out which role the European Court of Justice played in the enhancement of students' rights and how ECJ jurisprudence did affect the national systems of the Member States in this respect. In order to do so, the reader was offered an overview of both students' rights and Member States obligations in the area of higher education under Community law. Afterwards the concept 'judicial activism' has been introduced and its current meanings have been presented to the reader. As much of the literature on judicial activism has been published in the United States and in relation to the US Supreme Court, the operationalization of the concept offered by American scholars could not be taken over one by one. Therefore, the concept has been operationalized in a way which made possible its application in the European context of this study. The concept has then been applied to fifteen judgments delivered by the European Court of Justice in the domain of students' rights between the mid-1980's and now. From the analysis of these judgments it has become clear that the ECJ has significantly enhanced the rights of students with its case law. Moreover it has been demonstrated that the Court engaged in judicial activism in order to enhance students' rights. It was then found that this development has had a severe impact on the national systems of the Member States. The case law of the European Court of Justice has penetrated the national legal systems and promoted their Europeanization. The Member States were forced to open up their welfare systems also for economically inactive Community nationals. This has aggravated the problems of study grant tourism and an unbalanced flow of migrant students.

From the findings of the foregoing parts of this study it can be concluded that the European Court of Justice has played a significant role in the enhancement of students' rights. It has considerably increased the rights of economically inactive students and extensively enlarged the rights of (former) migrant workers and their children. EU students can now claim equal treatment with regard to conditions of access to educational institutions as well as the criteria providing access to assistance intended to cover the costs of access to education in the host state. Furthermore, these students can now claim access to non-contributory social welfare benefits. The children of migrant and frontier workers can claim student grants directly to themselves and export them to pursue studies in a Member State other than their host state. The non-discrimination principle has been a key Article in the enhancement of students' rights by the Court. But also "Union citizenship and the principle of proportionality are used to promote what appears to be a postulate of migration policy instead of an interpretation of relevant primary and secondary Community law"²⁵⁷. As has been pointed out, did the activities of the ECJ have a significant impact on the national systems of tuition fees and educational grants. These systems were opened up for Community nationals, who could now claim

²⁵⁷ Hailbronner (2006), p.10.

significantly more welfare benefits from the host state than was provided for by the Treaties and secondary law. The implications for the Member States are therefore especially of a financial nature.

At this point, some limitations of the study have to be addressed. The measurement criteria that have been developed to measure the concept 'judicial activism' in this study have been applied in this study for the first time. Neither their validity nor their reliability can be ensured. It is possible, that the outcome of the analysis of the ECJ's case law would have been a different one, if other measurement criteria had been used. For reasons of time and space, it was also not possible to analyze all cases in the domain of students' rights. It is therefore possible, that the outcome of the analysis would be a different one, if more or other cases had been analyzed.

At this point in time, it cannot be explained why the Court did engage in judicial activism in certain cases and abstained from judicial activism in others. It is therefore suggested that further research is done in order to uncover possible underlying relations.

7. Summary

This study aimed to find out which role the European Court of Justice played in the enhancement of students' rights and how ECJ jurisprudence did affect the national systems of the Member States in this respect. In order to do so, the reader was offered an overview of both students' rights and Member States obligations in the area of higher education under Community law. Afterwards the concept 'judicial activism' has been introduced and its current meanings have been presented to the reader. As much of the literature on judicial activism has been published in the United States and in relation to the US Supreme Court, the operationalization of the concept offered by American scholars could not be taken over one by one. Therefore, the concept has been operationalized in a way which made possible its application in the European context of this study. In this study, an ECJ judgment has been considered as activist, if at least one of the following conditions has been satisfied:

- Departure from precedent
- Provision of an unnecessarily broad opinion
- Deviation from interpretative methodology
- Maximalist interpretation
- Engaging in interpretive fidelity
- Ignorance of applicable Treaty articles or secondary law provisions
- Legislating from the bench

The concept has then been applied to fifteen judgments delivered by the European Court of Justice in the domain of students' rights between the mid-1980's and now, namely *Gravier*, *Blaizot*, *Lair*, *Brown*, *Echternach* and *Moritz*, *Di Leo*, *Raulin*, *Bernini*, *Wirth*, *Meeusen*, *Grzelczyk*, *Bidar*, *Commission v. Austria*, *Morgan and Bucher*, and *Förster*. From the analysis of these judgments it has become clear that the ECJ has significantly enhanced the rights of students with its case law. Moreover it has been demonstrated that the Court engaged in judicial activism in order to enhance students' rights. It was then found that this development has had a severe impact on the national systems of the Member States. The case law of the European Court of Justice has penetrated the national legal systems and promoted their Europeanization. The Member States were forced to open up their welfare systems also for economically inactive Community nationals. This has aggravated the problems of study grant tourism and an unbalanced flow of migrant students. From the findings of the foregoing parts of this study it can be concluded that the European Court of Justice has played a significant role in the enhancement of students' rights. It has considerably increased the rights of economically inactive students and extensively enlarged the rights of (former) migrant workers and their children. ECJ case law has also been found to have had a significant impact on the national systems of tuition fees and educational grants.

8. References

- Alter, K. J. (1998). Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice. *International Organization*, 52, pp. 121-147.
- Armbrecht, S. (2005). Ausbildungsförderung für Studenten - Gleicher Zugang für Unionsbürger? *Zeitschrift für europarechtliche Studien*, 8, pp. 175-209.
- Barnard, C. (2005). Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills. *Common Market Law Review*, 42, pp. 1465-1489.
- Bode, S. (2005). *Europarechtliche Gleichbehandlungsansprüche Studierender und ihre Auswirkungen in den Mitgliedstaaten: Zur Reichweite des Diskriminierungsverbots im Hochschulbereich unter besonderer Berücksichtigung der Unionsbürgerschaft*. Baden-Baden: Nomos.
- Brown, R. L. (2002). Activism Is Not a Four-Letter Word. *University of Colorado Law Review*, 73, pp. 1257-1274.
- Busby, N., & Smith, R. (2007). *Core EU Legislation*. Great Britain: palgrave macmillan.
- Cartabia, M. (2009). Europe and Rights: Taking Dialogue Seriously. *European Constitutional Law Review*, 5, pp. 5-31.
- Chalmers, D., Hadjiemmanuil, C., Monti, G., & Tomkins, A. (2006). *European Union law: text and materials*. Cambridge: Cambridge University Press.
- Cross, F.B., & Lindquist, S.A. (2007). The Scientific Study of Judicial Activism. *Minnesota Law Review*, 91, pp. 1752-1784.
- Dougan, M. (2008). Cross-Border Educational Mobility and the Exportation of Student Financial Assistance. *European Law Review*, 33, pp. 723-738.
- Dougan, M. (2005). Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education Within the EU? *Common Market Law Review*, 42, pp. 943-986.
- European Commission. Retrieved March 25, 2010, from http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm
- French, R.S. (2008). *Judicial Activists - Mythical Monsters?* Speech given at the 2008 Constitutional Law Conference. Retrieved July 13, 2010, from http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj31.html
- Golyner, O. (2009). Case C-158/07, Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep, Judgment of the Court (Grand Chamber) of 18 November 2008. *Common Market Law Review*, 46, pp. 2021-2039.
- Golyner, O. (2006). Student Loans: The European Concept of Social Justice According to Bidar. *European Law Review*, 31, pp. 390-401.
- Green, C. (2009). An Intellectual History of Judicial Activism. *Emory Law Journal*, 58, pp. 1195-1264.

Hailbronner, K. (2006). The EU Directive on Free Movement and Access to Social Benefits. *CESifo DICE Report 4/2006*, pp. 8-13.

Huisman, J., & van der Wende, M. (2004). The EU and Bologna: are supra-and international initiatives threatening domestic agendas? *European Journal of Education*, 39, pp. 349-357

Hailbronner, K. (2005). Union Citizenship and Access to Social Benefits. *Common Market Law Review*, 42, pp. 1245-1267.

Iliopoulou, A., & Toner, H. (2002). Case C-184/99, Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve, Judgment of the Full Court of 20 September 2001, [2001] ECR I-6193. *Common Market Law Review*, 39, pp. 609-620.

Jöllenebeck, B. (2005). *Studium und Aufenthalt ausländischer Studenten in Deutschland*. Retrieved June 7, 2010, from http://deposit.ddb.de/cgi-bin/dokserv?idn=984836500&dok_var=d1&dok_ext=pdf&filename=984836500.pdf

Jorgensen, S. (2009). The Right to Cross-Border Education in the European Union. *Common Market Law Review*, 46, pp. 1567-1590.

Kmiec, K.D. (2004). The Origin and Current Meanings of "Judicial Activism". *California Law Review*, 92, pp. 1441-1477.

Mataija, M. (2009). Case C-158/07, Jacqueline Förster v. IB-Groep - Student Aid and Discrimination of Non-Nationals: Clarifyinf Or Emaciating Bidar? *The Columbia Journal of European Law Online*, 15, pp. 59-64.

Mei, A.P. van der (2005). Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State. *European Journal of Migration and Law*, 7, pp. 203-211.

Micklitz, H.-W. (2009). Judicial Activism of the European Court of Justice and the Development of the European Social Mode in Anti-Discrimination and Consumer Law. *EUI Working Papers LAW No. 2009/19*. Retrieved March 23, 2010, from <http://ssrn.com/abstract=1557139>

Mietens, A.L. (2008). *The Europeanisation of Student Financial Support Systems: A Case Study of the Changes of the Dutch and German Student Financial Support Systems*. Master Thesis. Retrieved March 2, 2010, from <http://essay.utwente.nl/59039/>

O'Keefe, D. (1992). Case C-357/89, Raulin v. Netherlands Ministry of Education and Science, and Case C-3/90, Bernini v. Netherlands Ministry of Education and Science, Judgments of 26 February 1992. *Common Market Law Review*, 29, pp. 1215-1228.

Ooik, R.H. van (2008). Export van studiefinanciering in de EU. *Nederlands Tijdschrift voor Europees Recht*, 14, pp. 125-129.

Public Papers of the Presidents of the United States, Administration of George W. Bush, 2002

Rieder, C. (2006). Case C-147/03, Commission of the European Communities v. Republic of Austria. *Common Market Law Review*, 43, pp. 1711-1726.

Rozo, C. (N/A). Juridical Activism and Regional Integration: Lessons from the European Court of Justice. *Integration & Trade*. Retrieved March 18, 2010, from http://www.iadb.org/intal/aplicaciones/uploads/publicaciones/i_INTAL_IYT_02_1997_Rozo.Pdf

Shuibhne, N.N. (2008). Case C-76/05 Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Case C-318/05, Commission v. Germany, Judgment of the Grand Chamber of 11 September 2007, not yet reported; Joined Cases C-11/06 & C-12/06 Morgan v. Bezirksregierung Köln; Bucher v. Landrat des Kreises Düren, Judgment of the Grand Chamber of 23 October 2007, not yet reported. *Common Market Law Review*, 45, pp. 771-786.

Teichler, U. (2009). Internationalisation of Higher Education: European Experiences. *Asia Pacific Education Review*, 10, pp. 93-106.

Tryfonidou, A. (2009). In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point? *Common Market Law Review*, 46, pp. 1591-1620.

Vught, F. van. (2006). A supranational European university policy? An analysis of the European Union's higher education and research policies (Draft). pp. 1-47.

Waele, H.C.F.J.A. de (2005). Europees burgerschap en studiefinanciering: nieuwe rechten, nieuwe beperkingen na het arrest Bidar. *Nederlands Tijdschrift voor Europees Recht*, 11, pp. 122-127.

Waele, H.C.F.J.A. de (2009). *Rechterlijk activisme en het Europees Hof van Justitie*. Den Haag: Boom Juridische uitgevers.

Watson, P. (1987). Case 293/83, Gravier v. City of Liège, Judgment of 13 February 1985. Reference to the Court by the Tribunal de Première Instance, Liège, for a preliminary ruling on the interpretation of Articles 7 and 59 of the EEC Treaty. Case 293/85R, Commission of the European Communities v. Kingdom of Belgium: Order of the President of the Court of 25 October 1985. *Common Market Law Review*, 24, pp. 89-97.

White, R.C. (2005). Free Movement, Equal Treatment, and Citizenship of the Union. *International & Comparative Law Quarterly*, 54, pp. 885-905.

Appendix

**Vorbereitendes Dokument zum
Interview im Bundesministerium für Bildung und Forschung
- Vorläufiger Fragebogen**

1. Hintergrund

In meiner Bachelorarbeit untersuche ich die Rechtsprechung des Europäischen Gerichtshofes (EuGH) in Bezug auf die Rechte von Studenten sowie die Implikationen dieser Rechtsprechung für die Mitgliedsländer der EU. In der Tat ist es so, dass Studenten viele Rechte nicht durch den Weg der politischen Gesetzgebung erhalten, sondern vor dem Europäischen Gerichtshof einklagen müssen. Ein bekanntes Beispiel ist das kürzlich getroffene Urteil, dass Studenten ihr BAföG auch mit ins Ausland nehmen dürfen. Durch diesen sogenannten "richterlichen Aktivismus" des Europäischen Gerichtshofs entstehen für EU-Studenten neue Rechte, aber für die Mitgliedsländer der Europäischen Union eine Vielzahl neuer Pflichten, die dann politisch umgesetzt werden müssen.

2. Kernfrage

Welche Implikationen entstehen den Mitgliedsstaaten der Europäischen Union durch den richterlichen Aktivismus des Europäischen Gerichtshofs?

Anmerkung: Deutschland ist eines der Mitgliedsländer der Europäischen Union und dient in der Studie als „Beispielland“. In diesem Interview stehen darum die Implikationen für die Bundesrepublik Deutschland zentral.

3. Fragebogen

Um die Kernfrage beantworten zu können, ist es notwendig eine Anzahl von Unterfragen zu beantworten:

- Umsetzung
 - Wer ist für die Umsetzung der Rechtsprechung des EuGH verantwortlich? Welche Akteure sind an der Umsetzung beteiligt?

- Wie wird die Rechtsprechung des EuGH umgesetzt? Wie verläuft der Prozess der Umsetzung?
 - Wie lange dauert es im Durchschnitt, bis die Rechtsprechung des EuGH umgesetzt wird und neue Regelungen in Kraft treten?
- Kosten
 - Welche Mehrkosten entstehen der Bundesrepublik Deutschland?
 - Welche Mehrkosten sind durch die Portabilität des BAföG entstanden?
 - Welche Mehrkosten entstehen Deutschland durch die Auszahlung von BAföG an nicht-deutsche EU Studenten?
 - Wie werden solche Mehrkosten finanziert bzw. finanziell ausgeglichen?
- Konditionen für „ausreichende Integration“

Laut europäischer Rechtsprechung ist es den Mitgliedsländern erlaubt um die Auszahlung von finanzieller Unterstützung während des Studiums an Konditionen zu knüpfen, die eine „ausreichende Integration“ des Studenten im Gastland beweisen.

 - Wie ist das Konzept der „ausreichenden Integration“ in Deutschland definiert?
 - Welche Konditionen wurden entwickelt um „ausreichende Integration“ zu messen? Welche Voraussetzungen müssen ausländische EU-Studenten erfüllen, um in Deutschland BAföG zu bekommen?
- Brain Drain
 - Besteht eine Balance zwischen deutschen Studenten die ins Ausland gehen und Studenten die aus anderen Ländern nach Deutschland kommen um hier ein Studium zu absolvieren?
 - Welche Maßnahmen werden ergriffen um ausländische Studenten dazu zu bewegen auch nach ihrem Studium in Deutschland zu bleiben um zu verhindern, dass Deutschland die Finanzierung der Ausbildung dieser Studenten übernimmt, aber keinerlei „Profit“ aus deren erworbenem Wissen ziehen kann?

B – Summary of the interview with an employee of the German Federal Ministry of Education and Research

This text summarizes the interview conducted with an employee of the German Federal Ministry of Education and Research on 22 April 2010. The interview covered several different topics one after another. This text keeps the lines that were followed during the interview. In the beginning of each section the questions that were posed will be summarized. Afterwards the answers will be summed up.

Note: In this interview, the German experiences were placed at the center of attention.

- **Implementation of the ECJ's judgments**

The first part of the interview dealt with the implementation process that starts after the European Court of Justice has delivered a ruling. The questions sought to find out (a) who is responsible for the implementation of the implications resulting from a judgment of the ECJ, (b) how the national process of implementation goes, and (c) how long such implementation takes on average?

When a Member State evaluates which implications an ECJ ruling has for its own legal system, a distinction is generally made between two situations: on the one hand the situation in which in the case at hand legislation of the Member State itself was disapproved of by the ECJ, and on the other hand the situation in which the ECJ delivered a judgment in which it disapproved of the legislation of another Member State, which however has a certain degree of similarity to the own legislation. If it is the case that the ECJ ruled on legislation of the Member State itself, the Member State of course has to implement the judgment. If it is however the case that the Court has disapproved of the legislation of another Member State, it is important to check whether the own legislation is so similar that it would also be disapproved of, or whether there are enough differences so that a reaction is not necessary.

If the Court disapproved of the own legislation of a Member State or if a Member State comes to the conclusion that its legislation is so similar to that legislation of another Member State which the Court has disapproved of, that legislation has to be changed. In order to make the legislation compatible with EU law, two possibilities exist. If the wording of the legislation is so flexible that the Court's interpretation can be subsumed into the wording of the national legislation, a change of legislation is not necessary. In such a case the implementing agencies will be instructed by an order ("Erlaß") to now interpret the wording of the legislation in the way stipulated by the European Court of Justice. If however the wording of the national legislation is not that flexible, the process of changing the law has to be started. Such was the case in *Morgan and Bucher*. In order to change the

legislation on the Federal Training Assistance Act (“BAföG”), both Bundestag and Bundesrat have to approve the new legislation. The process of changing the legislation concerning the Federal Training Assistance Act takes on average between a few months and half a year.

Until the new legislation is in place, all implementing agencies are instructed to decide on cases by applying the rules laid down by the European Court of Justice, because the case law of the Court has to be complied with from the moment that it is delivered.

- **Costs**

The second part of questions dealt with the topic of costs. In particular, it was asked (a) how much additional costs arose for Germany through the portability of the German BAföG, (b) how much additional costs arose for Germany through payment of BAföG to non-German students, and (c) how such additional costs are financed.

It is important to note that Germany was not forced by Community law to provide portable BAföG. Germany has itself chosen to provide such assistance in order to promote the mobility of students.

It is not possible to numeralize the additional costs that arose for Germany either through the portability of BAföG or the payment of BAföG to non-German students.

Two-thirds of the BAföG is financed by the Federal Government (“Bund”) and one-third is financed by the German Länder. If after a judgment, such as Morgan and Bucher, additional costs arise, the Federal Government again pays two-thirds of these additional costs, whereas the Länder pay one-third of the additional costs.

- **Conditions measuring the “certain degree of integration”**

The third part of the interview dealt with the conditions which are applied to measure the concept “certain degree of integration”. The questions sought to make clear (a) how Germany has defined the concept, and (b) which measurement criteria have been developed to measure the concept.

The Federal Training Assistance Act is connected with the German Law on the rights of residency of foreigners. Article 8 BAföG provides a list of persons that are eligible to receive BAföG. Accordingly Germans as well as those that are considered to be Germans according to the German Basic Law, EU citizens with a permanent right of residence as well as those treated equally (e.g. certain of their family members), and asylum seekers as well as refugees are eligible for German BAföG. Furthermore other non-European persons are eligible to receive BAföG, depending on their residence permit status.

Germany thus defines the concept “certain degree of integration” with the help of Community law, according to which several groups of EU citizens have to be eligible for German BAföG. Furthermore Germany makes eligible those persons that have stayed for a certain time in Germany and/or are expected to stay for a considerable time period due to their residence permit status, as they are expected that they will use the education which they received in Germany and will therefore provide the country with some benefit (e.g. through the payment of taxes).

- **Brain Drain**

The last part of the interview has dealt with the topic called brain drain. The questions sought to establish (a) whether in Germany there is a balance between outgoing and incoming students, and (b) which measures are employed to try to keep foreign students in Germany after they have finished their studies in that country.

As has been pointed out above, Germany makes eligible for BAföG certain groups of non-EU students, expecting that due to their residence permit status they will remain in Germany for a considerable period of time and that therefore Germany will benefit from the education with which it has provided those students.

Additionally, Germany has the philosophy that even though not every student will remain in Germany and there will be some losses, these losses will be compensated for by the arrival of students that have studied elsewhere. In the end, Germany expects to derive more benefits from the mobility of students than that it will suffer losses.

Vorbereidend document voor het interview bij het Ministerie van Onderwijs, Cultuur en Wetenschap - Vragenlijst

1. Achtergrond

Voor mijn Bacheloropdracht onderzoek ik de jurisprudentie van het Europees Hof met betrekking tot de rechten van studenten. De aanleiding hiervoor is dat studenten veel rechten niet via de parlementaire wetgeving verkrijgen, maar gerechtelijk opeisen. Een recent voorbeeld van een richtinggevende uitspraak van het Hof is de arrest Morgan en Bucher, waarin het gaat om de portabiliteit van een Duitse studiebeurs voor een studie in andere lidstaten van de Europese Unie. Door dit zo genoemde "rechterlijk activisme" van het Europees Hof ontstaan voor EU studenten nieuwe rechten, en voor de lidstaten van de Europese Unie nieuwe verplichtingen, die vervolgens in politieke processen door de lidstaten moeten worden omgezet.

2. Centrale onderzoeksvraag

Welke implicaties ontstaan er voor de lidstaten van de Europese Unie door het "rechterlijk activisme" van het Europees Hof van Justitie?

Noot: Nederland is een van de lidstaten van de Europese Unie en wordt in dit onderzoek als "voorbeeldland" gebruikt. In dit interview staan daarom de implicaties die voor Nederland ontstaan centraal.

3. Vragenlijst

Om de centrale onderzoeksvraag te kunnen beantwoorden, is het nodig om een aantal sub-vragen te beantwoorden:

- Vertegenwoordiging van de Nederlandse belangen tijdens een rechtzaak

- Wie bepaald welke belangen de juristen in een rechtzaak vertegenwoordigen?
- Welke maatregelen worden genomen om de Nederlandse belangen zo goed mogelijk in een rechtzaak te vertegenwoordigen?
- Omzetting
 - Wie is voor de omzetting van de jurisprudentie van het Hof verantwoordelijk? Welke actoren/partijen zijn bij deze omzetting betrokken?
 - Hoe wordt de jurisprudentie van het Hof omgezet? Hoe verloopt het proces van de omzetting van jurisprudentie naar nationale wetgeving?
 - Hoe lang duurt het gemiddeld, tot dat jurisprudentie van het Hof in nationale wetgeving is omgezet? Welke regels gelden er in de tussentijd?
- Kosten
 - Welke meerkosten ontstaan er voor Nederland?
 - Welke meerkosten zijn er voor Nederland ontstaan door de portabiliteit van de Studiefinanciering?
 - Hoe veel Studiefinanciering wordt er in Nederland elk jaar betaald aan niet-Nederlandse studenten?
 - Hoe worden deze meerkosten gefinancierd?
- Conditie voor “voldoende mate van integratie in de samenleving”

Volgens de jurisprudentie van het Hof mogen lidstaten van de Europese Unie het uitbetalen van financiële steun koppelen aan bepaalde condities om te waarborgen dat de aanvrager voldoende is geïntegreerd in de samenleving van het gastland.

 - Hoe heeft Nederland het concept “voldoende integratie” gedefinieerd?
 - Welke condities zijn ontwikkeld om “voldoende integratie” te meten?
 - Waarom heeft Nederland specifiek voor deze condities gekozen?
- Brain Drain
 - Bestaat er een balans tussen Nederlandse studenten die naar het buitenland gaan en EU-studenten die een studie in Nederland volgen?
 - Welke maatregelen worden genomen om buitenlandse studenten na hun studie in Nederland te behouden om te voorkomen dat deze studenten na hun afstuderen naar hun eigen land terug gaan en Nederland geen profijt kan trekken uit de kennis die ze hier tijdens hun studie hebben verworven?

D – Summary of the interview with three employees of the Dutch Ministry of Education, Culture and Science

This text summarizes the interview conducted with three employees at the Dutch Ministry of Education, Culture and Science on 18 June 2010. The interview covered several different topics one after another. This text keeps the lines that were followed during the interview. In the beginning of each section the questions that were posed will be summarized. Afterwards the answers will be summed up.

Note: In this interview, the Dutch experiences were at the center of attention.

- **Representation of the Dutch interests during a court case**

The first group of questions dealt with the representation of the Dutch interests during a court case. The questions posed sought to find out (a) who in the Netherlands is responsible for determining the interests of the Dutch state as they are then represented by Dutch lawyers before the European Court of Justice, and (b) which measures are taken in order to present these interests as good as possible during a court case.

Who determines the interests represented in a court case depends on the subject-matter in question. If study finance is the subject matter, the Dutch Ministry of Education, Culture and Science supplies the content, whereas the Ministry of Foreign Affairs carries out the legal representation. Documents that are worked out during the pre-litigation phase emerge from cooperation between the Ministry of Education, Culture and Science and the Ministry of Foreign Affairs. The interests that are finally represented before the ECJ are determined by the responsible minister, i.e. the minister responsible for education, culture and science.

In order to represent the Dutch interests as good as possible, it is tried to defend the own arguments in the best possible way. That includes an explanation of how the rules in question are interpreted by the Dutch authorities and the reference to earlier case law of the European Court of Justice. Moreover, support is sought by exchanging positions with other Member States and inviting those who find themselves in a similar situation or share the position of the Dutch authorities, to present their position before the Court.

- **Implementation of the ECJ's judgments**

This second part of the interview dealt with the implementation process that starts after the European Court of Justice has delivered a ruling. The questions sought to find out (a) who is responsible for the implementation of the implications resulting from a judgment of the ECJ, (b) how

the national process of implementation goes, and (c) how long such implementation takes on average and which rules are applied in the meantime.

As soon as the European Court of Justice delivers a judgment, the results are received by a so-called ICER-group, in which each ministry is represented. ICER stands for *Interdepartementale Commissie Europees Recht*. That group has a look at the ECJ's judgment and writes an ICER-fiche, which summarizes the judgment, points out which departments are affected, and indicates possible effects for both the policy-field and legislation in question. That fiche is then sent to the contact persons at the relevant departments, who forward it to the directorate that is responsible for drafting legislation. They process the fiche and decide whether a change of law is necessary. If that is the case, the normal law-making procedure starts. That process can take between 1.5 and 2 years, but can also be completed within one year if it is a so-called *spoed geval*.

In the meantime the implementing agencies are instructed to decide on cases by applying the implications of the ruling of the ECJ, because the case law of the Court has to be complied with from the moment that it is delivered.

- **Costs**

The third part of questions dealt with the topic of costs. In particular, it was asked (a) how much money the Netherlands have until now spent on portable study finance, (b) how much money is spent every year through payment of study finance to non-Dutch students, and (c) how such costs are financed.

It is important to note that the Netherlands were not forced by Community law to provide portable study finance. The Netherlands have themselves chosen to provide such assistance in order to promote the mobility of students. However, due to Community law, not only Dutch citizens are eligible for portable study finance, but also certain other groups of EU citizens – if they fulfill the necessary conditions. Thus, Community law has an influence on the payment of study finance. An example is the current court case between the Commission and the Netherlands, which is about the so-called “3 out of 6” rule, which is currently applied by the Netherlands. If the Court would find the Dutch rule to be incompatible with Community law, the Netherlands might face a (huge) increase in costs. As a result the Netherlands might have to decide between having to bear more expenditures or having to abolishing the system of portable study finance.

All financial assistance for students is in the Netherlands financed from the treasury, and finally from taxpayers money.

Information could neither be provided about the amount of money that has until now been spent on portable study finance, nor on the amount of money spent on study finance for non-Dutch students. However, it has been pointed out that it is much more difficult to make students repay the loans they have received from the Dutch state, as soon as a cross-border element is included.

- **Conditions measuring the “certain degree of integration”**

The fourth part of the interview dealt with the conditions which are applied to measure the concept “certain degree of integration”. The questions sought to make clear (a) how the Netherlands have defined the concept, (b) which measurement criteria have been developed to measure the concept, and (c) why the Netherlands have chosen especially these conditions.

Dutch study finance is intended to help students cover the costs of access to higher or university education and the maintenance costs during their studies. EU citizens can only receive study finance for the maintenance costs if they are either permanent resident in the Netherlands or are economically active in the Netherlands or are a certain family member of a migrant worker. In order to be recognized as a migrant worker, one has to work 32 hours per month.

All EU students have a right to receive assistance to help them cover the costs of access to higher or university education. Therefore they can apply for the so-called *collegegeldkrediet*, a student loan with a very low interest rate, which has to be repaid a certain time after finishing the studies pursued.

In order to be eligible for portable Dutch study finance all students, including EU citizens, have to fulfill the “3 out of 6” rule, according to which they have had to be resident in the Netherlands for at least 3 out of the foregoing 6 years.

The concept “certain degree of integration” has thus been defined according to Community law, which prescribes that a student has to be either permanently resident or be a migrant worker or be related to a migrant worker in a certain way. These criteria have been imposed by both Community and case law.

For portable study finance the Netherlands have come up with the “3 out of 6” rule. This criterion has been chosen because it is easy to control. It has been indicated that other criteria are possible, but that these are either hard to implement or incompatible with Community law. Furthermore it has been pointed out that Member States experience it as very difficult to come up with measurement criteria, because they cannot estimate whether such criteria would hold before the ECJ. Whether the “3 out of 6” rule complies with Community law remains to be seen.

- **Brain Drain**

The last part of the interview has dealt with the topic called brain drain. The questions sought to establish (a) whether in the Netherlands there is a balance between outgoing and incoming students, and (b) which measures are taken to try to keep foreign students in the Netherlands after they have finished their studies in that country.

There is no balance between outgoing and incoming students. The Netherlands is a net receiver of students. However, no attempts are made to keep these foreign students in the Netherlands after they have finished their studies in the Netherlands. The idea behind this seems to be that as long as all Member States contribute to and promote the mobility of students, every Member State will benefit from this.