

New Horizons in European Studies

Aston University, 24-25 April 2014

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

www.uaces.org

Angelika W Schenk

University of Bremen
Institute of Intercultural and International Studies (InIIS)
schenka@uni-bremen.de

UACES Student Forum Conference, Birmingham, April 2014
Panel 'Education across Borders: Studying (in) Europe'

- Not for quotation -

Contraction *vis-à-vis* Extension

Member States' Reactions to Case Law of the European Court of Justice on Student Mobility and Study Grants¹

This paper aims at shedding light on two largely underexplored contemporary challenges to welfare states in the European Union (EU): on the one hand, the transnationalization of welfare rights and citizenship, and on the other, the judicialization of politics. One major case that reflects these dynamics has lately been the broadened eligibility of non-economically active citizens to non-contributory welfare services such as university students' access to study grants across the EU. This is of particular interest as it represents a vital domain where European integration is crucially promoted by case law of the Court of Justice of the European Union (CJEU) despite welfare policies being foremost a member-state competence according to the Treaties and further secondary legislation. Yet, member states' responses to EU jurisprudence on non-contributory benefits and the impact on their welfare systems is largely unknown. Therefore, this paper will analyse the changing role of CJEU jurisprudence over the past twenty years in the realm of cross-border study finance as well as member states reactions to it in terms of extension *vis-à-vis* contraction of study finance benefits. The qualitative research design includes case studies of Germany and the UK as these countries host almost 50% of all mobile EU students. Also, these two countries have both been subject of several CJEU rulings on cross-border study finance. This study will show, first of all, that the Court's approach has changed in such a way that it regards student mobility as an important aspect of European integration, thus, enhancing students' options to experience study programmes in other member states by facilitating their access to study finance in other member states, i.e. a 'transnationalization' of citizenship and welfare rights, while at the same time, member-states options of 'territorialization', i.e. autonomy over regulating their study finance systems, are increasingly reduced. Secondly, this paper will find that both country cases largely expand their study finance schemes as a result of CJEU jurisprudence with, however, the UK attempting to find niches to circumvent some of the case law. Altogether, the enhanced right to access study grants as a mobile university student seems to be an illustrative example for an overall development of CJEU induced transnationalization of welfare rights.

¹ This paper has been developed in the context of the Collaborative Research Center 597 'Transformations of the State' project A6 'Political autonomy in the EU multi-level legal system' as well as in current considerations for a follow-up.

I. Introduction

Analysing the dynamics and implications of globalisation and Europeanization on national welfare states has been a long standing research tradition. Within, many scholars have been focussing on the transformation of welfare states with regard to increased liberalisation, international competitiveness and privatisation (Davies 2006). However, three distinct aspects within this field of research demand further attendance. First of all, many studies in this realm have tended to focus on access to cross-border welfare benefits solely on the basis of provisions on free movement of workers, omitting the free movement for those not in employment, which is based on EU citizenship rights, even though the transitions between these provisions are often gradual. Secondly, existing research on Europeanization is leaning much more towards focusing on causes stemming from the Treaty as well as European secondary legislation, thus, largely neglecting case law of the Court of Justice of the European Union (CJEU; Börzel 2002; Schmidt *et al.* 2008; Töller 2010). And thirdly, even though the *potential* effects of European integration on member states' welfare systems are widely discussed in the academic literature, the *actual* impact is largely unknown (Dustmann and Frattini 2013: 26). This holds true even more when considering the implications on national welfare systems caused by the free movement of non-economically active persons.

Therefore, this paper will add threefold new insight to the existing research. First of all, this study focuses on access of non-economically active persons to welfare benefits in other member states by taking the case of university students attending study programmes across the Union and their eligibility to study finance in their respective host member state. Secondly, while this access has certainly also been broadened by Treaty provisions and EU secondary legislation, a major cause of enhanced citizenship and welfare rights has been jurisprudence of the CJEU, which will, thus, be at the centre of this analysis. Herein, it will be depicted how CJEU case law has developed during the past twenty years not only with respect to enhanced citizenship rights by taking the example of university students but also with regard to delimiting member states' options to safeguard their welfare and higher education systems in the sphere of study financing. And thirdly, it will be analysed how member states have reacted to exactly this challenge posed by CJEU case law.

This study will show, first of all, that the Court's approach has changed in such a way that it regards student mobility as an important aspect of European integration, thus, enhancing students' options to experience study programmes in other member states by facilitating their access to study finance in other member states, i.e. a 'transnationalization' of citizenship and welfare rights, while at the same time, member-states options of 'territorialization', i.e. autonomy over regulating their study finance systems, are increasingly reduced. Secondly, this paper will reflect that both country cases, namely Germany and the UK, largely expanded their study finance schemes as a result of CJEU jurisprudence with, however, the UK attempting to find niches to circumvent some of the case law.

This paper will first give an overview of the main theories on judicialization and transnationalization of European welfare states (II), then present the analytical framework of the study (III), portray the main EU secondary legislation as well as CJEU case law on cross-border study finance, including an evaluation of the Court's changed approach to the award of these benefits (IV) before analysing responses by Germany and the UK to this EU legislation and jurisprudence (V), and finally drawing some conclusions (VI).

II. Theorising the judicialization and transnationalization of European welfare states

Traditionally, welfare states have been based on the so-called 'principle of territoriality', according to which social rights are subject to long-term residence and national citizenship. In particular, social security has been confined to national borders, so that it cannot be exported (Cornelissen 1996), thus depicting strong elements of 'closure' (Ferrera 2005, 2009). This setting has historically been justified by reasons of optimally ensuring crucial objectives of the welfare state such as solidarity, equity, accessibility and particularly universal

provision (ibid; Sieveking 2007). However, first of all, various elements of welfare state closure have been challenged since the beginning of European integration, and particularly since the introduction of the Single European Market (SEM) in 1992 through the Maastricht Treaty. Herein, it has become clear that the market-opening principles of EU integration have tremendously challenged the principle of territoriality as well as its concomitant allocating principles such as solidarity (Martinsen 2005; Ferrera 2005). Secondly, cross-border welfare rights and respective service provision have been mainly confined to a rather exclusive circle of beneficiaries with a high socio-economic status. Also, citizens from different member states are principally not granted equal access to cross-border welfare services, dependent on their member state of affiliation. These dynamics, therefore, depict a rather inherently discriminatory approach to welfare provision (cf. e.g. Rothgang and Götze 2009 concerning cross-border health care). Yet conversely, the free movement of workers, as one of the four Fundamental Freedoms born out of the SEM, is distinctively grounded on the principle of non-discrimination with regard to nationality.

In this respect, Stone Sweet (2004: 24) calls the Treaty an 'incomplete contract' which has to be further elaborated by legislative as well as judicial means. Or, to put it in Scharpf's (2007: 12) words: 'vague and ambivalent [Treaty] formulations [...] are effectively invitations to judicial specification.' So, not only various EU directives, regulations and implementing provisions have aimed at coordinating welfare services and benefits among member states but also case law by the CJEU plays an increasingly important role in promoting the scope and substance of European integration (Weiler 1994, 1999; Stone Sweet and Sandholtz 1998; Martinsen 2003, 2009; Stone Sweet 2004, 2010) such as in the realm of social rights and welfare policies. These trends do not only hold true for aspects of 'classic' labour mobility in the EU but also for broadened rights of non-economically active EU citizens such as workers' dependents or university students. However, this has been a legally and politically contested policy area as member states attempt to shield their welfare regimes as much as possible from supranational influence and aim to restrict access to cross-border welfare services whereas the CJEU case law generally broadens eligibility in this regard.

This increased involvement of the judiciary in the process of European integration has first prominently been theorised by Stone Sweet's work on 'judicialization', which he defines as 'the process through which judicial authority over the institutional evolution of a society is constructed' (Stone Sweet 2004: 2). However, findings in the academic literature have found rather varying empirical impacts of CJEU case law on member states (Blauberger 2014). Thus, it has been contested whether European integration through judicial means does have a significant impact on welfare regimes at all and if so, to which extent these dynamics indeed affect the quality and accessibility to social services in member states. On the one hand, it has been argued that Europeanization impacts of CJEU case law are rather limited, either because effects of the CJEU have simply been overstated or since it is well possible for member states to contain their compliance. Yet, on the other hand, scholars who have found significant Europeanization impacts of CJEU case on member states, e.g. as the legal uncertainty of EU law represents a pathway for national actors to challenge ever more national rules, disagree over its material substance. So, they either argue in favour or against an active CJEU by either highlighting positive effects of broadened individual citizenship rights or underlying the challenging nature of CJEU case law for collective institutions, i.e. the common good of member-state welfare systems.

So, first of all, several scholars have argued that CJEU case law still leaves sufficient leeway for national policy-making (O'Brien 2008), which has often been labelled 'judicial restraint'. One reason for this is the often vague and complex nature of CJEU rulings compared to secondary legislation which makes it more difficult to implement (Wasserfallen 2010: 1133). Even more, an important strand of the literature has contended that member states succeed in deliberate 'contained compliance' when adopting CJEU case law to national legislation, thus, respecting CJEU judgments while circumventing broader than necessary adjustments (Conant 2002).

Secondly, different scholars claim significant Europeanization impacts of CJEU case on national welfare policies (cf. e.g. Wasserfallen 2010; Kelemen 2011; Schmidt 2012). Weiler (1991) has illustrated that this stems, *inter alia*, from the important concepts of supremacy and direct effect of CJEU case law over national law. Schmidt (2008) has argued that the legal uncertainty of CJEU case law as opposed to EU secondary legislation allows for opportunities of national actors to push for Europeanization. For example, if national lower courts refer cases to the CJEU which will in turn trigger national legislation, member states are under great pressure to undergo policy reforms. Also, the European Commission can pressure member states through infringement procedures at the CJEU.

Herein, on the one hand, the more optimistic point of view regards the CJEU as a pioneer in promoting a novel, co-ordinated regime partially relocated to the supranational level for the protection of citizens' social rights (Caporaso and Tarrow 2009: 595, 609). On the other hand, the rather sceptical viewpoint is one that frames judicialization through the term of 'judicial activism' (mirroring 'judicial restraint'), which is understood as 'the allegation that the ECJ has unduly extended the scope of Union law and overstepped its own jurisdiction, to the detriment of the "reserved competences" or (more broadly) the political autonomy of Member States' (Dogan 2012: 114). This perspective further argues that the increased involvement of the EU judiciary spilled-over to policy fields that had previously been excluded from integration in EU legislation now results in deregulatory and liberalising effects that undermine the adequate functioning of national welfare systems (Newdick 2006; Menéndez 2009; Scharpf 2009, 2010). This is explained by the fact that the judiciary focuses on the enforcement of highly individualised instead of collective welfare rights which would ensure reciprocity among society (Höpner and Schäfer 2007, Scharpf 2010). Regarding legislation on free movement of economically non-active citizens, it has been shown that it still contains many open concepts so that the CJEU was repeatedly in the position to interpret these in a way that limited member states' options to exclude other EU citizens' access to welfare provision (Rennuy 2013).

III. Analytical framework of the study

Even though some literature on – sometimes alleged – impacts of CJEU case law on member-state welfare systems exists as shown above, relevant empirical effects are still largely unknown (Dustmann and Frattini 2013: 26). Therefore, this first study, which lies in the context of a larger project, will be an explorative one based on an *X*-oriented design asking for possible effects of a cause (Radaelli 2012: 9), i.e. member states' responses to CJEU jurisprudence on cross-border study finance.

In more detail, it will be scrutinised whether member states pay regard to CJEU case law or whether they rather largely ignore it. Also, are criteria for study finance eligibility modified? Do these potential developments lead to an extension of beneficiaries, i.e. students, or rather to a general contraction of welfare provision? In order to tackle these various questions, this paper will analyse domestic reactions in member states, serving as case studies: Germany, and the UK, which are both targeted by rather large migratory flows but at the same time differ largely in their study finance system as well as in other regards such as welfare regime type and judicial system. Thus, the two central research questions of this study will ask:

First, how has CJEU jurisprudence on cross-border study finance developed over the past twenty years in regard to broadened citizenship rights vis-à-vis member states' options to safeguard their welfare and higher education systems in the sphere of study financing?

Secondly, how have member states reacted to the CJEU jurisprudence on cross-border study finance in terms of contraction and extension of these benefits?

The independent variables of this study reflect the concepts of *transnationalization* and *judicialization* of welfare and citizenship rights within the sphere of cross-border study finance. Herein, the analytical focus lies on CJEU jurisprudence; however, relevant Treaty provisions as well as secondary legislation will also be

included as these lay down the basic criteria for eligibility to cross-border study finance across the Union. Subsequently, all existing 36 CJEU cases on mobile students' access to study grants in other member states have been analysed and categorised. The time span covers judgments between 1983 and 2013.

Then, dynamics of transnationalization and judicialization of citizenship and welfare rights in the EU are expected to put pressure on member-state welfare systems. Importantly, CJEU jurisprudence will not only affect the member state that is addressed with a particular judgment ('inter partes') but also all other member states that depict a similar social assistance or study finance system². This might, then, either result in broadened university students' access to cross-border study finance (benefit 'extension') or lead to a diminishing scope of these for domestic students and/or students from other member states alike (benefit 'contraction'). Herein, three parts of analysis are of importance: legislative responses, depicting whether and in how far national legislators amend legislation as a response to CJEU jurisprudence; administrative responses, reflecting whether novel national legislation stemming from CJEU case law is indeed transposed into administrative practice; as well as judicial responses since in case of legal uncertainty, which is often occurs in EU law, the choice is left to the interpretation of courts (Obermaier 2009).³

Therefore, two case studies of different member-state welfare systems have been conducted, namely Germany and the UK⁴. These both belong to the group of rich Western EU member states and are, therefore, all targeted by rather large migratory flows, also particularly in terms of university students. In addition, Germany and the UK attracted almost half of all mobile university students in 2011 (45.6%, which is 310,200; cf. Eurostat 2013). Their individual percentages of EU students attending university there are also higher than average, which the case studies will show in more detail. Moreover, these two countries have both been subject of several CJEU rulings on cross-border study finance (DE: ten cases, UK: four cases).

The country selection, depicting a most-different case design (Gerring 2007: 27), will be meaningful in so far as the selected countries depict the largest possible variation on important dimensions. First of all, with regard to political factors such as welfare regime types, the selected country cases include a liberal, means-tested welfare state (UK) and a conservative and corporatist, social insurance based one (DE) according to Esping-Andersen's (1990, 1999) classic typology. Secondly, concerning legal systems, the member states chosen differ to a large extent in their legal traditions, particularly with regard to judicial review (strong judicial review in DE compared to weak judicial review in the UK). The selected countries also vary regarding their legal system (civil law systems in DE and common law in the UK). Thirdly, as to administrative structures, the sample includes federal states (DE) and one unitary state (UK).

IV. The trigger: transnationalization and judicialization of citizenship and welfare rights

Processes of transnationalization and judicialization in the European Union which incurred enhanced access of mobile EU citizens to welfare services in other EU countries have already existed since the first Treaties and a first Regulation in the 1960s. For a long time, however, these were restricted to the economically active, i.e. cross-border workers, and their dependants. Yet since the 1990s and the integration of the Single European Market as well as particularly the 2004 Citizenship Directive, these rights have been increasingly broadened to all EU citizens, also those that are non-economically active such as university students, on the basis of the principle of non-discrimination in terms of nationality and citizenship rights. In the following

² Whether CJEU rulings are to be considered as inter partes or erga omnes has been contested among legal scholars. However, in practice, any new CJEU case (and certainly also national courts' cases) on a similar topic will presumably bear previous CJEU judgments in mind (Obermaier 2009: 16).

³ However, due to restraints in scope of this paper, this study will mostly focus on legislative and administrative responses. Judicial responses will be followed more closely in subsequent research.

⁴ For various analytical reasons, the case of Belgium will also be included in follow-up studies.

chapter, a first brief overview of free movement rights for cross-border workers will be given as a basis for the consequent paragraphs on EU citizenship and welfare rights granted to the non-economically active. Herein, the Citizenship Directive as relevant secondary legislation will first be presented before demonstrating how these pieces of legislation have been further developed by the CJEU with regard to citizenship rights in general and rights granted to exchange students in particular.

IV.1 The background: EU legal provisions on the free movement of workers

Even though the focus of this paper lies on non-economically active university students' eligibility to cross-border study finance, it is still vital to illustrate EU legal provisions on welfare rights to cross-border workers. This is particularly crucial as some category of students, namely those who are or had been economically active in the host state before, can invoke their free movement and cross-border social security rights on the basis of legislation on free movement of workers.

The free movement of workers had already been codified in 1957 by the EEC Treaty and is today laid down in Articles 45 to 48 TFEU (Treaty on the Functioning of the European Union). These provisions prohibit any form of restriction to workers' free movement rights, including discrimination on grounds of nationality with regard to employment, remuneration and working conditions (Article 45(2) TFEU). In addition, Article 51 EEC Treaty had specified that further EU secondary legislation was to be drafted in order to clarify cross-border workers' residence and welfare rights. This had been effectuated by Regulation 1612/68/EC (now 492/2011) 'on freedom of movement for workers within the Union' and Regulation 1408/71/EEC (now 883/2004) 'on the coordination of social security systems', which had been considered Europe's then 'most advanced social policy achievement' (Martinsen 2003: 2). These Regulations grant cross-border workers the right to access the same welfare benefits and tax advantages as nationals of the host country (Art 7(2) Reg 492/2011; Art 4 Reg 883/2004) as well as the right to portability of social security across member states (Articles 5 and 6 Reg 883/2004), such as pension fund benefits. All of these rights are granted from the very beginning of their stay, contrary to non-economically active persons. Concurrently, CJEU case law has clarified further implications of these Treaty and secondary law provisions such as including the self-employed (C-17/76 *Brack v Insurance Officer*) and job-seekers (C-249/83 *Hoeckx* & C-122/84 *Scrivner*) to a broader category of 'workers' having access to cross-border social security.

IV.2 At the core: EU legal provisions on exchange students' access to study finance

The original framework of secondary EU law on cross-border access to welfare benefits has gradually been extended through CJEU case law so to broaden its personal and material scope (Martinsen and Falkner 2011). Particularly in the 1990s, after the completion of the Single European Market in 1992 and following vital CJEU cases, the tight restriction of granting cross-border welfare rights only on the basis of employment status, had been opened up largely on the basis of EU citizenship rights. These rights were first introduced in the Treaty of Maastricht in 1992 and are laid down in Articles 20 to 25 TFEU, complemented by Articles 18 and 19 on non-discrimination.

IV.2.1 EU secondary legislation on cross-border study finance

The principle on non-discrimination with regard to free movement as laid out in the Treaty is limited to the conditions set out in the Treaty and respective secondary legislation (Weatherill 2012: 418). For instance, both the 1993 Student Mobility Directive and the 2004 Citizenship Directive, which repealed the former, set clear limits on how students can invoke free movement and welfare rights.

The 1993 Student Mobility Directive

Directive 93/96/EEC 'on the right of residence for students' was adopted after the initial Directive on that matter, 90/366, had been annulled by the CJEU for choice of incorrect legal basis in *Parliament v Council* (C-295/90) [1992]. This novel 'Student Mobility Directive' recognised the rights of EC students to reside in another member state while attending university there. However, it was clear that mobile students should not

rely on the host member state's welfare system. Therefore, their right to free movement was conditional on proof of sufficient financial resources as well as coverage by sickness insurance (Art 1). For the same reasoning, the right to establish entitlements for maintenance grants was precluded for any length of residence stay (Art 3). However, it is important to note that this article did not preclude students from receiving social security benefits. Lastly, member states had the right to withdraw residence rights if students could no longer sustain themselves.

In 2004, the Student Mobility Directive along with two other directives on welfare and residence rights for non-economically active mobile persons in the European Community (Directive 90/364/EEC 'on the right of residence' and Directive 90/365/EEC 'on the right of residence for employees and self-employed persons who have ceased their occupational activity') was repealed by the Citizenship Directive 2004/38/EC, which combined the different bases for welfare claims of these three directives.

The 2004 Citizenship Directive

Directive 2004/38/EC constitutes a cornerstone of enhanced citizenship rights, i.e. extending encompassing welfare and residence rights from economically active to non-economically active mobile EU citizens such as university students. The Citizenship Directive is based on Articles 18, 21, 46, 50 and 59 TFEU, directly amending the afore mentioned Regulation 1612/68 on cross-border workers. Its paragraphs specify the main conditions under which union citizens and their family members can exercise residence and welfare rights as well as the limits placed on these rights on grounds of public policy, public security and public health. In more detail, these rights are categorised into three distinct residence periods, which apply as well to university students. Within the category of 'welfare benefits', a distinction is drawn between 'social assistance', also called 'subsistence benefits', i.e. basic financial aid to all non-economically active persons, and 'maintenance assistance', also called 'study finance' or 'study grants', i.e. additional financial support relating only to university students.

- (i) Up to a residence period of three months, EU citizens and their family members are granted the right to reside freely in any member state without fulfilling any conditions other than a valid proof of identity. Yet, according to Article 24(2), member states are not obliged to grant any form of social assistance or study finance during this time if the person in question is not economically active.
- (ii) During a residence period between three months and five years, Article 7(1) specifies that citizens are only allowed to reside in another member state if they are either economically active, a dependent of one such person or able to produce valid proof of sufficient financial resources and sickness coverage to not become 'a burden on the social assistance system of the host member state'. Students attending an accredited institution are allowed to reside for the duration of their studies but have to fulfil the same conditions. The amount of what is considered as 'sufficient resources' is to be evaluated on a case-by-case basis by member states, though it must not be higher than the threshold for social assistance eligibility of nationals of the host state (Art 8(4)). Also, member states do not have the right to automatically expulse a Union citizen in such case (Art 14(3)).

Theoretically, all EU citizens, whether economically active or not but excluding job-seekers, are now entitled to social assistance measures, which also includes university students (Art 24(2) in conjunction with Art 14(4)(b)). However, as residence rights beyond three months for non-economically active persons are only granted on proof of sufficient financial resources, these citizens are in practice unlikely to access social assistance measures during this residence period (European Commission 2014: 3). Moreover, students are precluded from accessing maintenance grants during this residence period if they are neither economically active nor children of cross-border workers and if the member state in question does not opt for providing more generous social security measures (Art 24(2)).

- (iii) Lastly, for stays exceeding five years, permanent residence rights are granted to union citizens and their family members (Art 16), so that they are no longer obliged to fulfil the above conditions (Art 12(1) in conjunction with Art 7(1)). Thus, Union citizens are now entitled to the same rights as nationals of the host member state (Art 24(1)), including welfare benefits. This, now, also includes access to maintenance grants for university students from other member states (Art 24(2)).

Altogether, it becomes clear that the Citizenship Directive has strengthened residence and welfare rights of mobile university students and all other non-economically active persons. However, it is also evident that a distinct hierarchy in the rights of cross-border workers *vis-à-vis* non-economically active citizens can still be observed as workers are granted broad welfare rights right from the beginning of their stay whereas university students and other non-economically active persons have to fulfil certain residence periods before being entitled to welfare benefits. Moreover, the condition of non-economically active EU citizens 'not becoming a burden on the host member state' is rather opaque so that it might either be interpreted in favour of member states aiming to restrict full access to national welfare benefits or to the advantage of the free movement of citizens. Due to this legal uncertainty, decisions on this issue have been referred to the CJEU by national courts quite a number of times during the past decades which the next section will deal with.

IV.2.2 CJEU case law on student mobility and cross-border study finance

The principles of non-discrimination with regard to nationality and the prohibition to restrict the free movement of EU citizens, whether economically active or not, as well as mobile citizens' (partial) access to cross-border welfare benefits is increasingly reflected in CJEU judgements. Herein, the Court's reasoning has been based on its definition of Union citizenship, which is 'destined to be the fundamental status of nationals of the Member States' (C-184/99 *Grzelczyk* para 31). So, the CJEU has repeatedly challenged the idea of national autonomy of welfare systems, i.e. the 'principle of territoriality' (Dougan 2009), even though Art 153(2)(a) TFEU excludes any form of harmonization of member state legislation relating to, for instance, member-state social security systems.

This overall development can also be observed for the case of cross-border study finance. Herein, the Court based these decisions partly on questioning the requirement of the Citizenship that 'EU citizens should not become a burden on the social assistance system of the host member state', and, in turn, limited the application of this condition. All in all, this overall dynamic can be interpreted as being in line with a general development of the initial EU regulatory framework being expanded in personal and material terms through salient CJEU case law and legislative revisions (Martinsen and Falkner 2011: 138).

Differing bases for claiming cross-border study finance

When collecting and analysing all relevant CJEU case law on study finance since the 1980s, a categorisation of bases for study finance claims as well as the development thereof is feasible. As a whole, recent case law of the CJEU has stressed general access to university studies in other member states (C-73/08 *Bressol*), *inter alia* through the obligation to recognise secondary education diplomas from other member states (C-65/03 *COM v BE*; C-147/03 *COM v AT*). The Court also clarified the criteria of eligibility to social assistance and/or study grants financed by, on the one hand, the host state:

- Having established a real link with the host state through minimum residence periods (e.g. three years for receiving social assistance, not maintenance grants, as to C-184/99 *Grzelczyk*), substantial parts of secondary education (C-209/03 *Bidar*) or marital and job-seeking status (C-367/11 *Prete*);
- Being a child of a migrant worker, thereby enabling admission to general educational courses (C-42/87 *COM v BE*; C-413/99 *Baumbast*; C-480/08 *Teixeira*), access to study grants (C-389/87, C-390/87 *Echternach, Moritz*; C-308/89 *Di Leo*; C-7/94 *Gaal*; C-337/97 *Meeusen*; C-542/09 *COM v NL*; C-20/12 *Giersch*) and tideover allowances (C-224/98 *D'Hoop*; C-258/04 *Ioannidis*);

- Being currently or previously employed in the host state, allowing students to retain the status of a worker and to receive study grants immediately (C-39/86 *Lair*; C-197/86 *Brown*; C-357/89 *Raulin*; C-3/90 *Bernini*; C-413/01 *Ninni-Orasche*; C-46/12 *LN v Styrelsen*). This employment must be remunerated and conducted 'under the direction of another person' (*LN v Styrelsen* para 40) as well as being 'effective and genuine' and not 'purely marginal and ancillary' (ibid. para 42; *Ninni-Orasche* para 32). While in *Brown*, an employment serving as 'pre-university industrial training' was considered 'merely ancillary' (cf. para 27), thus, not qualifying for the status of a worker, only few hours of work per week during the studies (*LN v Styrelsen* para 41) or just short-term employment prior to the studies (e.g. 2.5 months in *Ninni-Orasche*, cf. para 32) were considered sufficient. Member states are not entitled to set generalised minimum employment periods for nationals from other member states to be conferred the status of a worker (*Lair* para 44) but must conduct a comprehensive case-by-case assessment of whether the above criteria are met (*Ninni-Orasche* para 32; *LN v Styrelsen* para 43). Lastly, it is required that there is a link between the purpose of the studies and the previous employment except for cases of involuntary unemployment where retraining is necessary (*Lair* para 37). Also fixed-term contracts may be considered instances of involuntary unemployment (*Ninni-Orasche* para 48).

Benefits financed by the host state also include reduced fares on public transportation (C-75/11 *COM v AT*); additional enrolment fees are prohibited (C-152/82 *Forcheri*; C-193/83 *Gravier*; C-24/86 *Blaizot*; C-242/87 *COM v Council*). On the other hand, exchange students are able to claim, largely unconditionally, study grants from their home state, if existent (C-11/06, C-12/06 *Morgan, Bucher*; C-523/11, C-585/11 *Prinz, Seeberger*; C-220/12 *Thiele Meneses*; C-275/12 *Elrick*) and to deduct tuition fees from their home taxes (C-56/09 *Zanotti*).

The CJEU's varying approach to the award of cross-border study finance

When regarding the development of CJEU case law on study finance during the past twenty years, it becomes clear that a shift in the Court's orientation has taken place. This can be exemplified quite well by taking the example of the 1988 *Lair* and *Brown* rulings, the 2001 *Grzelczyk* and 2005 *Bidar* judgments as well as the most recent *Thiele Meneses* and *Elrick* rulings of 2013.

Among its very first judgments on the topic were the 1988 rulings in *Lair*, regarding a French student in Germany, and *Brown*, a student with dual French and British nationality studying in Cambridge. Herein, the CJEU held that exchange students were not eligible to maintenance grants as these would fall outside the material scope of the Treaty as to Art 12 EC (Art 18 TFEU) since educational and social policy were considered a matter of member state competence (cf. *Lair* para 15 and *Brown* para 18).

Yet more than ten years later, the CJEU tremendously altered its position in the *Grzelczyk* 'landmark judgment' (Martinsen 2002: 136). Rudy Grzelczyk was a French national studying in Belgium for three years while sustaining himself on own financial means and loans before applying for minimal subsistence measures ('minimex') at the Belgian authorities during his fourth year which had been refused. The CJEU then ruled that exchange students were in fact able to invoke Articles 12, 17 and 18 EC (Art 18, 20, 21 TFEU), thus, they were entitled to social assistance under certain conditions. As noted before, the Student Mobility Directive only excluded maintenance grants but did not address the issue of social assistance, thus, did not exclude it. The Court justified this altered approach, as compared to *Lair* and *Brown*, by stating that cross-border mobility had become a reality of the Union, contrary to 1988 (*Grzelczyk* paras 34 and 35).

A very similar reasoning was applied in the 2005 *Bidar* judgment. Dany Bidar was a French national who had completed three years of secondary education in the UK before commencing his university studies in London and applying for a student loan which was refused by English authorities on grounds of him not being settled in the UK. However, while a three year period of residence prior to the start of the studies was considered sufficient to receive a student loan according to then UK legislation (which dated back to 1971),

this condition was linked to being economically active, i.e. *Bidar* could never obtain the status of a 'settled' person while being enrolled in an educational institution. Here, the CJEU ruled that this exclusion from accessing student loans for reasons of not being settled while being lawfully resident was in breach with EU law. Thus, the Court argued that students who have demonstrated a 'certain degree of integration into the society of the host state', so for instance through completion of secondary education in the host state, could be regarded as settled and, therefore, claim a student loan.

Lastly, the 2013 cases *Thiele Meneses*, on the one hand, concerned a German national mostly having resided outside of Germany studying in the Netherlands and being rejected for a study grant by German authorities, and on the other hand *Elrick*, a German national studying a one year's training course in the UK and also being rejected for a study grant by German authorities for reason of the short duration of the course. The CJEU ruled, again, that these mobile students could invoke Articles 20 and 21 TFEU, so that they had to be granted the respective maintenance grants.

CJEU jurisprudence on study finance: territorialization vis-à-vis transnationalization

It becomes evident that the afore-mentioned cases have to be regarded separately with regard to their material scope: while *Lair* and *Brown* [1988], *Bidar* [2005], *Thiele Meneses* and *Elrick* [2013] all regarded the award of maintenance grants, *Grzelczyk* [2001] addressed access to social assistance for exchange students, which are two distinctly different forms of welfare benefits. This has been alluded to in the previous sections showing that also relevant secondary legislation, the Citizenship Directive, treats these two types of benefits differently: while it is, at least formally, possible for exchange students to access social assistance already after a residence period of three months, eligibility to maintenance grants requires permanent residence, i.e. a residence period of generally five years.

Secondly, it becomes clear that CJEU case law is generally being situated on a fine line between (a) 'territorialization' and (b) 'transnationalization' of welfare rights. In the first instance, member states are granted larger autonomy over regulating their study finance systems as ruled in *Lair* and *Brown* in 1988 whereas in the second instance, the Court extends cross-border access to study finance on the basis of EU citizenship rights as in *Grzelczyk* in 2001, in *Bidar* in 2005 and in *Thiele Meneses* and *Elrick* in 2013. This tension between member states' and citizens' interests is also spelled out in para 44 of the *Grzelczyk* judgement where the Court stresses the trade-off between not burdening member-states' welfare systems disproportionately, and securing a basic level of financial solidarity across the union.

Thirdly, it could be observed that there is a clear tendency of the Court moving away from (a) 'territorialization' to (b) 'transnationalization' of welfare rights by extending access to cross-border study finance and by reducing member states' options to delimit the provision of study finance to exchange students. Resulting from the *Grzelczyk* and *Bidar* judgments, students were to be treated almost as if they were nationals of the host member state under certain circumstances. This also foreshadows a process from collective to increasingly individual rights: while (a) preserves a common public good (access to higher education for the many in a domestic context), (b) grants individual rights for students crossing borders in their studies. Even if this is argued to be attainable for any European student, economic restrictions on exchange student mobility surely disapprove so. And this is true even more so as the CJEU requires member states to conduct case-by-case assessments when it comes to evaluating claims for cross-border study finance on the basis of a sufficient degree of integration – a threshold that is very much 'ill-defined' according to Weatherill (2012: 419). Even though this case-by-case evaluation has been argued to be a fairer process (Kostakopoulou 2012: 183) it is surely much more cumbersome for member states.

Lastly, there is no clear picture to whether EU jurisprudence fills the gap of legal uncertainty produced by secondary legislation. After now having presented all relevant legal provisions, it can be reconstructed that the 1993 Student Mobility Directive had left legal uncertainty about cross-border students' eligibility to social assistance measures as it only precluded their eligibility to maintenance grants. This legal gap in

secondary legislation was filled by CJEU case law through the *Grzelczyk* judgment. This distinction between social assistance and maintenance grants for cross-border university students had then been taken up by the 2004 Citizenship Directive. However, neither this piece of secondary legislation nor subsequent CJEU jurisprudence clarifies the exact conditions for a student 'not to become a burden on the social assistance system of the host member state' and also not for what is to be considered 'effective and genuine' employment, thus, not filling the gap of legal uncertainty here.

V. The outcome: member-state reactions to broadened rights for exchange students

The realisation of higher education generally belongs to member states' welfare systems and also constitutes a major part of a nation's culture and identity. Moreover, systems of study finance may be rather costly and numerous requests for study finance by foreign students may well burden the financial sustainability of host member state welfare systems. Even more so, member states cannot know whether these students might merely be 'free-riders' that will not contribute to the host country's economy after completion of their studies (Dougan 2005: 954). Thus, member states have generally opposed EU integration in this sphere so to retain their national autonomy (Damjanovic 2012: 149). However, they have so far not yet succeeded in finding a solution for a fair distribution of financial burdens resulting from student mobility with clear 'net importer', i.e. hosting, and 'exporter', i.e. sending countries (ibid.: 156).

According to Eurostat (2013), an average of 3.4% of students came from another EU-27 or EEA member state or from Croatia, Macedonia or Turkey in 2011 in a given member state. Among them, the UK (195.400), Germany (114.800), Austria (54.300), France (48.800), and the Netherlands (41.700) received most students in absolute numbers whereas Luxembourg (42.6%), Austria (15%), Denmark (8.1%), the UK and Cyprus (both 7.8%) ranked highest as hosting countries in relative terms with Germany following on rank ten (4.2%). This makes clear that flows of incoming university students differ largely across EU member states. Regarding the cases of this study, both analysed countries reported that they were net importer (i.e. hosting) countries (for Germany cf. EHEA 2012c: 14; for the UK cf. EHEA 2012a: 12, for England, Wales and Northern Ireland; and EHA 2012b: 13, for Scotland).

With regard to different ways of financial support for university students in European countries, Eurostat (2012: 106) illustrates that these measures can differ in three ways: (i) support to cover the cost of living, in the form of grants and/or loans; (ii) contributions to tuition costs and support for the payment of administrative fees, in the form of grants and/or loans, reductions and/or exemptions; (iii) financial assistance to students' parents through tax relief and/or tax allowances. According to Eurostat (2012: 88), the average public spending on higher education in the EU as a percentage of GDP amounted to 1.1% in 2008. It varied from, for instance, 2.2% in Denmark, 1.5% in Austria and the Netherlands, 1.4% in Belgium, 1.2% in Germany and France, and 0.8% in the UK. However, it also has to be considered that in the UK, 30.5% of all spending on education comes from the private sector whereas this numbers amounts only to 7.8% in Denmark, for instance (EU average: 13.8%; Eurostat 2012: 93). Moreover, countries also differ widely in the amount of financial support (scholarships, grants and loans) to university students as a percentage of public expenditure on tertiary education (Eurostat 2009: 207; figures for 2005). While Denmark (30.8%), the Netherlands (27.8%) and the UK (25.8%) depict rather high levels (with 5%, 15.5%, and 19.1%, respectively, financed as loans, the rest as grants or scholarships), the levels in, for instance, Germany (19.2%), Austria (16.8%), and Belgium (15.2%) are much lower (EU average: 20.5%).

V.1 Germany

In most of the *Länder* in Germany, studying is free of charge, only in Lower Saxony students have to pay 1,000 EUR per academic year (to be abolished in the academic year of 2014/15). Financial support ('BAföG') is available and awarded as half a grant and half a loan without interest rate, ranging from 10 to 670 EUR per month (i.e. 120 to 8,040 EUR per year) with a limit on 10,000 EUR to be paid back for the loan. Students are eligible to BAföG on grounds of income, savings, housing and family situation as well as disability and need to be at most 30 years old (35 years for masters). Merit-based financial support used to consist of 300 EUR per month plus the same amount of money as BAföG if the same criteria are met, however, awarded as a full grant. Moreover, student loans are available, called 'Bildungskredit' (granting up to a maximum of 7,200 EUR during the whole studies) and 'Studienkredit' (granting up to 54,600 EUR in total). In addition, parents receive additional allowance as long as their children pursue vocational training or higher education, yet only up to the age of 25 years of their children, which amounts to 184 EUR per month for the first two children, 190 EUR for the third and 215 for the fourth and more children. Alternatively, parents can be awarded a lump-sum tax relief of 3,504 EUR per year per child per parent (i.e. 7,008 EUR per child per family). Whether the child allowance or the tax relief is more favourable to a family will be checked by the regional tax office in favour of the parents (European Commission 2013a: 12).

According to §8(1)(2) BAföG (latest version as of 7 December 2010, BGBl I p. 1952), all Union citizens that are not economically active and that hold permanent residence status in Germany are entitled to study finance, i.e. BAföG. According to §4(a)(1) FreizügG/EU, all Union citizens that have continuously resided in Germany for five years are considered to be permanent residents. It is further specified in BAföG that students that are children or registered/marriage partners of migrant workers, or that are or have been employed in Germany, can receive BAföG right from the start of their studies according to §8(1)(3) and §8(1)(4) BAföG respectively. According to the relevant administrative regulations (BAföGÄndVwV 2013, no. 8.1.12 pp. 35-6), 'employment' is to be defined in line with EU law in so far as the type of employment is to be remunerated but not necessarily to an amount which earns a living, and has to be of 'genuine economic value' and not purely marginal in scope. Further, according to administrative regulation no. 8.1.13 (p. 36), the type of employment and studies need to be related unless the respective citizen has become involuntarily unemployed. German students enrolled in a university of another country (not only EU member states) can receive BAföG for the duration of up to one continuous year (§16(1) BAföG) and if the studies in this country are of 'particular importance' for the student, three further terms of studies may be financially supported through BAföG (§16(2) BAföG). Lastly, this extended period of study finance is only granted for studies in another EU member state if the German student in question has already resided in Germany for duration of at least three years. As regards the above-mentioned merit-based study grants, eligibility is given to the same circle of beneficiaries as defined in §8 BAföG (BMBF 2014). The same is valid for the award of a study loan ('Bildungskredit'; cf. BVA 2014). Moreover, as to child allowance granted to parents, students (and all other children) from other member states that live in Germany together with their parents can receive these benefits right from the start of their stay in Germany according to relevant legislation ('Bundeskindergeldgesetz', cf. also BZSt 2014: 6).

A recent report by the German government published on 25 March 2014 noted that in December 2013, almost 660,000 children from other member states with parents living in Germany received child allowance from German authorities (BMI and BMAS 2014: 128). This report had been intended to address German municipalities and to depict courses of action with regard to social security being awarded to EU citizens living in Germany, particularly those not in employment. Herein, among several measures⁵ proposed to alleviate the burden on several municipalities, payment of child allowance was addressed. The report proposes to prevent abuse of child allowance by EU citizens through strictly linking the grant of these

⁵ Yet, these were mostly relating to welfare benefits which are not relevant for university students, i.e. also not relevant for this study, such as unemployment and housing benefits or integration measures.

benefits to parents' tax identification number so that child allowance is not granted more than once per child. Also, the actual existence of children is to be verified more strictly by official documents such as birth certificates. Both these check-ups had lately not been scrutinised thoroughly in administrative practice (ibid.: 92). Moreover, it had previously been proposed by Labour and Social Affairs Ministers of the *Länder* that the grant of child allowance should be linked to the obligation of attending an educational institution. However, for various reasons, this is considered too large a financial and administrative burden by both the Federal Ministry of the Interior as well as the Federal Ministry of Labour and Social Affairs (ibid.: 92-3). Also with regard to study finance, even though child allowance strictly speaking is also part of the various study finance measures, it will most probably only play a minor role with regard to student mobility in Germany as most exchange students will not arrive together with their parents.

Next, it is interesting to note that the just mentioned report by the German government does not at all evaluate the extent to which university students from other member states access financial support in Germany (BMI and BMAS 2014). However, a slightly older report focusing on BAföG has specified some numbers. In 2012, 152.9m EUR were spend in 2012 for BAföG granted to German students studying in other countries. This has increased largely during the past years as in 2010 the number amounted to 127.9m EUR and in 2008 to only 73.3m EUR as reported in the 22nd BAföG Report by the Bundestag (Deutscher Bundestag 2014: 22). The same holds true for foreign students attending German universities and funded by German authorities. In 2012, 237.5m EUR were spend in this regard while in 2010 the number only amounted to 203m EUR (ibid.: 26). As an official of the German Academic Exchange Service (DAAD) explains in an interview (ZEIT Campus 2014: 39), the amount spent on study finance is still less than what the German economy gains through foreign students spending money in Germany, particularly through those who stay and work in Germany subsequent to their studies. He states that calculations have been conducted which come to the conclusion that only 30 per cent of the foreign students need to remain in Germany after the completion of their studies in order to balance out German expenditure on their study grants. According to his information, this is exactly the percentage that continues living in Germany.

Furthermore, the BAföG report also illustrates that the development of increased spending on cross-border study finance stems from the last BAföG law update in Germany (22nd BAföGÄndG), which was adopted on 23/12/2007 came effective in 2008. Since then, German nationals can receive a study grant of up to 4.600 EUR for exchange terms of the maximum duration of one year (ibid.: 22). Also, foreign EU students with permanent residence status can now access study finance, which was not possible before. This law was adopted just after the CJEU judgements *Morgan* and *Bucher* of 23/10/2007, which required German authorities to grant study finance to German exchange students even if these had not studied in Germany before. Regarding the 2013 CJEU rulings in *Thiele Meneses* and *Elrick*, Parliamentary Undersecretary Dr Helge Braun explains that the Federal Ministry of Education and Research has required the regional authorities by decree to implement the Court's ruling par for par, which will later be included in the next update of the German study finance law (Deutscher Bundestag 2013: 57-8).

For the case of Germany, a twofold conclusion can be drawn. First of all, it becomes evident that legislation on study finance (BAföG) in Germany has been adopted largely in line with EU legislation. So, for instance, the wording in §8 BAföG on Union citizens' eligibility to study finance in Germany closely resembles that of the Citizenship Directive and of relevant CJEU case law such as the definition of employment in *Lair, LN v Styrelsen* and *Ninni-Orasche* as depicted in chapter IV. Also, after the cases of *Morgan* and *Bucher* as well as of *Thiele Meneses* and *Elrick*, German legislation had been changed in order to comply with CJEU case law. This is particularly interesting as it resulted in a significantly extended welfare provision both to Union citizens studying in Germany and German students enrolled in another member state. So, the research up to date does not depict any attempt of the German government to delimit its expenditure on cross-border study finance. Even though the administrative regulations are as well in line with the above, it will still be interesting to analyse further whether this compliance, resulting in extended welfare provision, is also

reflected in administrative practice. However, secondly, the story told by the award of child allowance to EU citizens living in Germany is already different. Here, the German government frankly discusses ways to delimit this expenditure but partly founders on administrative as well as financial (and presumably also legal) obstacles. Yet, as already stated, this challenge is only a minor one for Germany when it comes to student mobility. To conclude, it becomes clear that Germany has extended welfare benefits in terms of study finance to both domestic and EU university students by complying with EU law.

V.2 United Kingdom

In the UK, three types of financial support for university students exist: tuition fee loans, maintenance loans and maintenance grants. These as well as tuition fees themselves are regulated differently in the four countries England, Wales, Northern Ireland and Scotland. Tuition fees exist in all four countries but differ largely in their amount. For undergraduate studies, fees are regulated in all four countries and are capped at 9,000 GBP per year in England and Wales for all UK and EU students. Effectively, 8,385 GBP had been charged on average in England in the academic year of 2012/13. In Northern Ireland, 3,575 GBP are charged for domestic and EU students but 9,000 for students from other UK countries. A similar logic applies in Scotland: here, studying is free of charge for Scottish and EU students as the Scottish Government covers the tuition fees of 1,820 GBP per year for the students. However, students from other UK countries pay up to 9,000 GBP per year. These tuition fees do not have to be paid up front: students in England, Wales, and Northern Ireland can apply for loans that cover their full tuition fees and have to be repaid at an interest rate of 9 per cent of income above a threshold of 21,000 GBP (16,365 GBP in Northern Ireland). For graduate studies, fees are unregulated in all four UK countries. Nevertheless, the UK Research Council has recommended 3,900 GBP as a ‘most common’ amount of tuition fees even though fees still vary widely (European Commission 2013a: 33-6).

In addition to the loans on tuition fees, undergraduate students can also take out loans for living costs (‘maintenance loans’) which are set at a maximum 5,500 GBP per year in England (7,675 in London), 5,150 GBP in Wales, and 4,840 GBP in Northern Ireland. The loans on living costs are repayable in the same way as the above loans on tuition fees. For further financial support, students can also be awarded a need-based grant (‘maintenance grants’) during their undergraduate studies, which also varies in its amount according to the specific country. In England, students can apply for up to 3,354 GBP per year, which was received by 40 per cent of the students as the full amount and by 14 per cent as a partial amount in the academic year of 2012/13. In Wales, the maximum is set to 5,161 GBP per year, with 38 per cent of students having received a full grant and 30 per cent a partial one during the same year. In Northern Ireland, the grant amounts to a maximum of 3,475 GBP, with 39 per cent awarded the full amount and 23 per cent a proportion of the grant. In England, Wales and Northern Ireland, additional scholarships are available for students from disadvantaged backgrounds. With regard to financing graduate studies in England, Wales and Northern Ireland, about 60 per cent of students in taught programmes and 30 per cent in research programmes are self-financing; the rest mostly receive scholarships awarded by the different Research Councils. In Scotland, different grants exist for needy students with a maximum of 1,750 GBP awarded per year. In addition, they can take out loans of a maximum of 6,500 GBP per year depending on their status group. Family allowances or tax benefits contributing towards study finance do not exist in any of the four UK countries (ibid.).

In England, Wales and Northern Ireland, EU students are eligible for students and maintenance loans either on the basis of being employed, a child of a migrant worker, or if they have lived in the UK for three years before the start of the study programme (Nidirect 2014a). This has to be proved by providing valid documentation such as bank statements, Council tax bills, utility bills such as electricity or telephone bills, or a work permit (UKCISA 2013). EU citizens are regarded as ‘workers’ if they work either full- or part-time, if the work is ‘genuine and sufficient’ and not ‘marginal and ancillary’. As shown before, these provisions

have to be evaluated on a case-by-case basis but the UK government gives some idea on its interpretation: working as a cleaner for eight weeks for eight hours per week at an hourly rate of 10 GBP is not regarded as 'genuine' as the person was not self-sufficient. Also, helping out at a relative's shop for an hour or two and being paid 20 GBP per week is regarded as marginal and ancillary. However, being employed for three hours per day, five days per week for four months (without the hourly pay rate being specified) is considered genuine and effective (UK Government 2014). Students retain the status of a worker if they either work part-time to their studies or if they cease employment and start a university course that is related to the prior work except for cases of involuntary unemployment (UKCISA 2014a).

As regards non-economically active students from other member states enrolled at a UK university, a 'habitual residence test', including a 'right to reside test', must be passed before accessing any type of welfare benefit, including study finance (UKCISA 2014b). This test was first introduced in 1994 and expanded by the 'right to reside' test in 2004 as a reaction to the Citizenship Directive (UK Government 2013). It includes more than 100 alternative questions to evaluate the legal residence status of a person moving to the UK and claiming welfare benefits. However, as the European Commission has received numerous complaints by EU citizens residing in the UK that were eligible to certain welfare benefits according to EU law but were denied so after passing the 'right to reside test', it has referred the UK to the CJEU in May 2013 after previous requests to end this procedure had failed. The Commission argues that this test is in breach with EU law as it poses an additional burden on EU citizens in the UK, including students, as they have to meet additional criteria before accessing welfare benefits while UK citizens receive them solely on the basis of their UK citizenship (European Commission 2013b: 1-2).

The 2005 *Bidar* judgment on the unlawful practice of granting UK student loans only to those cross-border students who had been economically active in the UK before seems to have been transposed immediately at first sight. Yet on closer examination it becomes clear that while Statutory Instruments 2005 Nos. 1341 and 2084⁶ were directly implemented by changing the existing legislation in a way that all EU student having resided in the UK for three years would now be eligible for student loans, the administrative practice only changed with the academic year of 2006/07 when the Citizenship Directive was implemented (through the 'Immigration (European Economic Area) Regulations 2006 No. 1003). Only since then, it is publicly communicated that EU students can access student loans in the UK (Nidirect 2014b), even though it was legally possible already one year ahead of that date.

The *Bidar* case is also an interesting one as the UK had apparently felt safe to win due to its success in the earlier 1988 *Brown* case. In the main proceedings of the *Bidar* case, the UK Secretary of State for Education and Skills repeated the CJEU's position of the *Lair* and *Brown* rulings, stating that maintenance grants would fall outside the scope of EU Treaty provisions. This is even more interesting as the *Bidar* case had been filed two years after the *Grzelczyk* judgment was made public which did include study finance into the scope of the Treaty, even though the benefits granted were strictly speaking social assistance and not study finance. Thus, the UK government must have calculated students loans still falling outside of the Treaty scope as compared with the grant of *minimex*

Through these legislative amendments, the number of EU students accessing study finance in the UK has significantly increased: according to a report from 2011, debt for tuition fee and maintenance loans by EU students has quadrupled in just two years, increasing from 42 million GBP in 2008 to 167 million GBP in 2010 (The Telegraph 02/06/2011). For the academic year of 2010/11, foreign students received loans 88.5 million GBP, which had doubled from 44.5 million GBP in 2006/07 (Paton 2012). The Higher Education Policy Unit expects that numerous students are not likely to ever clear their debts. For instance, 2,800 EU students defaulted on their payments in 2011 (*ibid.*); 42 per cent of all EU students still owing money on

⁶ These amended the Education (Student Support) (No.2) Regulations 2002 as well as the Education (Student Support) Regulations 2005.

loans simply disappeared or were in arrears in 2011 (Henry 2012). It is estimated that particularly those students from poorer EU countries will never reach the 21,000 GBP income threshold (The Telegraph 02/06/2011).

For the case of the UK, conclusions are again twofold. On the one hand, it can be that legislation had mostly been amended in line with CJEU rulings addressing the UK. So for instance, the wording on what is to be considered 'employment' is, at first sight, very similar to given case law: it must not be 'purely marginal and ancillary', which is the same wording as in *Brown*. However, on the other hand, the other part of the definition of 'employment' only appears to be the same: according to British legislation, 'employment' has to be 'genuine and sufficient', not 'genuine and effective' as in EU law, which changes the whole meaning. When comparing this provision to the German one, it becomes very clear. While in Germany, employment by EU citizens does not necessarily have to earn a living in order to qualify for welfare benefits (BAföGÄndVwV 2013, no. 8.1.12 pp. 35-6), the British condition of employment having to be 'sufficient', i.e. that a person can be 'self-sufficient' through this work, does not regard certain types of employment in line with its definition, thus, the applicant would also not be successful in claiming benefits. Also, in the *Bidar* case, implementation was limited as the administrative practice was only changed one year after the initial statutory amendments. Moreover, it is also evident that the UK is particularly cautious with regard to welfare benefit abuse such as EU students not repaying their student loans. This seems to also explain why the UK government puts much effort into keeping the 'habitual residence' and 'right to reside' tests. Last but not least, it remains curious why the UK government maintains its old 1971 provision of granting student loans already after a period of three years, dating back to a period when the European level was not at all touching upon national study finance systems. To conclude, it can be stated that also in the UK, study finance has been extended quite largely since 2006 as a reaction to the EU secondary legislation and relevant CJEU case law as numbers on expenditure have shown. However, the UK government has constantly tried to delimit this additional expenditure through, for instance, defining a narrower interpretation of the concept of 'employment' and by effectuating the habitual residence test or deferred administrative practice.

VI. Conclusion

This study has analysed the changing role of CJEU jurisprudence over the past twenty years in the realm of cross-border study finance and member states reactions to it in terms of extension *vis-à-vis* contraction of study finance benefits. First of all, it has become clear, that the Court's approach has changed in such a way that it regards student mobility as an important aspect of European integration, thus, enhancing students' options to experience study programmes in other member states by facilitating their access to study finance across the Union. When comparing CJEU case law of the 1980s with rulings of the past years, it is evident that the Court has moved away from an approach of 'territorialization' that grants sufficient leeway to member states over regulating their study finance systems to 'transnationalization' where students are increasingly granted access to social assistance and maintenance measures.

Secondly, those member states analysed in this study, namely Germany and the UK, are both largely pressured by large numbers of incoming EU students for which study finance has exploded over the past five years. This has resulted from both countries largely complying with CJEU jurisprudence on cross-border study finance which required member states to generally broaden access to their study finance for EU citizens. Both Germany and the UK have made their secondary legislation compatible with the Court's rulings, even in so far as they 'copy and paste' the wordings of the rulings into their legislation. However, it was figured that the UK tried to minimise the extent to which EU citizens can access welfare benefits by, for example, narrowing down the definition of who can enjoy free movement rights for workers in the UK. Also, it was found that administrative practice seems to lack behind in some regards as well as attempts to restrict access to study finance exist in the UK, for instance through the 'right to reside test'. Further research has to

analyse whether this might also be the case in Germany. Also, judicial responses have not yet been taken into account. Therefore, subsequent studies will have to analyse all three types of member-state responses – legislative, administrative, judicial – more thoroughly.

It has also become clear at this stage of research that both countries only react to CJEU when being directly addressed ('inter partes') instead of also complying with other, similar rulings ('erga omnes'). This is particularly evident for the UK when the prior *Grzelczyk* ruling was largely ignored in the *Bidar* application and instead reference was made to the much older *Brown* judgment.

A conclusion to the question of contraction *vis-à-vis* extension can be drawn: according to the amount of expenditure and legislative changes subsequent to CJEU case law, access to study finance for EU students in Germany and the UK has certainly been largely extended. However, generalizations towards other member states need to be handled cautiously at this stage. For instance, Luxembourg is currently in the process of restricting study finance also to its own nationals in response to the 2012 *Giersch* judgment. Therefore, further analysis will also include the case of Belgium, which has already been addressed directly with ten CJEU cases and also has a larger than average proportion of EU students residing on its territory.

Moreover, the next analytical step will have to research the intervening variables that explain differing responses by member states. These will include member states' welfare regimes, parties in government, the legal system and its respective way of judicial review and administrative structures, the system of higher education, general public expenditure on tertiary education and its proportion devoted to study finance as well as eligibility criteria for study finance measures, neighbouring same-language countries with higher restrictions on access to university studies and/or study finance.

All in all, the enhanced right to access study grants as a cross-border university student seems to be an illustrative example for an overall development of CJEU induced transnationalization of welfare rights, which is expected to show similar developments regarding other types of non-contributory benefits of non-economically active mobile EU citizens such as access to social benefits for the unemployed.

References

- Blauberger, Michael (2014). 'National Responses to European Court Jurisprudence'. In: *West European Politics* 37, Forthcoming.
- (2012). 'With Luxembourg in Mind ... The Remaking of National Policies in the Face of ECJ Jurisprudence'. In: *Journal of European Public Policy* 19(1), 109-26.
- BMBF/Bundesministerium für Bildung und Forschung (ed., 2014). *Begabtenförderung im Hochschulbereich*. Available at: <http://www.bafoeg.bmbf.de/de/443.php> (03/04/2014).
- BMI/Bundesministerium des Inneren and BMAS/Bundesministerium für Arbeit und Soziales (2014). *Zwischenbericht des Staatssekretärsausschusses zu „Rechtsfragen und Herausforderungen bei der Inanspruchnahme der sozialen Sicherungssysteme durch Angehörige der EU-Mitgliedstaaten“*. März 2014. Bonn: BMAS.
- Börzel, Tanja A. (2002). 'Pace-Setting, Foot-Dragging and Fence-Sitting. Member State Responses to Europeanization'. In: *Journal of Common Market Studies* 40(2), 193-214.
- BVA/Bundesverwaltungsamt (ed., 2014). *Besonderheiten für Ausländerinnen und Ausländer. Vergabe von Bildungskrediten*. Available at: http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_BT/Bildungskredit/010_Vergabe_von_Bildungskrediten/005_Besonderheiten_fuer_Ausl%C3%A4nder/besonderheitenAuslaender_node.html (03/04/2014).
- BZSt/Bundeszentralamt für Steuern (ed., 2014). *Merkblatt Kindergeld*. Familienkasse.
- Caporaso, Jams A. and Sidney Tarrow (2009). 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets'. In: *International Organization* 63, 593–620.
- Conant, Lisa (2002). *Justice Contained. Law and Politics in the European Union*. Ithaca/London: Cornell University Press.
- Cornelissen, Rob (1996). 'The Principle of Territoriality and the Community Regulations on Social Security (Regulations 1408/71 and 574/72)'. In: *Common Market Law Review* 33(3), 439-71.
- Damjanovic, Dragana (2012). "'Reserved Areas" of the Member States and the ECJ: The Case of Higher Education'. In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 149-74.
- Davies, Gareth (2006). 'The process and side-effects of harmonisation of European welfare states'. *Jean Monnet Working Paper* 2/06.
- (2012). 'Activism Relocated. The Self-Restraint of the European Court of Justice in Its National Context'. In: *Journal of European Public Policy* 19(1), 76-91.
- Deutscher Bundestag (2014). *Zwanzigster Bericht nach § 35 des Bundesausbildungsförderungsgesetzes zur Überprüfung der Bedarfssätze, Freibeträge sowie Vomhundertsätze und Höchstbeträge nach § 21 Absatz 2*. Drucksache 18/460.
- (2013). *Schriftliche Fragen mit den in der Woche vom 25. November 2013 eingegangenen Antworten der Bundesregierung*. Drucksache 18/115.
- Dougan, Michael (2012). 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship'. In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 113-47.
- (2009). 'The Spatial Restructuring of National Welfare States within the European Union: the Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon'. In: Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds). *Integrating Welfare Functions into EU Law: From Rome to Lisbon*. Copenhagen: DJØF Publishing, 147-87.
- (2005). 'Fees, grants, loans and dole cheques: who covers the costs of migrant education within the EU?' In: *Common Market Law Review* 42, 943-86.
- Dustmann, Christian, and Tommaso Frattini (2013). *The Fiscal Effects of Immigration to the UK*. CREAM Discussion Paper Series, CDP 22/13. London: University College.
- EHEA/European Higher Education Area (2012a). *National Report regarding the Bologna Process implementation 2009-2012. United Kingdom*. Yerevan: European Higher Education Area.
- (2012b). *National Report regarding the Bologna Process implementation 2009-2012. UK, Scotland*. Yerevan: European Higher Education Area.
- (2012c). *National Report regarding the Bologna Process implementation 2009-2012. Germany*. Yerevan: European Higher Education Area.
- Esping-Andersen, Gøsta (1990). *The Three Worlds of Welfare Capitalism*. Princeton, NJ: Princeton University Press.
- (1999). *Social Foundations of Postindustrial Economies*. New York: Oxford University Press.
- European Commission (ed., 2014). *European Commission upholds free movement of people*. MEMO/14/9. Brussels: European Commission.
- (ed., 2013a). *National student fee and support systems 2012/13*. Brussels: Eurydice.
- (ed., 2013b). *Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards*. Press Release, IP/13/475. Brussels: European Commission.

- Eurostat (ed., 2013). *Mobility of students in Europe. Tertiary education*. Code: tps00064. Table available at: <http://epp.eurostat.ec.europa.eu/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00064&language=en> [25/02/2014].
- (ed., 2012). *Key Data on Education in Europe 2012*. Brussels: Education, Audiovisual and Culture Executive Agency.
- (ed., 2009). *The Bologna Process in Higher Education in Europe. Key indicators on the social dimension and mobility*. 2009 edition. Luxembourg: Office for Official Publications of the European Communities.
- Exadaktylos, Theofanis (ed., 2012). *Research design in European studies. Establishing causality in Europeanization*. Basingstoke: Palgrave Macmillan.
- Ferrera, Maurizio (2009). 'The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a 'Virtuous Nesting''. In: *Journal of Common Market Studies* 47(2), 219-33.
- (2005). *The Boundaries of Welfare*. Oxford University Press.
- Gerring, John (2007). *Case Study Research. Principles and Methods*. Cambridge, Cambridge University Press.
- Henry, Julie (2012). *Thousands of EU students owe £20 million in unpaid loans but just nine have been taken to court*. The Telegraph 03/06/2012. Available at: <http://www.telegraph.co.uk/education/educationnews/9307492/Thousands-of-EU-students-owe-20-million-in-unpaid-loans-but-just-nine-have-been-taken-to-court.html> (04/04/2014).
- Höpner, Martin and Armin Schäfer (2007). 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe'. In: *MPIfG Discussion Paper* 07/04. Cologne: Max Planck Institute for the Study of Societies.
- Kelemen, R. Daniel (2011). *Eurolegalism. The Transformation of Law and Regulation in the European Union*. Cambridge: Harvard University Press.
- Kostakopoulou, Dora (2012). 'The European Court of Justice, Member State Autonomy And European Union Citizenship: Conjunctions And Disjunctions.' In: Hans-W. Micklitz and Bruno De Witte (eds.). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia, 175-203.
- Martinsen, Dorte S. (2009). 'Conflict and Conflict Management in the Cross-border Provision of Healthcare Services'. In: *West European Politics* 32, 792–809.
- (2005). 'The Europeanization of Welfare. The Domestic Impact of Intra-European Social Security'. In: *Journal of Common Market Studies* 43(5), 1027-54.
- (2003). 'Who has the right to intra European social security? From market citizens to European citizens and beyond'. In: *EUI working paper law* 2003/13, European University Institute.
- (2002). 'Comments on Mazzoleni (ex parte Guillaume) (Case C-165/98 of 15 March 2001), Leclere (Case C-43/99 of 31 May 2001) and Grzelczyk (Case C-184/99 of 20 September 2001)', In: *European Journal of Migration and Law* 4: 127–44.
- Martinsen, Dorte S. and Gerda Falkner (2011). 'Social Policy: Problem-Solving Gaps, Partial Exits, and Court-Decision Traps'. In: Gerda Falkner (ed.) *The EU's Decision Traps*. New York: Oxford University Press, 128-44.
- Menéndez, Agustín J. (2007). *The European democratic challenge*. RECON Online Working Paper 2007/13. Available at: <http://www.proyectos.cchs.csic.es/euroconstitution/library/working%20papers/Menendez%202007.pdf> (04/04/2014).
- Micklitz, Hans-W. and Bruno De Witte (eds., 2012). *The European Court of Justice and the Autonomy of the Member States*. Cambridge, Antwerp, Portland: Intersentia.
- Newdick, Christopher (2006). 'Citizenship, Free Movement and Health Care. Cementing Individual Rights by Corroding Social Solidarity'. In: *Common Market Law Review* 43(6), 1645-68.
- Nidirect Government Services (ed., 2014a). *EU students*. Available at: <http://www.nidirect.gov.uk/index/information-and-services/education-and-learning/higher-education/student-finance/students-from-other-eu-countries/eu-students.htm> (03/04/2014).
- (ed., 2014b). *Repaying Student Loans - EU students*. Available at: <http://www.nidirect.gov.uk/repaying-student-loans-eu-students> (04/04/2014).
- Obermaier, Andreas (2009). *The end of territoriality? The impact of ECJ rulings on British, German and French social policy*. Farnham: Ashgate.
- Obinger, Herbert and Elmar Rieger (eds., 2009). *Wohlfahrtsstaatlichkeit in entwickelten Demokratien. Herausforderungen, Reformen und Perspektiven*. Frankfurt a.M.: Campus.
- O'Brien, Charlotte (2008). 'Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Solidarity.' In: *European Law Review* 33(5), 643-65.
- Paton, Graeme (2012). *Funding for EU students soars by £50m in two years*. The Telegraph on 05/10/2012. Available at: <http://www.telegraph.co.uk/education/universityeducation/9576890/Funding-for-EU-students-soars-by-50m-in-two-years.html> (04/04/2014).
- Radaelli, Claudio (2012). 'Europeanization: The Challenge of Establishing Causality.' In: Theofanis Exadaktylos (ed.). *Research design in European studies. Establishing causality in Europeanization*. Basingstoke: Palgrave Macmillan, 1-16.

- Rennuy, Nicolas (2013). 'The Emergence of a Parallel System of Social Security Coordination'. In: *Common Market Law Review* 50(5), 1221-66.
- Rothgang, Heinz and Ralf Götze (2009). 'Von negativer zu positiver Integration? Veränderungen in der europäischen Gesundheitspolitik am Beispiel der Patientenmobilität'. In: Herbert Obinger and Elmar Rieger (eds.). *Wohlfahrtsstaatlichkeit in entwickelten Demokratien. Herausforderungen, Reformen und Perspektiven*. Frankfurt a.M.: Campus, 517-44.
- Sainsbury, Diane (2012). *Welfare States and Immigrant Rights. The Politics of Inclusion and Exclusion*. Oxford: Oxford University Press.
- Scharpf, Fritz W. (2010). 'The asymmetry of European integration, or why the EU cannot be a "social market economy".' In: *Socio-Economic Review* 8, 211-50.
- (2009). 'Legitimacy in the Multilevel European Polity'. In: *European Political Science Review* 1, 173-204.
- (2007). 'Reflections on multilevel legitimacy', In: *MPIfG working paper 07/3*, Max Plank Institute for the Study of Societies, Cologne.
- Schmidt, Susanne K. (2012). 'Who cares about Nationality? The Path-Dependent Case Law of the CJEU from Goods to Citizens'. In: *Journal of European Public Policy* 19(1), 8-24.
- (2008). 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty'. In: *Journal of Comparative Policy Analysis* 10(3), 299-308.
- Schmidt, Susanne K., Michael Blauburger and Wendelmoet van den Nouland (2008). 'Jenseits von Implementierung und Compliance. Die Europäisierung der Mitgliedstaaten'. In: Ingeborg Tömmel (ed.). *Die Europäische Union*. Politische Vierteljahresschrift, Sonderheft 40. Wiesbaden: VS Verlag für Sozialwissenschaften, 275-96.
- Sieveling, Klaus (2007). 'ECJ Rulings on Health care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU'. In: *European Journal of Migration and Law* 9(1), 25-51.
- Stone Sweet, Alec (2010). 'The European Court of Justice and the judicialization of EU governance'. In: *Living Reviews in European Governance* 5(2), 1-50.
- (2004). *The Judicial Construction of Europe*. Oxford: Oxford University Press.
- Stone Sweet, Alec and Wayne Sandholtz (1998). 'Integration, Supranational Governance, and the Institutionalization of the European Polity'. In: *ibid.* (eds.). *European Integration and Supranational Governance*. Oxford: Oxford University Press, 1-26.
- The Telegraph (ed., 2011). *EU students get a better deal at British universities*. Available at: <http://www.telegraph.co.uk/education/universityeducation/8553427/EU-students-get-a-better-deal-at-British-universities.html> (04/04/2014).
- Töller, Annette Elisabeth (2010). 'Measuring and Comparing the Europeanization of National Legislation. A Research Note'. In: *Journal of Common Market Studies* 48(2), 417-44.
- UK Government (ed., 2014). *Habitual residence & right to reside - IS/JSA/SPC/ESA*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296065/dmgch0703.pdf (03/04/2014).
- (ed., 2013). *Improved benefit test for migrants launched*. Available at: <https://www.gov.uk/government/news/improved-benefit-test-for-migrants-launched> (03/04/2014).
- UKCISA/UK Council for International Student Affairs (ed., 2014a). *Definitions: For Student Support assessment*. Available at: <http://www.ukcisa.org.uk/International-Students/Fees--finance/Student-support/Definitions-Student-Support-assessment/#> (03/04/2014).
- (ed., 2014b). *EEA and Swiss students: Welfare Benefits*. Available at: <http://www.ukcisa.org.uk/International-Students/Fees--finance/Welfare-benefits/EEA-and-Swiss-students/> (03/04/2014).
- (ed., 2013). *EEA and Swiss students: Student Support*. Available at: <http://www.ukcisa.org.uk/International-Students/Fees--finance/Student-support/EEA-and-Swiss-students/#> (03/04/2014).
- Wasserfallen, Fabio (2010). 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union'. In: *Journal of European Public Policy* 17, 1128-46.
- Weatherill, Stephen (2012). *Cases and materials on EU law*. 10th ed. Oxford: Oxford University Press.
- Weiler, Joseph H.H. (1999). *The Constitution of Europe: Do the New Clothes have an Emperor? and Other Essays on European Integration*. Cambridge: Cambridge University Press.
- (1994). 'A quiet revolution: the European Court of Justice and its interlocutors'. In: *Comparative Political Studies* 26(4), 510-34.
- (1991). 'The transformation of Europe', In: *The Yale Law Journal* 100, 2403-83.
- (1981). 'The Community System: The Dual Character of Supranationalism.' In: *Yearbook of European Law* 1, 268.
- ZEIT Campus (ed., 2014). *Nachgefragt. Einfache Rechnung. Wie teuer sind ausländische Studenten für den Staat?* In: ZEIT Camps Nr. 2, May/April 2014.