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Discrimination in the access to and portability of study finance in the EU  

LLM Paper  
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“Si c’était à refaire, je commencerai par l’éducation”

Attributed to Jean Monnet
A certain JULES MICHELET has noted that "Achieving a goal is nothing. The getting there is everything." Admittedly, I have not gotten to where I am today all by myself. Throughout this year, I have been blessed to receive a lot of support. Therefore, acknowledging the significance of this support I want to seize this rare opportunity to express my gratitude.

In this regard, I would like to first of all thank professor GOVAERE and LIESBET VAN DEN BROECK for their continued support and trust. Secondly, I would also like to thank my parents for not only allowing me to take on this extra year but also for going through the motions with me. I know it has been a bumpy ride, but I hope that we can conclude that overall it was a pleasant one. Lastly, I would also like to thank my friends for their endless patience when listening to my ideas and complaints, as well as for the countless moments of fun shared throughout this year. Without any of you I don't believe I could have succeeded, and for this I will be forever grateful.

Monique Sengeløv,
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<tr>
<td>Advocate-General</td>
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<td>Article</td>
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<td>Court of Justice of the European Union</td>
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<td>European Union</td>
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<td>Principle of non-discrimination on grounds of nationality</td>
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<td>Treaty on the European Union</td>
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INTRODUCTION

On 14 & 15 December last year the Court pronounced two rulings in respectively Bragança Linares Verruga and Depesme and Kerrou. Both cases concerned in essence the restricted access to (portable) study finance for mobile students. These cases show that the tension between on the one hand the CJEU’s objective of promoting student mobility and on the other hand the Member States’ interests in ensuring the financial sustainability of their educational systems remains to be a burning issue.

In this regard, it is Article 165 (2) of the Treaty on the Functioning of the European Union\(^1\) that sets the EU the objective to promote and encourage student mobility within the European Union. Which is quite understandable considering that student mobility is thought to be extremely beneficial for both the student itself as well as the European society. Mobile students are deemed to gain a greater adaptability and flexibility due to the experience of more than one educational and cultural tradition and in addition it helps them develop new linguistic and intercultural competences on top of an extra degree of independence. Which in its turn happens to be linked to greater creativity and innovation processes.\(^2\) Thus, student mobility can most certainly be regarded as beneficial for the students as it supports their personal development. Next to creating a mobile, highly skilled and ‘EU aware’ citizenry, student mobility can also be considered beneficial for the EU as it plays a crucial role in creating an educated and adaptable workforce capable of responding to the challenges of a modern, skill-intensive economy. In essence, promoting the free movement of students in the EU indirectly contributes to the optimal allocation of highly skilled workers in the European Union at a later stage. Moreover, is it also suggested that student mobility helps to bring young Europeans closer together by fostering a sense of European identity and citizenship.

Therefore, it is also no surprise that the EU has a long track record of supporting learning mobility through various programmes and initiatives, of which the best known is the Erasmus programme. Nevertheless, considering that for students wishing to go abroad the most significant barrier is often the funding, the initiatives of the EU are not often of no direct avail.\(^3\) Conversely, the most significant role has been played by the Court of Justice.

\(^1\) Consolidated version of the Treaty on the Functioning of the European Union, OJ. C 326, 26 October 2012, 47. Hereafter, “TFEU”.
\(^2\) A. Hoogenboom, ”Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?”, Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 48.
\(^3\) H. Skovgaard-Petersen, “There and Back Again: Portability of Student Loans, Grants and Fee support in a Free Movement Perspective”, European Law Review 2013, (783) 784.
Over the years the Court has consistently cultivated the principle of non-discrimination on grounds of nationality to further develop and strengthen the rights of mobile EU students, including in matters relating to financial assistance to students, to the extent of promoting student mobility. The decision of the Court of Justice, however, to extend the entitlement of financial support to other EU mobile students, has made governments fear for a development embracing ‘student finance tourism’ at the expense of countries with well-developed systems of direct student aid. Accordingly, Member States have been trying to stretch the limits of the eligibility criteria to circumscribe the number of potential beneficiaries.

This abovementioned situation has led to several cases in which the Court has developed legal principles as to how the right to equal treatment of the mobile student has to be understood as well as to which extent the various eligibility criteria can be considered discrimination or justified differentiation. Therefore, this paper intends to examine these legal principles developed by the Court in light of recent developments.

Following this brief introduction, the first Chapter will start by setting out the legal framework and in particular the principle of non-discrimination. Subsequently, the legal principles as regards to access to study finance in the host State will be discussed in Chapter 2. Whereas the third Chapter will focus on the principles applicable to mobile student who wish to export their financial aid.

Hereby, has to be made note of the fact that this research will only focus on direct study finance in the form of grants and/or loans and on degree mobility rather than credit mobility. It can, namely, be assumed that students going to other member States to pursue only a part of their degree within the framework of, for instance the Erasmus programme, will not experience a huge amount of discrimination or discouragement to pursue studies abroad as they stay connected to their home university. At last, it should be remarked that all numbering used refers to the numbering under the Treaty of Lisbon, even when referring to all old case law and legislation.

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CHAPTER I. The Legal Framework

This paper sets out to examine the recent developments in the legal principles developed by the Court regarding the equal access to and portability of study finance for mobile EU students. Therefore, it might be opportune to start this paper by setting out the EU’s competence in the area of education, and in particular its powers relating to the organisation of student support schemes. Further, it can also be considered wise to elucidate on the principle of non-discrimination on grounds of nationality as this principle is quintessential to this research. Therefore, Chapter 1 will start by addressing the division of competence in the field of education and secondly move on to examine the principle of non-discrimination on the grounds of nationality as established in the European legal order.

Section I. The division of competence in the area of (higher) education

In the EU the division of competence is governed by the fundamental principle of ‘conferral of powers’, which means that the Union competences are confined to the powers attributed to it by the Treaties. The consequences hereof are that powers which have not been transferred to the Union by the Treaties are to remain with the Member States, as expressed by both Article 4 (1) and Article 5 (2) in the Treaty on the Functioning of the European Union. With the introduction of a ‘catalogue of competences’ in the Lisbon Treaty, the Treaty now clearly lists the categories and areas belonging to the Union in order to avoid competence creep and clearly establishes under Article 6 (e) TFEU that the areas of education, vocational training, youth and sport are policies in which the EU only enjoys a supporting competence.

It follows from EU’s competences being restricted to supporting, supplementing and coordinating measures in relation to education, that the EU may not adopt any legally binding acts that lead to harmonisation of the Member States’ laws or regulations in this field. On the contrary, the EU has to “fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.” Thus, restricting the competence of the EU to legislate in the area of education to “contribute to the development of quality education by encouraging cooperation between Member States” However, under the strict condition that these legal instruments do not harmonise the Member States’ legislation in the field of education. In other

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5 Consolidated version of the Treaty on the Functioning of the European Union, OJ. C 326, 26 October 2012, 47. Hereafter, “TFEU”.
7 Article 165 (1) TFEU.
8 Article 165 (1) TFEU.
9 Article 165 (4) TFEU.
words, the EU only has a competence to adopt incentive measures to encourage, *inter alia*, student mobility.

Accordingly, Member States have remained fully competent and free to design and decide on the organisation and financing of their education and vocational training systems. Which has led to a various set of widely different educational systems and equally different student support schemes throughout the EU, most often based on their perception of the role of the student in the society.\(^{10,11}\) In this regard, some Member State might have opted to award financial assistance to all students, whereas other Member States might have decided upon a need- or merit-based approach.\(^{12}\) Likewise, some Member States might have chosen to award financial aid to cover the cost of living directly to the students or to the parents in the form of grants and/or loans, while other Member States might have installed indirect support in the form of family allowances or tax relief.\(^{13}\) Moreover, some Member States may also have opted to grant travel benefits to its students or decided upon only requiring a small or even no tuition fee at all.\(^{14}\)

Needless to say, that fees and support can play an important role in supporting or discouraging access to higher education, as well as create an impact on progress and even on completion rates. Where fees and costs of studying might create an obstacle to engage in study, support measures are capable of alleviating this hurdle.\(^{15}\) On account of this most Member States then also seem to provide for at least one type of direct support mechanism of the abovementioned and half of them also foresee in indirect support through family allowances and/or tax incentives to students’ parents.\(^{16}\) Notwithstanding that the level of public expenditure allocated to higher education still significantly differs, as some


\(^{11}\) For a comprehensive analysis on the different perceptions of the role of students in society, see: A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", *Croatian Yearbook of European Law & Policy* 2013, Vol. 9, (15) 50-54.


Member States might still provide for a more ‘generous’ system towards the support of students, than others.  

Evidentially, the support systems that are deemed more ‘generous’ in regard to their awarded support, are expected to attract more foreign students wanting to enjoy the financial assistance. In any case, at least expected to attract more students, than the less ‘generous’ systems or systems only providing indirect support in the form of family allowances or tax relief.  

In this respect, the systems in the Nordic countries are often considered to be very attractive systems, given that the Scandinavian countries award direct cash benefits, meant to cover about all normal costs encountered by a student. 

Considering the relative high cost of such financial support to students, Member States providing for such a ‘generous’ system are very apprehensive towards both free-riding States, who only allocate a small amount of their public expenditure to the funding of students, as well as claims coming from unintended students with no clear link to the State engaging in “study grant forum shopping”. This category of students could be a huge potential cost for the funding State and are likewise not likely to contribute to the economic society, as they usually return to their country of origin upon earning their degree.

For this reason, Member States have subsequently been trying to circumscribe the potential beneficiaries of their financial aid by making the eligibility conditional upon the fulfillment of certain criteria such as nationality and/or (durational) residence requirements. Granted that the Member States are free to design and organise their education and its financing in accordance with their needs, the question rose to which extent these criteria had to be evaluated within the’ European project’. Since from a European law perspective it is clear that restrictive requirements just like those mentioned above are able to affect the mobility of students across the EU by direct or indirectly distinguishing between nationals and non-national students. Which generated the precise question of whether principles of Union law such as the right to free movement and the principle of non-discrimination on grounds of nationality were applicable to these situations. The Court ascertained quite early on that the fact that the powers regarding certain policy areas have remain within the spheres of Member States’ competence, cannot be translated into the notion that such national measures take effect in a vacuum.

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of national law, with no influence of European law whatsoever. In this regard, the next section aims to discover the significance of the European principle of non-discrimination on grounds of nationality, in matters of national student support measures.

Section II. The principle of non-discrimination on grounds of nationality

The previous section already briefly touched upon the fact that even though Member States remain fully competent in the field of educational matters, this does not imply that European law in any case will have no role to play. In fact, rather the opposite is true. Over the years the Court of Justice has consequently expanded the role and influence of the EU in educational matters and strengthened the rights of mobile EU students, inter alia, in relation to diploma recognition, their right to access education, as well as their right to study finance in other Member States by systematically cultivating the principle of non-discrimination on grounds of nationality.

§ 1. The right to equal treatment

In EU law the general principle of equality, as set out in the Lisbon Treaty, is largely expressed in the negative forms of prohibition of discrimination on specific grounds, such as: nationality, sex, racial or ethnic origin, religion and age. Evidently, these prohibitions are all very important and have an important human and social role in the society as we know it, nonetheless, the prohibition that truly stands out is without a doubt the prohibition on discrimination by reason of nationality. This general ban can be considered a cornerstone to the EU, and its significant role cannot be underestimated, because as VAN DER MEI put it: “without this non-discrimination principle of nationality, the EU would probably not even exist.”

Moreover, as the prohibition translates positively into a right to equal treatment and imposes on the Member States’ the obligation to treat Union citizens and national citizens equally in a similar situation, it can rightfully be considered to “constitute the rock on which the internal market is built as

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23 Hereinafter, when referring to ‘the principle of non-discrimination’, this will be in the sense of Art. 18 TFEU, i.e. being the principle of non-discrimination on grounds of nationality.
24 Article 2 TEU.
well as the very heart of Union citizenship." Which is, inter alia, illustrated by its early presence in the 1951 Treaty establishing the Coal and Steel Community, and in the 1957 Treaty of Rome establishing the Economic European Community.

The principle of non-discrimination on grounds of nationality can be found throughout Union legislation. The principle has been expressed in several treaty provisions such as Article 18 TFEU, Article 45 (2) TFEU, as well as in secondary legislation creating specific rights to equal treatment within a certain scope such as for example Article 7(2) of Regulation No. 492/2011.

Nevertheless, Article 18 TFEU can be considered the most important one as it is held to be the general and residual provision. In this regard, Article 18 TFEU stipulates that: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.” It sets out to provide a right to equal treatment in all scenarios, where the individual cannot rely upon any other specific provision tackling unlawful discrimination, provided it remains within the scope of application of the Treaties.

Moreover, despite Article 18 TFEU making a notion of ‘any’ discrimination, the ban does not guarantee an absolute right to equal treatment in all differential treatments between nationals and non-national EU citizens. Instead it is rather safe to say that the reliance on the general principle of non-discrimination and the reach of its right to equal treatment is subjected to certain limits.

§ 2. The limits on the ban of discrimination by reason of nationality

The applicability of the non-discrimination principle and the herewith linked right to equal treatment can be found to be restricted by three limits. Accordingly, a first limit can be discovered with regards to the notion of ‘discrimination’ itself, can a second limit be found in the substantive scope of the Treaty and can a third limit be identified in the scenarios where a discriminatory measure is found to be justified.

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30 Article 69 of the Treaty establishing the European Coal and Steel Community.
31 Article 7 of the Treaty of Rome establishing the European Economic Community.
Although, the Court has clearly stated that discrimination is only present when it cannot be justified by objective considerations.\textsuperscript{34} It has been highly debated whether justification grounds should be considered a part of the definition of discrimination or rather be construed as a limit to the application of the non-discrimination principle set out in Article 18 TFEU.

Notwithstanding that the arguments claiming justification grounds to be a limit within the notion of discrimination itself possess a certain validity, this paper has opted to tackle the potential justifications grounds as a separate limitation to the non-discrimination principle set out in Article 18 TFEU.

2.1. The notion of ‘discrimination’

A first limit to the reach of the non-discrimination principle can be found within the notion of discrimination itself.\textsuperscript{35} It becomes clear that discrimination has not been defined by the Treaties, nor been further clarified in secondary legislation, this task has rather been left to the Court.

By virtue of several judgments the Court has come to the conclusion that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated the same way unless such treatment is objectively justified.\textsuperscript{36} Accordingly, the non-discrimination principle, thus, also requires that different situations are treated differently, unless an identical approach or solution can be objectively justified.\textsuperscript{37} In other words, the ban on discrimination on the basis of nationality prohibits scenarios where persons or groups in an identical situation are treated differently, and where persons or groups in different situations are treated identically.\textsuperscript{38}

Correspondingly, discrimination will occur when one group is treated less (or more) favourably than another group, in the same or comparable situation. The latter of which being very important as under

\textsuperscript{34} Judgment of 19 October 1977, Ruckdeschel, C-117/76 & C-16/77, ECLI:EU:C:1977:160, ECR. 1769, para 7.
\textsuperscript{35} L. VAN DEN BROECK, Indirecte discriminatie op grond van nationaliteit: rechtvaardigingsgronden in het diensten- en personenverkeer, Antwerpen, Maklu, 2014, 60-61.
\textsuperscript{36} A. P VAN DER MEI, "The Outer Limits of the prohibition of discrimination on grounds of nationality: A look through the lens of Union Citizenship", Maastricht Journal of European and Comparative Law 2011, no. 1, (62) 64.
\textsuperscript{38} L. VAN DEN BROECK, Indirecte discriminatie op grond van nationaliteit: rechtvaardigingsgronden in het diensten- en personenverkeer, Antwerpen, Maklu, 2014, 18.
EU law a rule or act will only be considered discriminatory when the distinction can be attributed to one clear element, in this case nationality. As such, it will not be sufficient for the rule or act to just distinguish between nationals and non-nationals. It has to be established that the persons, or groups are in a similar or comparable position with no other differences present that can explain a differential treatment, than the sole basis of nationality.\(^{40}\)

Moreover, is it settled case-law that the equal treatment rule laid down in Article 18 TFEU, prohibits not only direct or overt discrimination by reason of nationality, but also all covert or indirect discrimination which leads to a same result in fact, by the application of other ‘neutral’ distinguishing criteria.\(^{41}\) It is apparent that such approach is needed in order to guarantee the effective working of one of the fundamental principles of the Union.\(^{42}\) Therefore, criteria prescribed by national legislation must be considered indirect discriminatory, where they irrespective of nationality, nonetheless essentially affect other EU nationals, or the great majority thereof.\(^{43}\) In like manner indistinctly applicable measures more capable of being satisfied by nationals will also be construed as indirect discrimination on grounds of nationality.\(^{44}\)

Noteworthy, is also the fact that the Court seems to have attached no or little importance to whether the measure is effectively likely to disturb the free movement of EU citizens.\(^{45}\) The Court simply does not attach much importance to the hindering of mobility the discriminatory rules may cause, given that discrimination is discrimination.\(^{46}\)

2.2. The material scope of the prohibition

From the outset uncertainty has also existed about the precise reach of the right to equal treatment irrespective of nationality, regarding the condition of having to fall “within the scope of application of the Treaties” laid down in Article 18 TFEU.


2.2.a) ‘pure internal’ affairs vs. national affairs

It has been questioned as to whether ‘pure internal’ affairs and national affairs can be considered falling within the scope of the Treaties, and accordingly within the reach of the non-discrimination principle.

As regards to ‘pure internal’ affairs the Court has held that Article 18 TFEU cannot be relied upon in all ‘pure internal situation’, wherein no link with the EU in the form of a cross-border element can be found. Thus, hereby clearly excluding reverse discrimination from the application of the non-discrimination principle enshrined in Art. 18 TFEU.47

On the other hand, with regards to ‘national affairs’, the precise question raised was whether the specification of falling within the material scope of the Treaties, required Member States to have transferred the powers in the concerned areas in order for measures to be caught by the prohibition. Several Member States had claimed that, the material scope of the non-discrimination principle depended on whether, and if so, to what degree, the competence in a certain policy area had been conferred upon the Union in the Treaties.48

Notwithstanding, the Member States ferociously defending their argument that “falling within the scope” can only be interpreted as meaning areas wherein the EU has obtained full competence. The Court from the outset answered this question negatively and rejected a competence-based approach to determine the limits of the material scope of the non-discrimination principle on grounds of nationality.49 In Casagrande the Court clarified that although educational and training might not be included in the spheres which the Treaty has entrusted to the Union institutions, this does not result in conditions imposed in those areas, to remain out of reach of the principle of non-discrimination.50 The Court argued that the Union had received the functional power to adopt measures stimulating the free

movement of workers at that time.\textsuperscript{51} Therefore, the Court concluded that it does not follow from the principle of conferral that the exercise of the powers transferred to the Union can in some way be limited, to the extent that it may affect certain measures taken in the execution of a policy still belonging to the Member States.\textsuperscript{52} Put differently the Court seemed to attach no importance to whether or not competences had been transferred to the Union in order to claim equal treatment concerning some substantive policies.\textsuperscript{53} Notably, however, the Court after having resolutely rejected the notion in \textit{Casagrande}, the Court did apply a said competence-based approach in the following cases of \textit{Gravier, Lair & Brown}.

\textit{2.2.b) The specific situation in the area of education: Gravier, Lair & Brown}

So, subsequent to the ruling in \textit{Casagrande}, where the Court had refused a competence-based approach, a said approach was in fact applied by the Court in three subsequent cases relating to educational matters.

In landmark ruling of \textit{Gravier} the Court came to the groundbreaking conclusion that on the basis of current article 18 TFEU non-economically active persons, including students, who reside lawfully on the territory of a Member State were entitled to equally access education in other Member States. In order to come to this conclusion the Court had reasoned that access to higher education could be considered falling within the scope of the Treaties given that a common vocational policy was being created and a new chapter on the supplementing powers in establishing a common vocational policy had been introduced. Hereby, clearly adopting a competence-based approach in order to reach the desired and fair conclusion. Which led to some confusion as to whether the \textit{Casagrande} –approach or competence based approach should be upheld in relation to educational matters.

Whereas in \textit{Gravier} the reason behind advancing the competence based approach, was ought to be found in the reason that a fair solution had to be adopted and a similar reasoning to \textit{Casagrande} was impossible.\textsuperscript{54} The doubt as to whether competence-based approach should indeed be considered the appropriate approach in matters relating to education, grew with the subsequent cases of \textit{Lair & Brown}. Wherein the Court likewise advanced a competence-based approach, despite resulting in

\begin{itemize}
\item \textsuperscript{51} A. P Van Der Mei, "The Outer Limits of the prohibition of discrimination on grounds of nationality: A look through the lens of Union Citizenship", \textit{Maastricht Journal of European and Comparative Law} 2011, no. 1, (62) 66.
\item \textsuperscript{52} Judgment of 3 July 1974, \textit{Casagrande v Landeshauptstadt München}, C-9/74, ECLI:EU:C:1974:74, para 12.
\item \textsuperscript{53} A. P Van Der Mei, "The Outer Limits of the prohibition of discrimination on grounds of nationality: A look through the lens of Union Citizenship", \textit{Maastricht Journal of European and Comparative Law} 2011, no. 1, (62) 68.
\item \textsuperscript{54} A. P Van Der Mei, "The Outer Limits of the prohibition of discrimination on grounds of nationality: A look through the lens of Union Citizenship", \textit{Maastricht Journal of European and Comparative Law} 2011, no. 1, (62) 67.
\end{itemize}
student unfriendly decisions of excluding study finance from the scope of the Treaties. Nevertheless, the cases in which the Court held importance to the conferral of competence with respect of the application of art. 18 TFEU remained limited to these three cases, even within the area of education. As the introduction of Union citizenship sparked a whole new approach.

2.2.c) The introduction of Union citizenship as game changer

With the introduction of Union Citizenship in the Maastricht Treaty in 1998 the competence-based approach in student cases came to a resolute end. In Martínez Sala, Grzelczyk and Bidar, the Court launched a new approach, based on the fundamental status of Union citizenship. The right to free movement of every EU citizens in combination with the power to take measures to facilitate that right, rendered the competence-based approach superfluous.

In Martínez Sala the Court established that as soon as an EU citizen exercises his right to free movement by moving abroad and lawfully residing on the territory of a host Member State. This situation will fall within the ambit of the non-discrimination principle on grounds of nationality as set out in article 18 TFEU. In doing so, moving away from the previous required economic nexus. In the following case of Grzelczyk the Court confirmed this ruling by stipulating once more that Union citizenship implies that EU citizens have a right to equal treatment whenever they have exercised their right to move and reside freely within the EU.

Eventually with the ruling in Bidar the Court confirmed that assistance granted to students to cover maintenance aid for students was also considered to be falling within the reach of the right to equal under Article 18 TFEU. The case of Bidar concerned a French national, who had entered the territory of the United Kingdom, in order to accompany his mother who had to receive medical treatment there. During his stay in the United Kingdom Mr. Bidar lived with his grandmother, as her dependant, and had pursued and completed his secondary education. After having finished his secondary education, Mr. Bidar wanted to start a course in economics at University College London. Although Mr Bidar received assistance with respect to tuition fees, he was rejected for the financial assistance to cover his

maintenance costs, on the ground that he was not settled in the United Kingdom. However, in accordance to the UK Support Regulations 2001 nationals of another Member State could never in their capacity as students be regarded as ‘being settled’, resulting in the fact that as long as Mr. Bidar remained a student he would never be considered ‘settled’ within the meaning of the UK legislation.

The Court starts by confirming his rulings in Martínez Sala and Grzelczyk that a citizen of the Union, including students, lawfully resident in the territory of another Member State can rely upon the principle of non-discrimination principle in all situation involving the exercise of the right to move and reside freely. Hereby, acknowledging that, in contrast to its previous rulings under Lair & Brown, Article 18 TFEU does in fact also apply to the purpose of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs.

Moreover, the Court found that although Article 3 of Directive 93/96 might prohibit such a right to payment of maintenance assistance under that Directive. This does not preclude a direct reliance on Article 18 TFEU of an individual lawfully resident in the territory of another Member State where he intends to start or pursue higher education from relying during that residence on the fundamental principle of equal treatment.

In summary it can be concluded that the Court has consistently been opening up the scope for application of the non-discrimination principle, written down in Art. 18 TFEU. With Martínez Sala, Grzelczyk & Bidar the Court has ascertained that Union citizenship is the fundamental status of nationals of the Member States, enabling those who find themselves in identical situations to enjoy the same treatment in law, irrespective of their nationality. In other words, the Court has developed the view that the mere exercise of one’s free movement rights as a Union citizen, will be sufficient for the non-discrimination rule to apply in any policy area and in relation to basically any right or benefit, including study facilitating benefits.

2.3. The possibility of objective justification grounds

The third en final ground that can limit the application of the principle of equal treatment are the findings of justifications based on objective considerations. In this regard, the Treaty does provide for

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discriminatory measures to be justified on specific grounds provided for under the Treaty, as for example in the case of non-discrimination by reason of nationality for workers. There, the Treaty does seem to allow distinguishing measures when this ensures the public security, public order and public health. Notwithstanding that Article 18 does not seem to provide for any explicit objective justification grounds. It can be presumed that the abovementioned justification grounds will also be available under Article 18 TFEU.

For a long time those explicit justification grounds were held to be the only available justifications for both direct as indirect discrimination. However, with the case of O’Flynn the Court decided, and has ever since, upheld that discriminatory measures, independent of nationality, can be justified, when it relates to overriding reasons relating to the public interest, that are moreover appropriate to achieve the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Hereby, can be noted that the Court has systematically held that it is for the national authorities to show the appropriateness and proportionality of the measure adopted by that State by submitting specific evidence substantiating its arguments. Nevertheless, this does not mean that the Member State is required to prove that the measure adopted is the most efficient one. It will be sufficient to prove that the measure is not inappropriate and does not go beyond what is needed to achieve the objective.

69 Judgment of 4 October 2012, Commission v Austria, C-75/11, ECLI:EU:C:2012:605, para 62; Judgment of 13 April 2010, Bressol and Others, C-73/08, ECLI:EU:C:2010:181, para 71
CHAPTER II. Discrimination in the access to study finance in the host State

The first major issue within the framework of student mobility and financial aid for students, concerns the access to financial aid in the host State. More precisely, to which extent mobile students, moving abroad to pursue a course of study are able to claim and enjoy the national financial support schemes provided for by their host State.

In hindsight, it was quite unsurprising that in pursuance of the Court’s ruling in Gravier & Raulin, that the Court would eventually rule that a same equal treatment was applicable in respect to access to maintenance grants and loans. Ever since Member States have, however, been prescribing conditions for the award of these study grants and/or loans. Mostly, these conditions make a distinction between own nationals and mobile EU students with regards to claiming financial support in the host Member State. Whereas the former often only has to fulfill a nationality, pedagogical and age requirement, the latter are often obliged to fulfill additional criteria such as durational residence requirements. Intuitively, one may ask the question whether these national schemes are compatible with EU law, after having established in Bidar that the granting of financial aid has to respect the fundamental principle of non-discrimination on grounds of nationality enshrined in the Treaties.

This Chapter intends to discuss the legal principles surrounding the principle of non-discrimination on grounds of nationality and the eligibility criteria relating to maintenance aid. In this regard, two big categories of mobile students can be distinguished. A first category made up by ‘pure’ or ‘naked’ EU students and a second consisting of EU + students. The latter are characterized by the fact that they enjoy additional rights under EU law, due to either their own status as an economically active person or as the family member of one. Whereas the former, the EU student does not enjoy any additional rights and is left to rely solely on its own status as Union citizen. Since the two categories enjoy a separate legal framework, they will be dealt with separately within this Chapter.

Section I. Economically Active Citizens: The EU + Students

§ 1. Specific legal framework: Regulation No 492/2011

For economically active citizens a slightly different legal framework has been found to apply. Contrary to the non-economically active citizens, the migrant workers and under certain conditions

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their family members have been enjoying the right to equal treatment in matters relating to maintenance aid from a much earlier date. This follows from Regulation No 1612/68 on the freedom of movement for workers, now replaced by Regulation No 492/2011. From the start Member States were convinced that the free movement of workers could only be achieved if the EU worker and his or her family members were able to fully integrate into the host Member State’s society. For this reason Article 7 (2) of Regulation No 1612/68 provided Union workers with the specific right to “enjoy the same social and tax advantages as national workers”, a wording that was reproduced by the current Article 7 (2) of Regulation No 492/2011. By which ‘social advantages’ has been held to include study grants ever since its ruling in Casagrande, where the Court held that even though education had not been transferred to the competence of the Union, the right to free movement of workers had a superseding functional nature, leading to the inclusion of study grants in the meaning of Article 7 (2) Regulation No 492/2011.

§ 2. The EU worker

It is apparent that the first category of individuals enjoying this specific right of equal treatment is the Union worker himself. They constitute the main subject of Regulation No 492/2011 and therefore are without any doubt entitled to receive equal maintenance aid with national workers on the basis of Article 7 (2).

2.1. The notion of ‘Worker’

The first question to arise was of course which persons could be construed to be a migrant worker in the sense of Regulation No 492/2011, as the Regulation did not seem to provide for a definition. In this respect, the Court however found that on account of Article 7 (2) of Regulation No 492/2011, constituting a particular expression of the principle of equal treatment enshrined in Article 45 (2) TFEU, a same interpretation had to be given as available under Article 45 TFEU.

Consequently, a ‘migrant worker’ in the sense of Article 7 (2) of Regulation No 492/2011 has to be defined as an individual who “for a certain period of time performs services for and under the direction of another person, in exchange for which he receives a remuneration.” Subsequently, the

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Court also found that the work performed, moreover, must be “real and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.”

What’s more is that the Court specifically held that de notion of ‘worker’ under Article 7 (2) of Regulation No 492/2011 could not be made conditional upon the fulfillment of certain additional durational employment criteria. In this regard, the Court stipulated that the equal access to maintenance aid had to be granted immediately and further unconditional to those satisfying the abovementioned definition. Since any other ruling would result in the notion of ‘EU worker’ in fact being determined under national law. Which cannot be the case, since the Court has consistently found the definition of a “worker” to be a concept of Union law. Therefore, its meaning cannot be dependent on its definition under national law, nor may be it be interpreted in accordance with the laws of the Member States. For the simple reason that if it was up to Member States to define the concept of either worker, it would grant each Member States the opportunity to modify the meaning of “migrant worker” to eliminate all protection provided for by the Treaties.

Accordingly, the equal treatment enshrined in Article 45 (2) and the particular expression in the area of the granting of social advantages in Article 7(2) of Regulation No 492/2011, therefore also seemed to apply equally to frontier workers, as no additional residence requirements could be imposed. The fact that Article 7 (2) Regulation No 492/2011 equally benefits both migrant workers resident in the host Member State as well as frontier workers employed in that Member State, while residing in another Member State, has also been confirmed on several occasions under the Regulation directly. The Court has explicitly granted the worker, who is of course a national of a Member State, the right to enjoy the same social and tax advantages as national workers even when residing in the territory of another Member State. On account of any other conclusion simply being contrary to the fifth recital of the preamble of the concerned Regulation, which expressly stipulates that the right of free movement must be enjoyed without discrimination by permanent, seasonal and frontier workers. As

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well as to the phrasing of Article 7 itself, which refers without any reservation, to workers with an EU nationality in general. 84

Although the Court clearly has found that any person performing real and genuine services for and under the direction of another person for a certain period of time in return for which he receives remuneration, has to be considered a worker under Union law. There remained to be a lot of confusion as to where the status of worker ended and where the status of student began and vice versa. Moreover, the question rose as to whether the intention engaging individuals to cross the border could also play a role in determining their status under EU law.

These question were addressed by the relative recent judgment in L.N v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte. 85 The case concerned Mr. N, a European Union citizen, whose nationality was not even mentioned. In June 2009 Mr. N, was offered a full-time employment in an international wholesale firm and for this the regional Danish government administration had issued a certificate of registration as ‘Union worker’. Subsequently, in August 2009 Mr. N applied for education assistance from September 2009 onwards in order to pursue a study at Copenhagen Business School to which he had applied before March 2009 and before entering Danish territory. From September 2009 Mr. N started his studies and resigned from his employment with the international wholesale firm, but then carried on other part-time employment. In October that year Mr. N was informed that his application for education assistance had been rejected, he appealed against this decision by arguing that he had the status of ‘Union Worker’ within the meaning of Article 45 TFEU and hence, entitled to equal access for financial aid. The VUS indicated that it had taken into account that Mr. N had come to Denmark with the main purpose of pursuing a course of study, since he had applied for the study prior to coming to Denmark, and shortly thereafter effectively started his studies.

The national court had taken the view that Article 24 (2) of Directive 2004/38 must be interpreted as meaning that a person considered to be a student is not entitled to a study grant even if he might also qualify as a ‘worker’. This argumentation was based on the wording of Article 7 (1) (c) of that Directive which defines a student as a person enrolled “for the principal purpose of following a course of study.” 86 The administrative body in Denmark responsible for the awarding of study grants and/or loans had assumed that EU citizens were only capable of having one (residency) status under EU law at any time. In other words, resulting in either being qualified as a student or as an Union worker.

Moreover, they held that in this perspective a citizen of the Union who studies full-time in a host Member State and who entered the territory of that Member State for that sole purpose can be refused maintenance aid for the first five year of lawful residence, despite executing part-time employment at the same time.\(^{87}\)

The Court, however, observed that Article 24 (2) Directive 2004/38 had to be interpreted restrictively, resulting in the fact that EU citizens are capable of holding more than one status under EU law simultaneously. The Court contended that although it does follow from the wording in Article 7 (1) (c) Directive 2004/38 that a Union citizen is to enjoy the right of residence for longer than three months if he is enrolled at an private or public establishment for the principal purpose of following a course of study. This can nevertheless not be translated into the fact that a Union citizen fulfilling those conditions is automatically precluded from qualifying as a ‘worker’ in the meaning of Article 45 TFEU as well.\(^{88}\) In this regard, the Court reiterates that low productivity of the person concerned, or only working a small number of hours per week do not preclude that person from being recognized as a ‘worker’ within the meaning of Article 45 TFEU, provided that the person concerned still pursues effective and genuine activities, which cannot be considered to be purely marginal and ancillary.

Moreover, it is up to the national courts to establish whether the activities of the concerned applicant are to be construed as effective and genuine in nature. Hereby, taking into account objective criteria and all circumstances relevant for the qualification as ‘worker’. By which the Court recalls that elements concerning the conduct of the person before and after the employment can nevertheless not be considered relevant since these are not related to the objective criteria which are needed.\(^{89}\) In addition the Court clarifies that where the conditions have been satisfied to qualify as a worker, the motives prompting the worker to seek employment in another Member State have no effect and must not be taken into consideration.\(^{90}\) Therefore, the Court clearly concludes that a mobile student moving to the territory of the host State with the main objective to study full-time does not automatically preclude him from having a status as ‘EU worker’ at the same time, provided he is in a relationship of


\(^{88}\) Judgment of 21 February 2013, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, C-46/12, ECLI:EU:C:2013:97, para 36.

\(^{89}\) Judgment of 21 February 2013, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, C-46/12, ECLI:EU:C:2013:97, para 43-46.

\(^{90}\) Judgment of 21 February 2013, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, C-46/12, ECLI:EU:C:2013:97, para 47.
employment and the scale of his activities taken as a whole are genuine and effective economic activity.⁹¹

In this respect, according to HOOGENBOOM, it can in pursuance of Megner and Scheffel⁹² be assumed that 10 hours a week would be considered sufficient to qualify as “genuine and effective” employment.⁹³ Although it has to be kept in mind that the Court explicitly states that there are no hard lower limits. So, in accordance with HOOGENBOOM it therefore might be assumed that a sort of dual test has been created where the 10 hours might function as a rebuttable presumption.

At last, for the sake of completeness it can also be mentioned that the ex-worker turned student can continue to rely upon his previous worker status to claim study allowances, when there is continuity between the previous employment and the studies subsequently commenced and the previous work cannot be regarded as ancillary to the subsequent studies. However, in the case of involuntarily unemployment it can be noted that such continuity is not required where the labour market conditions are such as to oblige the ex-worker to train in a different field.⁹⁴

§ 3. The children & other family members of Economically Active Citizens

A second category of individuals enjoying specific rights of equal treatment under Regulation No 492/2011 are the children and other family members of the Union worker. They have been granted derived rights under Art. 7 (2) Regulation No 492/2011 in order to prevent discrimination to the detriment of dependants of the worker to achieve a full integration into the host State’s society. Therefore, children and family members of Union workers have consistently been held to be entitled to the same social advantages as children of national workers, irrespective to their place of residence.⁹⁵ The latter of which follows the fact that Member States are precluded from imposing additional residence requirements on to the children and family members of Union workers, if such condition is not imposed on the children of national workers, as this would clearly constitute discrimination to the

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⁹¹ A. HOOGENBOOM, “EU Citizens with Multiple Statuses: The Case of the Student-Worker - Comments on Case C-46/12, LN v Styrelsen for Videregående Uddannelser og Uddannelsestøtte”, Europarättslig tidskrift 2013, no. 4, (820) 824.
⁹³ A. HOOGENBOOM, “EU Citizens with Multiple Statuses: The Case of the Student-Worker - Comments on Case C-46/12, LN v Styrelsen for Videregående Uddannelser og Uddannelsestøtte”, Europarättslig tidskrift 2013, no. 4, (820) 824.
⁹⁴ A. HOOGENBOOM, “Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?”, Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 31.
detriment of descendants dependent on the worker. Consequently, when dealing with the rights of equal treatment provided to the children and family members of Union workers under Article 7 (2) of Regulation No 492/2011, the rights have to be considered granted irrespective to their place of residence.

Once more the question was of course raised who could be considered a ‘child or family member’ of the EU worker. This question was addressed for the first time in Baumbast, wherein the Court had interpreted that provision as meaning that both the descendants of that worker and those of his spouse had the right to install themselves with the worker. Since any other interpretation would have failed to achieve the aim of integration of members of the families of migrant workers pursued by current Regulation No 492/2011. This reasoning was subsequently also confirmed in cases such as Lebon, where the Court also specified that the ‘dependency’ criteria had to be interpreted as being evidenced on account of a factual situation and in accordance rejected the notion that a right to maintenance had to be present. Nevertheless, in the wake of Giersch and the questionable position created for frontier workers and their children as regards to their entitlement to portable student support, the question relating to who could be considered a child of a worker was sparked once more.

Pursuant to the ruling in Giersch the government of Luxembourg had adopted the notion that the entitlement of children of frontier workers as regards to financial aid in general, should be limited even further. This by inter alia requiring that the person employed had to have established a clear and legal relationship with the child in order for the student to be able to rely upon Article 7 (2) of Regulation No 492/2011. This new issue concerning the refusal of maintenance aid to non-residing students on grounds that the person employed was not their father but their stepfather, was eventually addressed in Depesme & Kerrou.

In Depesme & Kerrou the Court reprised its previous case law adopted under Regulation No 1612/68 and reasoned that it follows from the current Citizens’ Rights Directive that the ‘child of a migrant worker’ in the sense of Article 7 (2) of Regulation No 492/2011 has to include the children of the spouse or registered partner under national law. The Court observes that there is no evidence to suggest that the EU legislature intended to distinguish between the scope of Directive 2004/38 and the scope of Regulation No 492/2011. On account of which follows that there is no reason as to why the

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97 In the event that no such residence requirement is prescribed for the children and family members of the national worker.
100 See chapter 3.
family members defined in Art. 2 (2) Directive 2004/38 would not be the same persons as under Regulation No 492/2011, when the individual is considered in his capacity as a worker. Moreover, a reasoning, which is in fact confirmed by Recital 1 of Directive 2014/54 on measures facilitating the exercise of rights conferred on workers. Furthermore, with regards to the extent of the contribution towards the spouse’s child the Court contended that the status of dependent member of a family, did not presuppose a right to maintenance. The acceptance of such argument would undoubtedly lead to variations in the composition of the family across the Member States, which would as a consequence jeopardize the uniform application of EU law. Accordingly, the Court therefore reiterated its previous decision that the status of dependant will result from a factual situation, which may be evidenced by objective factors such as a joint household. Nevertheless, there is no need to determine the reasons for recourse to the worker’s support or to make a precise estimation of its amount.

Given these points, it can in essence be concluded that as soon as the individual claiming the social advantage under Article 7 (2) Regulation No 492/2011, meets the definition of ‘child or family member’ written down in Article 2(2) (c) of the Citizens’ Rights Directive, they are also considered to be the family member or child of the frontier worker within the meaning of Article 7(2) of Regulation No 492/2011.

3.1. The children of economically active EU citizens

3.1.a) Article 10 vs. Art 7 (2) of Regulation No 492/2011

With respect to the ‘children’ of union workers wishing to pursue a study in the host employment State, Regulation No 492/2011 foresees in at least two set of rights on which equal financial aid can be claimed: Article 10 and Article 7 (2).

The first set of rights is provided by Article 10 of Regulation No 492/2011, which in fact grants the child of a Union worker a self-standing right of residence and full equal treatment as regards to study finance. However, in order for this right to be activated three conditions have to be satisfied. First, the child has to reside in the Member State in which one his or her parents is or has been employed as a Union worker, hereby clearly explicitly excluding frontier workers and their children. Secondly, the child must also have become resident in the host Member State during the exercise of the right of free

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movement of workers, and thirdly, must the child enroll in a form of education.\textsuperscript{108} Nevertheless, it is not required that those conditions are fulfilled at some specific point in time. Conversely, it is sufficient that the three factors coincide at some moment in time. As of which the provision will be activated and the child will gain his or her own right to full and immediate equal treatment in educational matters. Important to note is that once the right has been activated by the fulfillment of the three conditions, the child will continue to enjoy the right to equal treatment, even if the original conditions for acquisitions are no longer present.\textsuperscript{109} In other words, it is not necessary that the worker-parent from who the right was initially derived remains economically active nor that the worker keeps residing in the employment State. Additionally, the reliance on the right is also indifferent to the age of the child or his or her lack of dependence.\textsuperscript{110}

For children who have not resided in the host Member State, for example the children of frontier workers, or who simply do not fulfill the criteria of Article 10, a second set of rights are provided for under Article 7 (2) of Regulation No 492/2011.

Although the Dutch Minister in the case of \textit{Bernini} argued that student finance could not constitute a social advantage within the meaning of Article 7 Regulation No 492/2011, given that it is expressly granted to the student and not to his or her parents. The Court has consistently ruled that study finance granted by a Member State to the children of workers does in fact constitute a social advantage for the migrant worker within the meaning of Article 7(2) of Regulation No 1612/68, in the event that the worker continues to support the child.\textsuperscript{111} The Court has even upheld that the children of migrant workers can rely on the provision themselves, in order to obtain the funding if under national law it is granted directly to the student.\textsuperscript{112} Contrary to Article 10, however, the conditions creating the right to equal treatment have to remain present. In particular, this translates into the fact that when the worker-parent seizes to be a Union worker, the child will consequently lose his or her rights under Article 7

\textsuperscript{108} A. \textsc{Hoogenboom}, “Mind the gap - Mobile Students and their Access to Study Grants and Loans in the EU”, \textit{Maastricht journal of European and comparative law} 2015, no. 1, (96) 109-110.


\textsuperscript{110} C. U. \textsc{Amann}, \textit{The EU Education Policy in the Post-Lisbon Era: A Comprehensive Approach}, Frankfurt am Main, Peter Lang, 2015, 198.


(2) Regulation No 492/2011. The same also goes for the situation, wherein the child would lose its dependency.\footnote{A. Hoogenboom, “Mind the gap - Mobile Students and their Access to Study Grants and Loans in the EU”, Maastricht journal of European and comparative law 2015, no. 1, (96) 109-110.}

3.2. Other family members of economically active EU citizens

At last, also other family members of the economically active citizen (i.e. the spouse or registered partner) derive additional rights on the basis of Article 7 (2) Regulation No 492/2011. Similar to the child under Article 7 (2) of Regulation No 492/2011 they will enjoy a privileged position with immediate access to study grants and or loans in the host employment State, for as long as the worker keeps his economic activity.

Overall, it can be concluded that Union workers, student-workers as well as their family members, are quasi assimilated to national workers on account of Article 7 (2) Regulation No 492/2011. In matters relating to financial aid it seems that their link to a genuine and effective economic activity has been set to functions as a ‘magic tool’ granting them equal financial aid in the host State.

Section II. The Economically Inactive Students: The ‘pure’ EU Students

Contrary to the situation of the abovementioned EU\+ students, it was not possible for economically inactive students to rely upon the right of equal treatment provided for by Article 7 (2) Regulation No 492/2011. Therefore, it was not until the Court’s ruling in \textit{Bidar}, that the possibility was given to economically inactive students to claim financial aid in the host Member State under the same conditions as national students on account of the non-discrimination principle enshrined in Article 18 TFEU.\footnote{Judgment of 15 March 2005, \textit{Bidar}, C-209/03, ECLI:EU:C:2005:169.}

Nevertheless, as set out extensively in the previous chapter, the non-discrimination principle does not guarantee an absolute right to equal treatment in all circumstances, as the Court has allowed for objective justification grounds. In this regard, this section intends to examine the legal principles developed by the Court as regards to possible justification grounds and pure students’ real entitlement to equal study finance in the host State.

§ 1. \textit{Bidar}: A ‘genuine’ link requirement

After having established that matters relating to student support and maintenance aid could be considered falling within the reach of the principle of non-discrimination, the inevitable question rose
as of to which extent discriminatory measures and can eventually be upheld by virtue of objective considerations.

In *Bidar* the Court came to the conclusion that an unjustified discrimination on the basis of nationality existed. The criteria imposed by the UK Government were considered to be indirect discriminatory on the basis of nationality, given that the criteria of residence and settlement are way more feasible for nationals than for other non-national EU citizens placing them at a disadvantage.\(^{115}\)

Subsequently, the Court recalled that a difference in treatment might be justified, when, and only when it is based on objective considerations independent of the nationality of the persons concerned as well as proportionate to the legitimate aim of the national provisions.\(^{116}\) In this respect, the UK government had advanced that it is legitimate for a Member State to require a genuine link between the student claiming assistance to cover his maintenance costs and the employment market of the host Member State.\(^{117}\) On which the Court contended that it must indeed be observed that although the Member States must in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States,\(^{118}\) it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.\(^{119}\) For this reason, the Court acknowledged that in the case of maintenance aid to students, it is legitimate for a Member State to limit the beneficiaries to those students, who have demonstrated a certain degree of integration.\(^{120}\)

In this regard, the Court clarified that a finding that the student has resided in the host Member State for a certain length of time could evidence the required degree of integration, but did not provide any more guidance on how to establish a sufficient ‘degree of integration’.\(^{121}\)

In the case at hand, this eventually led to the conclusion that the concerned criteria prescribed by national legislation were unjustified restrictions to the non-discrimination principle under Art. 18 TFEU. The Court observed that the requirement of settlement precluded any possibility of a national of another Member State to obtain the settled status as a student. Hereby, making it impossible for any EU student to satisfy that condition and enjoy the right to assistance to cover his maintenance costs, regardless of his actual degree of integration of society of the host Member State. The Court, therefore,

ascertained that such treatment cannot be regarded as justified by the legitimate objective which those rules seek to secure.  

§ 2. Förster and the Five year Rule – Goodbye to Genuine link requirement? 

In the aftermath of Bidar it was quite uncertain as to how a sufficient degree needed to be established exactly. It was only known “that a finding that the student has resided in the host Member State for a certain length of time” was appropriate to establish the required degree of integration.

Following the judgment in Bidar, the administrative body in the Netherlands, the Informatie Beheer Groep (the "IB" Groep) in charge of the enforcement of Dutch legislation relating to the financing of study finance adopted a new policy rule, requiring non-economically active EU students from other Member State to have been lawfully resident in the Netherlands for an uninterrupted period of at least five years, prior to the application in order to be eligible for maintenance grants. In the subsequent case of Förster the Court was asked to examine the legitimacy of this requirement in relation to the non-discrimination principle on grounds of nationality.

The case concerned Ms. Förster who had settled in the Netherlands in 2000, and thereafter enrolled for training as a primary school teacher as well as for a course in educational theory leading to a bachelor’s degree at the Hogeschool van Amsterdam. During her studies Ms. Förster had taken up various kinds of paid employment. In this regard, she completed a paid work placement in a Dutch special school from October 2002 until June 2003 and after having passed her final exam for the bachelor’s degree she accepted a post as a social worker in an institution for people with psychiatric problems in June 2004. During her studies Ms. Förster had been granted a maintenance grant by the Dutch IB-Groep, as it had considered Ms. Förster to be a ‘worker’ within the meaning Article 45 TFEU and therefore entitled to equal access to maintenance grants as own nationals of the host State in the Netherlands, under Article 7 (2) of the then Regulation No 1612/68 and current Regulation No 492/2011. However, following a check, the IB-Groep determined that Ms. Förster had not been gainfully employed between July 2003 and December 2003 and therefore held a decision that she should no longer be regarded as a worker. As a result, the decision concerning the financial support was annulled and Ms. Förster was requested to repay the concerned sums.

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Therefore, the question at hand in Förster was whether it was permissible for Member States to only impose such a durational residence requirement on non-nationals originating from other Member States in order to determine the present of sufficient integration into the host Member State’s society, and furthermore, whether a five-year-of-prior-residence criteria could be considered proportional to achieve that legitimate aim, or whether other criteria different to the duration of residence, should play a role when determining the degree of integration into the society of the host Member State.

In Förster the Court, by referring to its ruling in Bidar, ascertained that the durational residency requirement could, in fact, be considered appropriate for assuring the integration into the society of the host Member State. The Court continued that in order to justify discrimination the conditions, however, also had to be proportional. In this regard, the Court, quite surprisingly, does not consider the five years’ of uninterrupted residency requirement to be excessive. Instead referred the Court to the durational residence requirement present in Article 24 (2) Directive 2004/38 to evidence that a condition requiring five years of continuous residence was both appropriate and proportionate for the purpose of guaranteeing that the student was integrated into the society of the host Member State. Moreover, emphasizes the Court that such residence requirements generate a significant level of legal certainty and transparency when it comes to the award of maintenance aid to students. By which the Court subsequently accepts that a five year of uninterrupted residence requirement is not a prohibited discrimination, but instead a justified differentiation of direct nationality.

2.1. The aftermath of Förster: A Goodbye to the Genuine Link requirement

It goes without saying that the ruling in Förster was quite remarkable on several issues. First of all, because the Court allows for discrimination based directly on nationality. Although the Court did not allow for it explicitly, it nonetheless applied the indirect discrimination test by simply referring to the fact that the issue had already been addressed in Bidar. Which was most certainly not the case as Bidar concerned indirect discrimination. Nevertheless, the Court succeeded in covertly saving a direct discrimination by applying the indirect discrimination test.

Nevertheless, the most important striking consequence of the Förster-ruling might be the abolishment of the ‘genuine link’ requirement as we know it. In essence, Bidar told us that lawful residence for a

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'certain time' could be one way of demonstrating a genuine link. Hereby, fostering a case by case assessment of the circumstances surrounding the applicant in addition to the demonstration of a real or effective link with the host Member State. However, in Förster the Court relied solely on the residence requirement and does not take any other factors into account. Leaving the five years of uninterrupted residence to be no more than "a mere reflection of the genuine link requirement rendering a complex assessment unnecessary." It simply seems to install a non-rebuttable presumption of non-integration for the people not satisfying it, without taking due regard of other qualitative factors such as family ties, place where children go to school, motives for moving, property, the continuity of residence, volunteer work, etc., which may also serve as indicators of integration.

An explanation as to why the Court probably regarded the residence requirement proportionate, probably lies in the fact that if it had ruled the opposite it could have indirectly, yet clearly, have indicated that Article 24(2) of Directive 2004/38, at least as regards lawfully resident EU students might be invalid. Accordingly, it therefore also seems highly unlikely that the Court will abruptly alter this case law. Nevertheless, it does seems that the sole reliance on a single genuine link indicator is increasingly becoming a highly questionable practice. Pushing the question as to whether Förster can still be considered good law.

Both before Förster and repeatedly after, the Court has consistently determined that the relevant and sufficient degree of integration in the society of the member State from which a benefit is sought cannot be based on one, and only one criteria such as residence to the exclusion of all other economic and social factors capable of proving the existence of the necessary attachment. This has, inter alia, been the case in Prinz & Seeberger, where the Court for the first time, remarkably, also suggested alternative links. The Court held that when a student is national of the State concerned other factors

136 A. HOogenboom, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 27.
such as his family ties, employment history, language skills, or the existence of other social and economic factors might be relevant to establish the degree of integration.\textsuperscript{138}

Overall, it can be concluded that both Directive 2004/38 and the Förster-ruling may be regarded as ‘politically wise’\textsuperscript{139}, in that the Court of Justice clearly tried to balance the promotion of student mobility and its benefits with the interests of the Member States to ensure the financial sustainability of their educational systems.\textsuperscript{140} However, it cannot be denied that student mobility lost. It is not unimaginable that without the prospect of financial help a lot of students may be deterred to go abroad for study purposes or simply be unable to afford education abroad, given that it can be safely assumed that it will only be in rare cases the student will have resided in the host Member State prior to commencing their studies.\textsuperscript{141}

\textsuperscript{138} Judgment of 18 July 2013, Prinz and Seeberger, C-523/11, ECLI:EU:C:2013:524, para 38.
\textsuperscript{139} A. P. VAN DER MEI, "Union Citizenship and the Legality of Durational residence requirements for entitlement to student financial aid", Maastricht Journal of European and Comparative Law, no. 4, (477) 485.
CHAPTER III. Discrimination in the access to portable study grants and/or loans

The next major issue within the framework of student mobility and financial aid for students, relates to the portability thereof. More precisely, to which extent mobile students can make use of the national financial support schemes of their host State to pursue a study abroad in another Member State.

Two types of situations can be identified in export cases: for one, the EU citizen who seeks to export study grants provided by his own Member State in order to study abroad and secondly, a migrant EU national from Member State A, who enjoys a right to equal treatment with the nationals of host Member State B and seeks to export those grants to a Member State C.\footnote{A. Hoogenboom, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 34.}

Over the recent years, the case law concerning the export of study grants and/or loans has been subjected to several new developments. Therefore, this Chapter sets out to assess the current legal principles surrounding the principle of non-discrimination on grounds of nationality and the eligibility criteria relating to the export of maintenance aid for students.

Section I. The right to portable student grants and/or loans

As a preliminary point it has to be noted that the Court has ruled that EU law does not provide for an enforceable right to portable education grants or loans. Member States are, therefore, not obliged under EU law to provide for portable aid in order to pursue higher education studies in other Member States.\footnote{Judgment of 24 October 2013, C-275/12, Elrick, ECLI:EU:C:2013:684, para 25; Judgment of 24 October 2013, Thiele Meneses, C-220/12, ECLI:EU:C:2013:683, para 25.} Accordingly, it has been up to the Member States themselves to decide whether or not they want to foresee such a right, as well as, in principle, the conditions upon which they wish to grant it.

This freedom, however, has to be nuanced immediately as the Court has clarified from the start that, where a Member State has opted for the introduction of such a portability in their financial support schemes, the Member State has to ensure that the conditions attached to its eligibility are in compliance with EU law.\footnote{Judgment of 27 September 1988, Matteucci v Communauté française de Belgique, C-235/87, ECLI:EU:C:1988:460, para 14; Judgment of 23 October 2007, Morgan & Bucher, C-11/06, ECLI:EU:C:2007:626, para 28; Judgment of 18 July 2013, Prinz and Seeberger, C-523/11, ECLI:EU:C:2013:524, para 30.} More precisely, the conditions under which individuals are eligible to
claim study grants and/or loans may not discriminate on grounds of nationality and/or put EU citizens who have exercised their right to free movement at a disadvantage.\textsuperscript{145}

Notwithstanding the lack of an enforceable right of portable study grants and/or loans under Union law, most Member State do seem to allow for the export of their educational grants and loans. An explanation hereof can for one be found in the commitment of the Member States to increase the mobility of students under the \textit{Bologna Process}, but also increasingly within the \textit{EU initiatives}.\textsuperscript{146}

Since it is apparent that the opportunity for students to export the study grants and loans offered plays a major role in the pursuit of more student mobility.\textsuperscript{147}

In general, the export of educational grants can be considered beneficial for the funding State, given that it generates the possibility to enjoy the educational opportunities offered in other Member States, while simultaneously also benefiting from the skills and knowledge brought back by the returning student.\textsuperscript{148} Over the years, Member States have, however, become very apprehensive of “Study grant forum shopping” and of financing the education of students with no link or limited connection to the funding State. They fear that the financing of such students with no intention to return to the financing State, will offset the potential benefits generated by the export in the first place.\textsuperscript{149, 150}

For this reason, Member States have made the granting of portable financial aid conditional upon certain requirements. Most frequently, the Member States have opted for some form of residence requirement to examine whether the applying individual can demonstrate a genuine connection or a certain integration into the society of the funding State.\textsuperscript{151} \textit{De facto} these criteria are intended to determine the likelihood of the concerned students contributing to the national economy at a later

\textsuperscript{145} A. Hoogenboom, “Mind the gap - Mobile Students and their Access to Study Grants and Loans in the EU”, \textit{Maastricht journal of European and comparative law} 2015, no. 1, (96) 105.

\textsuperscript{146} A. Hoogenboom, “Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?”, \textit{Croatian Yearbook of European Law & Policy} 2013, Vol. 9, (15) 34. For a more comprehensive analysis on the European initiatives to promote student mobility, see: C. U. Amann, \textit{The EU Education Policy in the Post-Lisbon Era: A Comprehensive Approach}, Frankfurt am Main, Peter Lang, 2015, 56-115.


\textsuperscript{150} It can be established that the Member States, as set out in previous Chapter, yet again fear the unequal and unfair allocation of public funding in matters dealing with cross-border education.

stage, by assessing their likelihood to return and establish themselves in the financing State after completing their studies abroad. In this regard, and contrary to the situation set out in the previous Chapter, most Member States, therefore, seem equally reluctant to create a blanket right for portable aid to their own nationals. Consequently, practice shows that a lot of Member States have opted to apply the conditions to their own nationals alike.

It is clear that such durational requirements will be to the disadvantage of two distinct categories of EU citizens. For one this will clearly affect frontier workers and their children, who by definition will never be residing in their State of employment, as well as migrant workers who have not resided in the host State for a sufficient period of time yet. Secondly, also nationals who have exercised their right to free movement under EU law, by residing for some time in a different Member State will be affected by this criteria. As a result this has of course generated the question whether such durational residence requirements for portable aid have to be considered incompatible with the principle of non-discrimination on grounds of nationality, despite the fact that own nationals are being submitted to the same conditions, and/or with the right to free movement as these criteria might generate an adverse effect on own nationals’ decision to move and reside in a different Member State.

However, taking into account the objective of this research to assess the compatibility of student support schemes with the principle of non-discrimination on grounds of nationality, this Chapter will further focus on the eligibility criteria imposed on economically active EU citizens seeking to claim portable study finance in the State of employment. Although the recent developments in the portability of student grants and loans for the ‘own’ nationals in relation to the free movement principle of Union citizens is also interesting this will, however, take us too far within the framework of this research. Lastly, there should also be noted that non-economically active citizens might also be considered to be discriminated by these residence requirements. This effect can, nevertheless, be regarded as insignificant, since their situation remains basically the same as it has been set out in the previous Chapter. It can reasonably be assumed that Member States will be allowed to require the economically inactive Union citizen, who is also not a national, to have resided for up to five years on its territory

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153 See Chapter 2, where the CJEU in Förster allowed for direct decimation by reason of nationality to be justified on grounds of objective considerations.
155 A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 34.
prior to awarding him financial support for study purposes in another Member State. 156 With this in mind, the next section will therefore solely focus on the lawfulness of residence requirements imposed on Union workers, claiming portable educational grants in their State of employment.

Section II. The portability of student grants and loans for The Economically Active

In the previous Chapter it has already been set out that economically active EU citizens and their family members are able to enjoy additional equal treatment rights provided for under Article 45 TFEU and Article 7 (2) Regulation No 492/11. This article has been held to grant both migrant workers and frontier workers a right to equal treatment in relation to social advantages, including study grants and loans. Consistently throughout its case law the Court has continued to interpret this provision very broadly, thereby determining that ‘social advantages’ also includes study finance granted to the children of workers, in situations where the worker continues to support the child. This to the extent that even the children themselves can rely indirectly on these rights where national law provides for the funding to be granted directly to the children.

With regards to the export of study finance, the Court has determined from as early on as Matteucci that in the event portability is created for the State’s own nationals, a same opportunity must also be granted to EU workers lawfully established within its territory under Article 7 (2) Regulation No 492/2011. 157 This progressive trend relating to portable grants and loans peaked with the Court’s ruling in Meeusen, in which the Court ruled that where Member States allow for portable study finance for the children of national workers than they must also allow for portable study finance for the children of migrant workers from other Member states, without having regard to their State of residence. 158 Following the Meeusen-ruling Member States, however, became very concerned with the financial consequences hereof and argued that they should not be forced to grant educational grants to non-resident students pursuing a course of study in another Member State and consequently, insisted


on their competence to circumscribe the potential beneficiaries of portable aid by virtue of (durational) residence requirements.\(^{159}\)

\section*{1. Commission v Netherlands: The lawfulness of residence requirements}

Notwithstanding that the Court in subsequent cases did determine that the so-called “first stage study” conditions\(^{160}\) were incompatible with the principles of EU law, just like the measures prohibiting the portability of financial aid to the State of nationality.\(^{161}\) It took a considerable period of time before the Court was able to examine the lawfulness of (durational) residence requirements as such.\(^{162}\)

The case of \textit{Commission v Netherlands} was the long-awaited case where the Court was finally given the opportunity to address the lawfulness of the durational residence requirements imposed by Member States’ as an eligibility criteria for the portability of study finance towards migrant workers. This judgment can, therefore, also be considered the important starting point of a relatively recent series of cases relating to various residence requirements imposed by Member States with the aim of limiting the beneficiaries of portable study grants.\(^{163}\)

The case concerned the lawfulness of the so-called ‘3-out of 6’ rule that had to be fulfilled in order to be eligible for portable study grants and or loans under the \textit{Dutch Study Finance Act} of 2000\(^{164}\) (Hereafter: WSF 2000). In order to ensure the financial sustainability of their financial education system the Dutch WSF 2000 had introduced the requirement of lawful residence in the Netherlands for a period of 3 years in the last six years preceding the application for study finance, in order to demonstrate a genuine link with the Netherlands.

The Commission, however, was of the opinion that in so far this residence requirement was applicable to migrant workers, including frontier workers and to members of their families it constituted an infringement of the obligations under art. 45 TFEU and Article 7 (2) of Regulation No 492/2011. Even though the requirement applied equally to both national workers as well as migrant workers, the

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\textsuperscript{159} A. P. \textsc{Van der Mei}, "Coordination of student financial aid systems: Free movement of students or free movement of workers?" in F. \textsc{Pennings} and G. \textsc{Vonk} (eds.), \textit{Research Handbook on European Social Security Law}, Cheltenham, Edward Elgar, 2015, 475-476.

\textsuperscript{160} This refers to the situation where the granting of portable aid has been made conditional upon the completion of a first year of their education in the financing State before continuing the same education abroad.


\textsuperscript{162} A. \textsc{Hoogenboom}, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", \textit{Croatian Yearbook of European Law & Policy} 2013, Vol. 9, (15) 34.

\textsuperscript{163} A. \textsc{Hoogenboom}, “Export of Study Grants and the Lawfulness of Durational Residency Requirements: Comments on Case C-542/09, Commission v. the Netherlands”, \textit{European Journal of Migration and Law} 2012, no. 4, (417) 417.

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Commission considered the requirement to amount to indirect discrimination. Given that a residence requirement will certainly be easier to fulfill for nationals than migrant workers and therefore be liable to disadvantage migrant workers, and in particular frontier workers and their family members. For the simple reason that the latter by definition will not be residing in the State of employment and therefore find themselves in the position of never being able to satisfy the 3-out-of-6 rule.\textsuperscript{165}

In contrast, the Netherlands, first of all, contended that there was no infringement of EU law whatsoever. They submitted that workers and their family members who fulfilled the 3-out-of-6 rule had to be perceived as being in an objectively different situation to those who did not fulfill this condition. Hereby, excluding the presence of discrimination from the start as a differentiation could not be evidenced by lack of a comparable situation.\textsuperscript{166} More precisely, the Dutch government argued that from the perspective of student mobility the situation of encouraging residing students to pursue education abroad differs completely to encouraging student mobility of students residing outside the Netherlands to pursue studies outside the Netherlands. In this regard, the Dutch government essentially put forward that those applicants fulfilling the residence requirement are in fact more likely to pursue higher education studies in the Netherlands by reason of their past residency and therefore need the incentive generated by portable financial aid. Whereas, those individuals not fulfilling the criteria are not predisposed to pursue a course of study in the Netherlands. Since they are already residing abroad, they can be considered mobile and therefore do not need to be further stimulated to study abroad.\textsuperscript{167, 168}

This argumentation was, however, rejected by the Court. The Court observed that the criterion by reference to which situations should be compared have to be on the basis of objective and easily identifiable factors. A mere probability that workers employed in the Netherlands, are more likely to pursue studies outside the territory of the Netherlands cannot serve as an objective factor.\textsuperscript{169} Consequently, with respect to the access of portable funding, the situation of a migrant worker employed in the Netherlands, but residing in another Member States, or that of worker having resided and worked in the same State for an ‘insufficient’ period of time, has to be considered comparable to that of a national worker residing and working in the Netherlands.\textsuperscript{170} Furthermore, AG SHARPSTON pointed out that the abovementioned Dutch argumentation also seemed to encompass a certain contradiction. In pursuance of previous cases the Netherlands had already accepted that children of

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frontier workers should have access to funding for studies in the Netherlands, under the same conditions as Netherlands nationals, hereby implicitly acknowledging that some children of cross-border workers may also be predisposed to studying in the Netherlands.\(^{171}\) Subsequently, the Court continued with establishing the presence of indirect discrimination by referring to its settled case law and confirming that a measure requiring a specific period of residence will primarily constitute a disadvantage for migrant workers and frontier workers, since non-residents are more likely to be non-nationals. Which will particularly be the case for frontier workers and their family members, who by definition will not be residing in their State of employment.\(^{172}\) As regards to the fact that own nationals were submitted to the same conditions the Court once more emphasised the fact that in order to qualify as indirect discrimination, it is not necessary to establish that all nationals of a Member States enjoy an advantage nor that only nationals of other Member States are placed at a disadvantage.\(^{173}\)

In the event that the Court would come to said conclusion of indirect discrimination, the Dutch government had alternatively also brought forward two possible grounds of justification. With the first, the government stressed the necessity of such a requirement in the light of avoiding any adverse effects on the very existence of the funding scheme and the need to ensure the further existence of the overall funding scheme. In this regard, the Netherlands referred to the previous cases of Bidar and Förster, wherein the Court had acknowledged the legitimacy of residence requirements prescribed by Member States conducive to limiting the access to educational grants.\(^{174}\) Secondly, the Netherlands submitted that said residence requirement had the objective of promoting student mobility by indicating the ‘static’ residents and simultaneously stimulating them to become mobile students.\(^{175}\)

With regards to this first objective the Court confirmed its classical position towards budgetary concerns as legitimate justification grounds. It reprised that although budgetary considerations may underlie a Member State’s social policy rationale and influence the nature or scope, they do not in themselves constitute an aim pursued by that policy and therefore they cannot justify discrimination against migrant workers. Moreover, any other decision leading to the acceptance of budgetary considerations as a valid justification ground might result in the principle of non-discrimination and


equal treatment being different in time and place according to the state of the public finances of the Member States.\textsuperscript{176}

As HOOGENBOOM notes the Court could had left it at this. However, the Court opted to further clarify its position upheld in \textit{Bidar & Förster} and distinguish it from the issue at hand.\textsuperscript{177} The Court expressed that a similar approach as adopted in \textit{Bidar} and \textit{Förster} could not be applied, taking into account that in those cases the Court had specifically ruled that the concerned individuals did not come into the scope of free movement of workers.\textsuperscript{178} Nevertheless, the Court continued to determine that the Member State’s power to require a certain degree of integration into the society of the funding State in order to receive social advantages, however, is not limited to situations where the applicants are economically inactive. Nonetheless, residency requirements as the one prescribed are in principle inappropriate when the persons concerned are migrant workers or frontier workers.\textsuperscript{179}

By reason of their work Union workers have to be presumed to be sufficiently integrated into the society. This, inter alia, follows from the fact that the Union worker pays taxes in the host Member State by virtue of his employment as well as contributes to the financing of social policies of that State and with this in mind the EU worker, should therefore be able to profit from them under the same conditions as national workers.\textsuperscript{180} Given all these points, the Court upheld its classical approach and rejected the objective of avoiding an unreasonable burden as constituting an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States with national workers.\textsuperscript{181}

Next, the Court moved on to address the second possible ground of justification: the promotion of student mobility. The Dutch government had submitted that the 3-out-of 6 year rule had the objective to identify and simultaneously stimulate the ‘static’ students to pursue higher studies in other Member States, by providing them with portable study finance. Moreover, the Netherlands contended that said residence considerations were equally beneficial for the Dutch society as the conditions rendered it more probable that the concerned students would return to the Netherlands upon graduation and bringing with them the gained knowledge and experience.\textsuperscript{182}

\textsuperscript{182} Judgment of 14 June 2012, \textit{Commission v Netherlands}, C-542/09, ECLI:EU:C:2012:346, para 70; A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A
Different to the first justification ground, the Court did accept the promotion of student mobility as an objective in the public interest, capable of justifying a restriction on the principle of non-discrimination by reason of nationality. The Court contended that in the light of Article 165 (2) TFEU and other European initiatives emphasizing the importance of mobility in education and training, student mobility could be regarded as an integral part of freedom of movement for persons and one of the main objectives of the European Union’s action. Nonetheless, in order to justify a restriction of a fundamental freedom such as freedom of workers, the measure still has to be appropriate for securing the achievement of the legitimate objective pursued and can it not go beyond what is needed to reach the goal. In this regard, the Court considered the dual aim of the objective to both encourage the mobility of those predisposed to study in the Netherlands, as well as ensuring the return of the students after their studies to be appropriate.

The measure was, however, rejected on the basis of necessity. The Court reasoned that the specific durational residence requirement was too exclusive in nature. According to the Court the Dutch government had prioritised an element which is “not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State.” Although the Netherlands had argued that no other rule would protect the interests of the Member States as efficiently, it was not considered sufficient for the Member State to simply refer to other measures which, in its opinion, were even more discriminatory than the concerned requirement. Therefore, the Netherlands did not manage to prove that the requirement did not go beyond what was necessary to achieve the objective, and as such the requirement that migrant workers and dependent family members had to reside 3-out-of 6-years in the Member State prior to the application for portable study finance, was held to be contrary to the right to equal treatment and principle of non-discrimination enshrined in Article 45 (2) TFEU and Article 7(2) of Regulation No 492/2011.

From the outset, it is apparent that the Court in Commission v Netherlands upheld its classical approach relating to the harmonisation of the legal positions of frontier and migrant workers in matter relating to social advantages. By reiterating that as a rule a distinction between these two categories of workers is not allowed on the basis of residency requirements. Remarkable, however, is that the Court...
with this ruling, did clarify to some extent how migrant worker had to be regarded within the ‘genuine link’ case law. 189 De Witte refers to it as a seemingly paradoxical statement of the Court, because for the first time the Court explicitly acknowledges that a certain degree of integration can likewise be required of economically active migrants before granting them access to welfare rights. While immediately after stressing that the mere economic activity will constitute such a degree of integration. 190 By which the Court, in general, seems to confirm that economically active citizens in practice should be able to enjoy an absolute and immediate right to equal treatment on the basis of their contribution to the society through their employment, or at the least cannot be submitted to any variations of residence requirement, irrespective of their length or reasonableness when claiming welfare rights. 191 Since it excludes all other representative elements of attachment.

Lastly, for the sake of completeness it can be noted that the Court only examined the 3-out-of-6 rule under Article 45 TFEU and Article 7(2) of Regulation No 492/2011 due to the factual circumstances surrounding the case, more precisely it seems to be caused by the fact that the original complaint with the Commission was lodged by a Flemish organisation representing frontier workers. 192 In this regard, it might therefore also be interesting to mention that in the relative recent case of Marten's, the unlawfulness of the 3-out-of-6 was confirmed with regards to own nationals claiming portable maintenance aid under Article 20 & Article 21 TFEU. 194

§ 2. The curious case of Giersch 195

Not long after the judgment in Commission v Netherlands, a new but similar case was brought before the Court of Justice. From the outset it seemed to be a rather straightforward case, as Giersch yet again concerned the entitlement of financial aid to children of Union workers and no new questions needed

to be addressed. The two decisions in *Giersch* and the *Commission v Netherlands* could, however, not be more different.\textsuperscript{196}

*Giersch* concerned Ms. Elodie Giersch, a Belgian national resident in Belgium, who had applied for financial aid in Luxembourg, in order to pursue her university studies in Belgium, on account of the farther being employed there. At the time maintenance aid for students in Luxembourg was provided for by the amended Law of 22 June 2000 on State financial aid for higher education. The aid consisted of quite a generous grant and a loan, of which the portability was allowed. Which is no surprise, given that studying abroad is rather usual for Luxembourg residents. Until 2003 it had in fact been a must as it was only then that the University of Luxembourg was founded.\textsuperscript{197} In order to receive this financial support the Luxembourg Financial aid prescribed that students had to be residents and possess the nationality of either Luxembourg or any other Member State of the EU. However, on account of this criteria Ms. Giersch, as well as 600 other applicants were rejected in their claim to student support by the competent administrative body in Luxembourg.\textsuperscript{198} The applicants claimed, however, that on grounds of their worker-parent having worked in Luxembourg they should be entitled to equal access of financial aid under Article 7 (2) of Regulation No 492/2011. So, in essence, the Court was once again faced with the question of whether national legislation, refusing financial aid to non-residing workers, i.e. frontier workers and their children, could be understood to be precluded by Article 7 (2) Regulation No 492/2011, on the grounds of being an indirect discriminatory measure as the frontier workers *per definition* will never be able to satisfy the prescribed residence requirement.

First of all, it should be noted that the Court, as well as AG MENGZOZI, had little difficulty concluding that the concerned measure constituted an indirect discrimination on grounds of nationality. This given the extensive amount of case law already available on the matter.\textsuperscript{199} The Court simply reprised that a difference in treatment based on residence is liable to operate to the detriment of nationals of other Member States and, therefore, constitutes an indirect discrimination on grounds of nationality.\textsuperscript{200} Which can only be justified, as set out before, by objective considerations appropriate to secure the

\textsuperscript{196} C. U. AMANN, *The EU Education Policy in the Post-Lisbon Era: A Comprehensive Approach*, Frankfurt am Main, Peter Lang, 2015, 204.


\textsuperscript{198} Judgment of 20 June 2013, *Giersch*, C- 20/12, ECLI:EU:C:2013:411, para 15.

\textsuperscript{199} See: Chapter 2 on EU+-students, as well as the paragraph above concerning *Commission v Netherlands*; Judgment of 20 June 2013, *Giersch*, C- 20/12, ECLI:EU:C:2013:411, paras. 34-46.

achievement of a legitimate objective, which does not go beyond what is needed to achieve the concerned objective.\textsuperscript{201}

In this regard, the government of Luxembourg had submitted two arguments to justify the different treatment. The first was based on social considerations and referred to the goal of increasing the proportion of residents holding a higher education degree in Luxembourg in light of the urgent need for Luxembourg to transition to a knowledge-based economy. Whereas, the second referred to the same budgetary concerns as invoked by the Dutch government \textit{in Commission v. Netherlands}, based on the Member States’ fear of ‘study grant forum shopping’ as an unreasonable financial burden to the national budget.\textsuperscript{202}

The budgetary objective was immediately considered not to be a legitimate justification for the differentiated treatment. The Court reiterated its previous statement that although budgetary considerations might affect the social policy choices and influence them, they themselves do not constitute an aim of social policy and therefore cannot be relied upon as a justification ground.\textsuperscript{203}

Whereas, on the contrary the social objective of wanting to increase the number of residents with a higher education degree was accepted by both AG MENGOZZI and the Court.\textsuperscript{204} The Court contended that the promotion of higher education can be considered an objective in the public interest, as this objective is also pursued at EU level. Therefore, the Court held that the argument of wanting to ensure an increase in the number of residents holding a higher education degree in order to transition into a knowledge economy, constituted a legitimate objective capable of justifying indirect discrimination by reason of nationality.\textsuperscript{205}

Moreover, the the residence condition was even found to be appropriate to attain the social objective advanced.\textsuperscript{206} In this regard, the Court held that students who are resident in Luxembourg prior to embarking on a higher education study might admittedly be more likely, than non-resident students, to settle in Luxembourg after completing their studies and become integrated into the national labour market.\textsuperscript{207} Although the applicants had argued that the children of frontier workers also have specific

\textsuperscript{201}See: Chapter 1 on justification grounds as limits to the reach of the of non-discrimination principle, as well as the paragraph above concerning \textit{Commission v Netherlands}.
\textsuperscript{202}Judgment of 20 June 2013, \textit{Giersch}, C- 20/12, ECLI:EU:C:2013:411, paras. 47-50.
\textsuperscript{204}Judgment of 20 June 2013, \textit{Giersch}, C- 20/12, ECLI:EU:C:2013:411, paras. 48 & 53- 56; Opinion of Advocate General MENGOZZI, delivered on 7 February 2013, Case C-20/12, \textit{Giersch}, ECLI:EU:C:2013:70, paras. 46-47.
\textsuperscript{205}Judgment of 20 June 2013, \textit{Giersch}, C- 20/12, ECLI:EU:C:2013:411, paras. 53 & 56..
\textsuperscript{207}Judgment of 20 June 2013, \textit{Giersch}, C- 20/12, ECLI:EU:C:2013:411, para 68.
reasons to make themselves available to the Luxembourg labour market when their studies are completed, the Court did not address these. Instead, the Court simply noted that even though migrant workers and frontier workers are, in principle, held to have a sufficient link with the employment State, through the payment of taxes and contributions to the social schemes of the State of employment, granting them a right to equally benefit from educational grants. It nevertheless follows from other previous rulings in Hartmann and Geven that certain distinctions between resident and frontier workers might be permissible, depending on the extent of their integration in the society of the Member State of employment. Accordingly, the Court therefore concluded that a frontier worker cannot always be considered to be “integrated in the Member State of employment in the same way as a worker who is resident in that State”.

In the above reasoning it becomes apparent that the Court considers the social aim of transitioning into a knowledge-economy to be appropriate on lose terms of evidence. As O’LEARY notes the Court first of all seems to have abandoned the specific evidence requirement needed to assess the objective justification and its appropriateness. In previous cases such as Commission v Austria and Bressol the Court had required "specific evidence substantiating its arguments of appropriateness and proportionality", whereas in Giersch the Court refers to the likelihood and reasonable probability thereof. Moreover, the overall acceptance of the social objective seems flawed and unsound. Although the increase of population holding a higher education degree seems logical and reasonable at first, when considered it seems to be very doubtful that a limitation of the beneficiaries of portable financial aid would effectively contribute to an increase of residents holding a tertiary degree, than the absence of such a requirement. Consequently, the social objective should in fact be perceived as a ‘hidden’ budgetary consideration accepted by the Court, as there is no doubt that the prescribed residence requirement only serves the purpose of circumscribing the potential beneficiaries to those

208 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 61.
209 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 63.
210 Judgment of 18 July 2007, Hartmann, C-212/05, ECLI:EU:C:2007:437, para 30
212 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 64.
213 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 65.
217 A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 39.
who are sufficiently integrated and for that reason are more likely “to guarantee the investment made in mobile students.”

Notwithstanding the appropriateness, the Court in the end still found the residence requirement to be incompatible with the principle of non-discrimination, by lack of proportionality. In line with previous rulings the imposed criterion was found to be too exclusive. By which the Court reprised that although residence might be a good indicator of the existence of a genuine link, it cannot be the sole means by which an EU citizen should be able to demonstrate their integration into the society of the funding Member State. On this point the Court could have concluded its judgment.

Conversely, the Court however chose the somewhat unusual path of pointing out some further suggestions and possibilities available to Luxembourg. In this regard, the Court introduced not in the least the possibility of ‘anti-cumulation’ provisions and ‘reservation provisions’. By which it would become possible for the Member State to deduct the amount received in other Member States from the grant provided, as well as prescribe a financial incentive or penalty to enforce the return of the beneficiary after graduation. Notwithstanding that the last suggestion raises serious questions as regards to the compatibility hereof with the fundamental principle of free movement. From a ‘discriminatory’ perspective the most shocking suggestion seems, nonetheless, to be that Member States could make the system of financial aid conditional upon the frontier worker-parent having worked in that Member State for a certain minimum period of time before being eligible for portable education grants. By which the Court equally seemed to imply that in accordance with Article 16 (1) of the Citizens Directive and Article 24 (2) a period of five years could be considered appropriate.

It is apparent that the decision pronounced in Giersch is quite curious. Perhaps the most striking is the fact that the Court stepped away from its classical approach, in the sense that migrant workers and frontier workers no longer share a same legal position as regards to their access of social

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218 A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 40.
219 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, paras. 72-73, 76.
220 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 79.
222 A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 41.
223 Judgment of 20 June 2013, Giersch, C- 20/12, ECLI:EU:C:2013:411, para 80; A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", Croatian Yearbook of European Law & Policy 2013, Vol. 9, (15) 38.
advantages. This was on the one hand illustrated by explicitly stating that frontier workers cannot automatically be considered as integrated into the State of employment’s society as resident migrant workers, and on the other hand by voluntarily suggesting the introduction of durational employment requirements as additional eligibility criteria for frontier workers and their children claiming portable maintenance aid. Which is without a doubt in sharp contrast to previous rulings such as *Commission v Netherlands*, where the Court had contended that Union workers, irrespective of residence, are assumed to be sufficiently integrated in the employment State’s society, by virtue of paying taxes and contributing to the social policies of that State.

The issue with the new found legal position of frontier workers is precisely that frontier workers are still likely to contribute to the social budget by paying tax as well as social contributions due to their employment. There are no rules for taxation at EU level, all double-taxation agreements still occur on a bilateral level, they only exist on the level of the Member States themselves. Therefore, the income of frontier workers can either be taxed in the State of employment or in the State of residence. It is apparent that if income tax is levied in the State of employment it is completely illogical to exclude frontier workers. In that scenario they should be able to enjoy the maintenance aid under the same conditions as national workers and residing migrant workers. Moreover, it should also be noted that although the fear of ‘study grant forum shopping’ has some validity with regards to non-economically active. It should not be overstated with regards to frontier workers, given that it can be considered highly unthinkable and improbable that a worker-parent would change the State of his or her employment for the sole purpose of claiming student support for his or her dependent child. Considering that frontier workers often spend their life working in another Member State, accusing their children of ‘study grant forum shopping’ might go too far.

§ 3. In the aftermath of Giersch: Bragança Linares Verruga

In light of the *Giersch*, the Luxembourg legislature followed some of the suggestions given by the Court. In the Law of 19 July 2013 amending the Law of 22 June 2000 it was determined that children

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224 A. HOOGENBOOM, "Mobility of Students and the financial sustainability of higher education systems in the EU: A Union of harmony or irreconcilable differences?", *Croatian Yearbook of European Law & Policy* 2013, Vol. 9, (15) 37.
of frontier workers would qualify for financial aid if the worker-parent had been employed in the Grand Duchy for an uninterrupted period of at least five years and work at least of the half of the normal working hours.\textsuperscript{231} This amended law led to a new case \textit{Bragança Linares Verruga}, wherein the Court was provided with a chance to clarify its judgment and suggestions given in \textit{Giersch}.

However, it should be noted that already after one month the government of Luxembourg revised its financial aid law once more. Subsequently, with the Law of 24 July 2014 a new system was introduced, whereby dependent children of frontier workers were able to claim portable financial aid if their parents have worked in Luxembourg for at least five out of the last seven years.\textsuperscript{232} Nevertheless, \textit{Bragança} can still be considered relevant as it might to some extent clarify the ruling of the Court in \textit{Giersch}.

The case concerned the family \textit{Bragança Linares Verruga} who resided in France, while both parents being employed and working in Luxembourg. Their child being enrolled at the University of Liège in Belgium was however refused a portable grant on the grounds that neither of his parents had been working in Luxembourg for a continuous period of five years at the time of the application. The refusal was on account of a small break of two and a half months in his mother's employment totaling a period of almost 8 years. This decision was challenged by the parents and eventually ended up before the CJEU to decide whether in pursuance of \textit{Giersch} the condition of a continuous period of work of five years is compatible with the principle of non-discrimination in matters concerning financial aid.

With respect to finding discrimination on grounds of nationality, the Court noted that the national legislation at issue made a distinction between non-residing and residing students. Consequently, the Court reached the unsurprising conclusion that indirect discrimination was present. Considering that even though nationals and nationals of other Member States have to fulfil the condition alike, such a differentiation based on residence is likely to operate mainly to the disadvantage of other Member State nationals.\textsuperscript{233} The crucial question, therefore was to which extent a durational employment criteria of five years could be considered an appropriate and necessary means to the attainment of a legitimate objective. The latter hereof posed no problem, given that in the previous judgment of \textit{Giersch} the Court had already held that action undertaken by a Member State in order to ensure that it’s resident

\textsuperscript{231} C. U. AMANN, \textit{The EU Education Policy in the Post-Lisbon Era: A Comprehensive Approach}, Frankfurt am Main, Peter Lang, 2015, 204.

\textsuperscript{232} Article 3(5) (b) of Law of 24 July 2014, as cited in C. U. AMANN, \textit{The EU Education Policy in the Post-Lisbon Era: A Comprehensive Approach}, Frankfurt am Main, Peter Lang, 2015, 205.

\textsuperscript{233} Judgment of 14 December 2016, \textit{Bragança Linares Verruga and Others}, C-238/15, ECLI:EU:C:2016:949, paras. 42 & 43.
population is highly educated constitutes a legitimate objective capable of justifying indirect discrimination on grounds of nationality.\footnote{Judgment of 14 December 2016, Bragança Linares Verruga and Others, C-238/15, ECLI:EU:C:2016:949, para 46.}

Therefore it only remained to ascertain whether the condition of a continuous period of work of five years could be considered appropriate and necessary to achieve the abovementioned objective. With regards to the appropriateness the Luxembourg government submitted that the condition of the minimum and continued period of work in Luxembourg of five years was intended to ensure that the financial aid was granted only to students who have a connection with Luxembourg society in order for there to be a high probability that after completing their higher education studies the beneficiaries will settle and become integrated in the Luxembourg labour market. According to the Grand Duchy this objective will therefore be attained, if the frontier worker can show stable employment for a significant period in Luxembourg, as the government considers this an element representative of the actual degree of attachment to the society or labour market of Luxembourg.\footnote{Judgment of 14 December 2016, Bragança Linares Verruga and Others, C-238/15, ECLI:EU:C:2016:949, para. 48.}

Similar to the decision in \textit{Giersch}, the Court once again accepted the criteria as being appropriate to attain the legitimate objective pursued. In this regard, the Court first of all reiterated its previous case law to confirm that it remains legitimate for a Member State to require evidence of a certain integration with the funding State’s society in order to avoid an unreasonable burden on the overall financial system, which might be caused by ‘study grant forum shopping’.\footnote{Judgment of 14 December 2016, Bragança Linares Verruga and Others, C-238/15, ECLI:EU:C:2016:949, paras. 49, 50, 51 & 57.} In this regard, it also confirmed its ruling in \textit{Giersch} that it is even permissible for a Member State to make the granting of financial aid to the children of frontier workers conditional upon the fulfilment of additional eligibility criteria to ensure a certain integration.\footnote{Judgment of 14 December 2016, Bragança Linares Verruga and Others, C-238/15, ECLI:EU:C:2016:949, paras. 52, 54, 55 & 57} Next, the Court also find the measure to be of such a nature as to establish a genuine connection with the society of the employment State as well as guarantees a reasonable possibility that the student will return to Luxembourg after graduation.\footnote{Judgment of 14 December 2016, Bragança Linares Verruga and Others, C-238/15, ECLI:EU:C:2016:949, paras. 55 & 58.}

Notably, the same remark as raised under \textit{Giersch} as regards to the acceptance of the \textit{appropriateness} of the concerned measures can be mentioned here. Moreover, it is interesting to note that AG \textsc{Wathelet} considered the minimum and continuous period of work of the parent of the student to be inappropriate for attaining the objective pursued.\footnote{Opinion of Advocate General \textsc{Wathelet}, delivered on 2 June 2016, Case C-238/15, Bragança Linares Verruga and Others, ECLI:EU:C:2016:389, para 75.} Although AG \textsc{Wathelet} acknowledges that
students who are resident in the funding State might be more likely to return to the funding State after having embarked on their higher education studies than non-resident students after completing their studies. He is apprehensive towards the impact of durational employment requirement of one of the student’s parents.\textsuperscript{240} In this regard, the AG stipulates that even though the criterion might have been suggested by the Court itself by way of example, that approach clashes with the traditional approach applicable in cases of student mobility. He submits that the issue at hand is much more related to the situation as dealt with in \textit{Prete}, where the Court rightfully held that “\textit{the knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical market}”\textsuperscript{241}.\textsuperscript{242} For this reason, he submits that the measure is unrelated to the objective pursued, namely to increase in Luxembourg the proportion of residents holding a tertiary degree.

Nevertheless, the Court did consider the condition of an uninterrupted period of five years to go beyond what is necessary to obtain the legitimate aim pursued. Although the Luxembourg Government submitted that it had simply used the possibility afforded to it under paragraph 80 in \textit{Giersch} to avoid the risk of ‘study grant forum shopping’ and to ensure that the frontier worker has a sufficient link with Luxembourg society. The Court, however, clarified that it had only referred to Article 16 (1) and Article 24 (2) of Directive 2004/38 in \textit{Giersch} to illustrate how EU law makes it possible, in the context of economically inactive Union citizens to avoid the risk of 'study grant forum shopping'.\textsuperscript{243} Therefore, the Court observes that the requirement of having worked in Luxembourg for a minimum continuous period of five years, notwithstanding any few short breaks, involves a restriction that goes beyond what is necessary, considering that such breaks are not liable to sever the connection between the applicant and the Grand Duchy of Luxembourg.\textsuperscript{244}

Consequently, the requirement of having to be employed for an uninterrupted period of five years was held to be indirect discriminatory on the basis of nationality. With \textit{Bragança}, however, we can see a clear confirmation of the ruling in \textit{Giersch}. Hereby, establishing that frontier workers and their children will from now on be confronted with more stringent conditions in their claim to portable financial aid, than their fellow migrant workers residing in the State of employment. Accordingly, it can also be presumed, that in light of \textit{Giersch} & \textit{Bragança}, the currently prescribed 5-out-of 7 rule will most likely be considered to be a justified discrimination on the basis of nationality. Nevertheless,

\textsuperscript{240} Opinion of Advocate General \textsc{Wathelet}, delivered on 2 June 2016, Case C-238/15, \textit{Bragança Linares Verruga and Others}, ECLI:EU:C:2016:389, para 70.
\textsuperscript{242} Opinion of Advocate General \textsc{Wathelet}, delivered on 2 June 2016, Case C-238/15, \textit{Bragança Linares Verruga and Others}, ECLI:EU:C:2016:389, para 74.
\textsuperscript{244} Judgment of 14 December 2016, \textit{Bragança Linares Verruga and Others}, C-238/15, ECLI:EU:C:2016:949, para 69.
with regards to measures applicable in other Member States it is however still somewhat uncertain as to whether the Court will also transpose the legal principles developed above. It could very well be that the Court might have intended them to be explained and perhaps limited in the future to the very specific nature of the Grand Duchy of Luxembourg, but this will most definitely be continued.245

CONCLUSION

A first observation that can be made is that although education remains a competence of the Member States and the EU is still considered to only possess supplementing and supporting powers, national education systems are influenced by EU law to a large extent. Over the years the Court has consistently cultivated the principle of non-discrimination on grounds of nationality to further develop and strengthen the rights of mobile EU students and as such to promote student mobility. As regards to the right to claim financial aid of mobile students a high point was reached with the ruling in Bidar, wherein the Court held that all EU citizens, including students, lawfully resident in the territory of another Member State can rely upon Article 18 TFEU for the purpose of obtaining financial aid for students to cover his maintenance costs in the host State.

However, in an attempt to equally acknowledge the interests of the Member States in ensuring the sustainability of their educational systems, the Court considered it legitimate for Member States to limit the beneficiaries to those students capable of demonstrating a sufficient degree of integration into the host State’s society. In doing so in fact creating a ‘genuine link’ principle for non-economically active citizens. Nevertheless, in the subsequent case of Förster, the Court surprisingly turned the ‘genuine link’ criteria into nothing more than the fulfilment of a durational residence requirement. On account of the Court’s sole reliance on the residence requirement, without taking into account any other factors capable of demonstrating a sufficient integration. In light of recent cases within this area, it does seem that the sole reliance on a single genuine link indicator is increasingly becoming a highly questionable practice, generating the question as to whether Förster can still be considered good law.

The abovementioned is in sharp contrast to the position of the economically active student or family member thereof in the host State, who are under Regulation No 492/2011 set to enjoy immediate and full equal access to assistance from the first day. Their link to a genuine and effective economic activity has been set to functions as a somewhat ‘magic tool’ granting them equal financial aid in the host State, and marking a clear distinguishing line with the position of non-economically active citizens who are subjected to additional eligibility criteria.

However, when examining the situation relating to the access of portable study grants this clear division becomes blurred. A first step towards this was taken by the Court in Commission v Netherlands, where the Court held that ‘genuine link’ requirements could, in principle, be imposed on migrant workers alike. Albeit, immediately noting that workers should be assumed to be sufficiently integrated by virtue of their tax payment. A second full-on blow to the division line was generated by the following cases of Giersch and Bragança. In these cases the Court ascertained that a frontier
workers cannot automatically be considered as integrated into the State of employment’s society as a resident migrant worker for the attainment of financial assistance to students. On account of which the Court subsequently suggested and even confirmed, that durational employment requirements could, in fact, be imposed on frontier workers and their family members as justified differentiation. Following these developments it is perhaps safe to say that in the scenario of portable financial aid economic activity cannot be regarded as some ‘magic tool’ to receive equal access. Nor can it be accepted that the issues surrounding the eligibility criteria regarding portable student assistance has been settled.

Overall, it is apparent that access to financial for students will remain a burning issue. With the cases such as Förster and Giersch, it has become clear that the EU is moving further and further away from the original idea that “labour will move to where it is needed, or where the individual free-mover can flourish”\textsuperscript{246} to the idea that although student mobility is beneficial, the actual importance lies in the fact that the students granted with financial aid are likely to stay or return to the Member State responsible for financing the studies in question. Clearly, this seems to suggest a shift to the rational that in order to qualify for study finance the most important aspect is the likelihood of that student settling in the financing Member State afterwards and contributing to the development of that Member States’ economy rather than the economic development of the internal market as a whole.\textsuperscript{247}

At times the Court seems to have forgotten about the benefits generated by student mobility and the result of an optimal allocation of highly skilled workers among the economies of the EU. Consequently, there seems to be a rightful call for a stronger and more coordinated political approach in this area, to try and truly reconcile the objective of the Union promoting student mobility with the interest of the Member States in ensuring the financial sustainability of their educational systems.


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