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**Access to and Portability of Student
Grants and Loans:
Where Targets Meet Free Movement Law**

IHELG Monograph

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Access to and Portability of Student Grants and Loans

Where targets meet free movement law

Dr. Annette Schrauwen

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Abstract

In the area of higher education, the relationship between the Bologna Process, Union law and national law is tense. This paper analyses that relationship through the lens of student grants and loans. The Bologna Process is a form of voluntary cooperation between European states including all those of the EU. One of the targets agreed in this process is to double student mobility in 2020 and portability of student grants is a tool to reach that target. In the European Union, higher education and student mobility are also high on the agenda, however targets are not similar to those of the Bologna Process. Student grants and loans, indispensable for student mobility, are firmly in the hands of the Member States. Their support systems differ widely according to the national perception of the role of the student in society. Still, financial support needs to be compatible with Union law. This paper looks at how national financial measures are constrained by free movement rights of Union citizens. It argues that this might affect the Bologna target of higher mobility of students and could indirectly lead to social discrimination according to the wealth of the country of origin. The paper concludes with a short discussion of how a European Student Lending Facility might decrease the tension between targets, Union law and financial support and what consequences this might have for social justice and the construction of a European view on the role of the student in society.

1. Introduction

On 12 March 2010, the European Higher Education Area was formally launched in Budapest and Vienna in the context of the Bologna Process. The hallmark of the European Higher Education Area is student mobility. In fact, one of the targets set in the Bologna process is to double student mobility, to 20% in 2020.¹

The Bologna Process is named after the Bologna Declaration, signed in 1999 by the ministers in charge of higher education from 29 European States. Currently, 47 States have adhered to the Process, and the European Commission is also fully involved. Since 1999, ministerial conferences have been held every two years.² Each

¹ See Leuven/Louvain-la-Neuve Communiqué, 2009, point 18, available at http://www.ond.vlaanderen.be/hogeronderwijs/bologna/conference/documents/Leuven_Louvain-la-Neuve_Communique_April_2009.pdf, last visited on 12 August 2010.

² Notably in Prague, Berlin, Bergen, London and Leuven/Louvain-la-Neuve. In 2010, the ministers met in Budapest and Vienna to launch the European Higher Education Area. At

conference is concluded by a communiqué, in which ministers affirm their intentions and set priorities and targets in order to bring about a European Higher Education Area. The focus in the Bologna Process was initially on the development of a common framework of qualifications and cycles of study (setting up the ECT system and the two-cycle Bachelor-Master system), and on facilitation of mobility for students and teaching staff. During the process, other missions such as lifelong learning and employability, student-centred learning and promotion of the social dimension of education were added.

Though the Bologna process is taking place outside the European Union context, all EU Members plus the Commission participate in it. The targets set in the Bologna process are an element of a soft-law instrument to which participants adhere, marking thereby their wish to tackle higher education in an intergovernmental way.³ Nevertheless, the European Union did not leave the field of higher education untouched. EU policy making in this field really started within the context of the Lisbon Strategy⁴, whereby the European Council in Lisbon in 2000 did set the goal for the European Union 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.⁵ In this context, the Open Method of Coordination (OMC) is used, whereby no binding legislation is issued, but instead voluntary objectives and benchmarks are set and good practices are exchanged. As a consequence, there is double and sometimes overlapping action at European level: the Bologna Process and the Lisbon Strategy. As others have already noted, it leads to a strained relationship.⁶ Once EU Member States design national measures to live up to targets set in the Bologna Process, ideally they also take into account targets and benchmarks set in the context of the Lisbon Strategy and vice versa. Furthermore, the measures EU Members take have to be compatible with EU Treaty provisions, notably those in the area of free movement.

this meeting, the Budapest-Vienna Declaration on the European Higher Education Area was issued. In 2012, the ministers will meet in Bucharest.

³ See S. Garben, "The Bologna Process: From a European Law Perspective" in *European Law Journal* 2010, p. 186-210, at p. 187.

⁴ See A. Warleigh-Lack and R. Drachenberg, "Policy Making in the European Union", in M. Cini and N. Pérez-Solórzano Borragán, *European Union Politics*, 3rd edition, 2010, p. 209-224, at p. 219. They take the field of education and training as case study to examine the potential of the Open Method of Coordination as a mode of governance.

⁵ See Presidency Conclusions, Lisbon European Council of 23 and 24 March 2000.

⁶ See S. Garben (as cited), at p. 188.

The purpose of the present article is to examine the strained relationship Bologna-EU-national level by looking at one particular asset, notably access to students' maintenance grants and portability of grants. It starts with comparing the targets set by Bologna with those set by the EU. Subsequently an overview of the diverse national financial measures in place will be given. They will be examined in the context of their enhancement of student mobility, notably through an analysis of the case law of the European Court of Justice (ECJ) on the compatibility of national financial measures with free movement law. The paper ends with a short discussion of several proposals to decrease the tension between Bologna Process, EU law and Member State activity in the area of student support for mobility.

2. Financing Student Mobility: The Bologna Process

Since the beginning of the Bologna Process in 1998, mobility of students has been recognized as a point of focus. The link between mobility and access to and portability of grants and loans was made in the Berlin communiqué of 2003, where the ministers of education affirmed they would 'take the necessary steps to enable the portability of national loans and grants'.⁷ The commitment was reconfirmed two years later in the Bergen communiqué, and in the 2007 London communiqué the ministers made identifying and overcoming obstacles to the portability of grants and loans a priority for 2009.⁸ As stated before, the target of '20% of those graduating in the European Higher Education Area should have had a study or training period abroad' was set in the 2009 Leuven communiqué. The ministers also indicated which instruments could be used to reach the target, and stated that 'the full portability of grants and loans are necessary requirements'.⁹ The Budapest-Vienna Declaration of 2010 on the European Higher Education Area is a reconfirmation of the agreed objectives. Interestingly, the ministers use the word 'implementation' when they reconfirm their commitment to the Bologna objectives,¹⁰ as if these objectives have a binding nature. However, a further examination of documents produced by follow-

⁷ See Berlin communiqué p. 2. All communiqués are available at the website mentioned in footnote 1.

⁸ See Bergen communiqué 2005, p. 4 and London communiqué 2007, point 3.2.

⁹ See Leuven/Louvain-la-Neuve communiqué 2009, point 18 and 19.

¹⁰ See Budapest-Vienna Declaration 2010, point 7: "We, the Ministers, are committed to the full and proper implementation of the agreed objectives (...)".

up groups and peer learning activity show that both the 20% target and the need of full portability of grants and loans are still under discussion.¹¹

Two remarks need to be made on the mobility target of the Bologna Process that are important for drawing parallels with student mobility in EU context. First of all, the focus was initially on intra-European mobility, but with the development of the global dimension of the Bologna Process mobility into and out of Europe gets more attention.¹² Secondly, the communiqués underline the necessity of *portability* of grants and loans, and thereby implicitly opt for the home State as being responsible for financing student mobility.

3. Financing Student Mobility: The European Union

Within the context of the European Union, student mobility is also high on the agenda.¹³ In the summer of 2009, the Commission produced a green paper with the title “Promoting the learning mobility of young people”.¹⁴ The purpose of the green paper is ‘to open up the debate to stakeholders and the wider public, seeking their views on how best to boost substantially the opportunities for young people to have a *mobility experience*’.¹⁵

The Green paper identifies a number of factors that keep students from moving abroad, like lack of language skills and intercultural knowledge, time pressure to finish studies and lack of funding. Public consultations were closed in December 2009, and the Commission will prepare a proposal for practical follow-up.

¹¹ In a report of the so-called Bologna Follow-up-group of 26 May 2009, it is stated that “Estonia, followed by UK other countries” questioned the relevance of the 20% target, see BFUG (SE) 18_2A (SE), point 5, available at http://www.ond.vlaanderen.be/hogeronderwijs/bologna/documents/BFUG_archive_2007-2009/BFUG_Leuven_27April2009_outcome_of_proceedings.pdf, last visited on 27 August 2010; in a Summary report of the Peer Learning Activity on ‘Ways to increase mobility: funding models examined’, Alicante, Spain, 29-31 October 2008, one can read that ‘it was clear from discussions on days 1 and 2 that funding is not the only – and may not be the most significant – barrier to increasing mobility levels.’, see European Commission, Doc.MHE 70, p. 17

¹² See A. Surssock and H. Smidt, *Trends 2010: A decade of change in European Higher Education*, European University Association, 2010, p. 75.

¹³ See reference to all Council conclusions and documents for the Lisbon process in the introduction of the green paper; see also Recommendation (EC) No 2006/961 of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility, OJ EU 2006, L 394/5.

¹⁴ COM(2009) 329 final, of 8.7.2009.

¹⁵ *Idem*, p. 2.

Meanwhile, Commissioner Vassiliou of Education, Culture, Multilingualism and Youth has announced that in September 2010, the Commission will adopt *Youth on the Move*, an initiative that aims to promote mobility of students and young people and is a contribution to the successor of the Lisbon Strategy, *Europe 2020*.

In the context of *Europe 2020, a European Strategy for smart, sustainable and inclusive growth*¹⁶, the present EU's reform strategy for the coming decade, the European Council has endorsed some of the targets agreed upon in the Bologna Process as one of the headline targets, notably to reduce the share of early school leavers to 10% and increase the share of the population aged 30-34 having completed tertiary education from 31% to at least 40%.¹⁷ The Bologna target of 20% mobility by 2020 does not figure as such in the new EU Strategy. The Commission mentions student mobility in its Europe 2020 Communication, but does not give any target. It merely states it will work towards integration and enhancement of EU mobility programs and link them up with national programs and resources.¹⁸ It may come as a surprise the EU doesn't copy the Bologna target that is supposed to be 'hallmark of the Higher Education Area'. However, few Bologna countries have so far incorporated the 20% target in their national higher education strategy.¹⁹ This can be seen as a demonstration of the strained relationship between Bologna targets, EU context and national competences in the field of education.²⁰

4. Financial Measures in place

Several studies on the impact of the Bologna Process show that most countries have some financial measures in place to support student mobility, but that

¹⁶ Com (2010) 2020 of 3 March 2010, adopted by the European Council on 17 June 2010, see European Council Conclusions of 17 June 2010.

¹⁷ See Annex I of the Council Conclusions of 17 June 2010.

¹⁸ Com (2010) 2020, p. 11. However, the High Level Expert Forum on Mobility, established by former Commissioner Jan Figel, did suggest a general target for cross border mobility for at least 50 per cent of the youth generation (16-29 years) in 2020 in its 2008 report to the French Presidency of the EU, see report of the High Level Expert Forum on Mobility, *Making learning mobility an opportunity for all*, 2008, at p. 17, available at http://e.europa.eu/education/doc/2008/mobilityreport_en.pdf, last visited 3 September 2010.

¹⁹ See Eurydice, *Focus on Higher Education in Europe 2010: The impact of the Bologna Process*, 2010, p. 42-43. All Eurydice publications are available free of charge at <http://www.eurydice.org>.

²⁰ See also European Council Conclusions of 17 June 2010 where it is frequently underlined that the European Council recommendations will not alter Member States' competences in areas such as education: points 3, and annex I, footnote 1.

economic disparity between countries in the European Higher Education Area creates major problems for the less wealthy countries and citizens.²¹ They simply cannot afford to support a substantial number of their citizens to study in some of the more wealthy countries.

The measures that States have put in place to promote student mobility are very diverse and show that not all countries share the same basic objectives in this field: some focus on incoming mobility (United Kingdom), while others are more concerned to stimulate outgoing mobility (Belgium, the Flemish Community), and others aim to encourage both incoming and outgoing mobility. Also, some States seem to have a lot of incoming students and a low level of outgoing students risking an overburden of their educational system. This is the case for the UK, Belgium, Austria and Germany. Others, like Slovakia, have a high rate of outgoing students and a low level of incoming mobility, which can imply a brain drain.²²

Reports also signal that there is a growing number of 'free movers'²³: those who leave a country and enroll in a higher education program in another country without taking part in a EU mobility program, like Erasmus.²⁴ To those 'free movers' either access to student support from the host State or portability of funding from the home State seems to be relevant. However, there is no clear guidance on which State is financially responsible for the moving student: the home State or the host State. The result is that students can sometimes benefit from overlapping support (by both home State and host State), and sometimes end up with no support at all.

²¹ Eurydice, *Focus on Higher Education in Europe 2010: the Impact of the Bologna Process*, 8 March 2010, p. 38; See also *The Bologna Process in Higher Education in Europe. Key Indicators on the Social Dimension and Mobility*, 2009, Eurostat, p. 97-109 available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-78-09-653/EN/KS-78-09-653-EN.PDF, last visited on 10 September 2010.

²² Eurydice, *Higher Education in Europe 2009: Developments in the Bologna Process*, 2009, p. 43-45. However, data are based on foreign nationality of students and therefore not very reliable: 40% of all foreign students have already been resident in the host country prior to taking up higher education studies. See also Commission staff working document SEC (2009) 1616 *Progress Towards the Lisbon Objectives in Education and Training Indicators and Benchmarks 2009*, p. 37.

²³ Eurydice 2009, p. 38.

²⁴ The Erasmus program has made over 2 million students study abroad since 1987. This seems impressive, but is only 4% of the graduate population. See *The EU Contribution to the Higher Education Area*, Commission brochure, March 2010, p. 12. Growth in participation in Erasmus programs has slowed down in recent years, see Commission staff working document *Progress Towards the Lisbon Objectives in Education and Training Indicators and Benchmarks 2009*, (as cited), p. 33.

Even though the communiqués of the Bologna Process emphasize portability and thus responsibility of the home State, they cannot force the Bologna members to opt for strict home State responsibility. The European Union for its part has no competence to remedy the imbalances in promotion of mobility²⁵, nor does it have the budget. Therefore EU Member States remain free to stimulate either incoming mobility, or outbound mobility, or both. And they remain competent to design their financial supporting measures accordingly.

Financial student support in Europe is mainly organized along two social indicators – wide versus limited access to higher education and financial dependence versus independence of students vis-à-vis their families. This gives rise to three major categories of support. Next to financial support to cover the costs of living, in the form of loans and grants directly paid to students, one can distinguish financial support for the payment of administrative fees and contributions to tuition costs, in the form of loans and grants (or exemptions and reductions) to students, and financial support to the parents of students in tertiary education, in the form of family allowances or tax relief.²⁶

Both in the context of the Bologna Process and in the context of the European Union, a link is made between enhancing student mobility and financial support measures. But the basic concepts underlying financial student support have hardly been discussed. Still, support concepts seem to differ according to a different notion of the role of student in society. Schwarz and Rehburg have identified four types of student role model, which give rise to different support modes:²⁷

Students as responsible citizens: in this model, nearly all students receive financial support in the form of grants and loans. Usually, there are no student fees, but there is also no tax relief or child allowance for the students' parents. This model is mainly found in the Nordic countries.

Students are young learners: parents are responsible for the education of their children, who will only get support if the parents are not sufficiently able to pay.

²⁵ Article 165 par. 4 explicitly excludes harmonisation of laws of the Member States, but see S. Garben (as cited) who argues for the existence of a legal basis in other Treaty provisions, notably in internal market provisions.

²⁶ See Eurydice, *Key Data on Education in Europe 2009*, July 2009, p. 140.

²⁷ S. Schwarz and M. Rehburg, 'Study Costs and Direct Public Student Support in 16 European Countries – Towards a European Higher Education Area?' *European Journal of Education*, vol. 39, 2004, p. 521-532 at p. 531.

There are student fees, but not for those who receive support. This is the model applied in Western and middle European countries.

Students are children sheltered by their family: the majority of students live with their parents during their studies, who must ensure their children's education. Support is only given in case of urgent need. There are student fees (except for Greece). The model is found in southern European countries.

Students are investors in their future career (UK and the Netherlands): students must contribute to their education, hence high student fees. Students may receive public support in the form of grants and especially loans, students themselves are responsible to make proper use of it.

Although the Bologna Process stimulates participant countries to take into account portability of financial support and the European Union forces its Member States to make financial support compatible with EU law, in the context of both the Bologna Process and the Europe 2020 Strategy, countries remain free to design their financial measures and they will adhere to their perception of the role of the student. However, the different notions of the role of the student in society and the ensuing different modes of finance also result in differences as to the potential access to foreign students and portability for national students. The different results present themselves clearly on examination of the case law of the ECJ in which it rules on the compatibility of student support measures with provisions on free movement and EU citizenship. Again, it is instructive for the strained relationship between the Bologna Process, EU law and national measures.

5. The limits set by free movement law

In its interpretation of the Treaty provisions on free movement of citizens, the Court deploys the argumentative framework it uses in market freedoms. The case law follows the sequence of first addressing the question whether there is a hindrance to free movement and then looking for an objective justification for the hindrance. The argumentative sequence ends with the question whether the hindering measure is proportionate to the objective it seeks to protect. Ideally, assessment of student support measures in the market-like argumentative framework should be suitable to enhance student mobility with a view to both the Bologna target and the Europe 2020 Strategy. The case law analysis below is divided

according to two perspectives: access to financial support by the host State to study in that State and portability of financial support provided by the home State, in order to study in another State. It must be noted that the analysis only is valid for access to grants and loans for foreign students from EU Member States.

Access to grants and loans in the host State

Already since the 1985 *Gravier* case, access to education in the host State, and thereby access to grants and loans for tuition costs, must be accorded along the equal treatment principle.²⁸ For quite a period, the case law made a distinction between tuition fees and maintenance costs, and foreign students only had access to host State grants and loans for tuition costs.²⁹ However, the introduction of Union citizenship gave students access to host State maintenance grants. This became clear in the case of *Danny Bidar*.³⁰ He was a French national who lived with his grandmother in the United Kingdom. His grandmother supported him while he attended the local secondary school. After three years, he started reading economics at University College London and he applied for a student loan. According to the British student support rules, he was only eligible for a student loan if he was settled in the UK, but as a student national from another Member State, he could never be settled. Secondly, he needed to be ordinarily resident in the UK throughout the three-year period preceding the first day of the first academic year of the course – which he was. The Court, referring to its earlier *Grzelczyk* case,³¹ ruled that social assistance for a student “whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs” fell within the scope of application of the Treaty, because the Treaty on European Union had introduced citizenship of the European Union into the EC Treaty and added a new chapter devoted to education and vocational training. Furthermore, the Council had adopted a Students Directive, which provided that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements.³²

²⁸ Case 293/85, *Gravier*, [1985] ECR 593.

²⁹ See e.g. case 39/86, *Lair*, [1988] ECR 3161 and case 197/86, *Brown*, [1988] ECR 3205.

³⁰ Case C-209/03, *Bidar*, [2005] ECR I-2119.

³¹ Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

³² *Grzelczyk* (as cited), par. 35.

As Bidar was lawfully resident in the UK, he could rely on a right to equal treatment (now on the basis of article 18 TFEU). This meant the UK could no longer impose the 'settlement' condition. However, Member States were allowed to ensure that granting assistance to students from other Member States does not become an unreasonable burden that could have consequences for the overall level of assistance that the State offers to students. Therefore Member States are allowed evidence of a certain degree of integration into the host State, which is reflected in a certain period of residence.³³ So there is a 'quantitative approach' to equality³⁴: the longer a migrant stays in the host State, the more integrated he is in that State and the greater the number of benefits he receives on equal terms with nationals. This quantitative approach is reflected in the EU Citizens Directive 2004/38,³⁵ which gives only those migrants that legally reside in the host State for a continuous period of more than 5 years the right to student support in the form of grants and loans. However, if migrants are economically active or family member of an economically active EU national they have immediate access to student support from the host State.³⁶

At first sight, this case law is providing foreign EU students with a right to grants from the host State and can be said to enhance mobility. However, the results might be different according to the student support system a host State has. Those host countries that provide direct support to students - those who see students as responsible citizens or investors in their future career - will have to give support to students who have established a degree of integration into the host society. In host countries where parents are responsible for their children's education, equal access to support for 'sufficiently integrated' foreign students is not that obvious. On the one hand, one could be of the opinion that, as support is indirect and given to the parents, the parents must have a socio-economic link with the host State to receive exemptions and tax benefits.³⁷ On the other hand, if exemptions and tax reductions are believed to be a form of support to the student, equal access to support for

³³ *Bidar* (as cited), par. 56-60.

³⁴ See also Barnard, C. *The Substantive Law of the EU. The Four Freedoms* 3rd ed., OUP, 2010, p. 452-455.

³⁵ Directive 2004/38 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

³⁶ Article 24 (2) of Directive 2004/38; in the case of workers' family members, "the rationale of access to student loans is not access to education but rather to remove obstacles to the free movement of workers", see also Golnyker, O, "Student Loans: The European Concept of Social Justice According to Bidar" in *European Law Review* 31(3), 2006, p. 390-401, p. 394.

³⁷ See also J. J. Vossensteyn, *Portability of student financial support. An Inventory in 23 European countries*, CHEPS, 2004, p. 64.

'sufficiently integrated' foreign students mean that host States will have to take an objective decision on entitlement to support, which is not an easy job, given the disparities between income, property value and average income at national level.³⁸ Indirect support does not seem attractive for foreign students who come to the host State for the purpose of studying only.

Furthermore, the entitlement to equal treatment an individual may have depends on his/her status under Union law. The economically actives (self-employed, workers) and their family members have access to maintenance grants and loans on the same basis as nationals of the host State based on article 45 TFEU. It already existed before the *Bidar* ruling. The concept of worker is defined according to Union law – in the Netherlands this concept has been translated in the rule that everyone who works 32 hours a month on average is a worker. Former workers have the same entitlement under certain conditions.³⁹

Economically inactive persons who legally reside in the host State on the basis of either national law or Community law have only access to maintenance grants and loans if they can show a certain degree of integration into the society of the host State, reflected in a period of residence. The Citizens Directive allows the host State to use a residence requirement of five years in its article 24(2). In the *Förster* case⁴⁰ the Court was asked whether a five year residence requirement could be imposed *on non-nationals only* and if a shorter period of residence should be required in individual cases if other factors indicate a substantial degree of integration into the society of the host State.

The Court treated the distinction between nationals (no residence requirement) and foreigners (residence requirement) not as prohibited discrimination, but as justified differentiation. Furthermore, it ruled that the residence requirement by its very existence guarantees a significant level of legal certainty and transparency in the context of the award of maintenance grants to students. Therefore, individual circumstances need not be taken into consideration. The Court added that Member States remain free to award residence grants to students who do not fulfil the five years' residence requirement.

³⁸ See O. Golyner, "Student Loans: the European Concept of Social Justice According to *Bidar*", *European Law Review* 2006, 31(3), p. 390-401, p. 398.

³⁹ Regulation 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, [1970] OJ L142/24.

⁴⁰ Case C-158/07, *Förster* [2008] ECR I-8507.

The result of this ruling is that students in their capacity as students probably cannot profit from access to maintenance grants and loans in the host State, unless they study for over five years. This is only different in those States that had a shorter residence condition before the entry into force of the Directive, like the UK that has a three years' residence condition. Although the Directive does not have a non-regression clause (implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to Citizens...), recital 29 of the Preamble states "This Directive does not affect more favourable national provisions".⁴¹ Furthermore, in *Teixeira*, a ruling of February 2010 on entitlement to housing assistance⁴², the Court seemed to imply that the Directive does not allow that stricter conditions are applied than those which applied before the entry into force of the Directive.⁴³ The Court based this on recital 3 of the preamble, which states that the Directive sets out to simplify and strengthen the right of free movement and residence of all Union citizens. One could find support here for the argument that States like the UK cannot modify their three years' residence condition into a five years' one. To my knowledge the UK hasn't done that and is not planning to do so. So in the UK, foreign students might profit from the *Bidar* ruling during their studies, if these take longer than three years.

No access if the burden is 'unreasonable'

Higher education is expensive and is financed through general *national* taxation. That, and the uneven flow of students across the States (UK, Austria and Belgium attracting a lot of foreign students) make that national taxpayers of some States subsidize maintenance grants and loans that have sub-commercial interest rates and very often are subject to an income threshold of the graduate below which the loan becomes a grant. As Barnard did put it: the reality is that (poor and usually non-mobile) taxpayers from the host State are supporting the further education of (already well-educated, middle class) students from other Member States with whom they share little by way of community of interests.⁴⁴ These better-educated students

⁴¹ C. Barnard, case note on *Bidar*, *CMLRev.* 2005, p. 1465-1489, at p. 1483.

⁴² For a parent who had a derived residence right as primary carer of children who started their education in the host state.

⁴³ C-480/08, *Teixeira*, Judgment of 23 February 2010, not yet reported, at par. 60.

⁴⁴ C. Barnard, case note to *Bidar*, (as cited) at p. 1485. See, in the same vein, A.G. Slynn in *Gravier* (as cited), p. 604: "As State education is substantially supported by revenues from resident nationals, there is force in the argument that it is not discriminatory to require

will not contribute to the economies of the host State, when 75 percent of them return to their home State. No wonder that the Bologna Process focuses on portability of grants and loans. However, this argument suggests that there is a direct or indirect link between the obligation of residents of the host State to pay taxes and the entitlement to student support. However, as Geelhoed has stated in his Opinion to the *Bidar* case, if the argument is taken to its logical conclusion, it 'implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance'.⁴⁵ Thus there is social discrimination inherent to this position. The ECJ did not explicitly reject the link between taxpayers and benefits, however in the ruling it did not accept the 'unreasonable burden' argument on that basis. It accepted the 'unreasonable burden' argument because Member States should be able to prevent consequences for the overall level of assistance provided by the State.⁴⁶

It is difficult to tell what the exact financial impact is, as data are largely missing here. Newspapers tend to give headlines on large sums of money that are presented as the 'costs' of the Courts ruling in favour of the individual student, but these costs then are defined without looking at the whole socio-economic context of the financial support system of a State and thereby represent only part of the picture. The argument that the ultimate consequence of high costs could be that States lower the level of individual support per student seems sound. In *Bidar*, the Court accepts the argument without insisting on proof of an unreasonable burden nor does it instruct the national judge to look further into the matter. Without expressing itself on the link between taxes and benefits, the Court nevertheless seems to sustain the idea that States do not have to pay for the university education of students from other Member States.⁴⁷

those who do not contribute directly or indirectly to the common weal to make some contribution" and also S. Jørgensen, "The Right to Cross-Border Education in the European Union", *CMLRev.* 2009, p. 1567-1590, at p. 1570-1571.

⁴⁵ At point 65.

⁴⁶ *Bidar* (as cited), par. 65.

⁴⁷ See also M. Dougan, 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?' *CMLRev.* 2005, p. 943-986, at p. 974. For access to education, the Court seems to be more strict, as shows the recent *Bressol* case in which it accepted that unequal treatment in access to medical studies could be justified in order to protect public health. Here the Court was very specific in demanding proof of the negative consequences of open access for nationals and non-residents to medical studies for public health, see Case C-73/08, *Bressol*, judgment of 13 April 2010, not yet reported.

This has been a reason for some to argue that a better way to promote mobility would be financial support from the home State.⁴⁸ The emphasis on portability of student support in the Bologna Process also reflects that view.

Portability of Grants and Loans from the Home State

Portability of grants and loans means the home State makes it possible for students to use direct student financial assistance abroad. But here also, Member States have to take into account ECJ case law on free movement and the principle of equal treatment. In cases like *Bernini, di Leo* and *Meeusen*,⁴⁹ it became clear that children of workers and frontier workers may claim student support under the same conditions as children of nationals, and in particular without any further requirement as to place of residence, as long as these residence requirements are not demanded of nationals. These rulings are based on article 7(2) of Regulation 1612/68.⁵⁰ At the time of these rulings, the financial consequences seemed limited, as both *di Leo* and *Bernini* were children of workers who had completed primary and secondary education in the host State and only then went to the State of their nationality to proceed with their studies. As workers, their parents had contributed to the welfare system of the State that granted the student support. The case of *Meeusen* concerned a child of frontier workers who had never lived in the State granting student support, but in this particular case financial consequences of the ruling were limited due to the fact that the State's system at the time restricted portability of support to a limited number of foreign educational institutions.

Since *Bidar*, student assistance falls within the material scope of the Treaty and all citizens who lawfully reside in another Member State can invoke equal treatment as to awards of maintenance grants. The category of potential non-national support receivers has broadened beyond that of children of economically active EU citizens. This raises the question whether Member States who have a policy of portability of student support can put residence conditions for the award of such support, thereby limiting such support only to students who have shown a certain degree of integration into that State. According to the Citizens Directive⁵¹, only the

⁴⁸ See in particular S. Jørgensen (as cited).

⁴⁹ Case C-3/90, *Bernini* [1992] ECR I-1071, Case C-308/89, *di Leo*, [1990] ECR I-4185 and Case C-337/97, *Meeusen*, [1999] ECR I-3289.

⁵⁰ Regulation 1612/68, O.J. 1968, L257/2.

⁵¹ Directive 2004/38, as cited.

host State can refuse student support to foreign students who have not resided in that State for at least five years. However, according to the ruling in *Meeusen*, these residence conditions must apply equally to nationals meaning that restrictions on portability will also apply to national students.

The Dutch authorities have implemented this case law in their rules on general portability of student support that were introduced in 2007 and made portability conditional upon a 3 out of 6 year residence requirement. Students can export Dutch financial support if they lived 3 out of 6 years preceding their application for support in the Netherlands. The residence condition also applies to Dutch nationals. The Commission started a procedure against the Netherlands⁵² because it feels the residence requirement is incompatible with Community law, as this is a hindrance to free movement. The Dutch authorities do not want to drop the residence requirement, because they fear they will have to pay student support for children of EU-migrant workers who study in their home country, even if these children have never lived in the Netherlands. They consider this especially problematic since the concept of EU-worker also covers seasonal workers. The Commission for its part seems to find support for its arguments in the *Morgan* and *Bucher* ruling.⁵³

In these cases, the Court had to assess the compatibility with EU law of a German rule that support could only be used for education abroad if students continued a study they had started in Germany. In the *Morgan* and *Bucher* cases, the Court ruled that this was a barrier against free movement of citizens⁵⁴, as they could be discouraged to start their studies in another Member State. The ECJ declared the *Bidar* type of argument that Member States may prevent the risk of an unreasonable burden in principle valid for the portability of student support, in such a way that support is only given to those who have shown a 'sufficient degree of integration'.⁵⁵ The Court said however that a residence condition for *Morgan* and *Bucher* went beyond what was necessary to show the degree of integration, as both students had German nationality and were raised in Germany.

This argument seems to indicate that a distinction between nationals and non-nationals can be made when it comes to proving the 'degree of integration'. In

⁵² Lodged under number C-542/09.

⁵³ Joined cases C-11/06 and C-12/06, *Morgan and Bucher*, [2007] ECR I-9161.

⁵⁴ Article 20, par. 2 sub b TFEU

⁵⁵ *Morgan and Bucher* (as cited), par. 44.

the *Förster* case, the Court accepts that differentiation between national and non-nationals in this respect is possible.⁵⁶ It would be in line with other case law of the ECJ, where the Court very easily accepts that nationals have a sufficient degree of integration in their home State, even if they have left that State for over twenty years.⁵⁷ However, whether this differentiation and thus a residence condition can also apply to children of migrant workers, even if they are frontier or seasonal workers, is doubtful, in view of the *Meeusen* case.

Whether nationals may claim that their State allows portability of support on the basis of these cases is hard to tell. In all the cases judged so far, the Court ruled on conditions of portability, not on the basic decision to accept portability of support.⁵⁸ This is different for the type of support that is given through tax reductions and exemptions for students' parents. The home State has to give tax reduction for studies in other member states under the same conditions as tax reduction for studies in the home State.⁵⁹ As a result, for this category of support, the home State is and remains financially responsible no matter where in the EU the children study.

As for foreign students in their capacity as economically inactive citizens, they probably cannot profit from access to portable maintenance grants and loans in other States, unless they have resided there for a certain amount of time (with a maximum of five years).

Students who are children of workers are in a different position, for they may receive support from the State where their parent is employed even if they have never resided in that State themselves. One could say that this is in line with the 'contribution to the welfare system' argument, since the worker will pay taxes in the host State. On the other hand it is not really in accordance with the aim of Regulation 1612/68, notably integration of the worker and his family in the host State.⁶⁰

Again, financial implications of free movement case law for States that decide to make grants and loans portable are difficult to assess, as there are no exact data available. However, it is not unthinkable that certain States will lower the general

⁵⁶ *Förster* (as cited), par. 60.

⁵⁷ See Case C-499/06, *Nerkowska*, [2008] ECR I-3993.

⁵⁸ See also M. Dougan, 2005 (as cited) at p. 978: "So, while Community law cannot oblige Member States to provide public funding in respect of any given activity, it can require Member States to justify why the public funding they have chosen to offer is subject to territorial restrictions."

⁵⁹ See Case C-76/05, *Schwarz and Gootjes-Schwarz*, [2007] ECR I-6849

⁶⁰ See preamble of Regulation 1612/68, 9th indent.

level of portable support if the burden becomes indeed unreasonable. Or else they might want to annul their systems of portability to make sure there is no intervention from Union Law,⁶¹ even though they have adhered to portability of student support under the Bologna Process.

6. Accommodating Bologna targets with EU law?

The implicit choice in favor of home State responsibility for student mobility through promotion of portability of grants and loans made in the Bologna Process is not supported by the logic of EU free movement law that has equal treatment as core value, irrespective of the providence of financial support - home State or host State. It has been argued that higher education should be understood as falling under the EU law concept of 'services', and that as a result more attention would be given to the responsibilities of the home State, as can be seen in patients' rights to cross-border medical services.⁶² Nevertheless, the underlying normative justification for sole responsibility for the home State is problematic, for it accepts that students have not 'earned' financial support from the host State for their education because neither they nor their parents contributed to the host State's welfare system through tax payments.⁶³ The argument of Advocate General Geelhoed is equally valid here: taken to its logical conclusion there is social discrimination in this position. In respect to student mobility, the social discrimination is on State level: less wealthy countries cannot support student mobility, for they do not have the financial means to support their nationals who study in more expensive educational systems abroad. Thus, sole home State responsibility probably will not result in a level playing field in terms of what level of financial support is available to mobile students.

Some Member States use the European Social Fund for the promotion of mobility,⁶⁴ but here also level of and conditions applicable to financial support differ widely. In the context of the EU, the Structural Funds and the research Framework Program are mentioned as being important to promote mobility, next to the Erasmus

⁶¹ M. Dougan, 'Cross-Border Educational Mobility and the Exportation of Student Financial Assistance', *European Law Review* 2008 p. 723-738, p. 731.

⁶² See notably S. Jørgensen (as cited).

⁶³ *Idem*, p. 1571.

⁶⁴ See European Commission, *Summary report of the Peer Learning Activity on 'Ways to increase mobility: funding models examined'* (as cited), p. 8.

program.⁶⁵ These programs do not concern the 'non-program driven mobility of university students', the mobility of 'free movers'.⁶⁶ For them, the suggestion made in the context of the Bologna Process, to set up a 'European Student Lending Facility'⁶⁷ seems more promising. It would take away the social discrimination that is inherent in the focus on sole home State responsibility. The idea is inspired by the system set up by the Nordic countries that provides financial compensation to net contributors to higher education with respect to tuition fees. It would be a way to address the issue of repayment of student loans at Union level, as has been suggested in a case comment of the *Bidar* ruling.⁶⁸ Furthermore, it has been submitted in academic literature that a well-designed European loan scheme could promote access to higher education and mobility without creating undesired effects between European countries. However, it requires a European concept of the role the student has in society, notably the concept of the student as investor in his/her own future career.⁶⁹ Additional support for acceptance of the concept of student as investor may be found in research that has shown that mobile graduates have more successful and interesting careers.⁷⁰ Still, a change in cultural perspective with respect to the role of student in society is not expected to occur without any problems.

The creation of a European Student Lending Facility seems attractive, for it fits a student support system into the Bologna targets without the disadvantages sole home State responsibility has. Moreover, it prevents EU Member States from having to design all sorts of complex student loan facilities in order to accommodate them with EU free movement law. One could say it even tackles the issue of equal treatment within the host State. In view of the limits set by Directive 2004/38 and the Court's ruling in *Förster*, residence conditions are still the tool EU Member States will

⁶⁵ See report of the High Level Expert Forum on Mobility, *Making learning mobility an opportunity for all*, 2008, (as citd) at p. 10.

⁶⁶ Eurydice 2009 (as cited) p. 38.

⁶⁷ See European Commission, *Summary report of the Peer Learning Activity on 'Ways to increase mobility: funding models examined'* Alicante, Spain, 29-31 October 2008, Doc.MHE 70, p. 9.

⁶⁸ O. Gonlyker, 'Student Loans: the European Concept of Social Justice According to *Bidar*', *European Law Review*, 2006, p. 390-401, at p. 400.

⁶⁹ M. Guille, 'Student Loans: a solution for Europe?', *European Journal of Education*, 2002, p. 417-431, p. 429. Guille suggests three parameters: 1. All students are eligible to loans, to promote private responsibility. Loans should cover living costs. Flexible fees should be introduced, they should be free for students from disadvantaged backgrounds. 2. Repayments should be tailored to ability to pay, they increase or decrease in proportion to income. 3. Students should pay interests, but not too high, as high rates could discourage students from borrowing and reduce participation in higher education.

⁷⁰ See point 1.6.1 of the Summary report of the Peer Learning Activity on 'Ways to increase mobility: funding models examined' (as cited) p. 6-7.

work with when it comes to supporting students to study in national higher education institutions. The argument that differentiation implicit in residence conditions is not contributing to mobility targets is no longer relevant once a separate Lending Facility to accommodate mobile students has been designed.