Access to Higher Education in the EU

Evolving Case Law of the CJEU

Kari Käsper & Tanel Kerikmäe[*]

Abstract

A prerequisite for a competitive market can be achieved better through clear legal policy in European higher education. There is a time for the EU to intervene more into the area to eliminate state protectionism. The reasoning in CJEU case law gives a guidance for corrigendum of further legal basis. The students of another Member State should not deserve different treatment. EU role in the field of education should be significant to avoid state-based bureaucracy. The jurisprudence of CJEU creates a basis for the further development of the regulation, which leads to foundation for well-functioning internal market in the global world.

Keywords: EU common market, European higher educational area, CJEU case-law on education, free movement of students, educational strategies.

A. Introduction

European common market is facing critical times, and we know that this is the result or consequence of lack of joint efforts. A competitive and strong job market can be achieved only if the preparation of the highly skilled specialists will be done on the basis of common understanding of the quality and shared aims of the university education.[1] As a general principle, education has not been in the competence of EU.[2] However, it seems that there is a time for the EU to intervene

* K. Käsper, M.A (law [Tallinn University of Technology 2012] and Law studies [International University Audentes, eq. with master of law 2005]) is a lecturer of EU law at Tallinn Law School, Tallinn University of Technology. Tanel Kerikmäe (Ph.D [Tallinn University, Political Science and State Governance 2009], LL.Lic [Helsinki University, Law 2006], LL.M [Helsinki University, Law 1994] and Law studies [Tartu University, eq. with master of law 1992]) is a professor and head of the Jean Monnet Chair of European Law, Tallinn Law School, Tallinn University of Technology. The current article is based on K. Käsper's thesis (supervised by Prof. Kerikmäe), defended in 2012.

1 *See* T. Kerikmäe, L. Roots, 'Excessive Control over the University Business by EU Member States: Baking the Goose that lays the Golden Egg?', *in* T. Muravska, G. Prause (Eds.), *Business–University Partnership: Social and Economic Environment*, Berliner Wissenschafts-Verlag, Berlin, 2012 [issued in 2012].

2 Art. 165 TFEU. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity.

more into the education administration of EU Member States, at least through a shared competence method. The President of European Commission, Jose Manuel Barroso, stated recently that economic growth stems directly from *universitatis*.[3] Today, the current European higher educational landscape is able to produce only 35% of the market needs, falling to 26% in 2020 if the current practice related to the traditions of Member States and universities in the field of higher education increases.[4] State protectionism, restrictions to the free movement and access to the universities of another EU Member State are quite evident and clear reasons of the failure. It would be assumed that the reasoning in CJEU case law would be considered and crystallized to the legislative rules and norms to develop a solid basis for the common understanding of access to the higher education in Europe. The current contribution analyzes the reasoning stemming out from the evolving case law related to discriminatory treatment by Member States and makes conclusions for mapping the current situation that would be an encouragement for further realignment or adjustment of the legal regulation both in national and supranational level.

I. The Court-Led Evolution of Free Movement for Students in EU Law Pre-Maastricht

The line of case law that has resulted in CJEU giving individuals specific rights relating to the education area has not remained without criticism. As seen below, several of the judgments have resulted in a political backlash for the Court. The Court itself seems at times to be unsure whether to follow the advice of some of the more progressive opinions of Advocate Generals (AGs) or to limit itself to a stricter interpretation of the Treaties, more in line with the approach taken by many Member States.

The first time education was regarded to be able to have a dimension related to EU law in the CJEU case law was in the *Casagrande* case in 1974.[5] In that case, the court opened up to the possibility that EU measures in other areas where it had competence could have impact in education and training as well. The case concerned the application of Article 12 of Regulation 1612/68 on the free movement of workers, more specifically the rights of children of EU migrants to access education in equal terms with children of nationals of that country. The Italian national in question was the son of Italian parents who had lived all his life in Munich. When his father died, he was refused a grant that he had applied for and had to drop out of 10th Form. AG Warner advocated for an interpretation of Article 12 of the Regulation, which required that children of migrant workers have to be admitted under the same conditions as the children of nationals must include financial terms: "The very idea of admission under the same conditions must include, it seems to me, admission on the same financial terms, whether these

3 Presented by President Barroso at European Conference on 'Higher Education in the Framework of the 2020 European Union's Strategy', Centro de Excelência Jean Monnet da Universidade de Lisboa, Lisbon, 2012.

4 *Ibid.*

5 Case 9/74, *Donato Casagrande v. Landeshauptstadt München*, [1974] ECR 773.

involve the payment of fees or the receipt of grants".[6] As it will become clear later, the concept of 'same financial terms' would become a source of contention, not specifically regarding the children of migrant workers, but regarding free movement of students as a whole.

De Witte calls the Court's reasoning in the *Casagrande* case 'unassailable'. He remarks that "the establishment of the common market is not a policy sector in the traditional sense in which States understand this for their own internal purposes; it is rather a policy objective which may require changes in vast and undetermined number of 'national' sectors".[7] This approach can be agreed with because there is no reason why a wide area like education should be considered so special that no EU policies could impact it in any way. Parallels can be drawn here with the regulation of health care and cases such as the Tobacco Advertising case.[8]

Similar questions rose in the *Forcheri* case,[9] which concerned the Italian wife of an also Italian official of the European Commission working in Brussels. Mrs Forcheri had to pay a 'fee for foreign students' when enrolling at the beginning of the 1979–1980 and 1980–1981 academic years in a 3-year course to study to become a social worker at a Belgian higher education institution. The Court found there to be an infringement because the plaintiff was lawfully established in the Member State and should therefore be not discriminated against vis-à-vis the nationals of the Member State in question. The Court's reasoning considered it to be vocational training and treated the course as such.

In the landmark *Gravier* case,[10] the Court found for the first time that a student could claim a self-sufficient right of access to education, which was not deriving from the use of rights related to free movement of workers by a Community economic migrant within the Treaty, as had been the case in *Casagrande* and *Forcheri*. The case concerned the payment of an enrolment fee ('minerval') in Belgium by a French citizen in a strip cartoon art course at the *Académie Royale des Beaux-Arts* in Liège, which the Belgian nationals were not required to pay. She and her family did not have any previous connection to Belgium. The Belgian government and the government of the French Community in Belgium argued that the fee was necessary to offset the imbalance between incoming and outgoing students and that due to the fact that foreign students have not paid taxes in Belgium, it is not discriminatory to ask for their financial contributions. The Court did not accept these explanations and found that there had been an infringement of the former Article 7 EEC banning discrimination based on nationality.

The classification of such a fee to be directly discriminatory was remarkable because similar 'out-of-state tuition' fees for students who study at a public uni-

6 Opinion of Advocate General Warner in Case 9/74, *Casagrande*, p. 784.

7 B. De Witte (Ed.), *Introduction, European Community Law of Education*, Nomos, Baden Baden, 1989, p. 10.

8 Case C-376/98, *Federal Republic of Germany v. European Parliament and Council of the European Union*, [2000] ECR I-8419.

9 Case 152/82, *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v. Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées – Ecole Ouvrière Supérieure*, [1983] ECR 2323.

10 Case 293/83, *Françoise Gravier v. City of Liège*, [1985] ECR 593.

versity outside of their home state exist in the US.[11] This was an inevitable outcome of the 'ever-closer union'. In a way, *Gravier* was a kind of an early warning of a situation, which has now been observed in other areas such as health care and pensions. Thus, the *Gravier* judgment gave rise to the legal doctrine that all fees related to higher education that migrant EU students are required to pay fall under Article 18 TFEU, which has concrete and specific implications to this day. This has created an equal treatment requirement regarding tuition fees in all higher education institutions in European Union, forcing them to equalize fees charged from citizens of their own country and citizens of other EU countries.[12]

The *Gravier* case specifically relates to the context of citizenship because the fee was not based on residence requirements but rather on citizenship requirements. Therefore, it was easy for the Court to find direct discrimination as Belgian citizens who were not residents of Belgium would have been exempted from paying the fee. Perhaps an additional factor was that, as stated by the Commission, no Member State charged citizens of other EU countries higher fees (except for Greece, who had retaliated against Belgium by introducing higher tuition fees to Belgian students only).[13]

The Court made other important points regarding education in the *Gravier* judgment. Similar to *Casagrande*, the Court remarked in the *Gravier* judgment that "access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law".[14] Basing its approach partially to the establishment of the 1976 action programme in the field of education, the Court concluded that a common vocational training policy is gradually established, constituting "an indispensible element of the activities of the Community."[15] AG Slynn argued that it must be within the concept of free movement of workers that the non-discrimination rule should also apply for training before and after the worker actually begins his or her work.[16]

Also, the Court found that courses in strip cartoon art constitute vocational training in the meaning of the Treaties, thereby expansively interpreting the term. This created confusion regarding what are the limits of vocational training, *i.e.*, what kind of university course would not be covered under the term. The Court shortly after confirms the expansive interpretation of vocational training

11 A.P. Van der Mei, 'Free movement of students and the protection of national educational interests: reflections on *Bressol and Chaverot*', *European Journal of Migration and Law*, Vol. 13, 2011, p. 125.

12 G. Davies, 'Higher education, equal access and residence conditions: Does EU law allow member states to charge higher fees to students not previously resident?', *Maastricht Journal of European and Comparative Law*, Vol. 12, 2005, p. 229.

13 Opinion of Advocate General Sir Gordon Slynn delivered on 16 January 1985, in Case 293/83 *Gravier*, p. 595.

14 Case 293/83 *Gravier*, para. 19.

15 *Ibid.*, paras 23 and 24.

16 Opinion of Advocate General Slynn, in Case 293/83 *Gravier*, p. 601.

coming from *Gravier*, including veterinary studies,[17] the study of Romanic and Teutonic languages[18] and electrical engineering.[19]

Flynn considers that it was also significant in *Gravier* that the Court noted that "the questions referred concern neither the organization of education nor even its financing, but rather the establishment of a financial barrier to access to education for foreign students only", thereby sidestepping the issue whether a matter that would have an impact on the organization or financing of education could similarly constitute discrimination.[20] It is of course peculiar that an issue relating to enrolment fees would not, in the opinion of the Court, concern the financing of education.

In the *Blaizot* case,[21] the Court delimited more clearly the borders between vocational training and general education. The case concerned again the issue of the *minerval* in Belgium, and this time there were a number of foreign students studying veterinary medicine who challenged the *minerval* after the results of the *Gravier* case. The Court sided with the students in defining vocational training very broadly,[22] stating that university education in general constitutes vocational training, except for those courses which are "intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation".[23] It also did not signify between levels of study (such as doctoral or post-doctoral studies). Indeed, the Court agreed that in terms of medical studies, these stages are inseparable.[24] The wide interpretation of vocational training as encompassing almost all stages and forms of higher education opened doors for the EU to become more active also in the higher education area at least partly under the guise of vocational training. Indeed, there are no cases where the CJEU has stated that a contentious course or academic program would not fall under vocational training. It can be also considered that the article concerning education is *lex generalis* and vocational training *lex specialis*.[25]

In any case, this particular debate is no longer that relevant because education and vocational training are treated the same under the TFEU since Maastricht Treaty, when education and vocational training articles were given similar content.

Shaw comments that these early decisions by the CJEU meant that education was able to be impacted by EU law due to activities in some other area of EU law having an impact in the field of education or when Member States organize their system of education, they should not do it in a way that is incompatible with the

17 Case 24/86, *Vincent Blaizot v. University of Liège and others*, [1988] ECR 379.

18 Case 39/86, *Sylvie Lair v Universität Hannover*, [1988] ECR 3161.

19 Case 197/86, *Steven Malcolm Brown v. The Secretary of State for Scotland*, [1988] ECR 3205.

20 J. Flynn, 'Gravier: Suite du Feuilleton, European Community Law of Education', *in* Bruno De Witte (Ed.), Nomos, Baden Baden, 1989, p. 95.

21 Case 24/86 *Blaizot*.

22 *Ibid.*, para. 19.

23 *Ibid.*, para. 20.

24 *Ibid.*, para. 21.

25 K. Lenaerts, 'Education in European Community Law after "Maastricht"', *Common Market Law Review*, Vol. 31, 1994, p. 26.

common goals mentioned in the Treaties.[26] There is a parallel here to be drawn with the Court's argumentation in the *Tobacco Advertising I* case,[27] in which the Court considered actions undertaken to harmonize Member State rules within the internal market, which also had an impact on public health, where, similarly to education and vocational training, any kind of harmonization is prohibited. The Court confirmed "that provision does not mean that harmonizing measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health".[28] It was, however, delimited by the Court stating that "Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation [...]".[29] It is quite difficult to ascertain from this how much intervention into areas such as public health, education or vocational training can there be without this amounting to a circumvention of the prohibition of harmonization.

Flynn gave a preliminary assessment that this early case law of the Court "may be sufficiently destabilising to propel the ministers to the meeting room".[30] Indeed, as referred to in the previous chapter, the early case law of the CJEU might have triggered the Member States to agree on the rather restrictive wording of what is now Article 165 TFEU. However, as we will see further, the wording of Article 165 stopped the CJEU only for less than a decade. In lieu of the private individuals who had caused the education issues to appear in front of the CJEU through preliminary references, it was the Commission which started to pressure Member States in the area of education by initiating cases at the CJEU in support of improving student mobility and bringing down barriers for access to higher education in other Member States. This was also predicted by Khan who stated that "despite some member states' desire to maintain their independence in education, there will likely be an increasing realization that education plays a major role as a significant aspect of positive integration in contributing to the internal dynamic of the EC".[31]

II. The Commission Strikes Back: Application of Article 165 by the CJEU in Belgian and Austrian Education Cases

During the decade after the adoption of the Maastricht Treaty, not much happened in terms of judicial activity by the CJEU in the sphere of access to higher education. The *Gravier* case law was applied by the Member States and no citizenship-based issues regarding access to higher education were brought to Court through preliminary references. The Court's case law was not impacted by the prohibition of harmonization in Article 165; indeed, it increasingly used the four freedoms to circumvent the barriers created by the Member States in the Treaty.[32]

26 J. Shaw, 'Education and Law in the European Community', *Journal of Law & Education*, Vol. 21, 1992, p. 415.

27 Case C-376/98, *Germany v. European Parliament and Council.*

28 *Ibid.*, para. 78.

29 *Ibid.*, para. 79.

30 Flynn, 1989, p. 107.

31 A.N. Khan, 'European Common Market and Education', *Journal of Law & Education*, Vol. 23, p. 52.

32 Kwikkers, p. 42.

Remarkable cases pre-Maastricht had nearly all been private enforcement actions through preliminary references, not by the Commission. However, this changed in 2003 when the Commission brought infringements proceedings against Belgium and Austria for restricting the influx of large numbers of students from the neighbouring France and Germany, respectively. It is difficult to explain why the Commission decided to go after these countries, but it could be argued that it wanted to claim at least partially education back to the EU domain after the rapid developments of the parallel Bologna Process. Alternatively, the Commission could have received encouragement from the introduction of citizenship of the EU and subsequent EU case law, specifically the *Grzelczyk* case, which was delivered in 2001.

The Austrian and Belgian education cases, which has also been referred to in academic literature as the 'Belgian-Austrian Education Saga',[33] have significant similarities, but are also somewhat different in their details, although the underlying problem they related to was the same. Both of these Member States are in a special linguistic position. Both Austria and the French Community in Belgium had traditionally an unrestricted access-based policy for access to higher education for all students wishing to study. Both of these countries also have a larger neighbour where the same language is spoken (German or French) and where access to university education is limited by a *numerus clausus* system. Therefore, there is a greater incentive than usual for students who were not able to fulfil requirements to enter university in their native countries to move from Germany to Austria and from France to the French Community in Belgium to be able to study in a university. In Belgium, some particular courses consisted of up to 86% of students from other Member States.[34]

In the case of *Commission v. Belgium,*[35] the French Community of Belgium had passed a law that required that foreign students who wished to study in certain fields (medical studies, dental and veterinary science, and agricultural engineering) had to take and pass an aptitude test in case they were not able to prove that they qualify for admission in their own country of origin. The Court, based on the case law established with the *Gravier* judgment, held that the Belgian rule was indirectly discriminatory and since Belgium had not offered any justifications, found for the Commission.

The case of *Commission v. Austria,*[36] which was decided one year later, involved access to studies to become a dentist or a dental surgeon in Austria. Like Belgium, Austria required students to prove that they had fulfilled the criteria to be admitted to a university in their own country. The Court held that because the law will inevitably have a greater effect on nationals other than Austrians, it

33 S. Garben, Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française*, Judgment of the Court (Grand Chamber) of 13 April 2010, nyr. *Common Market Law Review*, Vol. 47, 2010, p. 1495.

34 Opinion of Advocate General Sharpston delivered on 25 June 2009, in Case C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française*, [2010] ECR I-2735, para. 20.

35 Case C-65/03, *Commission of the European Communities v. Kingdom of Belgium*, [2004] ECR I-6427.

36 Case C-147/03, *Commission of the European Communities v. Republic of Austria*, [2005] ECR I-5969.

results in indirect discrimination. Austria, unlike Belgium, attempted to justify the infringement based on safeguarding the homogeneity of the Austrian higher or university education system: it was claimed that allowing unrestricted access to Austrian higher education to any number of foreign students would cause structural, staffing and financial problems. The Court rejected this argument stating that entry examinations or minimum grade requirements would achieve the same goal in a non-discriminatory way, and it also required Austria to present specific calculations which would show that there was a real risk to the financial integrity of the Austrian higher education system. In a similar way, it rejected the justification based on prevention of abuse of Community law. It held that "In this case, it need merely be observed that the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty, and cannot therefore of itself constitute an abuse of that right." This is similar to the arguments of the CJEU in the *Centros* judgment in the area of freedom of establishment, where the Court found that establishing a company in another Member State solely to bypass the minimum capital requirements in the home country would not be contrary to EU law and would not amount to abuse of rights.[37]

One should also point out the argumentation of AG Jacobs in the *Commission v. Austria* case, where he expressed reluctance to accept any kind of access criteria that would exclude students from other countries:

> [...]From the overall tenor of Austria's arguments and the facts of the case, it seems that 'homogeneity' is tantamount to 'privileged access for Austrian citizens'. It is not disputed that Austrian universities are a realistic alternative mainly for German-speaking students. That group is likely to consist of, obviously, German students and also Italian students coming from the German-speaking part of Italy, along the border with Austria. Given the stringent conditions applicable both in Germany and in Italy as regards certain university courses such as medical studies, the effect in practice of the contested national provision, even if couched in general terms and applicable to students from any Member State, is to hinder the access of those students to the Austrian system. It appears that it is the risk posed by those students that the contested national provision is intended to avert. In other words, the practical, or even the intended, effect of the contested national provision is to preserve unrestricted access to university education mainly for holders of Austrian secondary diplomas, while making it more difficult for those foreign students for whom the Austrian system constitutes a natural alternative.

37 Case C-212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, [1999] ECR I-1484.

> Such an aim, which is discriminatory in essence, is not consistent with the objectives of the Treaty.[38]

The way the Court struck down Austrian justification regarding the need to safeguard the higher education system does not seem to take into account the specific sensitivity of higher education for Member States, and the judgment lacked sensitivity towards the specifics of the education sector.[39] The Court embarked with this judgment on a course which states that universities are not really primarily national bodies any more catering primarily for students from their own Member States. This gives rise to a number of difficult questions related not so much to the role of the universities in the development of national identity or language, but more importantly regarding financing. It does not seem to be fair that taxpayers of Belgium and Austria should be required to invest in providing quality higher education for students from France and Germany or limit access to studies in a non-discriminatory way so that their own nationals would no longer have a guaranteed place in the higher education system. Garben also criticizes that the CJEU judgment is not nuanced enough and therefore has 'hollowed out' the principle of national educational autonomy provided in Article 165(1).[40]

The judgments were met with an angry response from European leaders. Belgium and Austria adopted or amended their laws by introducing specific quantitative restrictions for foreign students. In 2006, Austria adopted a new law reserving 75% of study places of medicine and dentistry studies for applicants who had completed their secondary education in Austria (20% was reserved for EU students and 5% for students for non-EU students). Belgium also reserved 70% of student places in (para)medical studies for those who have previous residency there.[41] The Commission initiated infringement procedures in 2007, but postponed them later for five years formally out of concern for the sustainability of the Belgian and Austrian health systems. However, informally it was stated that stopping the proceedings by the Commission had been due to political pressure from Austria when negotiating the Lisbon Treaty where Austria demanded a protocol to be able to restrict the number of students from other countries.[42] Stay of action by the Commission, however, did not mean the end of the story. As had happened before Maastricht, it was up to private individuals to contest the quantitative restrictions, and this soon happened.

38 Opinion of Advocate General Jacobs delivered on 20 January 2005, in Case C-147/03, *Commission v. Austria*, para. 30.

39 S. Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth*, European Monographs Series Set, Kluwer Law International, Alphen aan den Rijn/Frederick, 2011, p. 114.

40 *Ibid.*, p. 115.

41 Van der Mei, 2011, pp. 126-127.

42 Garben, 2011, pp. 115-116.

III. The Bressol *Judgment: Balancing National Educational Autonomy with Free Movement of Students*

The case of *Bressol*[43] involved contesting the previously mentioned Belgian quotas for studying in specific medical and paramedical fields mostly by French students who had been unsuccessful in passing the quota system (only one in five applicants were generally admitted to French veterinary schools),[44] but also by university lecturers from the French Community in Belgium who felt that a limitation of the number of students by the new system puts their jobs at risk. This combination of French students and Belgian teachers challenged the Belgian authorities' decision to limit the number of students in these areas. The importance of the decision cannot be understated. The CJEU was given an opportunity to clarify its position regarding obstacles to access to education and give guidance on how to solve in the future challenges involving students studying in other Member States and the ability of Member States to restrict certain student places for the residents of the Member State. This is highly important for the analysis of other indirectly or directly discriminatory access requirements. The fundamental difference in this case related to the fact that at issue were the residence-based requirements, which could amount to direct or indirect discrimination.

The CJEU was asked to answer to questions regarding whether the measures undertaken by the French Community in Belgium as a result of the influx of students from France would be justified as the situation puts an excessive burden on public finances and threatens the quality of education. The referring court also asked whether the measures would be justified in case it was shown that lack of resident students would result in lack of qualified personnel in the area of public health, which would put into risk the health care system of the Member State. It also asked whether maintaining an open access system for residents and creating a *numerus clausus* system for non-residents would be against EU law.

1. *The Opinion of AG Sharpston*

AG Sharpston spent considerable effort and space in her opinion analyzing whether specific aspects of the described system represent direct or indirect discrimination based on nationality.[45] As the CJEU has never defined direct discrimination, she analyzed the principle of equal treatment and the concept of indirect discrimination, concluding that the principal residence requirement was indirectly discriminatory and that the second condition (having the right to permanently reside in Belgium) was directly discriminatory. In the opinion of the AG, the former is supported by CJEU case law whereas the latter conclusion was based on an assessment that all Belgian nationals automatically satisfy the second condition whereas all other EU citizens do not automatically have that right.[46]

She then considered the three grounds that were offered for justification of discrimination posed by Belgium. AG Sharpston pointed first out that the public

43 Case C-73/08, *Bressol.*

44 Opinion of Advocate General Sharpston, in Case C-73/08 *Bressol*, para. 22.

45 *Ibid.*, paras 43-58.

46 *Ibid.*

financing justification, which essentially means that Belgium must train more qualified health personnel than it could afford, and the risk to public health of lack of qualified medical personnel, are conflicting each other.[47] She goes on to call the first justification 'purely economic', which in the context of higher education is especially problematic, as opposed to areas of social security. She also makes a crucial distinction between access to financial support for education, which may be withheld from students lacking the 'certain level of integration' following the Court's decision in the *Bidar* case,[48] and access to education, which is the point in this case. Drawing from the *Grzelczyk* case,[49] AG Sharpston suggests that Member States should accept a certain degree of financial solidarity that applies to access of education.

AG Sharpston also puts forward a strong case for rejecting the 'free-rider' argument that students from one Member State go to other Member States to get social benefits that they or their parents never contributed to.[50] The implicit Belgian argument that the behaviour of migrant students constitutes a form of abuse of rights stemming from the EU freedom of movement is flatly rejected by AG Sharpston. Rather, she states that students who move from one Member State to another in order to be educated there are exercising their right to freedom of movement, which they, as citizens, are entitled to do without any discrimination based on nationality. She points out that students are a source of income for local economies where the university is located and pay indirect taxes on the goods and services they consume while studying. Another key argument that she adds is that Belgium does not make the same distinction among its own nationals regarding access to education, so that those Belgian nationals who pay little or no taxes in Belgium are treated exactly the same as those who contribute more.[51]

In the AG's opinion, the first justification must also be rejected because of the specific 'closed-envelope' nature of the financing system, which means that universities do not get more or less money based on the number of students they enrol and is therefore budget neutral.[52] That argument is, however, difficult to reconcile with basic principles of economy, which dictate that an increase of students also means a specific increase in costs. Van der Mei also mentions that in other systems in which the funding of higher education takes place according to the number of students, a huge influx of students from other Member States could seriously impair the financial health of the Member State.[53] It would have been more persuasive for the AG instead to focus on the link between attracting high-quality workforce, which university graduates are, and the benefits this brings to the local community and the host state in general. Although many of

47 *Ibid.*, para. 88.

48 Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119.

49 Case C-148/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-06193.

50 Opinion of Advocate General Sharpston, in Case C-73/08 *Bressol*, para. 95.

51 *Ibid.*, para. 96.

52 *Ibid.*, para. 97.

53 Van der Mei, 2011, p. 131.

the students may choose to return to their home Member States after the end of their studies, there could still be a significant number who stay and contribute to the economic and social functioning of the host Member State as a worker or self-employed person, especially if there is a dire need for qualified workers there.

Regarding the risk to the quality of education, the second justification put forward by Belgium, the AG conceded that the overcrowding of classes is a legitimate concern and that the basic aim of the justification is acceptable.[54] However, she rejected the justification based on a proportionality test, stating that there was no adequate studies made on the actual impact that accepting the foreign students had on the quality of education. The AG also pointed out that the problem in this case is not really in the number of foreign students which is overburdening the system, but the total number of students, basically arguing that Belgium drop its free access to all of its nationals policy of higher education access in case it is unprepared to accept that unlimited free access is offered to all EU students. Discriminatory treatment here is unacceptable according to AG Sharpston because it directly contradicts Article 18 TFEU.[55] Alternatively, AG Sharpston argues that the flow of students across borders should be regulated at the EU level, in order to prevent some Member States piggybacking on the budgets of others. This approach has been criticized as forcing Member States to drop their open access systems in favour of others, unless there is regulation in the EU level or another kind of political settlement is reached between the Member States involved.[56]

The third justification of the Belgian government related to the preservation of the quality of the public health system: if there are too few Belgian nationals graduating from the Belgian higher education establishments in which foreign students have taken all the places, there would not be in the long term enough qualified people to fulfil the needs of guaranteeing the public health system. AG Sharpston claimed that the risk-assessment was not done by the Belgian government to a sufficient extent in order to prove that the risk is sufficiently real and serious.[57] After pointing out the obvious contradiction between the quota as an aim to reduce the number of students and the justification of not having enough graduates, she focuses on the fact that in case there was enough job opportunities available in Belgium in the area of veterinary and medical professions, there would be greater possibility that non-Belgians studying in Belgium take up those jobs, thus averting the risk of lack of qualified personnel.[58] One could add to the AG's arguments that in many EU Member States there is already a substantial lack of quality medical staff, which has so far been solved with the help of the freedom of movement of workers. AG Sharpston should have emphasized the impact of the free movement rights for workers in this regard and the development of an European labour market, which should make the kinds of justifica-

54 Opinion of Advocate General Sharpston, in Case C-73/08, *Bressol*, para. 102.
55 *Ibid.*, para. 106.
56 Van der Mei, 2011, p. 132.
57 Opinion of Advocate General Sharpston, in Case C-73/08, *Bressol*, para. 117.
58 *Ibid.*, para. 119.

tions which are based on the lack of skilled people in the labour market of a particular Member State obsolete in most cases, and especially in the cases of medical and veterinary studies in which there are no regional or national specificities.

2. The Court's Argumentation and Ruling

The CJEU stated simply that the system introduced in Belgium was a case of indirect discrimination based on nationality, without making the distinction that the AG had made.[59] The Court went on to analyze the three justifications offered by the Member State.

On the excessive burden to public finances, the CJEU used what was the weakest part of the argumentation of the AG in rejecting this justification. It stated that the 'closed envelope' system used by the Belgian authorities meant that the number of students is not in any way related to the financing of education.[60]

Regarding the justification relating to the need to preserve the quality of the higher education system, the Court agreed that it could be a legitimate aim, but decided to discuss this together with the public health argument because it only concerned these specific areas of law.[61]

Regarding the public health arguments, the CJEU reverted to the national court in giving the final answer whether there is a genuine risk to the protection of public health. However, it did establish a set of very detailed proportionality assessment criteria.[62] First, it stated that the quality of health care in a territory might be impacted by the reduction of quality in training of the health professionals who work at that region. Second, the Court also agreed in principle that a limit to the total number students might have an effect on the availability of health professionals and thus protection of public health.

However, the Court specified that the link between the number of graduates from medical courses and public health system is only indirect and requires a detailed analysis of the prospective situation. The Member States are free to take protective measures against those risks and do not have to wait until the shortage has materialized.

The Court went even further and specified the content of the analysis to be provided in this specific case. For each of the nine courses which were subject to quotas, the analysis must contain the maximum number of students who can be trained while keeping the required quality standards, as well as the number of graduates who must establish themselves in the French Community in Belgium to provide adequate public health services. Most importantly, the CJEU pointed out that it cannot be assumed in the analysis that all non-resident students return to their home state after studies and, conversely, all resident students remain in the Member State. In addition, the analysis should include an assessment of those

59 Case C-73/08 *Bressol.* para. 40-46.
60 *Ibid.*, para. 50.
61 *Ibid.*, para. 54.
62 *Ibid.*, para. 68.

medical professionals who have not studied in Belgium, but might establish themselves there.[63]

In addition to the detailed analysis, the referring court is required also to evaluate whether the measure is appropriate, by assessing whether limiting the number of students brings about the increase of number of graduates that will in future provide health services within the French Community. The referring Court must also check the measure regarding whether there are less restrictive measures available, especially other ways to motivate students to establish themselves in the French Community of Belgium after the end of their studies there or to attract graduates from other Member States to the region.[64] The Court also indirectly expressed its doubts regarding the system of drawing lots as being compatible with the aims of EU law, but let that also to be decided by the referring court.

The decision of the Court is a delicate one. It tries to balance between the difficult situation it has been placed to. It is possible to read the judgment both in a way that it supports and cements the principle of equal access to higher education and allows discrimination in this regard only in the most serious circumstances, as evidenced by the detailed nature of the requirements that need to be fulfilled in order to allow the Belgian system to continue. However, the fact that the CJEU, unlike AG Sharpston, did not reject flat out the Belgian quotas could be seen as a sign of retreat by the CJEU, a kind of pullback from the previously bold decisions. Van der Mei calls the Court's judgment in *Bressol* disappointing because the Court did not give further guidance on the fundamental issue of whether Member States can restrict the influx of students from other Member States in order to protect the financing or organization of their higher education systems.[65] By dealing only more specifically with the public health justification, the use of the judgment outside of the scope of access to medical studies is somewhat limited.

Van der Mei calls the judgment politically clever because the Court has recognized the concerns of Member States regarding the potential influx of a huge number of students from other Member States. At the same time, the detailed assessment required from the national court shows a strict application of the proportionality test, which means that the Court cannot be accused of not supporting student mobility.[66] Garben also lauds the concessions made to Member States by the CJEU in this judgment, although the Court is seemingly putting more emphasis on the free movement of students' principle than national policy choices in the field of education.[67] In van der Mei's assessment, the decision finds the right balance between considering the various interests of Member States and

63 *Ibid.*, paras 72 and 73.
64 *Ibid.*, paras 75-79.
65 Van der Mei, 2011, p. 130.
66 *Ibid.*, p. 130.
67 Garben, 2010 (Comment...), p. 1505.

the EU as a whole.[68] The Commission seems to consider the public health exception in the *Bressol* case as exceptional.[69]

In the national court proceedings following *Bressol*, the obvious issue was how to fulfil the CJEU's almost impossibly detailed test. In the case of many of the courses, the national court found them not to be compatible with the criteria, but did accept the government's evidence on proof regarding physiotherapy and veterinary medicine.[70] Kwikkers finds the decision of national court to be political rather than legal, as it considered the insufficient data offered by the government to show that there was a real risk that justified the quotas.[71]

B. Conclusion

It is understood that rule of law should also prevail in the field of higher education. However, the legal policy may strongly be influenced by the goal setting and strategies that, in the context of the current article, would be balancing national educational autonomy with the principle of free movement of students. EU has only been given supportive competence in the field of education. However, in case we expect that the European universities should act as considerable contributors to the innovation and competitiveness in the European Union, the parallelism of the case law of Luxembourg in the field of free movement of workers and students should be justified. As the EU workers have been considered equal, the students of another Member State should less and less considered 'international' and therefore deserving different treatment or even restrictions. State protectionism (that may have several reasons, including non-stable educational strategies within the state borders) can get hit as the European Higher Education Area is getting more weight. European Union welfare can be achieved only if there are more graduates with quality education from European universities that is based on prerequisites such as non-discriminatory policy of the Member States in the field of access to the higher education that leads to the drastically increased mobility of students. EU role in the field of education should be significant to avoid state-based bureaucracy and protectionism. The case law of CJEU creates a sufficient basis for the further development of the European Higher Education Area that would lead, in ideal, to essential foundation for successful and well-functioning internal market in the global world.

68 Van der Mei, 2011, p. 132.

69 Youth on the Move: A Guide to Rights of Mobile Students in the European Union, Commission Staff Working Document, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions, Youth on the Move: An initiative to unleash the potential of young people to achieve smart sustainable and inclusive growth in the European Union, SEC(2010) 1047, 15 September 2010, Brussels, 2010, p. 5.

70 Kwikkers, p. 59.

71 *Ibid.*