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Veröffentlichungsversion/Published version: Postprint
Zeitschriftenartikel/Journal article

Failing on the social dimension: Judicial law-making and student mobility in the EU

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Abstract

National welfare states and free movement rights are in tension in the European Union (EU). Yet, despite potential free-riding dynamics, fully developed welfare states appear remarkably resilient. Two explanations can account for this in the literature: institutional heterogeneity of welfare states leads to differential impact of free movement, and contained compliance with EU legal obligations means that non-discrimination provisions exist mainly on paper. By example of higher education and student financial maintenance, we show that under adverse conditions, free movement rights need exceptions to not undermine national welfare. Moreover, the incapacity of the European Court of Justice to provide clear and stringent guidelines in regards to EU students' access to student benefits, confronts potential beneficiaries with significant legal uncertainty. This introduces new inequalities among EU students. Our analysis shows the limits of judge-made law in furthering social justice.

Keywords: European Court of Justice; student mobility; welfare state resilience

Introduction

The European Union is in need of a stronger social dimension to compensate for economic inequalities with redistributive policies. While the single market contributed to economic liberalisation in member states, the social embedding of markets has found much less backing from the EU: The joint decision-making in the Council and the European Parliament with its demanding decision rules is confronted with heterogeneous preferences. Against this, the supranational-hierarchical mode of decision-making is much more efficient, as the supremacy and direct effect of European law allows the European Court of Justice (ECJ) to engage in judicial legislation via case law (Scharpf 2000). However, with view to the social dimension, Scharpf warned the supranational-hierarchical mode would result in a 'double asymmetry': The vertical power between the EU and member states becomes distorted when EU case law undermines member states' autonomy in shaping their welfare systems, and risks unbalanced welfare access from non-nationals. At **(← p. 1522)** the same time, the horizontal balance among member states is altered, since ECJ case law does not uniformly affect member states' different institutional settings (Scharpf 2010).

While the pitfalls of the joint-decision mode persist particularly in view of increased socio-economic heterogeneity among member states after the Eastern enlargement, the supranational-hierarchical mode does not seem to have resulted in a race to the bottom among member states. Although the EU stands out for its far-reaching free movement and non-discrimination rights, the advanced welfare states of the richer member states appear resilient. There is largely 'no welfare magnet' (Martinsen and Werner 2018). Institutional heterogeneity not only implies that ECJ case law granting equal rights for EU citizens impacts member states in different ways, it also gives sufficient leeway to protect domestic institutions from interfering case law. Member states appear successful in 'containing justice' (Conant 2002) to shield their welfare systems from over-use.

In this paper, we make two contributions. First, we show that under certain unfavourable conditions, namely high mobility and unconditional welfare services, there may indeed be the projected under-provision of welfare due to overuse. We analyse the example of German medical students in Austria, where the European Commission recently vetted restricting free movement rights to safeguard national public policy with a quota system (IP/17/1282), and related results in Belgium. Secondly, our analysis of EU students' cross-border social rights concludes that Court-driven non-discrimination and free movement rights cannot adequately contribute to furthering the social dimension of a largely heterogeneous Union. Thus, different from the literature which sees a policy driven by the Court fail because member states resist implementation and contain justice, we emphasize the inherent limitations that judge-made law faces. When enforcing non-discrimination in heterogeneous settings, not only are member states impacted in different ways, but also new inequalities result among individuals.

We start by summarizing the literature on free movement rights, their implications on national welfare, and the importance of court-led policy-making. We go on explaining the institutional rules for student higher education and justify our case selection. On this basis, we discuss the example of under-provision of medical training. Analysing the case law structuring students' financial support, we show that judicial law-making without legislative backing cannot provide a European social dimension.

Free movement, national welfare and the Court

Member states have largely reserved their rights over welfare state policies, which are highly diverse given different historical legacies. In view of the welfare state's crucial role for legitimating governments, there are good **(← p. 1523)** reasons for striving for national social policy autonomy. The EU backs up free movement rights with the coordination of welfare

state entitlements, the first coordination rules dating back to the late 1950s (regulation No. 3 and No. 4). The central regulations 1612/68 (492/2011) and 1408/71 (883/2004) build on these early rules. Different rounds of enlargement increased the socio-economic heterogeneity among member states, making it difficult to use the joint-decision mode to achieve headway in the social embedding of the European single market. Apparently, EU social policy, could not build on the supranational-hierarchical mode of decision-making to the same extent as the single market, whose realisation was helped by the prominent place in the Treaty of the four freedoms of goods, services, persons, and capital, as well as competition law. In the single market, case law often furthered joint decision-making. The extent of the codification of case law causes Davies to regard the EU legislature as an 'agent' of the Court (Davies 2016). As Weiler noted early, in the EU, the weakness of the legislature and the strength of the Court are closely related given that case law of the Court can hardly be overruled (Weiler 1991).

With social policy, the supranational-hierarchical mode targets redistributive and not regulatory policies. This results in less joint decision-making than in the single market, while risking undermining national welfare policies. For instance, the Court had judged early on, in its 1986 *Kempf* case (139/85), that the free movement of workers implied immediate access to in-work welfare benefits for most EU workers – this became politically contentious in the context of the Brexit decision. Though revisions of the aforementioned coordination regulations have often responded to ECJ case law (Martinsen 2015), the ECJ can only open national policies but not force about common redistributive schemes.

Since the late 1990s, the Court has developed EU citizenship rights in host member states, reflecting the general importance of judicialisation in the EU (Stone Sweet 2004). Legal scholars generally welcomed this extensive case law as furthering the social dimension of the EU (Wollenschläger 2011). While the Court has become more restrictive since late 2014, in line with concurrent politicisation (Blauberger et al. 2018), and falls short of a strict

prohibition to discriminate on the basis of nationality, it has required 'a certain degree of solidarity' by the host state since the 2001 *Grzelczyk* ruling. To some extent EU member states therefore have to practice unconditional solidarity, without requiring reciprocity in the sense of expecting up-front contributions.

Rounds of Eastern enlargement and increased socio-economic heterogeneity among member states made the risk of pressures on welfare states more salient. Already Pierson and Leibfried discussed the latent tension between a unified market and national social policy as only sustainable because of the very limited extent of intra-European mobility compared to the US (Pierson and Leibfried 1995: 28). In the meantime, intra-European mobility of the working-age population reached 3.7% in 2015.[1] So far, empirical research **(← p. 1524)** suggests that the expected pressure on rich welfare states with free mobility leading to dynamics of a prisoners' dilemma does not materialise (Martinsen and Rotger 2017; Werner 2017). To a surprising extent, welfare states appear resilient, and European integration is neither linked to notable retrenchment nor to under-provision of welfare due to overuse.

Two main lines of research can explain such welfare state resilience in the face of unrestricted mobility. First, the heterogeneity of member states' institutions – that Scharpf (2010) analyses as a horizontal asymmetry among member states – implies that the opening-up of national welfare to EU citizens impacts member states differently. Secondly, and adding to this, member states may be reluctant to implement rights that are granted by the ECJ, making national welfare states more open on paper than they are in reality.

Institutional differences among member states are significant. Following Esping-Andersen (1990), there are different 'worlds of welfare capitalism': the Anglo-Saxon, continental, and Scandinavian kinds, based on distinct forms of social policy and industrial relations. Distinguishing social and liberal market economies, Scharpf (2010: 235) expected that liberal market economies could accommodate far-reaching EU free movement rights

more easily than social market economies, as the latter's institutions coordinating economic activities would be undermined. In the meantime, this expectation needs to be modified, as the distinction between liberal and social market economies appears too broad to capture the vulnerability to opening demands from the EU. Contrary to expectations, the Danish welfare state copes well (Martinsen and Rotger 2017). Conversely, the UK's flexible labour market attracts lower-skilled workers, and in-work benefits make immigration more costly (Ruhs 2017). Moreover, sufficient administrative capacity is needed to closely monitor and enforce residence requirements and benefit eligibility, effectively using the leeway that EU law grants to protect their welfare systems (Blauberger and Schmidt 2017). Institutional heterogeneity among member states, to sum up, may play out in a more complex way than the difference between liberal and coordinated economies suggests, making predictions about welfare state resilience difficult.

Another part of the literature looks beyond institutional heterogeneity to explain the relative resilience of member states' welfare. Here, the argument is one of resistance by member states towards their European legal obligations with view to equal treatment – there is 'contained compliance' (Conant 2002: 32). Conant argues that member states rarely take general lessons from case law but only respond to the single ruling. General policy change requires mobilisation of actors claiming their rights; an argument emphasised by Cichowski (2007). Similarly, Wasserfallen (2010) argues in his analysis of the Citizenship Directive of 2004 that case-law requirements become implemented across the board only if case law is codified in EU legislation. Also, Martinsen (2015) regards constraints of case law as politically **(← p. 1525)** mediated. In sum, if member states disagree with the rulings of the Court and see their socio-economic institutions under pressure, there are multiple means to resist the impact – either by politically modifying EU policies as shaped by case law or by simply not implementing case law beyond the single ruling.

However, this 'contained compliance' view is contested. We find many instances of member-state administrations responding to ECJ case law in the same way as they would to rulings of their highest national courts – in a straightforward rule-of-law fashion with administrative circulars spelling out new administrative practices or new legislation (Schmidt 2018). From this perspective, much of the political or administrative leeway that the 'contained compliance' view points out is not a modification or rejection of case law, but better explained by case law only establishing general principles, instead of whole policies. Also, it is only by emphasising their problems with case law, that member states can hope to signal their difficulties to the ECJ, possibly leading to a change in jurisprudence.

To conclude, the institutional diversity of member states may explain why free movement has not led to a notable under-provision of welfare. Their vulnerability or resilience depends on multiple aspects, and is not captured only by welfare-state type. In addition, the impact of the EU is lessened by contained compliance. Missing in the debate is a critical discussion to what extent case law furthering non-discrimination can contribute to the social dimension. Generally, it is assumed that the Court can help the re-embedding of markets (Caporaso and Tarrow 2009), if its rulings are properly implemented – however, possibly at the risk of undermining national welfare.

Our analysis on the opening of higher education adds onto this literature twofold: First, we show that under certain – adverse – conditions, under-provision may indeed be the result of enforcing free movement rights, making restrictions on free movement necessary. Moreover, we question the Court's power to address the social dimension successfully. Given the institutional heterogeneity of member states' social schemes, we argue, non-discrimination gives poor guidance to the Court for furthering justice. Rather, the Court may produce new inequalities as we will show.

Free movement in higher education and its impact on member states

In the following, we analyse the implications of EU free movement rights on member states' welfare systems, focusing on higher education policies, which are increasingly counted as part of the welfare state (Busemeyer and Trampusch 2011: 434). By looking at students, we analyse a particularly mobile part of the population, with low barriers to move for university training. **(← p. 1526)** After explaining our case selection and data, we will give the legal background to equal university access and student financial support.

Case selection and data

If there is a tension between the EU free mobility regime and national welfare states, higher education is suitable to be investigated as a policy given the mobility of students. With the cases of German medical students in Austria and French students in Wallonia, theoretical expectations of an under-provision under conditions of free movement already materialised. Student financial support is – in those member states where it exists – subject to the general coordination of social entitlements, but regulated in less detail than the classical social benefits of old age, health or unemployment. ECJ case law has repeatedly re-defined the scope of eligibility. There is significant institutional heterogeneity among member states in this policy area, so that free movement rights should play out in different ways.

We will discuss the empirical repercussions of equal university access and the opening of financial maintenance based on a comparative study of Belgium and Austria, and an analysis of the case law in this policy field. Clearly, the requirement of non-discrimination has more severe implications for smaller countries sharing a language with a larger neighbour, particularly if they opt for tuition-free universities. Our case selection is thus guided by considerations of which countries are most likely vulnerable to exploitation of public services through individual rights. In view of 13 ECJ rulings on student access and 29 on financial support, we cannot present our comprehensive case law analysis, but only refer to some of the

relevant cases. We draw on 30 semi-structured, anonymised interviews with administrators and experts from both countries and from the European institutions as well as an analysis of official documents and the press. The interviews were conducted between 12th of November 2013 and 8th of March 2016 and transcribed. Questions concerned how administrations implement ECJ case law and requirements of non-discrimination, how trans-border coordination with administrations from other member states takes place, and which problems arise.

Equal university access – secondary legislation and case-law development

Education policy remains largely in member-state competence: the EU was long limited to vocational training and is still largely confined to coordinating national policies (Articles 165 & 166 TFEU). As regards student mobility, apart from the European Erasmus scheme, EU policy has come to the forefront in terms of the Treaty's four freedoms and the general principle of non-discrimination since the mid-1980s and through the introduction of EU Citizenship **(← p. 1527)** within the Maastricht Treaty (Article 20 TFEU). Also the Charter of Fundamental Rights knows a right to education (Article 14) (Dougan 2005).

Case law rather than EU legislation has been influential in shaping access to university education in the EU. Already in the mid-1980s, member states were prohibited to ask tuition fees exclusively of students from other member states as this discriminates on the basis of nationality. The respective Belgian policy was challenged by a French student in 193/83 *Gravier*. An infringement procedure against Belgium (C-193/85) followed. Thus, member states were obliged to grant equal access to their higher education systems despite non-existing community competences for education at the time. Such equal access rights are unknown between the states of the USA and of Canada (Maas 2017), which indicates that such opening is not trivial.

Shortly after the Maastricht Treaty had brought education among the Treaty's goals in 1992, the Student Mobility Directive (93/96/EEC) was agreed in 1993. This directive codified the case law on EC students' equal access to university in other member states.

Student financial support – secondary legislation and case-law development

The Student Mobility Directive of 1993 required financial self-sufficiency and sickness insurance of students studying in other member states, excluding their access to study grants, and allowing a withdrawal of residence rights from students not able to finance themselves. Residence as a student did not contribute to welfare entitlements. Case law granting maintenance support of the host state, based on students' own or derived employment status, has developed since the 1980s, drawing on the equal treatment provisions of Regulations 1612/68 (492/2011) and 1408/71 (883/2004). EU workers' children can access education, including financial maintenance. Economically not active EU citizens do not enjoy unconditional non-discrimination following Union Citizenship but first need to establish a 'link' to the new member state.[2]

Compared to the question of non-discriminatory university access, student rights to financial support are more complex as benefits may be granted by the home or the host state, and the Court can link eligibility to an own or derived employment status, or to EU Citizenship rights. As it will become apparent, building a policy of access to benefits on case law is highly complex, as at least four different criteria of eligibility can open up schemes: cross-border workers' children, students with worker status, students under EU Citizenship status (with these three categories all relating to study finance access in the host state), and students receiving portable student support from their home state. **(← p. 1528)**

First, already in the mid-1970s, the Court opened maintenance support to cross-border workers' children in the host country (*Casagrande* (9/74)), so that welfare support can be accessed in the country of residence and of employment. In case C-20/12 *Giersch*, the Court

emphasised that member states may take measures against 'study grant forum shopping' (No. 80), showing its willingness to acknowledge some reciprocity by allowing member states, for instance, to require students to work some time in their home state.

Second, students can access financial support based on their own former or ongoing worker status. Originally, the Court required a close link between the type of previous employment and the content of the subsequent studies – with the exception of involuntary unemployment (C 39/86 *Lair*). While in C-197/86 *Brown*, an employment serving as 'pre-university industrial training' did not qualify for the status of a worker, in C-413/01 *Ninni-Orasche*, 2.5 months of fixed-term employment prior to the studies was considered sufficient. In a case involving Denmark, only few hours of work per week (C-46/12 *LN v Styrelsen*) qualified for the privileged worker status, leading Denmark to open its generous non-means tested and non-repayable benefits.

Third, the introduction of EU Citizenship in the Maastricht Treaty resulted in solidarity becoming a tenet of EU jurisprudence. In the *Grzelczyk* case (C-184/99), a French student in Belgium ran out of finances after three years of study and applied for the Belgian 'minimex' social assistance. Interpreting Union citizenship as 'destined to be the fundamental status of nationals of the Member States', the Court argued that support had to be granted as long as the person was not an 'unreasonable burden on the public finances'. A few years later, *Grzelczyk* and other related case law was codified in the Citizenship Directive 2004/38/EC, repealing amongst others the Student Mobility Directive: Union citizens enjoy the same social and residence rights as nationals after five years of legal residence. As before, students need 'sufficient resources' (Article 24). Yet, in line with *Grzelczyk*, Union citizens may not be automatically expulsed when in need (Article 14(3)). Member states need to prove 'a burden on the social assistance system of the host member state'. Thus, the directive is imprecise in crucial respects, juggling between the difficulties that the Council could not overrule the case

law of the Court, but neither aimed at codifying its generosity. Concerning students, the directive was taken up by the Court in its 2008 *Förster* judgment (C-158/07), revealing a more 'cautious judicial tone' (Weatherill 2012: 437): Partially revoking its flexible criterion of a 'certain degree of integration,' and following the directive, the ECJ allowed the Netherlands to require a minimum five-year residence for accessing financial maintenance. In contrast to previous cases, it based its reasoning largely on the directive – and not solely on Treaty provisions.

Fourth, also the portability of student support into other member states resulted in judicial disputes. Two situations lead to conflict (Hoogenboom **(← p. 1529)** 2013: 34): First, it is up to the home state to grant exportability, but if granted, rules need be non-discriminatory. Second, and more complex, if students have not previously studied or hardly lived there, their link to their paying home member state is often in doubt. (1) After striking down preconditions of initial enrolment (C-11-12/06 *Morgan* & *Bucher*) and residence *(Prinz & Seeberger* C-523/11 & C-585/11) in Germany, *Elrick* (C-275/12) challenged requirements regarding the duration of study. (2) In *Thiele Meneses* (C-220/12), the Court held that even a German who had hardly lived in Germany could access the study grant and export it to another country, tying eligibility to a surprising extent to nationality (Strumia and Brown 2015). Thym (2015: 38) argues that portability is a flip-side to the clarification in *Förster* that a five-year rule is allowed to ensure sufficient integration in the country granting financial assistance.

To conclude, the evolving case law clarified to some extent conditions of eligibility in the host state, home state, and portability. The rights of mobile workers' children and students with EU worker status are relatively settled. For cross-border workers, however, there is some 'confusion' in the case law, making the right less unconditional (De Witte 2013: 210). For all others, the host state needs to grant non-discriminatory access only after a five-year residence

period. As a consequence, restrictions on portability have been loosened. Beyond these guidelines, the limits of unifying rights to social benefits via case law become apparent. In a context of heterogeneous member-state policies, the Court uses different criteria of eligibility and oscillates between treating students as dependent family members and as individuals with their own rights (De Witte 2013: 212). There are many constellations where no longer a single state is clearly responsible. Next to children of cross-border workers, students who already access a portable grant may become additionally eligible with part-time employment in the host state. With view to integration criteria, there may be an overlap of acquired eligibility in the host state, and persistent eligibility in the former home state.

Between national prerogatives and EU judicial requirements: member states' reactions

As we saw, ECJ case law on non-discrimination and free movement highly influences member states' policies on access to university and student support. In the following, we will first discuss access to university education with a focus on Belgium and Austria. We will then turn to the more complex question of opening financial support and analyse member states' responses.

Under-provision in Belgium and Austria – the contested issue of equal access to university studies

Member states pursue different higher-education policies opting for tuition-free university education or more market-based approaches. The **(← p. 1530)** opening-up of higher education through the principle of non-discrimination necessarily has different implications: If tuition fees cover the full cost of education, it is easy to be non-discriminatory with view to nationality as markets discriminate already along the ability to pay. If university education is publicly funded, however, the redistribution from the general taxpayer to those receiving higher education makes opening more difficult. Because it is not possible to discriminate

along national lines under EU law, alternative means of protection become necessary. Language serves as such an alternative. Small member states with tax-funded university education bordering larger member states with the same language are, therefore, most vulnerable. This is the case for Belgium, with Wallonia bordering France, and for Austria. In fact, according to a calculation based on Eurostat figures for 2010, Hoogenboom (2013: 49f) finds that among all member states, Austria had the highest net-intake of 11.2% foreign students in the student body. Belgium reached 5.5% and the third place. The UK, imposing tuition-fees, was number two with a share of 6.9%.

Belgium and Austria were subject to Court cases challenging their attempts to close their universities for EU students. In order to protect their own citizens' university access, both countries originally demanded additional requirements from non-resident students (Gideon 2015). Germans could only study medicine in Austria if they could do so in Germany as well, in a sort of mutual-recognition principle (Hoogenboom 2013: 21). Belgium introduced a similar requirement in 2004, although the Commission had already handed its infringement procedure against Austria to the Court the year before. In July 2005, the Court judged the Austrian rule to be discriminatory on grounds of nationality by treating school leavers from Austria more favorably (C-147/03). In its judgment, the Court emphasised that measures need to be proportionate, may not be of a preventive character, build on objective considerations and clear evidence, and not be tied to nationality (Hoogenboom 2013: 23). The Court, in general, hardly recognizes budgetary justifications for restricting freedoms. Already a day after the Court ruling, Austria included a safeguard measure in its law, should opening threaten the 'homogeneity' of its education system (§ 124b (5) Universitätsgesetz).

After forced opening, the number of German students in medical, dental and veterinary studies as well as in psychology more than tripled from 784 to 2,461 students in 2005, then reflecting 7.4% of the total student population in these fields. In February 2006,

the minister triggered the safeguard and restricted the intake of students not being Austrian school-leavers to 25% (20% EU/EEA students and 5% international students) for Austrian faculties of medicine and dentistry.[3] Indeed, the percentage of German students in the aforementioned fields of study has continuously risen, being above 20% since 2011 and currently peaking at 25.7% of all students (in winter 2016). The very high figures for psychology, where almost every second **(← p. 1531)** student (42.5% in 2016) comes from Germany, underline how vulnerable Austria is without a quota.

The Commission had also addressed Belgium for infringing non-discrimination rights. Belgium had first experimented in the early 2000s with non-discriminatory entry exams to restrict the intake of non-Belgian students to medical, dental and veterinary studies, but French students often succeeded much better in these tests. Similar to Austria, the only resort was a restriction on mobility through quotas: Reacting to a proportion of up to 75% of students being non-Belgian and mostly from France (50% of foreign students were French in the fields of medical studies), places for non-Belgian nationals were cut to 30% for physiotherapy and veterinary degrees in Wallonia in 2006.[4] Thus, here we see an example where member states did not succeed in managing the impact of case law on welfare institutions without resorting to discrimination along the lines of nationality. Welfare was protected at the cost of free movement.

It is an open secret that the ratification of the Lisbon Treaty allowed Austria and Belgium to negotiate a moratorium of their infringement procedures until 2012, in order to gather data to justify their quotas for public policy reasons.[5] Both countries were in close contact to discuss possible ways of reconciling their university policies with EU law, emphasizing the need to safeguard public health.[6] Not being allowed to draw on financial arguments, Belgium, in addition, justified the quota with the quality of higher education, while Austria emphasised the coherence of its education system.[7] In parallel, a preliminary

ruling from Belgium was decided in 2010. While staying true to its general line of arguing, the Court accepted in C-73/08 *Bressol* proportionate measures for reasons relating to public health and the quality of education to restrict the non-discriminatory access to university training. The ruling strengthened the Austrian and Belgian position, while serving a blow to the Commission's attempts of opening member states' higher education.[8]

Though the Commission remained unconvinced by justifications for discriminatory treatment, voiced by Belgium and Austria, for instance, in *Bressol* (No. 56-61), the ruling allowed both countries to persuade the Commission of an extension of the moratorium until 2016 to gather further data backing their quota systems.[9] Following the prolongation, the Belgian government introduced quotas in additional fields – general and dental medicine (in 2012) as well as orthopedics and audiology (in 2013). The close monitoring of the situation showed that as many as 68% of German medical students return to their home country after their studies in Austria,[10] providing evidence to the Belgian and Austrian governments' fear of under-provision in medical professions.

Finally, in May 2017, the Commission agreed the quota system for medical studies in Austria to be proportionate and justified by protecting public health (IP/17/1282). The Belgian case is still open. Austria needs to keep monitoring the situation presenting reports to the Commission every five years. For dental **(← p. 1532)** studies, however, the Commission denied the justification, ordering Austria to remove the discrimination along nationality in the academic year 2019/20. By vetting the Austrian quota policy, the Commission acknowledged that free movement can undermine national welfare. If small countries neighbour large ones with more restrictive conditions, and language does not impose a barrier, tuition-free university education is highly vulnerable. Apparently, strategies of contained compliance were neither sufficiently available in Austria nor in Belgium to protect the policy. Without

exemption from free movement rights they would have had to alter their national policy altogether (Leidenmühler 2016).

Student maintenance support

Member states differ in their financial support of students. Some member states have no such policy at all. The more market-based student support is, in the form of a loan, the more easily it can be opened. The more it has a grant character, not being re-payable, and in the Danish case not even means-tested, the more conditional access has to be. Member states also differ greatly in their coverage of student financial maintenance. While some countries, like Italy, support below 10% of their students, others like Denmark fund between 90 and 100% (Lam et al. 2013: 31f.). Member states, moreover, pursue different preferences regarding student mobility: Some foster incoming students, for instance the UK, whereas others support outgoing students, and some aim to do both (Schrauwen 2011). Thus, free movement rights and non-discrimination will again impact these policies in different ways. Different to university access in Austria and Belgium, there are no unconditional rights to student support, but eligibility depends on prerequisites.

While the legal situation has become clearer in the course of case-law development, we saw that the Court bases eligibility on differing criteria. Consequently, case law results in highly complex European rules for financial student maintenance that are difficult to administer. In fact, even when member states implement case law on student support in a rule-of-law fashion, the complexity of the rules in this policy area shows the limits of the Court as a social arbiter.

In dealing with eligibility in cross-border situations, it has become usual practice for administrations to check with their counterparts in neighbouring member states – e.g., for Belgian with Dutch,[11] for Austrian with German[12] – which is more complicated when benefits are administered in decentralised as opposed to centralised structures. When benefits are

means-tested, host administrations have to engage in difficult calculations comparing income and savings in another member state.[13] The plurality of eligibility criteria do not allow for an unambiguous designation of responsibility to a single member state, and require structures to prevent double claims. **(← p. 1533)**

This complexity of conditional rights to funding of EU students gives reluctant member states some scope to contain compliance, thereby exemplifying the micro foundations of how member states keep their systems resilient under conditions of free movement. We focus on Austria, as the Belgian case study (mirroring what we said about institutional differences) did not bring up problems with the funding of EU students, despite the *Gzelczyk* case that dealt with this topic. Thus, in Austria the administration regularly deducted the amount of Austrian child benefit from grants, even if the parents of EU students were not residing in Austria.[14] Another illustration is a case from November 2015 at the Austrian Federal Administrative Court (Bundesverwaltungsgericht), newly established in a 2014 administrative law reform.[15] A German medical student had taken up two sorts of part-time employment in Austria and claimed eligibility to a student grant on this basis, providing the necessary documentation as to the financial situation of the family. But the court denied the application, as the student only handed in proof of not having applied for a German grant, but could not bring proof that such application would not follow later.[16]

Contained compliance is also facilitated because eligibility decisions are often administrative acts, with no proper judicial redress but only an administrative complaint procedure, not leading to published decisions. This hides administrative interpretations of European case law from future claimants. In Austria, before the 2014 reform, the ministry decided on appeals, and cases were only published when either the administrative court (Verwaltungsgerichtshof) or the constitutional court became involved. The *Ninni Orasche* case being handed from the administrative court to the ECJ was therefore an exception.

Similarly, the opening of the generous Danish benefit in 2013 (C-46/12 *L. N.* vs *Styrelsen*) was an 'accident' given the unlikeliness of judicial redress in the Danish procedure (Martinsen and Werner 2018). Its non-transparent procedure similarly shields Belgium from judicial appeals.[17]

As already mentioned, the implications of highly complex EU legal rules are not always clear to governments. Thus, Austria suddenly noticed that all EU citizens were eligible for grants, although this had never been intended.[18] After 22 months of residence, an Italian student had applied for a grant. When it was denied, she appealed, arguing that Austria had not used the possibility of Article 24(2) of the Citizenship Directive 2004/38 to constrain EU citizens' equal rights in the first five years of residence. The federal administrative court recognised that the law on study grants (§4(1) StudFG) indeed did not require a five-years residence period for EU citizens, implying full equal rights based on Article 24(1). Once the ruling spelt out the legal situation in December 2014, the responsible Ministry quickly reacted with a reform (BGBl. I Nr. 47/2015).

If governments make such mistakes, legal uncertainty must be even more burdensome for individuals. It is notable that the official Austrian website **(← p. 1534)** explaining eligibility for grants, speaks of the 'legal complexity' and 'rapidly changing conditions (case law of the ECJ!)' making it impossible to clarify when EU citizens enjoy equal rights.[19] Different to secondary law, where legislatures lay out conditions of benefits according to certain criteria, case law of the Court is developed with view to the constellation of the dispute at hand. What a ruling means for the situation in other member states is not always evident.[20] Consequently, potential beneficiaries with legal counsel enjoy clear advantages when policy is guided by relatively non-transparent case law compared to more transparent legislative law. Legal uncertainty is heightened because the Court gives few reasons in its

judgment, and does not spell out when it changes its interpretation (Beck 2012: 255; Conway 2012).

Different to legislatures, courts are not legitimated to draw up whole policies; they have to interpret law in a given case. The Court thus cannot devise general rules for student financial maintenance; it can only establish what non-discrimination and free movement mean for the eligibility criteria of different member states' schemes. In light of the heterogeneity of national schemes, if they exist at all, case law consequently increases institutional complexity and introduces new grounds for inequality, given the many possible combinations of cross-border situations of student support. In the above mentioned Austrian court case, the student argued that he felt discriminated against for having to bring proof of non-application for grants in Germany. After all, Italian, Polish, Slovakian, Romanian, and Czech students did not need to bring such proof as their countries do not provide portable student grants (No. 2.3.11 of the ruling).[21]

In sum, while administrations may use the complexity of financial grants to contain compliance, they are also faced with demands of inter-administrative coordination and information, when legally no exclusive responsibility of a single member state can be established. Compared to tuition-free university education, the complexity of student financial maintenance helps protecting the resilience of the schemes. At the same time, it becomes apparent how the Court by itself cannot succeed in building a level-playing field through its case law. Given member states' heterogeneous schemes and the different eligibility criteria of EU law, case law results in legal uncertainty, and contributes to new inequalities: Institutional heterogeneity increases with the many different possible cross-border situations. A German student in Austria will be treated differently than an Italian one. The Court cannot compensate for the EU legislature failing to provide for social Europe.

Conclusion: the limits of integration through law

National welfare states and free movement rights are in tension in the EU. Yet, fully developed welfare states appear remarkably resilient, certainly helped by the largely immobile population. Two explanations can account for this in the **(← p. 1535)** literature. On the one hand, the institutional variety among member states is high. Implementing free movement and non-discrimination rights has asymmetric repercussions on member states. Given the many institutional features that determine the impact – type and funding of social benefits, criteria for benefits, labour market flexibility, administrative efficiency, data exchange – opening may not clearly (dis-)advantage one specific type of welfare state, but depends specifically on the shape of different benefits. On the other hand, explanations link welfare resilience to member states' contained compliance. The scope for such behaviour is greater the more conditions are tied to a benefit.

With higher education and student financial maintenance, we chose a part of the welfare state that offers institutional variety among member states. The example of free movement into medical studies in Austria and Belgium shows that under adverse conditions welfare provision requires discriminatory measures, such as a quota, for protection. The Commission finally agreed to this restriction of free movement and non-discrimination. Tuition-free unconditional university access in smaller member states, neighbouring larger states with the same language and a more restrictive university policy, are extremely vulnerable to free-riding. The analysis of this case alongside the more complex student maintenance rules shows that comparable non-favourable conditions for opening are rare. Had the Court required Austria in *Brey* (C-140/12) to open up its compensatory pension without conditions to all EU pensioners choosing to settle in Austria (Davies 2018), similar dynamics of a race to the bottom would have been likely. If benefits are unconditional and important

enough for a mobile target population to move, member states' welfare systems can be undermined, as predicted by Scharpf (2010).

Student financial maintenance has not seen similar threats of under-provision. Even Denmark, with its generous scheme, is under little pressure (Martinsen and Werner 2018). Under the assumption that member states aim to protect their national schemes against over-use, in general we find a surprising extent of compliance with EU case law. The different avenues of containing compliance are more hidden. Administrative procedures may lack judicial redress and transparency of reasoning, hiding that EU students are not always treated on a par. As all schemes have some conditions, which EU students need to fulfil, they can be guarded without explicit restriction on free movement. It should not be overlooked, however, that the impact of case law may also lie in non-decisions. Member states appear to refrain from introducing portability of grants, for instance.[22]

Comparing the extreme cases of medical students in Austria and Belgium with student support, we can thus trace several instances of a contained compliance strategy that adds to the resilience of schemes. In the context of diverse member-state policies regarding student financial maintenance, another finding of our analysis is notable: The incapacity of the Court to **(← p. 1536)** provide clear guidelines as to the conditions of students' eligibility criteria. The Court links EU students to the scheme of a host or the home state along different lines, relating to employment or residence. Some requirements of solidarity are absolute, such as worker status, others are conditional upon the link to the country. The resulting complexity of rules, apparent in our description of case law, confronts not only potential beneficiaries with significant legal uncertainty, but introduces new inequalities among EU students: Those with access to legal counsel are advantaged. Moreover, with multiple possible cross-border constellations situating EU students in-between schemes of host- and home-states, new inequalities result, as documentation requirements and administrative hurdles EU students

face will be very different, depending on his or her home country. Non-discrimination, by itself, fails in delivering the social dimension.[23]

Different to single market policies, the ECJ did not succeed as an important motor of common social policies. Where case law may result in a regulatory race to the bottom in the single market, there is the analysed risk of under-provision in the social realm. But compared to the regulatory policies of the single market, it appears much more unlikely that common social policies involving distributive issues should follow case law. Our analysis of university policy has exemplified the different traditions and policy priorities of member states. In view of legislative inaction towards social Europe, the limits of judge-made law in furthering the social dimension have to be recognised.

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Acknowledgements

We would like to thank the anonymous reviewers and the editors of JEPP. The paper is part of TransJudFare, funded by Norface, WelfareStateFutures (DFG SCHM 2404/1-1). We thank Martin Weinberger for excellent research support, and the participants of the November 2017 workshop in Bremen for their feedback.

Notes

[1] European Commission (2016) 'Questions and Answers on the revision of social security coordination rules' 13 December, Brussels: Commission of the European Communities, available at http://europa.eu/rapid/press-release_MEMO-16-4302_en.htm (accessed 03 May 2018).

[2] See, e.g., C-39/86 *Lair* and C-197/86 *Brown* [both 1988] and also C-389/87, C-390/87 *Echternach*, *Moritz* [1989]; C-308/89 *Di Leo* [1990]; C-357/89 *Raulin* and C-3/90 *Bernini* [both 1992], C7/94 Gaal [1995]; C-337/97 *Meeusen* [1999].

[3] *Der Standard* (2006) 'Plus 111 Deutsche Studenten', 11. Februar.

[4] Interview with expert at University of Louvain-la-Neuve, 12/11/2013; Interview with Flemish Ministry of Education & Training, 27/05/2015. The Observatory on Borderless Higher Education. (2010). "Mutatis mutandis? The Court of Justice of the European Union rules that member states may be allowed to impose non-resident student quotas'." from http://www.obhe.ac.uk/documents/view_details?id=823, available at https://www.ares-ac.be/fr/statistiques (accessed 03 May 2018).

[5] Interview with expert at University of Louvain-la-Neuve, 12/11/2013; interview with European Commission, Legal Service, 11/08/2015.

[6] Interview with Advocate General at the European Court of Justice, 12/11/2013.

[7] Interview with Juriste à la direction générale de l'Enseignement non obligatoire et de la Recherche scientifique, la Fédération au niveau de Bruxelles, 12/11/2013; interview with Académie de Recherche et d'Enseignement supérieur – ARES, 11/09/2015.

[8] Interviews Legal Service, European Commission, 12/11/2013 & 11/08/2015.

[9] Die Presse (2011) *Offener Uni-Zugang wackelt, 09.07.2011*.

[10] Bundesministerium für Wissenschaft, Forschung und Wirtschaft (2014) 'Beantwortung der schriftlichen parlamentarischen Anfrage Nr. 2721/J betreffend **(← p. 1537)**"der Zugangsregelungen an Österreichischen Universitäten" des Abgeordneten Dr. Nikolaus Scherak vom 5. Dezember 2015'.

[11] Interviews Department for Study Grants, Flemish Agency for Higher Education (AHOVOKS), 12/08/2015.

[12] Interview, Landeshauptstadt München, 19/03/2015.

[13] Interviews Studienbeihilfebehörde & BMWFW (Bundesministerium für Wissenschaft, Forschung und Wirtschaft), 08/03/2016.

[14] Interviews Studienbeihilfebehörde & BMWFW (Bundesministerium für Wissenschaft, Forschung und Wirtschaft), 08/03/2016.

[15] Bundesverwaltungsgericht (26.11.2015) Entscheidung BVwG W129 2008055-2.

[16] Verwaltungsgerichtshof (21.12.2016) *Ro* 2015/10/0012.

[17] Interviews Department for Study Grants, Flemish Agency for Higher Education, Adult Education, Qualifications and Study Grants (AHOVOKS), 12/08/2015.

[18] Bundesverwaltungsgericht (01.12.2014) *Beschluss* W128 2009681-1/2E.

[19] Österreichische Studienbeihilfenbehörde. (2015) 'Studienbeihilfe: Wer hat Anspruch?', 11.07, available at https://www.stipendium.at/studienfoerderung/studienbeihilfe/wer-hat-anspruch/ (accessed 03 May 2018).

[20] Interview with Flemish Ministry of Education & Training, 27/05/2015.

[21] Verwaltungsgerichtshof (21.12.2016) *Ro* 2015/10/0012.

[22] Interview with Flemish Ministry of Education & Training, 27/05/2015.

[23] This is why, in the world trade regime, the most-favoured nations clause compensates for such inequalities arising from applying the non-discrimination rule.We thank Fritz Scharpf for pointing this out. **(← p. 1538)**

References

Beck, G. (2012) *The Legal Reasoning of the Court of Justice of the EU*, Oxford/Portland: Hart.

Blauberger, M. et al. (2018) 'ECJ judges read the morning papers: Explaining the turnaround of European citizenship jurisprudence', *Journal of European Public Policy*, <THIS ISSUE: PUBLISHER TO ADD /UPDATE DETAILS AT PROOF>.

Blauberger, M. and Schmidt, S. K. (2017) 'Free movement, the welfare state, and the European Union's over-constitutionalization: administrating contradictions', *Public Administration* 95(2): 437-449.

Busemeyer, M.R. and Trampusch, C. (2011) 'Review Article: Comparative Political Science and the Study of Education', *British Journal of Political Science* 41(2): 413-43.

Caporaso, J.A. and Tarrow, S. (2009) ‘Polanyi in Brussels: supranational institutions and the transnational embedding of markets’, *International Organization* 63(4): 593-620.

Cichowski, R.A. (2007) *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge, UK: Cambridge University Press.

Conant, L. (2002) *Justice Contained. Law and Politics in the European Union.*, Ithaka/London: Cornell University Press.

Conway, G. (2012) *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge: Cambridge University Press.

Davies, G. (2016) ‘The European Union legislature as an agent of the European Court of Justice’, *Journal of Common Market Studies* 54(1): 1-16.

Davies, G. (2018): 'Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication', *Journal of European Public Policy,* <THIS ISSUE: PUBLISHER TO ADD /UPDATE DETAILS AT PROOF>.

De Witte, F. (2013) ‘Who Funds the Mobile Student? Shedding Some Light on the Normative Assumptions Underlying EU Free Movement Law’, *Common Market Law Review* 50(1): 203-15.

Dougan, M. (2005) ‘Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?’, *Common Market Law Review* 42(4): 943-86.

Esping-Andersen, G. (1990) *The Three Worlds of Welfare Capitalism*, Princeton: Princeton University Press.

Gideon, A. (2015) 'The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective', *Journal of Common Market Studies* 53(5): 1045–60.

Hoogenboom, A. (2013) 'Mobility of Students and the Financial Sustainability of Higher Education Systems in the EU: A Union of Harmony or Irreconcilable Differences?', *Croatian Yearbook of European Law and Policy* 2013: 15-60.

Lam, Q.K.H., Oste, D. and Wächter, B. (2013) *Portable state grants and loans: An overview and their contribution to outgoing student mobility*, Bonn: Lemmens Medien GmbH.

Leidenmühler, F. (2016) *Quotenregelung für Studierende der Human- und Zahnmedizin auf dem europäischen Prüfstand*, ÖGfE Policy Brief, 31, Wien.

Maas, W. (2017) 'Boundaries of political community in Europe, the US, and Canada', *Journal of European Integration* 39(5): 575-90.

Martinsen, D.S. (2015) *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*, Oxford: Oxford University Press. **(← p. 1539)**

Martinsen, D.S. and Rotger, G.P. (2017) 'The fiscal impact of EU immigration on the tax-financed welfare state: testing the 'welfare burden' thesis.', *European Union Politics* 18(4): 620-39.

Martinsen, D.S. and Werner, B. (2018) 'No welfare magnet – movement and benefits in Germany and Denmark compared', *Journal of European Public Policy,* forthcoming.

Pierson, P. and Leibfried, S. (1995) 'Multitiered Institutions and the Making of Social Policy', in S. Leibfried and P. Pierson (eds), *European Social Policy. Between Fragmentation and Integration*, Washington D.C.: The Brookings Institution, pp. 1-39.

Ruhs, M. (2017) ‘Free movement in the European Union: National institutions vs common policies’, *International Migration*, 55(S1), pp. 22–38.

Scharpf, F.W. (2000) ‘Notes toward a theory of multilevel governing in Europe’, *Scandinavian Political Studies* 24(1): 1-26.

Scharpf, F.W. (2010) ‘The asymmetry of European integration, or why the EU cannot be a 'social market economy'’, *Socio-Economic Review* 8(2): 211-50.

Schmidt, S. K. (2018) *The European Court of Justice and the Policy Process: The Shadow of Case Law*, Oxford: Oxford University Press.

Schrauwen, A. (2011) *Access to and Portability of Student Grants and Loans: Where targets meet free movement law*, Amsterdam: Amsterdam Centre for European Law and Governance.

Stone Sweet, A. (2004) *The Judicial Construction of Europe*, New York: Oxford University Press Inc.

Strumia, F. and Brown, C. (2015) ’The Asymmetry in the Right to Free Movement of European Union Citizens: the Case of Students’, available at http://eulawanalysis.blogspot.de/2015/07/the-asymmetry-in-right-to-free-movement.html (accessed 04 May 2018).

Thym, D. (2015) ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’, *Common Market Law Review* 52(1): 17-50.

Wasserfallen, F. (2010) ‘The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union’, *Journal of European Public Policy* 17(8): 1128-46.

Weatherill, S. (2012) *Cases and materials on EU law,* 10th ed., Oxford: Oxford University Press.

Weiler, J.H.H. (1991) 'The transformation of Europe', *The Yale Law Journal* 100(1): 2402-83.

Werner, B. (2017) 'Das Europäische Freizügigkeitsregime als Herausforderung für die nationalen Sozialsysteme: Reaktionen des deutschen Wohlfahrtsstaates und die Folgen', *Politische Vierteljahresschrift* 58(4): 509-532.

Wollenschläger, F. (2011) 'A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration', *European Law Journal* 17(1): 1-34. **(← p. 1540)**