Common Market Law Review **43:** 1711–1726, 2006.

Case C-147/03, *Commission of the European Communities* v. *Republic of Austria*, Judgment of the Court (Second Chamber) 7 July 2005, not yet reported

1. Introduction

The (in)famous Lisbon strategy[1] and various Presidency Conclusions all highlight the importance of education and mobility of teachers, students and young people in general.[2] Both aspects – the importance of education and mobility – are addressed by the EC Treaty in the section on Education, Vocational Training and Youth.[3] Several programmes, most prominently ERASMUS MUNDUS,[4] were set up in order to promote the idea of mobility.

The basic principle for these programmes is giving students access to other EU universities without discrimination. Admission criteria play a decisive role in this regard and have already been at the centre of the European Court of Justice's case law.[5]

This case note will not only discuss the current judgment, which addressed the Austrian admission criteria; it will also study the new legal situation in Austria which resulted from the ECJ's judgment and will question its legitimacy in the light of already established principles in this field.

1. Presidency Conclusions of the European Council (23–24 March, 2000).

2. See Presidency Conclusions of the European Council (23–24 March 2006); it is interesting to note that this policy seems to work if one reads the latest EUROBAROMETER survey (National Report of Austria): Austrians asked what they associate with the EU mention the EURO (48%) and more criminality (44%). However, if one focuses only on young people (15–24 years) they name freedom to travel, work and study everywhere in the EU (57%) followed by the EURO (48%) (EUROBAROMETER/64 (2005), Nationaler Bericht: Österreich, 23–24).

3. Art. 149(2), second indent EC: "Community action shall be aimed at: … encouraging mobility of students and teachers, …." Cf. Art. 150(2), third indent EC for vocational training.

4. Decision No 2317/2003/EC of the European Parliament and the of the Council of 5 Dec. 2003 establishing a programme for the enhancement of quality in higher education and the promotion of intercultural understanding through cooperation with third countries (Erasmus Mundus) (2004 to 2008), O.J. 2003, L 345/1. See generally about the legal basis for the ERASMUS programme: Van der Mei, *Free Movement of Persons Within the European Community. Cross-Border Access to Public Benefits* (Oxford, Hart, 2003), p. 343.

5. Case C-293/83, *Gravier*, [1985] ECR 593; Case 24/86, *Blaizot*, [1988] ECR 379; Case 293/85, *Commission* v. *Belgium*, [1988] ECR 305.

2. Facts

The following section will give a brief outline of the Austrian legal situation regarding university admission criteria effective at the material time.[6] According to paragraph 35 of the Austrian Law on University Studies (*Universitäts-Studiengesetz*[7]) everybody holding a secondary Austrian diploma (*österreichisches Reifeprüfungszeugnis*) fulfilled the "General University Entrance Criteria" and consequently was entitled to study any subject offered at an Austrian university. According to paragraph 36(2) of the Law on University Studies, the Ministry of Education could – by Ministerial Regulation – set "Special University Entrance Criteria" for particular fields of studies (University Entrance Regulation).[8] However, none of these criteria established the requirement of a particular average grade.

Generally the Austrian admission system was designed to give students with a secondary Austrian diploma unrestricted and broad access to university.[9] Additionally, legal provisions allowed the Federal Minister of Education to designate groups of persons whose entrance qualifications were to be regarded as being issued in Austria, thus giving them an equally generous access to university to that of applicants holding an Austrian secondary Di-

6. It is worth mentioning that the Austrian highest Courts have already been faced with the question of university admission in Austria. In 1997 the Austrian Constitutional Court (*österreichischer Verfassungsgerichtshof*, VfSlg 14.886) had to decide if the Austrian university admission criteria were unconstitutional. An *Austrian* citizen, who held a secondary diploma from Germany, was denied admission to an Austrian university because she did not have a study place in Germany and therefore did not fulfil the "Special University Entrance Criteria". The Constitutional Court did not find the respective legal provisions in breach of Austrian Constitutional Law (in particular, the clause on prohibition of discrimination of Austrian citizens) and did not declare the legal provision void or the administrative decision unlawful. In accordance with its own case law, the Constitutional Court refused to refer the case to the ECJ for a preliminary ruling, essentially arguing that breaches of Community Law are equated by the Constitutional Court only with breaches of simply majority legislation; consequently they must be addressed by the Highest Austrian Administrative Court (Korinek, "Zur Relevanz von europäischem Gemeinschaftsrecht in der verfassungsgerichtlichen Judikatur" in Krejci, Marhold et al. (Eds.) *Festschrift Tomandl* (Manz, 1998), p. 465, 467). This even holds true if a fundamental Community right is in question. Strangely, this makes the Administrative Court the guardian of fundamental rights (Walter and Mayer, *Grundriß des österreichischen Bundesverfassungsrechts,* 9th ed. (Manz, 2000), para 246/31). The Administrative Court, declined the petition on procedural grounds (VwGH 23.2. 2000, 97/12/0366.).

7. BGBl. I Nr. 48/1997 last amended by BGBl. I Nr.121/2002. This Act is by now replaced by the Universitätsgesetz 2002 (Universities Act), BGBl. I Nr. 120/2002, last amended by BGBl. I Nr. 74/2006.

8. Universitätsberechtigungsverordnung – UBVO 1998, BGBl. II Nr. 44/1998, last amended by BGBl. II Nr. 429/2004: e.g. knowledge of Latin for human medicine.

9. This has to do with Austria's low percentage of people holding an academic degree (Begründeter Einspruch des Bundesrates, 21 April 2006, 1439 der Beilagen XXII. GP).

ploma; for historical reasons the Regulation cites persons holding a secondary Diploma from German or Ladino speaking secondary schools in South Tyrol, Italy.[10]

The situation, however, looked rather different for those applicants whose university entrance qualification was not issued (or not regarded as being issued) in Austria. According to paragraph 36(1) of the Austrian Law on University Studies, they had to demonstrate that they would meet the entrance requirements for the relevant course of study, including entitlement to immediate admission, in the (Member) State which issued the entrance qualification. In other words: the decisive criteria for admission for these applicants were not the Austrian criteria but admission criteria of another Member State. For German students, who were the primary target of this provision, this meant that not qualifying under the *numerus clausus* (achieving the minimum grade) in Germany, would thereby make them unable to gain access to a medical school in Austria. However, the same applicant, holding a university entrance diploma with the same average grade but issued by an Austrian school would be entitled to study e.g. at a medical school. With this application regime Austria quite effectively barred mostly German applicants who did not achieve the minimum grade for medical studies in Germany.

Unsurprisingly, this legal situation did not meet the approval of the Commission which sent a letter of formal notice to Austria in 1999. The Commission argued that paragraph 36 of the Law on University Studies breached Articles 12, 149 and 150 EC. Subsequently, over the following years, correspondence between the Commission and Austria was exchanged. Finally, not being satisfied with Austria's responses in the year 2003, the Commission brought an action against Austria under Article 226 EC for breach of the above mentioned Treaty provisions.[11]

3. The judgment of the Court[12]

The judgment, delivered by the Court in 2005, reiterated the existing case law by holding that university admission fell within the scope of the Treaty. In doing so, it quashed Austria's submission that the disputed paragraph 36

10. Paragraph 1(3) and 3 Personengruppenverordnung (Regulation of the Federal Minister), BGBl II Nr 211/1997 last amended by BGBl II Nr 15/1998.

11. See generally for further references about Community law and policy on education: Van der Mei, op. cit. *supra* note 4, Chapt. 5, Fn 4.

12. Since the Court essentially followed the reasoning of the Opinion of A.G. Jacobs in this case, and gave a ruling identical to that proposed by the A.G., this case note does not analyse the Opinion separately.

of the Law on University Studies fell outside the scope of the Treaty because it only addressed the *recognition* of secondary education.[13] The Court, with reference to *Gravier*[14] and *Commission* v. *Belgium*,[15] held that "[p]aragraph 36 of the UniStG [Law on University Studies] lays down conditions governing *access*[16] to higher or university education in Austria."[17] This, it stated, is covered by the Treaty.

Having established the applicability of the Treaty, the Court examined the Austrian law in the light of Article 12 EC.[18] Article 12 EC "requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State."[19] The fact that the Austrian law, however, required students not holding an Austrian secondary diploma to fulfil the access criteria of the "issuing State" leads to the conclusion that Austria applied "distinguishing criteria" when it came to university admission depending on where the university entrance diploma had been issued.[20] Therefore, the Court found not only an indirect discrimination between applicants "who have obtained their secondary education diplomas in a Member State other than the Republic of Austria, but also between those same students according to the Member State in which they obtained their secondary education diploma."[21] Furthermore, the Court referred to the principle of EU citizenship, which enables "those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for …."[22] According to well established case law the above described different treatment "could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions …".[23]

13. Judgment at paras. 30–35.

14. *Gravier*, *supra* note 5, paras. 23–25: "The common vocational training policy … constitutes, moreover, an indispensable element of the activities of the Community, whose objectives include inter alia the free movements of persons, the mobility of labour and the improvement of the living standards of workers. Access to vocational training is in particular likely to promote free movement of persons throughout the Community, …. It follows from all the foregoing that the conditions of access to vocational training fall within the scope of the Treaty." According to *Blaizot* (*supra* note 5, para 31) university studies are "covered by the term 'vocational training'".

15. *Commission* v. *Belgium*, supra note 5.

16. Emphasis added.

17. Judgment, para 34.

18. Ibid. at para 35.

19. Case C-186/87, *Cowan,* [1989] ECR 195, para 10.

20. Judgment, para 41.

21. Ibid. at para 43.

22. Ibid. at para 45.

23. Ibid. at para 48 (with further references)

Austria submitted three grounds to justify the different treatment: first, Austrian representatives argued that the different treatment is necessary in order to protect the "homogeneity" of the Austrian higher or university system; second, it prevents abuse of Community law; and finally, it is justified by international conventions, in particular within the framework of the Council of Europe regarding diploma recognition.[24]

None of the justifications was accepted by the Court. Regarding the argument of preserving the "homogeneity" of the Austrian higher or university education system, the Court found that Austria did not present any figures (and probably would not be able to present any data[25]) of the impact on abolishing the current safeguard mechanism. The Court, however, suggested that if Austrian universities experienced an excessive inflow of students, more proportionate measures, such as entry examinations, could be adopted in conformity with Article 12 EC.[26] Furthermore, the Court dismissed the "prevention-of-abuse-argument" by saying that the Treaty itself fosters mobility among students and teachers. Therefore it cannot be an abuse of Community law if a student tries to gain access to the Austrian higher educational system under the same conditions as students whose secondary diploma was issued in Austria.[27] Lastly, the Court addressed the question whether conventions concluded by Austria in the framework of the Council of Europe could justify any different treatment. The Court rejected the argument[28] by referring to the case of *Commission* v. *Luxembourg*, where it was held that a Member State cannot rely on international obligations "in order to escape its Community obligations."[29]

To conclude: the Court found breaches of Articles 12 EC, 149 EC and 150 EC. Consequently the Austrian law was changed by introducing paragraph 124a Universitätsgesetz 2002 (University Act) which declared that, generally, secondary diplomas (not confined to EU diplomas) were to be regarded as equal to Austrian diplomas.[30] This caused an influx of German students happy to escape the *numerus clausus* and willing to study in Austria.[31]

24. Ibid. at paras. 49–59.

25. Since Austria's entry into the EC in 1995 it has always discriminated against holders of foreign diplomas in this way.

26. Judgment, para 61.

27. Ibid. at paras. 67–70.

28. Ibid. at paras. 71–74.

29. Case C-473/93, *Commission* v. *Luxembourg,* [1996] ECR I-3207, para 40.

30. Universitätsgesetz 2002, BGBl. I Nr. 120/2002, amended by BGBl. I Nr. 77/2005. The inclusion of paragraph 124b University Act, which allows the Universities to introduce admission tests, can be considered to be a protective mechanism in order to regulate the access to particular fields of studies, such as human medicine and veterinary medicine.

31. There were 17% registered "German" medical students at the University of Vienna in

4. Reactions

Reactions to the judgment from the Austrian political establishment were swift and surprisingly uniform, considering the cleavages among the Austrian political parties after the coalition which was formed between the people's party (ÖVP) and the freedom party (FPÖ) in the year 2000. Scapegoats were identified as the Commission and the ECJ: Chancellor Schüssel detected on the eve of the Austrian Presidency some "dangerous developments". Referring to the judgment, Schüssel claimed that education policy belongs solely to the competence of the Member States and that the ECJ is undermining this national competence.[32]

A speaker for the Social Democrats saw the Commission having a passion for "torturing small, neutral countries".[33] What is interesting though, is that even the President of the Austrian Constitutional Court, Karl Korinek, did not refrain from giving his statement on the issue by criticizing the ECJ for having lost "its balance" and thus risked losing credibility and acceptance among the people.[34]

Considering this environment, it did not come as a surprise that the Austrian National Council voted on 1 March 2006[35] – during the Austrian EU Presidency – for a new federal law regulating university admission.[36] This law establishes now that a contingent of 95 per cent of study places will be allotted to EU citizens. However, 75 per cent of these places are reserved for students holding an Austrian secondary diploma.[37] The affected studies can be designated by Ministerial Regulation.[38]

the winter term of 2005/06; the Innsbruck medical school listed 42% "German" students and Graz 38% (Pöll, "Inländerquote soll Ärztenachwuchs sichern", *Die Presse*, 25 April 2006, VIII.)

32. "EU: Schüssel sieht 'einige gefährliche Entwicklungen'", *Die Presse.com*, 30 Dec. 2005, available at www.diepresse.com/artikel.aspx?channel=p&ressort=eu&id=529336.

33. "EU sagt 'Nein, aber' zur Quote", *Der Standard*, 24 Feb. 2006, 10.

34. "EuGH hat die Balance nicht gehalten", *Die Presse.com*, 26 Sept. 2005, available at www.diepresse.at/Artikel.aspx?channel=e&ressort=r&id=508678. The Court, however, according to EUROBAROMETER still ranks second best for the Austrians behind the European Central Bank (EUROBAROMETER, *supra* note 2, 34).

35. On the 21 April 2006 the Federal Council, however, raised a reasoned objection, therefore the bill came back to the National Council again on 23 May 2006, which delivered an insistence vote (*Beharrungsbeschluss*).

36. Nr 42 des Bundesgesetzes mit dem das Universitätsgesetz 2002 geändert wird, BGBl I Nr 74/2006.

37. Para. 124b (5) Universitätsgesetz 2002, amended by BGBl I Nr 74/2006. The quota Regulation was also welcomed by the leading opposition party, the Social Democrats and accepted – although less enthusiastically – by the Green Party ("Quote für Medizinstudium beschlossen", *derStandard.at*, 3 March 2006, available at derstandard.at/?url=/?id=2361414.

38. Para 124b (5) Universitätsgesetz, amended by BGBl I Nr 74/2006. Para 124b (1) limits

5. Comment[39]

The next section will discuss Austria's arguments during the Court hearing and the reasons given to justify the new legal admission system.

5.1. *Austria's concept of university admission*

As already mentioned, Austria lacks a sufficient percentage of university graduates. Therefore, it granted unrestricted access to university education which should help to improve the percentage of Austrian citizens with a higher education qualification.[40] However, two aspects are worth considering in this context, which question the validity of this submission. First, despite this (now) identified "policy of national interest", Austria did not deem it necessary to negotiate a protocol to the accession Treaty.[41] This would have enabled Austria to make reference to its peculiar situation. The fact that university admission was considered to fall under the application of the EC Treaty and therefore formed part of the *acquis communautaire* was obvious since the late 1980s, when the Court rendered its judgments in *Gravier*[42] and *Blaizot.*[43] However, no protocol was negotiated.

possible fields of studies to studies which are subject to a German nationwide *numerus clausus*: Biology, Medicine, Pharmacy, Psychology, Veterinary Medicine and Dental Medicine, Business Administration, Communication Studies and Journalism.

39. A year prior to the judgment against Austria, the Court had already found breaches of Art. 12, 149, 150 EC by Belgium (Case C-65/03, *Commission* v. *Belgium*, [2004] ECR I 6427). The Court proceeded to judgment without an Opinion of the AG, which is possible according to Art. 20 of the Statute of the Court which reads that "[w]here it [Court] considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General." Similar to Austria, Belgium is going to introduce a quota system from autumn 2006. However, the quota of 30% will only apply to first years and students who are not resident in Belgium for three years ("Belgien beschließt Quoten für nicht ansässige Studenten*", der.Standard.at*, 13 Feb. 2006, available at derstandard.at/?url=/?id=2331261.

40. Opinion of A.G. Jacobs, para 26. Ministry of Education, Science, and Culture, "Frequently Asked Questions (FAQ) zum EuGH-Urteil" (11 July 2005), available at www.bmbwk.gv.at/medienpool/12664/faq_eugh.pdf.

41. Cf. on the issue of protocols Hilson, "The Unpatriotism of the Economic Constitution? Rights to Free Movement and Their Impact on National and European Identity" (Paper prepared for the workshop on 'Political Identity and Legitimacy in the Politics of the European Union' ECPR Joint Sessions Nicosia, 25–30 April 2006), available at www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/nicosia/ws17/Hilson.pdf.

42. *Gravier, supra* note 5.

43. *Blaizot*, *supra* note 5.

Secondly, if it were Austria's primary concern to increase the percentage of Austrians holding a university diploma then it seems difficult to understand why Austria started to charge for tuition in 2001, which makes it more difficult – at least from a financial point of view – to pursue higher education.[44]

Austria applied a "country of origin" principle in order to protect its peculiar admission system. During the hearing, Austria's representatives argued that this principle should be applied in analogy to the field of free movements of goods and services.[45] However, this would mean that other countries which have entry examinations or minimum grade requirements would be forced to admit Austrian students as long as they fulfil the generous Austrian admission requirements. These countries would effectively be forced to defy their own admission criteria for particular students.

5.2. *Preserving the homogeneity of the Austrian higher educational system*

It has been shown above that Austria's university admission system is "liable to have a greater effect on nationals of other Member States than on Austrian nationals, and therefore … results in indirect discrimination."[46] Austria argued during the Court hearing[47] and when introducing the new quota system[48] that the indirect discrimination can be justified in order to protect "homogeneity of the Austrian higher education system".[49]

The terminology itself is slightly ambiguous.[50] Studying the Parliamentary materials, the meaning which unfolds seems to be the following: in Austria, young people should have unrestricted access to education from primary school up to university. All the different educational steps are very much interrelated and react sensitively to demands from society and companies.[51]

44. See generally on the effect of tuition: Hartmann, "Studiengebühren und Hochschulzugang", 33 *Leviathan* (2005), 439, 452–459.

45. Ministry of Education, Science, and Culture, *supra* note 40. However, the "country of origin" principle has been eliminated recently from the Services Directive (COM (2006) 160 final) out of fear that countries with low social standards would undermine those countries with higher standards (cf. on the Services Directive proposal (COM (2004) 2)) Editorial Comments, "The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?", 43 CML Rev. (2006), 307, 308–309.

46. Judgment, para 47.

47. Id. at para 48.

48. 1308 der Beilagen zu den Stenographischen Protokollen des Nationalrats XXII.GP, 4.

49. Opinion of A.G. Jacobs, para 30.

50. Cf. ibid.

51. 1308 der Beilagen, *supra* note 48, 4.

Those people who have successfully completed the educational path in Austria are usually deeply integrated in Austrian society and will most likely stay in the country after their studies.[52]

A sufficient number of graduates remaining in the country is crucial (particularly in the field of medical studies) in order to be able to grant balanced and unrestricted medical assistance to its citizens on a high level. Austria's fear is that if there were too many "foreign" trainee doctors or medical students in Austrian medical schools, there would be a risk that they would return back home after the completion of studies and leave the Austrian health care sector with a shortage of medical doctors.[53] However, these fears are not backed up by any statistical data. According to a recent – unpublished – study by the Austrian Federal Institute for Health Care (Österreichisches Bundesinstitut für Gesundheitswesen) within the next few years, 300 to 700 graduates of medical school will not find a job in Austria.[54] However, even if one accepted Austria's fear of labour shortage in the sector, there is no explanation why applicants holding a secondary diploma from a German school fall in the 20 per cent quota, whereas applicants holding a secondary diploma from a school in South Tyrol in Italy fall in the 75 per cent quota.[55] This distinction is arbitrary as both of them have probably never previously lived in Austria.

Austria backs its arguments with the *Vanbraekel* case where the Court held that "Article 56 of the Treaty allows Member States to restrict the freedom to provide medical and hospital services, in so far as the maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival, of the population …."[56] The Court made this statement in connection with freedom to provide services and the issue of infrastructure. Would Germany or the United Kingdom be prohibited from trying to hire medical doctors in Austria as soon as there is a short-

52. Id.

53. Cited, *supra* note 51, 4–5; Groen and White, *In-State versus Out-of-State Students: The Divergence of Interest between Public Universities and State Governments*, (NBER Working Papers Series, 2003), 18. It is interesting to mention that in the American context a study found that students who attended a public university are more likely to stay in their study-state than those students who attended a private university. One possible reason given by the authors is that in a public university they meet more in-state people and therefore start (local)networking.

54. Wörgetter, "Dramatische Ärzteschwemme", *Salzburger Nachrichten*, 24 May 2006, 2.

55. Paragraph 1(3) and 3 Personengruppenverordnung (Regulation of the Federal Minister), BGBl II Nr 211/1997 last amended by BGBl II Nr 15/1998. In this context it is worth remembering that although the legal provisions address the recognition of diplomas, they clearly regulate university admission and fall therefore under the Treaty provisions. (Judgment, paras. 30–35).

56. Case C-368/98, *Vanbraekel*, [2001] ECR I-5363, para 49.

age in the Austrian health care sector?[57] Could and would Austrian medical doctors be deprived of their right to free movement and be barred from leaving the country and working somewhere else? The answer is certainly "No".[58] As shown above, this argument cannot be successful with respect to a possible future constellation of the job market, as none of the graduates (neither those holding a "domestic" nor those with a "foreign" university admission diploma) can be effectively hindered in leaving the Austrian job market and finding a job somewhere else. Therefore, it cannot be justified to make distinctions between these two groups of people on the grounds of their "likelihood" of leaving the country in the future.

However, the question is whether the health care cases can be used in order to justify restrictions on the basis of financial considerations.

5.3. *Preserving the "financial equilibrium" in analogy to the health care cases*

On an introductory note it must be underlined that the "country of origin principle" invoked by Austria does not have the power per se to protect the financial equilibrium of the Austrian educational system. This can be easily seen by the fact that if Germany were to abolish the *numerus clausus* but not offer more study places at the same time, Austria would still face its current problems – or even more. Nevertheless, Austria submitted in the hearing that the massive "influx [of students] would entail serious financial, structural and staffing problems and pose a risk to the financial equilibrium of the Austrian education system and, consequently, to its very existence."[59] In analogy to the health care cases, in particular *Kohll* and *Vanbraekel,* Austria tried to argue that "undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind."[60]

Health care cases, however, describe a very different context from the situation Austria is facing. In the health care cases, patients leave their home State (where they are insured) in order to receive treatment in another State (destination State). The bill, however, has to be paid by the home State. In

57. Currently 300 to 400 recently qualified medical doctors go to Germany or the UK to work (Pöll, *supra* note 31).

58. According to the Austrian Minister of Health, Austria will hire nurses from other EU countries (ORF, "Mehr Pflegepersonal gesucht" (25 March 2006) available at oe1.orf.at/inforadio/62583.html.

59. Opinion of A.G. Jacobs, para 26.

60. Case C-158/96, *Kohll,* [1998] ECR I-1931, para 41. However, it is worth mentioning – as the AG did – that neither in *Kohll* nor in *Vanbraekel* (*supra* note 56) did the Court find the financial equilibrium endangered, Opinion of A.G. Jacobs, FN 19.

the current case, it is Austria (the destination State of the students), which complains about the burden of costs.

Furthermore, if one assumes that Austria provides a limited number of study places, e.g. 100, Austria can easily fill up the places due to the attractiveness of the Austrian university admission system. The problem in the health care cases presents itself in the reverse: a State offering 100 hospital beds (for which it has to pay) faces a situation where patients are leaving the country and thus it cannot "fill" the beds it provides and consequently wastes money. Austria's problem is having more applicants than study places. There is no financial risk for the infrastructure, even though the Court considered education not to be a service according to *Humbel*.[61]

Consequently, Austria's reference to the health care cases in the Court's hearing and when it introduced the new quota regulations seems somewhat inappropriate. Health care cases – due to their nature that the home State has eventually to pay the bill – do not address the issue of "free-riders" which is, however, a problem worth looking at in the context of subsidized education.

5.4. *Eliminating educational "free-riders" – a justified and desirable goal?*

If one wanted to eliminate educational "free-riders", what can be easily seen is that the question as to whether somebody is holding a secondary education certificate or not, cannot be considered an adequate criterion for the following reasons:[62] a person living across the border in e.g. Freilassing, Germany, attending a school in Salzburg, Austria has never paid taxes in Austria but would be entitled to attend an Austrian university under the "domestic" quota; the same applies to a person from South Tyrol (Italy), whose secondary diploma is declared equal by Ministerial Regulation.

However, one could ask whether a residency requirement linked with charging different tuition fees to residents and non-residents could be a justifiable tool to eliminate "free riders".[63] As is well known, charging different tuition – sometimes up to three times higher – between in and out state students has a long tradition in the US.[64] The question still discussed though, is

61. In Austria, the A.G. rejects the analogy with *Kohll* and *Vanbraekel* by highlighting that health care is a service under Art. 49 EC, whereas education does not fall under this provision, Opinion of A.G. Jacobs, paras. 33–34; see also van der Mei, op. cit, *supra* note 4, pp. 389–90. The Court does not address the matter at all; Case 263/86, *Humbel*, [1988] ECR 5365.

62. As clearly said in *Gravier,* nationality is not a legitimate criteria to distinguish; *Gravier*, *supra* note 5, para 26.

63. See generally on the topic Davies, "Higher education, equal access, and residence conditions: Does EU law allow Member States to charge higher fees to students not previously resident?", 12 MJ (2005), 227.

64. Chartier, "The toll for travelling students: Durational-residence requirements for in-

if the requirement of durational residence is unconstitutional.[65] The US Supreme Court addressed the issue of residency requirements first in the context of welfare benefits in *Shapiro*.[66] There, the Court held it to be unconstitutional to impose a one year residence requirement for the entitlement of welfare benefits. Two US district courts distinguished the cases of *Sturgis*[67] and *Starns*[68] from *Shapiro* on the ground that higher education cannot be equated with "denying the basic necessities of life to needy residents",[69] and that "it appears to be a reasonable attempt to achieve a partial cost equalization"[70] between residents and non-residents. Both cases were endorsed by the Supreme Court with a summary affirmation, which "is not to be read as an adoption of the reasoning supporting the judgment under review."[71] However, in *Sturgis,* Judge East dissented – essentially arguing that "[t]he State does not have any obligation to furnish its residents, at public expense, with any program of higher education, nor as far as it matters, any program of welfare benefits, public parks or public health or protection. However, when its legislature does provide by law at public overall expense any such program, meager or abundant as it may be, Washington is obligated to offer that program, subjected, as it may be, to any lawful police power regulation and conditions of fiscal recoupment, to all its residents on an equal basis."[72]

This falls very much in line with what the Supreme Court held in *Zobel*, which dealt with the State's dividend distribution plan for residents. There the Supreme Court essentially argued with reference to *Shapiro* and the Equal Protection Clause that "[i]f the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence – or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? … It would permit the states to divide citizens into expanding numbers of permanent

state tuition after Saenz v. Roe", 104 Mich. L. Rev. (2005), 573, 574.

65. Ibid.

66. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); Conlan, "Durational Residency Requirements for In-State Tuition: Searching for Access to Affordable Higher Learning", 53 Hastings L.J. (2002), 1389, 1395.

67. *Sturgis* v. *State of Washington*, 368 F.Supp. 38 (1973).

68. *Starns* v. *Malkerson*, 326 F. Supp. 234 (1970).

69. Ibid. at 238.

70. Ibid. at 240; see generally on the principle of affectedness: Hilson, "EU Citizenship and the Principle of Affectedness" in Bellamy, Castiglione and Shaw (Eds.), *Making European Citizens: Civic Inclusion in a Transnational Context* (London, Palgrave, 2006), p. 56.

71. *Zobel* v. *Williams*, 457 U.S. 55, 64, Fn 13 (1982).

72. *Sturgis v. State of Washington, supra* note 67, 42.

classes."[73] The Court in *Zobel* made explicitly clear that it assessed the one-year residence requirement in *Starns* not as a "return on prior contributions to commonwealth"[74] but as a test of bona fide residence, which only tries to establish that a person has the intention to remain in a state (in the future). The objective to "reward citizens for past contributions"[75] is not a legitimate one and conflicts with the Equal Protection clause.[76] "[Any] durational residence requirement is justifiable only to the extent that it serves as a test of bona fide residence. … Tuition residence requirements may no longer be justified [after *Zobe*l] as a reward to citizens for past contributions."[77]

In his Opinion in *Bidar,* Advocate General Geelhoed made a point similar to that of Justice Brennan in *Zobel* v. *Williams* :

> "The United Kingdom Government contends that it is legitimate for a Member State to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted. This argument suggests that there is a direct or indirect link between the obligation of residents of a Member State to pay taxes and the entitlement to benefits of the kind at issue in the present case. If it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom seriously would accept the social discrimination inherent to this position."[78]

The ECJ, however, found that despite the fact that Member States must "show a certain degree of financial solidarity with nationals of other Member States ... it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member

73. *Zobel* v. *Williams*, *supra* note 71, 64.

74. Ibid.

75. Ibid. at 63.

76. *Vlandis* v. *Kline*, 412 U.S. 441, 450, Fn 6 (1973) with reference to *Shapiro* v. *Thompson* (*supra* note 66), where the Supreme Court "rejected the contention that a challenged classification could be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes. That reasoning, the Court stated, 'would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services'."

77. Parent, "Tuition residence requirements: A Second Look in the Light of Zobel and Martinez", 61 Ind. L.J. (1986), 287, 314.

78. Opinion of A.G. Geelhoed in Case C-209/03, *Bidar* [2005] ECR I-2119 para 65.

States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State."[79] This requirement of a "genuine link" is a hurdle to free movement as a citizen knows if s/he leaves a State s/he has to establish this link somewhere else anew. This concept of a "genuine link" was accepted by the ECJ in some fields of benefits such as grants and loans. But it causes the same problems as Justice Brennan of the US Supreme Court rightly found: "[I]f each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority, only to have to begin building such seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive."[80]

Davies, who argues in his article in favour of charging different tuition fees, suggests that the "home State" should pay the difference between the lower resident-tuition and the higher out of State tuition.[81] The underlying idea would be to make the "home State" responsible for paying the difference in analogy to the health care cases.[82] However, the Court has consistently held that when it comes to hospital care (to continue the analogy) patients cannot receive paid hospital treatment without prior authorisation.[83] Would this mean that students are only allowed to leave the country if they cannot be offered a place to study at home? How then, should one deal with persons who have not been granted admission under the "home State" criteria and decided to go abroad instead where different or no admission criteria apply?[84]

Also, if a State charges no tuition fees and a student decides to study in a country with high tuition fees, the "home State" would have to pay two times (once in order to set up the infrastructure in the first place and once to the university where the student finally attends) and not have the advantage of at least receiving some indirect tax. Finally, what constitutes a "home State"[85] would have to be defined. It would probably not be admissible to equate "home State" with national citizenship; it must be possible at one stage that a former "host State" becomes a "home State" for fee purposes. If the so de-

79. Case C-209/03, *Bidar* [2005] ECR I-2119, para 56.
80. *Zobel* v. *Williams*, *supra* note 71, 68.
81. Davies, op. cit., *supra* note 63, 235–36.
82. Ibid. at 237.
83. Cf. Case C-157/99, *Geraets-Smits*, [2001] ECR I-5473, paras 76–80.
84. Dougan, "Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?", 42 CML Rev (2005), 943, 956.
85. Ibid. at 984–85.

fined "home State" requires a "genuine link" to a given society again it will be difficult for a "newcomer" to qualify as a resident in a Member State.

So far the ECJ has never explicitly decided the question of whether different tuition fees for residents and non-residents could be an admissible tool in order to exclude educational free riders.[86] The signals of the Court seem to suggest that it would not allow different tuition fees for residents and non-residents. If the Court accepted a genuine link for tuition purposes it would give up its current case law on prohibition of discrimination and further undermine the importance of EU citizenship in the field of education.[87] Also, the A.G.[88] and following him the Court[89] suggested entry examinations or a minimum grade in order to limit the influx of "foreign" students.

6. Conclusion

This case note concludes that the replacement of the unlawful "country of origin" principle for university admission in Austria with a quota system which reserves 75 per cent of the study places for students holding an Austrian university admission diploma is in breach of the EC Treaty.

Although the ECJ has never addressed the question of charging different tuition fees to residents and non-residents this does not seem to be a justified alternative. Both the A.G. and the Court very clearly spelled out that entry examinations or a minimum grade would be suitable measures to avoid discrimination.[90] With paragraph 124b(1) of the University Act,[91] universities were allowed to set up entry examinations for some fields of studies. That being the case, unrestricted university admission in Austria for holders of an Austrian secondary diploma no longer applies, insofar as Austria followed the suggestions of the Court and the A.G. on an entry exam. However, Austria's additional quota system must be considered disproportionate.

Generally, it is necessary for Member States to become aware of the fact that in a common market, where people move around, it will always be the case that a Member State pays for a person's education without necessarily harvesting the fruit e.g. in the form of taxes. But there are more things to consider

86. *Commission* v. *Belgium, supra* note 5.
87. Cf. Dougan, op. cit., *supra* note 84, 971–974.
88. Opinion of A.G. Jacobs, para 52.
89. Judgment, para 61.
90. Ibid.
91. Universitätsgesetz 2002, BGBl. I Nr. 120/2002, last amended by BGBl. I Nr. 77/2005.

> "in the light of the goals inspiring the EC Treaty, in promoting the 'ever closer union'. In view of the overall benefits to the EU that they produce, the public investment made in the education of those foreign students will provide a return to the host State, either directly, because the students subsequently enter its employment market, or indirectly, because of the benefits arising to the EU as a whole."[92]

Clemens Rieder*

92. Opinion of A.G. Jacobs, para 39.

* Phd student and teaching assistant, The University of Reading, UK. The author may be contacted at <c.rieder@rdg.ac.uk>. I am thankful to Professor Chris Hilson for his valuable comments on an earlier draft. The usual disclaimer applies.