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Anne Looijestijn-Clearie

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Netherlands: who pays the Piper?

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Centre for Migration Law  
Faculty of Law  
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P.O. Box 9049  
6500 KK Nijmegen  
The Netherlands

Editors Carolus Grütters  
Ashley Terlouw

Lay-out Hannie van de Put

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## STUDENT MOBILITY AND THE NETHERLANDS: WHO PAYS THE PIPER?

Anne Looijestijn-Clearie\*

*‘Among these travellers in pursuit of knowledge, Erasmus of Rotterdam (1469-1536) deserves pride of place. (...) His life is the stuff of dreams for us nowadays, when we realise that, at the end of the Middle Ages, Europe had no frontiers for intellectual life and was not split by linguistic differences which, although they are doubtless of cultural value, hinder the exchange of ideas between the peoples of this continent and their progress towards a closer and more committed union. The legend of Erasmus provides a ray of hope that those barriers may be overcome.’<sup>1</sup>*

### Abstract

Student mobility features high on the agenda of the EU. The question, therefore, arises who is to finance the studies of mobile students: the home Member State or the host Member State. The subject of study financing is a sensitive one in all Member States. An inherent tension exists between the right to student mobility and the desire of the Member States to maintain the financial stability of their systems of study financing.

This paper discusses the conditions which a host Member State (in this case the Netherlands) may impose on students from another Member State with regard to the provision of maintenance grants. It does so on the basis two rulings of the CJEU: *Förster* and *Commission v the Netherlands*. Analysis of these two judgments makes clear that the CJEU draws a sharp distinction between economically active students and those who are economically inactive in the host Member State. With regard to the latter, the host State may make the right to a maintenance grant dependent on the student concerned showing a sufficient degree of integration into its society. This allows this State to impose a residence requirement on such students. As far as economically active students are concerned, on the other hand, the imposition of a residence requirement constitutes an indirectly discriminatory measure which is prohibited by EU law unless it is objectively justified.

The paper also briefly describes a judgment of the Dutch Central Appeals Tribunal in which preliminary questions were put to the CJEU. The questions referred concern both Article 45 TFEU and Article 7(2) of Regulation No 1612/68 (economically active students) and the citizenship provisions of the TFEU (eco-

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\* Senior Lecturer in European Law, Radboud University Nijmegen, the Netherlands. This paper was published in: K. Groenendijk et al., *Issues that Matter. Mensenrechten, minderheden en migranten. Liber amicorum voor prof. mr. R. Fernhout*, Nijmegen: Wolf Legal Publishers 2013, p. 125-137.

1 Opinion of Advocate General Ruiz-Jarabo-Colomer in Joined Cases C-11 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161, para. 43.

In paragraphs 37-43 of the Opinion, the learned Advocate General provides a very readable account of student mobility throughout the ages.

nomically inactive students). These questions may lead the CJEU to reconsider its sharp distinction between economically and non-economically active students.

**Keywords**

student mobility, the Netherlands, study financing, economically active students, economically inactive students.

## 1. Introduction

As can be seen from the quote above, the idea of student mobility in Europe is not new. The promotion of student mobility has, however, become a hot item in recent years, both in the EU and further afield. The Budapest-Vienna Declaration of 12 March 2010 marked the official launching of a European Higher Education Area (EHEA) as part of the so-called Bologna Process.<sup>2</sup> The Bologna Process is an intergovernmental framework within which the European Commission and 47 countries (including all the Member States of the EU) co-operate in the field of higher education. Since its inception one of the main focuses of the Bologna Process has been the promotion of student mobility.<sup>3</sup>

According to Article 165(2) of the Treaty on the Functioning of the European Union (hereinafter: TFEU), Union action in the field of education shall be aimed at, *inter alia*, ‘encouraging mobility of students and teachers (...)’.<sup>4</sup> A number of policy initiatives have also been developed in the EU itself with the goal of increasing student mobility.<sup>5</sup>

The Court of Justice of the European Union (hereinafter: CJEU) has, in its case law, also played an important role in the promotion of the mobility of stu-

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2 All the declarations and communiqués of the Bologna Process can be found on [www.ehea.info](http://www.ehea.info) (last accessed on 8 July 2013). See also, A. Schrauwen, ‘De kosten van studentenmobiliteit’, *NtEr*, December 2012, nr. 10, p. 336-341.

3 This was emphasised in the Leuven/Louvain-la-Neuve Communiqué of 2009 where the states participating in the Bologna Process set the target of increasing the number of students who had been on a study or training period abroad to 20% of all those graduating in Europe by 2020.

4 The Erasmus programme and other EU action programmes in the field of education are based on Articles 165 and 166 TFEU.

5 See, Recommendation 2006/961/EC of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility, OJ 2006, L394/5; European Parliament Resolution of 23 September 2008 on the Bologna Process and student mobility (2008/2070(INI)), OJ 2010, C8 E/18; COM(2009) 329 Final Green Paper: Promoting the learning mobility of young people, Brussels, 8 July 2009. See also, A. Hoogenboom, ‘Export of Study Grants and the Lawfulness of Durational Residency Requirements: Comments on Case C-542/09, *Commission v the Netherlands*’, *European Journal of Migration Law* 14 (2012), p. 417-437.

dents in the EU.<sup>6</sup> It emerges from this case law that the right to study financing varies according to the status of the student and the objective of the financing.

It is common ground that, according to the CJEU, EU students with the status of worker or self-employed person in the host Member State or who are a family member of an EU worker or self-employed person have the same right to study financing as nationals of this State.<sup>7</sup> Most of the rulings dealing with EU workers are based on Articles 12<sup>8</sup> and 7(2)<sup>9</sup> of the former Regulation 1612/68.<sup>10</sup>

As far as persons not having the status of EU worker or self-employed person or family member are concerned, in other words, EU nationals merely studying in another Member State, the CJEU drew a distinction between financing intended for access to education, such as tuition fees, on the one hand and maintenance grants, on the other.<sup>11</sup> However, things may have changed with the broad interpretation that the CJEU has been willing to grant to the concept of Citizenship of the Union, a new title inserted into the former EC Treaty by the Treaty on European Union in 1993, and to the so-called Citizens' Rights Directive.<sup>12</sup>

Within the EU this raises the question of who is to finance these mobile students: the home Member State or the host Member State. The issue of student financing is a sensitive one in all Member States. An inherent tension exists be-

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6 See, e.g., Joined Cases C-11 and C-12/06, *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161; Case C-75/11, *European Commission v. Republic of Austria*, judgment of 4 October 2012, nyr; Case C-20/12, *Elodie Giersch and Others v Luxembourg*, judgment of 20 June 2013, nyr.

7 For a list of the most important cases, see, A. Schrauwen, p. 336-337.

8 Article 12 reads: 'The children of a national of a Member State who is or who has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

9 Article 7(2) states that workers who are nationals of other Member States 'shall enjoy the same social and tax advantages as national workers.'

10 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom for workers within the Community, Official Journal, English Special Edition 1968 (II), p. 475. This regulation was repealed and replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ 2011, L141/1. Article 12 of Regulation No 1612/68 has become Article 10 of Regulation No 492/2011 but the text has remained identical as has the text of Article 7 which has retained the same numbering.

11 See A. Schrauwen, p. 337, who discusses the relevant case law.

12 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L158/77.

tween the unlimited right to student mobility and the desire of the Member States to maintain the financial stability of their systems of student financing.

Given its length, this paper will only focus on the most recent cases handed down by the CJEU on the question of study financing in the Netherlands. The purpose is to examine the topic of student mobility in the Netherlands on the basis of two rulings handed down by the CJEU, the *Förster* judgment<sup>13</sup> and the judgment in the case *Commission v the Netherlands*.<sup>14</sup> I will then briefly discuss a recent judgment handed down by the Central Appeals Tribunal (*Centrale Raad van Beroep*)<sup>15</sup> in the Netherlands concerning study financing in which this tribunal put preliminary questions to the CJEU.<sup>16</sup> I will attempt to answer the question whether the CJEU still draws a distinction between economically active students,<sup>17</sup> on the one hand, and students who are economically inactive in the host State,<sup>18</sup> on the other. The paper will end with a conclusion.

## 2. The Ruling in *Förster*

### 2.1 Background to the case

The ruling in *Förster* is the natural sequel to the *Bidar* case<sup>19</sup> handed down three years earlier. Both cases concern the conditions which a host Member State may impose on students from another Member State with regard to the provision of maintenance grants.

On 5 March 2000, Jacqueline Förster, a German national, came to the Netherlands in order to pursue a course of higher education. On 1 September 2000, she started a course in educational theory at the College of Amsterdam (*Hogeschool van Amsterdam*).

From 16 March 2000, Ms Förster also had various kinds of paid employment in the Netherlands. From October 2002 until June 2003 she underwent

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13 Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507.

14 Case C-542/09, *European Commission v Kingdom of the Netherlands*, judgment of 14 June 2012, nyr.

15 The Central Appeals Tribunal (*Centrale Raad van Beroep*) is the highest court in the Netherlands in matters of social security.

16 *Centrale Raad van Beroep*, ECLI:NL:CRVB:2013:CA3728 of 24 June 2013.

17 The term 'economically active students' refers to students who can be regarded as workers (or self-employed persons) in the host State or students who are family members of EU workers (or self-employed persons) in the host State.

18 The term 'economically inactive students' is used to refer to students who do not work (and are not self-employed) in the host State and who are not family members of EU workers or self-employed persons.

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

full-time practical teacher training at a Dutch school. After that training, Ms Förster undertook no further paid employment in 2003. Ms Förster graduated in September 2004 with a bachelor's degree and subsequently found employment in the Netherlands.

From September 2000, the *Informatie Beheer Groep* (hereinafter: IBG)<sup>20</sup> granted Ms Förster study finance. That finance was periodically extended, always on the assumption that in the following period Ms Förster would be regarded as a worker within the meaning of Article 45 TFEU<sup>21</sup> who, pursuant to Article 7(2) of Regulation No 1612/68, had to be treated as a student of Dutch nationality with regard to study finance. According to a Policy Rule adopted by the IBG in 2005 on the monitoring of migrant workers,<sup>22</sup> any student who has worked for an average of 32 hours or more per month in the period subject to monitoring automatically enjoys the status of EU worker.<sup>23</sup> That Policy Rule concerns the monitoring of periods for which maintenance grants have been awarded from the 2003 calendar year.

Following the ruling of the CJEU in *Bidar*,<sup>24</sup> the IBG adopted on 9 May 2005 another Policy Rule on the adaptation of applications for study finance for students from the EU, EEA and Switzerland.<sup>25</sup> According to Article 2(1) of that Policy Rule, a student who is a national of a Member State of the EU may be eligible for study finance, pursuant to Dutch legislation on study finance,<sup>26</sup> if, prior to the application for study finance, he or she has been lawfully resident in the Netherlands for an uninterrupted period of five years.

Initially, Ms Förster was also granted study finance during the second half of 2003. However, following a check, the IBG ruled by decision of March 2005, that Ms Förster had not been gainfully employed since July 2003. From

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20 The IBG is the administrative body in the Netherlands charged with the enforcement of Dutch legislation regarding the financing of studies.

21 This ruling was handed down before the entry into force of the Treaty of Lisbon. Therefore the numbering used in the ruling is the numbering of the former EC Treaty. For ease of reference and purposes of clarity, throughout this paper I will use the post-Lisbon numbering of the TFEU.

22 *Beleidsregel controlebeleid migrerend werknemerschap*, AG/OCW/MT 05.11.

23 The number of hours that a student must work in the Netherlands in order to be considered a worker within the meaning of Article 45 TFEU will, as from 1 January 2014, be increased to 56 hours per month, *Staatscourant*, Nr. 6195 of 11 March 2013. The Dutch Council of State (*Raad van State*) has its doubts as to whether this is in compliance with the definition of the term 'worker' within the meaning of Article 45 TFEU given by the CJEU. See, *Raad van State*, No.W05.12.0388/1 of 11 October 2012.

24 Case C-209/03.

25 *Beleidsregel aanpassing aanvraag studiefinanciering voor studenten uit EU, EER en Zwitserland*, AGOCenW/MT/05. Since 11 October 2006, this matter has been regulated by legislation and the Policy Rule has been repealed.

26 Law on the Financing of Studies 2000 (*Wet Studiefinanciering 2000*).



that date, therefore, she could no longer be regarded as an EU worker. In addition, at the material time, Ms Förster had not been lawfully resident in the Netherlands for five years. She was ordered to repay the study finance she had received for the second half of 2003, plus a sum for a public transport ticket<sup>27</sup> covering that period which had been paid by the IBG.

The case eventually came before the Central Appeals Tribunal in the Netherlands. Here, Ms Förster argued, principally, that, in the light of the *Bidar* judgment, since she was already, at the material time, sufficiently integrated into Dutch society, she was entitled under EU law to study finance for the second half of 2003 and, alternatively, that she had performed so many hours of paid employment in the first half of 2003 that she should be regarded as having been an EU worker for the whole of 2003.

The Dutch court put five preliminary questions<sup>28</sup> to the CJEU regarding the interpretation of Articles 18 and 21 TFEU, Article 7 of Regulation No 1251/70<sup>29</sup> and Article 3 of Directive 93/96/EEC.<sup>30</sup>

## 2.2 Ruling of the CJEU

The first question is whether Ms Förster may rely on Article 7 of Regulation No 1251/70 in order to obtain a maintenance grant from the IBG. The CJEU answers this question in the negative.<sup>31</sup> According to the CJEU, Article 2 of Regulation No 1251/70 sets out in an exhaustive fashion the conditions of entitlement to a worker's right to remain in the host Member State after having been employed there<sup>32</sup> and hence to continue to be entitled to equal treatment with nationals of this State as set out in Regulation No 1612/68. As Ms Förster does

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27 The Commission has recently brought infringement proceedings against the Netherlands claiming that the Netherlands has failed to apply the principle of equal treatment set out in Article 18 TFEU by limiting discounted fares on trains and buses to students who are either Dutch nationals or long-term residents in the Netherlands. All other EU citizens studying in the Netherlands, including Erasmus students, are therefore discriminated against. See, Press Release IP/13/574 of the European Commission of 20 June 2013.

28 Case C-158/07, *Förster*, para. 24.

29 Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ, English Special Edition 1970 (II), p. 402.

30 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ 1993, L317/59.

31 Case C-158/07, *Förster*, para. 25-33.

32 In addition to complying with the conditions linked to the duration of employment and residence, a worker who has been employed in the host Member State has the right to remain there only if his or her working relationship has ended because he or she has reached retirement age, his or her incapacity to work or his or her employment in another Member State while retaining his or her residence in the territory of the host State, to which he or she returns, as rule, each day or at least once a week.

not meet any of these conditions, she does not fall under the scope of Regulation No 1251/70.

The CJEU then deals with the second, third and fourth questions together.<sup>33</sup> The referring court asks in what conditions a student in the situation of Ms Förster can rely on Article 18(1) TFEU in order to obtain a maintenance grant in the Netherlands. It also asks whether the application to nationals of other EU Member States of a prior residence requirement of five years is compatible with Article 18(1) TFEU and, if so, if it is necessary, in individual cases, to take into account other criteria pointing to a substantial degree of integration into the society of the host State.

The CJEU holds, as it had done in *D'Hoop*<sup>34</sup> and *Bidar*,<sup>35</sup> that a national of a Member State who goes to another Member State in order to pursue education there exercises the freedom of movement guaranteed by Article 21 TFEU. This means that the student concerned falls within the scope of the TFEU and can invoke the right to equal treatment guaranteed by Article 18(1) TFEU for the purpose of obtaining a maintenance grant. According to the CJEU, the fact that the requirement of five years uninterrupted lawful residence in the Netherlands set out in the Policy Rule of the IBG does not apply to students of Dutch nationality<sup>36</sup> raises the question of what restrictions may be imposed on the right of students who are nationals of other Member States to a maintenance grant without being considered discriminatory.

The CJEU repeats what it had stated in *Bidar*<sup>37</sup> that the objective of ensuring that the grant of maintenance assistance to students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance granted by that State is a legitimate objective under EU law. Hence it is permissible for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State. A certain degree of integration can be demonstrated by the fact the student at issue has resided in the host State for a certain period of time. The CJEU finds the period of five years set out in the Policy Rule of the IBG to be an appropriate means of en-

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33 I will not deal with question five (on the question whether the principle of legal certainty precludes the retroactive application of a residence requirement which at the relevant time could not have been known to Ms Förster) as it has little bearing on the issues discussed in this paper.

34 Case C-224/98, *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191.

35 Case C-209/03.

36 This would seem to indicate that the residence requirement imposed by the Netherlands is a directly discriminatory measure which can only be justified under one of the express derogations contained in the TFEU. However, the CJEU pays no heed to this.

37 Case C-209/03.

sureing that the applicant for a maintenance grant is integrated into Dutch society. With regard to the proportionality of the five year residence requirement, the test applied by the CJEU is lenient to say the least. It does not find this requirement to be excessive because Article 24(2) of Directive 2004/38/EC, although not applicable *ratione temporis* to the case, provides that the host State is not obliged to grant maintenance assistance to economically inactive students who have not acquired the right of permanent residence on its territory. Article 16(1) of the same directive states that Union citizens will have a right of permanent residence in the territory of a host Member State where they have resided there legally for a continuous period of five years. The CJEU lays down a further condition with regard to the proportionality of the residence requirement, namely that it must be applied by the national authorities on the basis of clear criteria known in advance. According to the CJEU, the residence requirement laid down in the Policy Rule of the IBG is, ‘*by its very existence, such as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students.*’<sup>38</sup>

### 2.3 Observations

The rulings in *Bidar* and *Förster* go much further than previous rulings where the CJEU held that only economically active students had a right to a maintenance grant in the host State.<sup>39</sup> These rulings demonstrate that the CJEU has breathed life into the status of citizen of the Union also for economically inactive students. Economically inactive students can rely on Article 18 TFEU in order to obtain a maintenance grant in the host State.

However, as the CJEU made clear, this right of economically inactive students to a maintenance grant is not unlimited. Member States are permitted to ensure that the grant of maintenance costs to students from other Member States does not become an unreasonable burden which could have consequences for the overall level of student finance granted. It is therefore legitimate for a Member State to grant maintenance assistance only to students who have demonstrated a certain degree of integration into its society. In order to prove the existence of a certain degree of integration, a Member State may require that students from other Member States have resided on its territory for a certain period of time. As the *Förster* judgment shows, a requirement of five years uninterrupted lawful residence is permissible.

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<sup>38</sup> Case C-158/07, *Förster*, para. 57.

<sup>39</sup> See, e.g., Case 39/99, *Sylvie Lair v Universität Hannover* [1988] 3161 and Case 197/86, *Steven Malcolm Brown v The Secretary of State for Scotland* [1988] ECR 3205.

### 3. The Ruling in *Commission v the Netherlands*

The second ruling that I would like to discuss is *Commission v the Netherlands*.<sup>40</sup> This judgment concerns the portability of study financing granted by the Dutch authorities to students pursuing higher education outside the Netherlands.<sup>41</sup>

#### 3.1 Background to the case

Article 2.2. of the Dutch Law on the Financing of Studies 2000<sup>42</sup> sets out the conditions which students must meet in order to obtain full funding for their higher educational studies if they study in the Netherlands.<sup>43</sup> With regard to portable funding, Article 2.14(2) of this law states that such funding is available to students who are eligible for full funding of studies in the Netherlands and who have resided lawfully in the Netherlands during at least three out of the six years prior to enrolment at a higher education establishment abroad (hereinafter: the 'three out of six years' rule).<sup>44</sup>

Following a regular pre-litigation procedure, the Commission brought infringement proceedings against the Netherlands before the CJEU. The Commission requested the CJEU to declare that by requiring migrant workers, including frontier workers, and their dependent family members to fulfil a residence requirement (i.e. the 'three out of six years' rule) to be eligible under Dutch law for the funding of educational studies abroad, the Netherlands indirectly discriminates against migrant workers and has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68.<sup>45</sup>

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40 Case C-542/09.

41 In the 2003 Berlin Communiqué, the states participating in the Bologna Process agreed to take the necessary steps to enable the portability of national loans and grants, p. 4.

42 See footnote 27.

43 This provision reads as follows (see, para. 13 of the Opinion of Advocate General Sharpston in Case C-542/09). Study finance may be granted to the following:

- a) students who are Netherlands nationals;
- b) students who are non-Netherlands nationals who are treated, in the area of funding for studies, as Netherlands nationals based on a treaty or a decision of an international organisation;
- c) students who are non-Netherlands nationals who live in the Netherlands and belong to a category of persons who are treated, in the area of funding for studies, as Netherlands nationals on the basis of a general administrative measure.

44 Pursuant to Article 11.5 of the Dutch Law on Study Financing 2000, the competent minister may, in manifest cases of grave injustice, derogate from the residence requirement laid down in Article 2.14(2) of that law.

In addition, until 1 January 2014, the 'three out of six years' rule does not apply to all students who are eligible for funding for higher education in the Netherlands and who wish to pursue higher education in certain border areas, namely Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany.

45 Case C-542/09, para. 1.

It is important to note that the Commission limited its claim to Article 45 TFEU and Article 7(2) of Regulation No 1612/68. The Commission makes no claim with regard to discrimination against economically inactive students by referring to Article 24 of Directive 2004/38/EC, Article 21 TFEU or any other provision of EU law governing the rights of citizens of the Union.

### 3.2 Ruling of the CJEU

The CJEU starts by stating that, according to settled case law,<sup>46</sup> funding granted for maintenance and education in order to pursue university studies constitutes a social advantage within the meaning of Article 7(2) of Regulation No. 1612/68. This also applies to study finance granted by a Member State to the children of workers where the worker supports the child.<sup>47</sup>

The CJEU holds that the 'three out of six years' rule is indirectly discriminatory because it operates primarily to the detriment of migrant workers and frontier workers in so far as non-residents are usually non-nationals. It, thus, rejects the arguments of the Netherlands that the situation of workers residing in the Netherlands for at least three years is not comparable to that of those who do not meet that condition.

The CJEU then examines whether the 'three out of six years' rule can be justified under EU law. The Dutch authorities put forward two justification grounds. The first is what Advocate General Sharpston refers to as the 'economic objective'.<sup>48</sup> The Dutch authorities argue that the 'three out of six years' rule is necessary in order to avoid an unreasonable financial burden which could have consequences for the very existence of the Dutch system of study financing. The Advocate General refers to the second justification ground as the 'social objective'.<sup>49</sup> The Dutch authorities claim that, given that the goal of the 'three out of six years' rule is to promote higher education outside the Netherlands, the rule ensures that the portable funding is available solely to those students who, without it, would not pursue studies outside the Netherlands. Such studies are enriching not only for the students, they are also advantageous for Dutch society in general and for the Dutch employment market in particular. By contrast, the first instinct of students who do not reside in the Netherlands would be to study in the Member State in which they are resident, and, hence, mobility would not be encouraged. According to the Dutch authorities, the

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46 Case 39/86, *Lair*, para. 24 and Case C-3/90, *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, para. 23.

47 Case C-542/09, para. 34-35.

48 See the Opinion of Advocate General Sharpston, para. 71-134.

49 *Ibid.*, para. 135-159.

Member State where a student resides determines quasi-automatically the place where that student will study.

With regard to the 'economic objective', the CJEU states that budgetary considerations in themselves cannot justify discrimination against migrant workers.<sup>50</sup> The Dutch authorities, however, argue that in *Bidar* and *Förster* the CJEU accepted that a residence requirement could be used in order to ensure that study financing granted to students from other Member States did not become an unreasonable burden for the host State. The CJEU is quick to distinguish the present case from the rulings in *Bidar* and *Förster*. In the latter two judgments, the CJEU ruled on residence requirements imposed on economically inactive students whereas the present case concerns migrant workers and their dependents. Although the power of the Member States to require nationals of other Member States to show a certain degree of integration into their societies in order to receive study financing is not limited to situations where the applicants are economically inactive citizens, the requirement set out in the 'three out of six years' rule is inappropriate when the persons concerned are migrant or frontier workers.

The CJEU observes that the distinction between migrant workers and their dependents, on the one hand, and economically inactive citizens of the Union, on the other, arises from Article 24 of Directive 2004/38/EC which permits the Member States, with regard to economically inactive citizens, to limit the grant of maintenance aid where the student has not acquired a right of permanent residence. With regard to migrant and frontier workers, the fact that they have participated in the employment market of the host State creates a sufficient link of integration into the society of that State allowing them to benefit from the principle of equal treatment as far as social advantages are concerned. This link of integration is brought about, *inter alia*, through the fact that the taxes paid by the migrant worker in the host State contribute to the financing of the social policies of that State. Therefore, migrant workers should benefit from social advantages under the same conditions as the nationals of that State. This brings the CJEU to conclude that the 'economic objective' put forward by the Dutch authorities cannot be regarded as an overriding reason in the general interest capable of justifying indirect discrimination against migrant and frontier workers and their dependents.

With regard to the 'social objective', the CJEU observes that the goal of promoting student mobility is an overriding reason in the general interest capable of justifying an indirectly discriminatory measure. The CJEU then examines whether the 'three out of six years' rule is an appropriate and proportionate way of promoting student mobility. With regard to the appropriateness of

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<sup>50</sup> Case C-542/09, para. 57-69.

the rule, the Dutch authorities claim that this is a means of ensuring that portable funding goes only to the students whose mobility must be encouraged. According to the CJEU, this argument is based on two premises. The first is that the Member State in which a student resides, be this the Netherlands or elsewhere, determines quasi-automatically where that student will study. The second is that the Dutch authorities expect that students who benefit from portable study financing will return to the Netherlands after completing their studies in order to reside and work there. The CJEU finds that these two premises indeed reflect the situation of most students and that, therefore, the 'three out of six years' rule is appropriate for promoting student mobility. This rule is then subjected to the proportionality test. The CJEU states that it is up to the Dutch authorities to show not only that the rule is proportionate to the objective pursued but also to provide evidence substantiating that conclusion. According to the CJEU, the 'three out of six years' rule is too exclusive. This rule gives priority to a factor which is not necessarily the sole factor which can be used to demonstrate the actual degree of attachment between a student and the Netherlands. The conclusion is, therefore, that the Dutch authorities have not proven that the 'three out of six years' rule is a proportionate way of promoting student mobility. The CJEU condemns the Netherlands for infringement of Article 45 TFEU and Article 7(2) of Regulation No 1612/68.

### **3.3 Observations**

The judgment in *Commission v the Netherlands* shows that the CJEU draws a sharp distinction between economically active citizens of the Union and those who are economically inactive in the host State. As far as the latter are concerned, the right to a maintenance grant can be made dependent on the student concerned demonstrating a sufficient degree of integration into the society of the host State. This means that it is permissible, under EU law, for the host State to lay down a residence requirement in such situations. With regard to migrant and frontier workers and their dependents, on the other hand, the establishment of a residence requirement forms an indirectly discriminatory measure which is prohibited under EU law unless it can be objectively justified. The participation of migrant and frontier workers in the employment market of the host State and the payment of taxes in this State demonstrate a sufficient degree of integration into the society of this State to allow such persons to be treated equally with nationals of the host State, also with regard to social advantages. This would seem to indicate that the CJEU applies a stricter approach to resident requirements imposed on economically active citizens than it does to residence requirements imposed on their economically inactive counterparts.

It is, however, important to note that, as mentioned above, in *Commission v the Netherlands*, the Commission limited its claims to an infringement of Article 45 TFEU and Article 7(2) of Regulation No. 1612/68. It did not argue that the 'three out of six years' rule infringed any of the provisions of EU which can be relied on by economically inactive students.<sup>51</sup> This is logical as the first condition which students of non-Netherlands nationality must meet in order to be eligible for portable study finance, is that they are eligible for full funding of their studies in the Netherlands. As the *Förster* ruling shows, this will only be the case if the student in question has, prior to the application for study finance, resided in the Netherlands for an uninterrupted period of five years. If the student concerned has passed this test, he will automatically pass the 'three out of six years' test. However, as the next case to be discussed demonstrates, situations may arise where application of the 'three out of six years' rule to economically inactive students may be contrary to Articles 18 and 21 TFEU and Article 24 of Directive 2004/38/EC.<sup>52</sup>

#### 4. The ruling of the Dutch Central Appeals Tribunal<sup>53</sup>

##### 4.1 Background to the case

This case concerns a student of Dutch nationality who moved with her family to Belgium when the student was five years old. The student followed her primary and secondary education in Belgium. Thereafter, she studied from the middle of 2006 until the middle of 2011 at the University of the Dutch Antilles (*Universiteit van de Nederlandse Antillen*) on Curaçao. During her studies, the student's parents paid, in large measure, her maintenance costs and the costs of her education.

The student applied for a basis grant (*basisbeurs*) from the Dutch authorities. On her application, the student ticked the box stating that she complied with the 'three out of six years' rule. Following a check, the competent Dutch minister established by decision of 28 May 2010 that during the period of August 2000 until July 2006 the student had not resided in the Netherlands for at least three years and, thus, did not comply with the 'three out of six years' rule laid down in Dutch legislation. The study financing was stopped and the student was ordered to pay back the amount that she had already received.

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51 In other words, Articles 18 and 21 TFEU or Article 24 of Directive 2004/38/EC.

52 As a result of the ruling of the CJEU in *Commission v the Netherlands*, the Dutch government has recently withdrawn this 'three out of six years' rule, but has opened the possibility of putting a maximum on the number of students who can be granted portable study financing. See, TK 33453, *Staatsblad* 2013, 180.

53 See footnote 16.



During the appeal procedure before the Central Appeals Tribunal, the competent minister stated that it was established that from October 2006 until October 2008, the student's father was a frontier worker who worked part-time in the Netherlands. The minister stated that, on the basis of the judgment in *Commission v. the Netherlands*,<sup>54</sup> he is willing to grant portable study financing to the student for her studies on Curaçao from September 2007 until October 2008. From October 2008, the student is, according to the minister, no longer eligible for portable study financing because her father was no longer a frontier worker. According to the competent Dutch minister, in such circumstances, the rule stipulating that a student must have resided lawfully for an uninterrupted period of five years in the Netherlands prior to the application for study finance applies. The student does not comply with this rule because she has resided in Belgium since she was five years old.

The Central Appeals Tribunal is uncertain if on the basis of EU law, a right to portable study financing continues to exist until the student concerned has completed her studies at a university abroad. It, therefore, put two preliminary questions to the CJEU. The first question, which consists of two parts, is concerned with the interpretation of Article 45 TFEU and Article 7(2) of Regulation No 1612/68. In essence, the referring court wishes to know if it is contrary to these provisions for the Netherlands to cease granting portable study financing for studies outside the EU to the dependent child of a frontier worker of Dutch nationality from the time the frontier worker ceases to work in the Netherlands, due to the fact that the child has not resided for at least three of the six years prior to her enrolment at a university abroad. The second part of this question is, if the first question is answered in the affirmative, whether it is contrary to Union law to grant portable study finance for a period shorter than the duration of the studies for which study finance was initially granted.

The second question concerns the interpretation of the provisions on EU citizenship in the TFEU. The referring court asks whether it is contrary to Articles 20 and 21 TFEU for the Netherlands to cease prolonging study finance for studies at a university established on Curaçao to which a student was entitled because her father was a frontier worker because the student has not resided in the Netherlands for at least three out of the six years prior to her enrolment at a university abroad.

## 4.2 Observations

The ruling of the Dutch Central Appeals Tribunal is very readable and contains a number of interesting observations with regard to student mobility and the obligations of Member States to grant study finance to students from other

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<sup>54</sup> Case C-542/09, discussed in paragraph 3 of this paper.

Member States studying on their territory and on the issue of portable study finance for both national students and those from other Member States. Unfortunately, given the required length of this paper, I cannot discuss these issues.

In the context of this paper, the most interesting thing about this ruling is the fact that the Central Appeals Tribunal puts preliminary questions to the CJEU concerning portable study financing both with regard to Article 45 TFEU and Article 7(2) of Regulation No 1612/68 (economically active students) and to that of the citizenship provisions of the TFEU (economically inactive students). These questions will give the CJEU the opportunity to decide whether to maintain its sharp distinction between economically active and economically inactive students or to decide whether this distinction should be abolished.

## 5. Concluding Remarks

The rulings discussed above show that student mobility and the question of which Member State is required to finance the costs of mobile students is very a topical issue in the case law of the CJEU.<sup>55</sup>

The discussion of the *Förster*<sup>56</sup> judgment and the ruling in *Commission v the Netherlands*<sup>57</sup> shows that the CJEU draws a sharp distinction between economically active students and those who are economically inactive in the host State. As far as the latter are concerned, the right to a maintenance grant can be made dependent on the student concerned showing a sufficient degree of integration into the society of the host State. This permits the host State to lay down a residence requirement with regard to such students. With regard to economically active students, on the other hand, a residence requirement constitutes an indirectly discriminatory measure which is prohibited by EU law unless it is objectively justified.

The recent preliminary questions put to the CJEU by the Dutch Central Appeals Tribunal in the ruling discussed above, provide the CJEU with the opportunity to decide whether or not to maintain this distinction.

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55 See, e.g., Opinion of Advocate General Sharpston of 21 February 2013 in Joined Cases C-523 & C-585/11, *Laurence Prinz v Region Hannover & Philipp Seeberger v Studententwerk Heidelberg*.

56 Case C-158/07.

57 Case C-542/09.