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## Language discrimination against EU students at German universities

With reference to

**Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court) Reference**

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**Dr. Walter Demmelhuber\***

## Language discrimination against EU students at German universities

**When German universities insist on knowledge of the German language at levels they themselves have set as a compulsory requirement for enrollment at university, this can be regarded under European law as discrimination against foreign EU citizens in relation to German citizens, who normally have German as a mother tongue, and as an infringement of the rules concerning free movement in the EU. Universities are not free to set their own requirements, but must comply with European and national legislation, laws and directives, for example concerning naturalisation or freedom to pursue a trade or profession of EU citizens. Different requirements concerning the level of language proficiency should not be used as a political instrument by universities to control relative numbers of foreign students or for general quality management purposes. A disproportionate requirement could therefore constitute an infringement of Article 18 TFEU<sup>1</sup> or the FreizügG/EU [Free Movement Act]<sup>2</sup>.**

According to the recently published OECD education report *Education at a Glance 2013: OECD Indicators*, Germany occupied third place in terms of the number of foreign students in relation to national students. After the USA (16.5%) and the United Kingdom (13.0%), 6.3%<sup>3</sup> of all students enrolled at German universities came from other countries. Furthermore, universities of music had a proportion of foreign students that was 2.5 times higher than the average for all German universities according to the German Music Council<sup>4</sup>, owing to the large number of applications from non-EU (typically Asian) countries.

In relative terms therefore, Germany is the most popular non-English-speaking country worldwide with 272 696 foreign students registered at German universities in 2013<sup>5</sup>. The attractiveness of studying in German as opposed to other countries is mainly due to the absence of tuition fees for all foreign students, except in Saxony, in which according to Article 12(3) of the Saxony University Freedom Act [Hochschulfreiheitsgesetz (SächsHSFG)], German and EU students are not charged tuition fees, but students from non-EU countries may be.

Besides tuition fees and the recognition of university entrance qualifications from non-EU countries (automatic in the EU as a result of the mutual recognition of qualifications), setting German language skills for university enrollment in particular is used as a means of entrance control in university policy. The presence of 272 696 foreign students in 2013 and courses

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<sup>1</sup> Treaty on the Functioning of the European Union

<sup>2</sup> Act on the Freedom of Movement of Union Citizens

<sup>3</sup> Centre for Educational Research and Innovation (Ed.), *Education at a Glance 2013: OECD Indicators*, ISBN 9789264201040, fig. C4.2

<sup>4</sup> Deutscher Musikrat [German Music Council], *Studierende in Studiengängen für Musikberufe – nach Frauen- und Ausländeranteil* [Students taking courses for the musical profession, showing proportions of female and foreign students], 2013

<sup>5</sup> DAAD, press report: Germany now the third most popular host country for foreign students, 09.07.2013

lasting two to four years on average for a Bachelor's or Master's degree are currently making tens of thousands of language tests of foreign students necessary each year<sup>6</sup>.

Even though the German Academic Exchange Service (DAAD) is calling for the number of foreign students to be increased to 350 000<sup>7</sup>, universities may respond with local language requirements to minimise additional integration costs.

**The main instrument for controlling university entrance by foreigners is the level of language proficiency. The purpose of this article is not to discuss or even question the policy of evaluating the level of language proficiency as a way of regulating university entrance. Good language skills can expedite and improve study progress. The purpose of this article is actually to assess such linguistic entrance criteria in terms of European law. Language skills should not be used more than absolutely necessary as an exclusion criterion for foreign students.**

In Germany, universities are mainly the responsibility of and governed by the laws of the *Länder*. The requirement for language skills to be shown by foreign students in Bavaria is therefore enshrined in the Bavarian Universities Act [Bayerisches Hochschulgesetz (BayHSchG)] and similarly in other federal *Länder* and the Universities Framework Act [Hochschulrahmengesetz]

*Article 42 BayHSchG*

*(1) ... Citizens of another Member State of the European Union have the same status as German citizens if they can prove that they have the language skills needed for study. Other persons ... can be registered if they can prove that they have the language skills needed for study.*

It is striking that the Act does not specify which institution is entitled to determine the level of language proficiency, does not define specific levels of language proficiency and does not distinguish between the levels of language proficiency attained by EU students and students from non-EU countries.

*Article 3 Freedom of Art and Science, Research, Teaching and Study* does not delegate to the universities the right to regulate restrictions on admission and *Article 12 Institutional Matters and State Matters* defines the following areas explicitly as state matters in

*Art. 12 (3) 1 ... the regulation of university entrance, enrollment and exmatriculation, determination of educational capabilities, setting admission numbers and the allocation of study places ...*

and in so doing contradicts the rules regarding language requirements at university level.

In Bavaria, the *Ordinance concerning the Qualifications for Study at the Universities of the Free State of Bavaria and the state-recognised private Universities* (Qualifikationsverordnung - QualV) of 2 November 2007 in *Article 11 Other Proof of University Matriculation* -

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<sup>6</sup> For an average study period combining a Bachelor's and Master's degree.

<sup>7</sup> DAAD, press report: Efforts to attract foreign students, 15.04.2013

*acquired abroad* transfers responsibility to the body responsible for recognising certificates in the Free State of Bavaria.

The *Notice from the Bavarian State Ministry of Education and Cultural Affairs* of 10 April 2013, Ref. VI.9-5 S 4521-6a.25 550 concerning the *Tasks of the certificate recognition body for the Free State of Bavaria* neither describes nor delegates responsibility for setting the language knowledge needed for academic study.

In the *Bulletin for non-German citizens wishing to apply to Bavarian universities with a foreign university matriculation certificate*<sup>8</sup>, the certificate recognition body is instructed that the necessary language skills are proven by the German Language Diploma of the Culture Ministers' Conference - Second Level<sup>9</sup>, even though this duty is not assigned to the certificate recognition body by the Bavarian Ministry of State.

In the *Bulletin for German citizens wishing to apply to Bavarian universities with a foreign university matriculation certificate*<sup>10</sup>, the certificate recognition body is informed that checking if there is sufficient knowledge of the German language remains the preserve of the universities in the registration procedure, even though Article 12(3)(1) of BayHSchG expressly describes the registration rules as the responsibility of the State.

Article 1 of the *General Rules concerning German Language Tests for Study at German Universities* (RO-DT) in the version of the University Rectors' Conference (HRK) of 03.05.2011 and the Culture Ministers' Conference (KMK) of 17.11.2011 states that persons without a German school education<sup>11</sup> are supposed to have sufficient language skills to undertake study. In the same Article, however, different levels are defined as recommendations and not as binding for universities. In addition, universities are expressly empowered by local authorisation and registration rules under Article 8(3), on their own initiative, to wholly or partially release certain groups of applicants from the obligation to prove that they have the language skills needed for study. Language teaching courses simultaneously to the academic degree to improve students' language skills are being proposed as well.

The application of European law to language requirements for EU students is neither evident nor mentioned in any legislation or recommendations by HRK or KMK. Council Directive 2004/114/EC of 13 December 2004 *On the conditions of admission of third-country nationals for the purposes of study* does not apply, since according to Article 1a it applies exclusively to non-EU citizens.

Article 16 I 3,4 of the *Residence Act* [*Aufenthaltsgesetz*] and the language requirement for study does not apply, as Article 1(2)(1) states that the *Residence Act* does not apply overall in the case of EU citizens resident in Germany under the *FreizügG/EU*. Article 2(2)(1) *FreizügG/EU* expressly includes education in the freedom of movement; it does not define

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<sup>8</sup> No. A 7/10/Da – Status: January 2010 MBNichttdtHZ

<sup>9</sup> Corresponds approximately to B2/C1

<sup>10</sup> No. A 6/10/Da – Status: January 2010 MBDtmitausläB

<sup>11</sup> Applicants for study who have not acquired their higher education entrance qualification at a German school, regardless of their nationality

language requirements, however. The erection of a language entrance barrier for EU students could therefore be declared to be null and void under the law on freedom of movement.

**Who is responsible for setting language requirements is not clear at all. The Bavarian Ministry of State, the Certificate Recognition Body, the Minister of Culture or the University Rectors' Conference or the universities themselves might be responsible. In reality, however, the necessary language skills are determined by the universities themselves, without any consideration of the requirements under European law or clarification of who is legally responsible. Universities often do not follow the recommendations of HRK and KMK and determine their own levels of language proficiency.**

The Common European Framework of Reference for Languages (CEFR) of the Council of Europe is used to define language skills by clearly and comparatively breaking down the language skills of learners into six levels of competence (A1, A2, B1, B2, C1, C2). All sub-skills (reading, listening, writing and speaking) are included. In addition, HRK and KMK also use TestDaF<sup>12</sup>-institutes or DSH-tests<sup>13</sup> at the universities' own language centres. The three levels B2, C1, C2 typically used at universities are approximately equivalent<sup>14</sup>:

B2	TestDaF 3	DSH 1
C1	TestDaf 4/5	DSH 2
C2		DSH 3

The levels that are relevant for study purposes are described as follows<sup>15</sup>:

B1 Can understand the main points of clear standard language on familiar matters regularly encountered in work, school, leisure, etc.

B2 Can understand the essential content of specific or abstract subjects in a complex text, including a technical discussion in his/her area of specialisation.

C1 Can understand a wide range of long, demanding texts and grasp implicit meanings.

C2 Can understand practically everything he/she reads or hears without difficulty. Can reproduce facts and arguments from various written and oral sources by summarising them in a coherent manner.

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<sup>12</sup> The initial funding for TestDaF was provided between 1998 and 2006 through DAAD from funds provided by the Foreign Office, the BMBF (Federal Ministry of Education and Research), the Association of German Science Donors [*Stifterverbands der deutschen Wissenschaft*], the Robert Bosch Foundation and the *Land* of North Rhine-Westphalia. TestDaF has funded itself entirely from examination fees since 2007.

<sup>13</sup> German language testing for university entrance

<sup>14</sup> Foreign language centre of universities in the *Land* of Bremen, comparative table of international certificates

<sup>15</sup> Common European Framework of Reference for Languages: learning, teaching, assessing, Langenscheidt, 2001

B2 relates to language skills in a person's own specialist area, C1 in any specialist area and C2 can be described as almost native speaker level and is comparable with the standard of German of a foreigner with a German education<sup>16</sup> after having successfully completed his/her education in a German *Gymnasium* (grammar school).

With regard to the level of language proficiency requirements, the question has been raised as to whether universities use the initial language level as a means of control of access in university policy and hence require more than is absolutely necessary<sup>17</sup>. This concerns, in particular, universities' interest in using more demanding language requirements as a way of keeping the quality of study high from the outset, instead of using accompanying 'Hort der Bildung' (shelter of education) language courses to guide (EU) students to academic success. In terms of discrimination against EU students, the question therefore arises as to whether these requirements are proportionate in a European context, since language requirements for foreign students are a barrier to entrance that is not faced by foreigners with a German education or German students.

The definition of proportionality is used by the ECJ on a regular basis<sup>18</sup>

*According to the Court's case-law, national measures which restrict the exercise of fundamental freedoms guaranteed by the Treaty can be justified only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective (cf, in particular, judgments of 30 November 1995 in case C-55/94, Gebhard, ECR 1995, I-4165, Paragraph 37, and judgment of 9. March 1999 in case C-212/97, Centros, ECR I-1999, I-1459, Paragraph 34).*

The 2011 DAAD report on *foreigners with a German education* also states that insufficient attention has been given hitherto to teaching the necessary language skills to foreigners with a German education<sup>19</sup>. Foreigners with a German education have a dropout rate that is twice that of German native speakers undertaking a course of study. For most countries of origin, the drop-out rate for persons without a German education<sup>20</sup> is the same as or slightly above the drop-out rate for foreigners with a German education<sup>21</sup>. However, because persons without a German education from Austria display drop-out rates that are 1.5 times higher than those of German students, there is a need to focus on more than just language deficiencies in connection with drop-out rates. Austrian women undertaking study in Germany display the

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<sup>16</sup> Foreign students at German universities who have enrolled in Germany or at a German school in another country

<sup>17</sup> Essen linguistic scripts, TestDaF and DSH - unequal language tests in comparison, 2002

<sup>18</sup> Judgment of the Court of Justice of 04/07/2000, Haim, Case C-424/97, Paragraph 57

<sup>19</sup> DAAD, *Foreigners with a German education* 2011, p. 48

<sup>20</sup> Only in the case of students from Western Europe is the drop-out rate of persons without a German education much greater than foreigners from the same countries of origin with a German education. Since this is not the case for other countries of origin, it is necessary to consider different causes.

<sup>21</sup> DAAD, *Foreigners with a German education* 2011, p. 52

second or third highest drop-out rate among foreigners undertaking study in Germany whose native languages are not German unless they come from Austria<sup>22</sup>.

It seems more likely that dropping out from university should be seen in a more differentiated context. It might be the case, for example, that a large number of foreigners choose courses in the natural or engineering sciences, in which there is also a larger proportion of drop-outs among German students. It is also conceivable that foreign students start courses in Germany (entry to which is possible only to a limited number of students in their home countries) in order to return to their home countries in the second or third semester after having been accepted on such courses there. Both these factors would significantly distort student drop-out statistics and would therefore not permit any relevant comparison with the level of language proficiency that is necessary.

Because foreigners with a German education normally have a knowledge of German equivalent to C2 as a result of having taken the German *Abitur* examination, there is no conclusive link between native language, level of German through *Abitur* and dropping out of education.

**Statistically speaking, foreigners with or without a German secondary education display a much higher study drop-out rate from university than German native speakers undertaking a course of study. However, because the difference in the drop-out rates of foreigners with or without a German secondary education is not very great, the reasons need to be sought mainly outside the area of language skills. Measures to enhance language skills during academic study are nevertheless useful.**

It is not realistically possible for persons without a German education and whose native language is not German to acquire the necessary language skills in addition to studying their chosen subject at Bachelor level in the short and medium term. Without preparatory or extra work, language courses would occupy up to 50% of typical hours per week per semester<sup>23</sup>. At least two years would be needed to be dedicated to full-time language study to move from A1 to C2 calculated purely on the basis of hours per week, without any further commitments<sup>24</sup>. Nor should it be forgotten that the time required to reach the higher levels of proficiency in a language rises disproportionately. If universities raise their language requirement, this inevitably leads to students not having sufficient time to meet the requirement. For example, European students taking a Bachelor's degree outside Germany can, through extra study, only with great difficulty achieve the level of language proficiency required by German universities for them to undertake a Master's degree, and this is a direct barrier to European academic mobility.

It is striking that in a European comparison based on sampling<sup>25</sup>, the language requirements for incoming and outgoing ERASMUS students are lower than for full-time students,

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<sup>22</sup> DAAD, *Foreigners with a German education 2011*, p. 53

<sup>23</sup> Information concerning the Common European Framework of Reference for Languages, Language Centre of the University of Bamberg, 2007, p. 4

<sup>24</sup> Language course level, SG Education AG, 2013

<sup>25</sup> Freie Universität Berlin, Hochschule für Musik Nürnberg, University of Leeds, Universidad de Valencia, Università degli studi di Firenze, Technische Universiteit Delft, Universidade de Coimbra, Wrocław University of Technology

although the ECTS<sup>26</sup> of ERASMUS students must be acquired under the same conditions. As a rule, the language requirements extend from none in a few cases, to A2-B1 in most cases and up to B2 in a few cases again. To make the anomaly even more striking, ERASMUS students have already completed a number of semesters and the language requirements should, in theory, be higher than those imposed on foreign full-time students at the start of their studies in Germany due to the advanced academic content.

It should also be noted that the levels of language proficiency required at German universities differ considerably, even within the same institution, which directly contradicts the prohibition on arbitrary decisions under EU law.

For example, Munich Technical University requires levels in the range of B2-C2 proven by various test centre methods for enrollment, without considering comparability in greater detail<sup>27</sup>. Depending on the faculty, the requirements of the University of Erlangen-Nürnberg range from no proof of language skills at all up to C1 level. It is striking that even speciality tests in German are held only at DSH-1 level<sup>28</sup>. One anomaly at the Free University of Berlin is that for courses requiring a high level of English, students who have gained their A-levels and therefore university access in an English-speaking country must nevertheless prove their proficiency in English in a language test<sup>29</sup>.

A comparison of academic teacher degrees with approximately the same content produces the following results at different musical universities in Germany:

- Mannheim University of Music B2 suggested (equivalent to DSH-1 for teacher training and other courses<sup>30</sup>)
- Detmold C1 Musical University (may be submitted two semesters later with language course conditions; i.e. at the end of the course in the case of a 1-year Master's degree)<sup>31</sup>
- Nürnberg Musical University C1 (for Master's in teacher training).<sup>32</sup>
- Würzburg Musical University C2 (for teacher training courses). Alternatively prior study in Germany<sup>33</sup>

A range from B2 to C2 for teacher courses at different musical universities shows that the quality-of-study argument is invalid and that the level of German is an instrument for controlling the selection of foreigners in university policy in order to reduce or control the relative numbers of foreigners at universities.

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<sup>26</sup> European Credit Transfer System

<sup>27</sup> [www.tum.de](http://www.tum.de), Study requirement for foreigners applying for courses, 11.12.2013

<sup>28</sup> [www.fau.de](http://www.fau.de), Knowledge of German for Master's courses, 12.12.2013

<sup>29</sup> [www.fu-berlin.de](http://www.fu-berlin.de), Language entrance requirements at the Free University of Berlin, 12.12.2013

<sup>30</sup> Rules on enrolment, 06.02.2013, Article 12

<sup>31</sup> [www.hfm-detmold.de](http://www.hfm-detmold.de), Information on language testing, 2013

<sup>32</sup> Rules concerning qualification requirements, 28.01.2013. Article 3.5.2

<sup>33</sup> [www.hfm-wuerzburg.de](http://www.hfm-wuerzburg.de), Foreign applicants– Proof of knowledge of the German language, 2013



Because musical universities have a proportion of foreign students that is 2.5 times higher than German universities on average, the introduction of tuition fees solely for non-EU students is now being discussed by politicians in Baden-Württemberg (the principle of equality prohibits the introduction of tuition fees for foreign students in general if German students are not also affected). This policy has already been adopted in Saxony, where EU students do not pay any tuition fees; foreign students from non-EU countries must pay them, however. Musical universities might therefore also use higher than average linguistic entrance barriers to regulate the proportion of foreign students.

It is worth noting in this context that the rules for the award of a doctorate generally do not require formal proof of a knowledge of German. The necessary language skills are regulated solely by individual understanding between the PHD-candidate and doctorate supervisor.

**German universities determine the necessary levels of language proficiency for themselves, at university or faculty level. There are very different language requirements even for what seem to be 100% comparable courses. In many cases, reference is made to recommendations by the HRK, while in others mainly local but not always comprehensible standards are applied. There is no proportionality or comparability under European law.**

Naturalized citizens must be considered separately from citizens of EU States or other foreigners. Because some universities distinguish between German citizens and foreigners, not between foreigners with or without a German education, the level of language proficiency required for naturalization in Germany must also be considered for comparison purposes.

Proof that the B1 level<sup>34</sup> has been reached is needed to acquire Germany nationality. It would, however, be contradictory and disproportionate not to require German citizens applying for university to submit proof of language proficiency while at the same time requiring European students to provide proof of proficiency at a higher level than B1.

Precedents and recommendations regarding the exercise of a profession by EU citizens (for example lawyers<sup>35</sup>, doctors<sup>36</sup> or pharmacists<sup>37</sup> – i.e. professions that require the ability to converse with clients at a high level), in particular in the cases of *Haim* and *Wilson* cited above, also show the consistency with which the ECJ opposes national language requirements and denies this right to set requirements at a national level inconsistently. Representative bodies have now adapted to this situation and only make recommendations that can be defended as being reasonable, e.g. for B2 level (knowledge of the language in own specialist area). It should be noted that a requirement for a student should not be greater than or equal to the requirement for a person exercising the profession at an advanced level.

For over 30 years, the established practice of the ECJ has ruled that European legal principles, in particular the principle of equality and the resulting prohibition on discrimination, have priority over and define the limits of national university policy and the resulting regulations at

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<sup>34</sup> Naturalization in Germany, the Federal Foreigners Representative, 2013

<sup>35</sup> Judgment of the Court of Justice of 19/09/2006, Case C-506/04.

<sup>36</sup> Foreign doctors should possess specialist language skills Marburg Doctors' Association, 03.11.2012 ► B2 for doctors

<sup>37</sup> Approval as a pharmacist, local government of Cologne ► B2 for pharmacists

federal and *Land* level. In particular, due to Forcheri<sup>38</sup> (higher tuition fees for EU students on entry into professional education prohibited), Gravier<sup>39</sup> (access to education is subject to EU law), Blaizot<sup>40</sup> (university education is equivalent to professional education) and other<sup>41</sup> cases, the ECJ has progressively established that although the organisation of education and educational policy are not as such included in the areas that were made the responsibility of Community bodies in the Treaty, the conditions for access to professional and university education nevertheless fall within the scope of the European treaties even if the students concerned moved to another country solely for the purpose of study.

The Förster case<sup>42</sup> can also lead to the conclusion that

*However, once a student, after five years' residence, has obtained the right of permanent residence, he or she has exactly the same rights as a local student.*

if he/she has duly enrolled (and passed a general admission examination if this is also a requirement for national students), no proof of language proficiency may be required, as the necessary language skills can be expected to have been acquired as a result of the five years' residence already automatically.

One way of clarifying language discrimination in Germany would be to refer the following question to the European Court of Justice for a preliminary ruling following a national complaint in Germany on the basis of Article 267 TFEU:

The ECJ should clarify whether, in view of the judgment in Gravier Case 293/83 and the application of Article 18 TFEU and/or the FreizügG/EU and well-established case law and legislation, universities or competent ministries may require from students of the EU who neither possess the nationality, nor native language nor A-levels of the host country<sup>43</sup> to submit additional proof of language proficiency.

Article 42 BayHSchG contains the following provision

*Citizens of another Member State of the European Union have the same status as German citizens if they can prove that they have the language skills needed for study.*

Article 42 BayHSchG does not require German citizens who have

- attended school up to A-levels (Abitur) in another country (persons without a German education),
- but speak little or no German (e.g. as a result of dual nationality or through acquisition of German nationality outside Germany solely through descent) or

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<sup>38</sup> Judgment of the Court of Justice of 13/07/1983, Forcheri, Case 152/83 ECR 1983, p. 2323

<sup>39</sup> Judgment of the Court of Justice of 13/02/1985, Gravier, Case 293/83 ECR 1985, p. 593

<sup>40</sup> Judgment of the Court of Justice of 02/02/1988, Blaizot, Case 24/86 ECR 1988, p. 379

<sup>41</sup> European Commission - Education and culture, rights as a student abroad, 2011

<sup>42</sup> Judgment of the Court of Justice of 18 November 2008, Förster, Case 158/07

<sup>43</sup> but have obtained in their own country A-levels that are recognised in the host country - in Germany, a German *Abitur* is normally considered to be proof of proficiency in the language, such persons being classified as having been educated in the country, regardless of nationality

- through naturalization (and proof of B1 in German) to once again prove their language skills before starting their studies.

These circumstances give rise to the following constellations in Germany:

- different levels of language competency are required for different Bachelor's degrees. This also applies to Master's degrees.
- different levels of language competency are required by different universities for the same Bachelor's degree. This also applies to Master's degrees.
- students who have German nationality by descent but speak little or no German are not normally required to submit proof of their knowledge of German.
- students who have acquired German nationality through naturalization and must have provided proof of B1 for this purpose are not required to submit further proof.

In the cases Haim and Wilson (424/97 and 506/04 respectively), the ECJ has consistently ruled that the Member States must exercise the greatest restraint in setting language requirements and that such requirements must be non-discriminatory, moderate and appropriate for achieving the objectives. The study drop-out rates for foreigners with a German education (non-German citizens not speaking German as a native language, but having passed the German *Abitur*) and persons without a German education are similar but much higher in comparison to German citizens, leading to the conclusion that the failure to successfully complete studies lies elsewhere. Foreigners with a German education are also not normally subject to such stringent language requirements as persons without a German education, as they are often exempted from language tests.

In Germany, universities normally set themselves very different levels of language proficiency (normally B1 - C2) to be attained by students before starting their studies. No distinction is made between students from EU and non-EU countries for this purpose. ERASMUS students are normally only required to have a B1 level of language proficiency.

The question should also include consideration of the extent to which it is important that the acquisition of language beyond a certain level (e.g. above B1) takes up so much time that it cannot be acquired in parallel to normal academic study, but only full-time or over a very long period. In the case of students in particular, consideration might be given, for example to the fact that a Bachelor's student taking a course in one country must actually be capable of acquiring the language skills needed for taking a Master's degree in another country. Otherwise, it would mean that if language requirements are higher, university entrance would be denied to most EU students who have not already learnt the language at school over a long period. Account should also be taken of the fact that knowledge of the language improves considerably during the first few months in the host country and a requirement regarding the level of language proficiency does not take account of this.

The ECJ should be asked to decide whether German universities and competent ministries are free to determine the entrance level of language proficiency. Or alternatively whether European legislation and case law require German universities and ministries to consistently

apply to students from European Member States (but not to students from non-EU States) European legal criteria that do not exceed the absolutely necessary (or nothing at all).

The following questions arise in this regard:

- 1) Are the Member States, acting on their own or through their respective competent institutions, entitled and free to require students who have obtained a recognized higher education entrance qualification to additionally submit proof of proficiency in the respective national language? Or is this an infringement of Article 18 TFEU, FreizügG/EU and/or well-established case law of the ECJ and therefore to be left to the European student to decide as responsible adults?
- 2) If a language requirement as set out in 1) is considered to be valid,
  - a. can it be concluded from the case of Förster, 158/07, that no proof of language proficiency can be demanded after five years' residence, since unequal treatment in comparison with a citizen of the host country is explicitly prohibited?
  - b. should the Member States conclude from the rulings in Haim and Wilson and other cases that Member States must exercise the greatest restraint in setting language requirements and that they must not be discriminatory anywhere in Europe, or should they set higher entrance criteria to restrict numbers, in order to ensure from the outset that the course will proceed without problems from the university's viewpoint? Should the interests of the students or of the universities be given priority in this regard?
  - c. Are the Member States also obliged to use language criteria as applied to naturalisation, for example, to prevent possible discrimination in comparison with their own citizens? In this case, what would happen if European Member States set different criteria for naturalisation or similar integration measures, resulting in unequal treatment within the EU? Is the setting of a language criterion that is higher than that required for naturalisation to be regarded in discrimination against EU students in this regard?
  - d. Must the Member State ensure that the same levels of language proficiency are required at different universities offering the same academic degree, in order to avoid unequal treatment at regional level?
  - e. Is it permitted depending on the nationality of a candidate to determine whether he/she is exempt from a language requirement or must language skills always be tested? This question arises from the circumstance that many universities do not require German citizens to submit proof of level of language proficiency, whose native language is not German, while other universities do require such proof from German citizens whose native language is German but who have graduated at a school gaining their A-levels abroad in a foreign language (Germans without a German education). A foreigner with a German education is normally exempt from language testing.

These questions are intended to determine whether (German) universities individually are free to set levels of language proficiency in order to use them as a quality criterion or means of controlling entrance of EU students. Or whether a European student can decide for himself/herself as a responsible adult, whether his/her level of language proficiency is sufficient for the course he/she is applying for.

## **Conclusion**

The responsibility for language criteria regulating the entry to academic degrees is unclear in Germany. On the one hand, state legislation for universities considers enrollment to be the responsibility of the *Länder*, but in reality universities define the levels of language proficiency they consider to be necessary at local level, at their own discretion and applying their own criteria. The levels communicated by the HRK and KMK are recommendations, not legal requirements, and universities sometimes set levels above or below them.

This leads to the conclusion that some universities are pursuing goals of university policy, recommendations of the HRK and KMK do not contain any references to European law and EU students are treated in the same way as students from non-EU countries, with no account being taken of the prohibition on discrimination under European law.

The ECJ has consistently ruled that regulation of university entrance must comply with European case law and legislation and that this must be observed by the countries and their universities when they set standards and in their management practice.

To avoid discrimination against EU students, the comparative criterion of B1 used for naturalization purposes could be applied if necessary. In case of doubt, since students are mature decision makers, EU students should be left to decide for themselves whether their own language skills are appropriate for study at a university.

In any case, it seems likely that the current method of allowing individual institutional language entrance criteria which depend on the university or faculty is untenable. A case for the principle of subsidiarity does not apply since it is actually the root cause for discrimination in this case.