Professor Niamh Nic Shuibhne

The initial text below (paras 1-14) was published on 18th December 2013 on the website the Scottish Constitutional Futures Forum, as an invited comment on the legal issues arising under EU law from the White Paper's proposal to continue to charge university fees to rest of UK students in the event of independence.[1]

The Scottish Constitutional Futures Forum is "a joint initiative of academics across the law schools of the Scottish universities [which] seeks to provide an independent framework within which the key questions concerning Scotland's constitutional future can be aired and addressed".

(http://www.scottishconstitutionalfutures.org/AbouttheSCFF/tabid/1611/Default.aspx)

The original text has been amended in two ways for present purposes:

1. Paragraph numbers have been applied to assist with cross-referencing.

2. A postscript has been added (paras 15-25) to take into account developments since first publication.

Professor Niamh Nic Shuibhne
Chair of European Union Law
School of Law, University of Edinburgh
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University fees and rUK students: The EU legal framework

1. The White Paper affirms that '[f]ree education for those able to benefit from it is a core part of Scotland's educational tradition and the values that underpin our educational system' (p198). In that context, it is clearly stated that the Scottish Government would 'continue to support access to higher education in Scotland for students from elsewhere in the EU in accordance with our support for student mobility across Europe' (p200). On the previous page, however, the Government also asserts that it will 'maintain the status quo by continuing our current policy of charging fees to students from the rest of the UK to study at Scottish higher education institutions'. It is difficult to see how these competing objectives can be reconciled under EU law.

[1] The text is available at:
http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2759/Niamh-Nic-Shuibhne-University-Fees-and-rUK-Students--the-EU-Legal-Framework.aspx

2. When students holding the nationality of an EU Member State move to other EU Member States for the purpose of attending university, they do so as European Union citizens. This is not just a symbolic status. The EU Treaty provisions on citizenship confer on these students a series of substantive – and enforceable – rights.
3. The right not to be discriminated against on the grounds of nationality is a fundamental element of that legal framework, as confirmed by Article 18 of the TFEU. It is important to remember that EU free movement law does not create an entitlement to *special* treatment for citizens who move to other Member States. But it does create a right to *equal* treatment. In other words, it is not generally permissible under EU law to discriminate against students from another Member State on the basis of their nationality alone.

4. It is also important to acknowledge that EU free movement law does not create absolute rights. The Treaty itself recognises that citizenship rights are conferred subject to the limitations and conditions that are expressly provided for in the Treaty and in relevant secondary legislation. The White Paper seeks to rely on the principle that Member States may legitimately derogate from their obligation not to restrict free movement rights in limited circumstances. However, the problem is that the analysis presented on this point in the White Paper fails to unpack the layered system of derogation and justification that determines the scope of permitted national exceptions from EU free movement obligations.

5. First, when national measures discriminate against EU citizens openly or *directly* on the basis of their nationality, then only the derogation grounds expressly included in the Treaty may be relied upon by States seeking to defend the resulting free movement restrictions. For the free movement of persons, these grounds are limited to concerns about public health, public security, and public policy. Despite the potential breadth of the notion of 'public policy', the Court of Justice has always interpreted its scope extremely narrowly in reality, emphasising instead the fact that 'the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively' (Case C-348/96 *Criminal proceedings against Calfa* [1999] ECR I-11, para. 23).

6. Second, the logic underpinning the idea of *indirect* discrimination in EU law is that while the conditions being imposed by national measures are neutral on the face of it – for example, residence conditions that apply to everyone, including home State nationals – it is, in fact, far more likely that home State nationals will actually be able to satisfy them. By contrast, a distinct burden is placed on the nationals of other Member States to meet the required period of residence, which might in turn deter them from exercising their free movement rights in the first place. Importantly for present purposes, a wider justification system applies in situations involving indirect discrimination. States may rely on the open-ended idea of 'objective justification' in such cases. In other words, they may raise broader public interest arguments than those listed explicitly in the Treaty. There are no conceptual limitations here. In other words, there is no need to attempt to 'mould' a public interest justification into the specified grounds of public health, public security, or public policy. If States can

make a good argument rooted in (any) public interest objectives, then the EU institutions will listen to it.

7. In both cases, however, i.e. whether direct or indirect discrimination is at issue, the contested national measure must also satisfy a proportionality test. In EU law, that test has two limbs. First, is the measure *suitable* or *appropriate* to achieve the stated public interest objective? Second, is the measure *necessary* for that purpose? In particular, it will be asked on the second point: could other measures that are less restrictive of free movement rights achieve the same policy aims?

8. Against that backdrop, let us consider the Scottish Government's proposal to 'maintain the status quo by continuing our current policy of charging fees to students from the rest of the UK to study at Scottish higher education institutions'.

9. First, students residing in rUK following Scottish independence would become nationals of another Member State. The White Paper's characterisation of its proposal as a limitation based on residence (p199) is misleading in this respect. It does not require Irish or Latvian or Swedish students to meet residency conditions in order to benefit from free university tuition. The proposed policy cannot, therefore, be classified as *indirect* discrimination under EU law since it is openly targeted at one group of EU nationals. This means that we are in the terrain of *direct* discrimination on the grounds of nationality – not the indirect discrimination generated by more 'neutral' residence conditions – and so any public interest arguments put forward to defend the measures must relate to public health, public security, or public policy only – and the latter in the very narrow sense in which it has been interpreted by the Court to date. For example, prior to the explicit recognition of consumer protection as a policy objective in the Treaties, the Court declined to interpret 'public policy' so as to cover such concerns (Case 177/83 *Kohl KG v Ringelhan & Rennett SA and Ringelhan Einrichtungs GmbH* [1984] ECR 3651). This is not an issue about the legitimacy or worth of the relevant policy arguments in any given situation; it is about the structure and scope of the Treaty provisions on free movement rights – which the Member States have never amended.

10. Second, a recurring problem in the debate on university fees has been the unfortunate conflation of three quite different strands of case law concerning access to university education. First, for nearly thirty years now, the Court of Justice has made it clear that directly discriminatory fee structures are incompatible with EU law. Even before the creation of citizenship rights through the Maastricht Treaty, the principle of equal treatment with regard to university fees was established in connection with the Treaty's support of cross-border vocational training (Case 293/83 *Gravier v City of Liège* [1985] ECR 593). Second, residence conditions have been accepted in principle in the sphere of indirect discrimination – but for the award of maintenance grants to students from other Member States. In other words, that line of case law is about the funds paid by States to support students through their university studies, not the fees that are paid by students to access their studies in the first place. Moreover, States are not normally obliged to extend maintenance grants to students from other Member States in the first five years of residence in any event

– i.e. before the status of 'permanent residence' is acquired under EU citizenship law (see e.g. Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507). Comparing the case law on university fees to that on maintenance grants is thus a mistaken attempt to compare apples and oranges, since the latter issue sits within the much more complex sphere of the law on access to *benefits*.

11. Third, the Court of Justice has – once – accepted that a State may justifiably limit access to its university courses, but in very specific circumstances (Case C-73/08 *Bressol and Others and Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-2735). The contested national rules restricted access to nine medical and paramedical programmes in Belgium, on the basis of concerns about teaching quality and the sustainability of the affected region's health infrastructure owing to a significant increase in student numbers from other States (especially France). Students who met codified residence criteria had open access to the programmes. All other – i.e. not just French – students were subject to a 30% threshold rule, the places for which were assigned through the drawing of lots. The Court of Justice did not hesitate to find that the rules contravened EU discrimination law. However, it then stated that while 'it cannot be excluded…that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students…the matters put forward as justification in that regard are the same as those linked to the protection of *public health*, since all the courses concerned fall within that field. They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health' (paragraphs 53-54, emphasis added). The Court went on to present detailed – and stringent – guidance on the appropriate proportionality test that needed to be applied by the relevant national court in order for the national quota rules to be saved under EU law. Fundamentally, it required proof 'that such risks actually exist' and emphasised that 'an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health' (para. 71).

12. In the White Paper, the Scottish Government has rationalised its proposal for a differential fee structure for rUK students on the basis of the 'unique and exceptional position of Scotland in relation to other parts of the UK, on the relative size of the rest of the UK, on the fee differential, on our shared land border and common language, on the qualification structure, on the quality of our university sector and on the high demand for places' (p200). But we cannot assume that the Court would apply similar reasoning to that seen in *Bressol* to public interest arguments based on the sustainability of a policy of free university education. First, the Court has consistently asserted that 'the health and life of humans rank foremost among the assets and interests protected by the Treaty' (Case C-171/07 *Apothekerkammer des Saarlandes and others* [2009] ECR I-4171, para. 19). Second, by singling out a particular group of EU nationals, the Scottish Government's proposal is qualitatively different from the indirectly discriminatory residence conditions challenged in Belgium. In infringement proceedings taken by the Commission against Austria, where differential (more onerous) university entry requirements for holders of qualifications from other Member States were being challenged, the Court focused

on the notion of less restrictive – and, crucially, non-discriminatory – alternative measures that Austria could implement, stating that 'excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade' and it also remarked that 'the risks alleged by the Republic of Austria are not exclusive to its higher or university education system but have been and are suffered by other Member States' (Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para. 62). Significantly, the Court also criticised the Austrian Government for merely asserting its case rather than properly demonstrating it.

13. All of this means that the Scottish Government would face an extremely steep uphill battle to convince the EU institutions that it should be entitled to retain a practice involving systemic direct discrimination against one particular cohort of EU citizens. If the position were to shift so that residence conditions and/or threshold quotas were proposed for *all* students – i.e. if the Government proposed indirectly rather than directly discriminatory limitations – then the Court's reasoning in *Bressol* might suggest a more successful outcome on one view. But that argument rests on the as yet untested assumption that the Court would be willing to translate the justification arguments made there for the protection of public health across to a different policy objective. Furthermore, how would Scotland actually *prove* that its proposed policy meets 'the need to maintain the current mix of students from different parts of the UK in Scottish universities in order to ensure that Scottish domiciled students have the opportunity to study in Scotland, and that Scotland secures the graduate skills it requires' (p199)? And relatedly, as has been emphasised throughout this comment, the Government would also have to show that, in a legal framework with proportionality at its core, it is unable to introduce any other measures that are less restrictive of free movement rights in order to achieve the same policy objectives.

14. States aim to achieve many good things, and often for very good policy reasons. But being an EU Member State brings with it, alongside the privileges of membership, a series of parallel responsibilities to try to achieve these things in a certain way, on the basis that treating all EU citizens equally is a good thing too. As an alternative strategy, the Scottish Government might be able to secure a temporary, transitional arrangement as part of the negotiation process that would have to take place following a vote in favour of Scottish independence, in order to protect its education system from an initial financial shock that current funding structures simply could not withstand. Even then, the Government would need to bring to the table very clear empirical evidence of the problem, and the extent of the problem, affecting the sustainability of its university system that charging rUK – and only rUK students – would resolve, also bearing in mind the suitability and necessity elements of the EU proportionality framework. And it would also need to acknowledge that an independent Scotland would be actively working towards recognising the full equality of all EU students – as EU citizens – in the longer term.

Postscript

15. Since the above comment was published, the question of objective justification has become the prevailing issue in public debate. Additionally, two legal analyses have been widely discussed in this context: a provisional legal view prepared for Universities Scotland in April 2013;[2] and the written response provided on behalf of the Commission in February 2014 by Androulla Vassiliou, European Commissioner for Education, Culture, Multilingualism, Sport, Media and Youth, to a parliamentary question posed by David Martin MEP.[3]

16. Neither of these two analyses addresses the proposal presented in the White Paper directly. This is because the legal view provided for Universities Scotland predates the publication of the White Paper; and because the Commissioner's written response explicitly states that '[i]t is not the role of the Commission to express a position on questions of internal organisation relating to the constitutional arrangements of a particular Member State' and so the response addresses the issue 'in general terms' only.

17. However, *both* texts explicitly make the same fundamental distinction between direct and indirect discrimination that is outlined in paras 5-9 above: i.e. when differential treatment is premised on nationality – as it is in the White Paper through the singling out of rUK students – then it is directly discriminatory.[4] Three main points flow from this categorisation.

18. First, in the context of current debates, the critical legal implication is that, as an established point of EU law, the objective justification route may not be used in situations of direct discrimination (explained in para. 6 above). Both the view provided for Universities Scotland and the Commissioner's written response confirm this point: they discuss objective justification *only* in the context of indirect (or, in the language of the Commissioner, covert) discrimination. For example, the Commissioner's written response first states clearly that in the context of 'the conditions of access to education, including tuition fees…any discrimination on grounds of nationality is prohibited'. The *Gravier* case is cited in support (see also, para. 10 above). The response does go on to outline the concept of objective justification but *only* with respect to 'differences in treatment *based on other*, *apparently neutral, criteria* (such as residence requirements)' (emphasis added).

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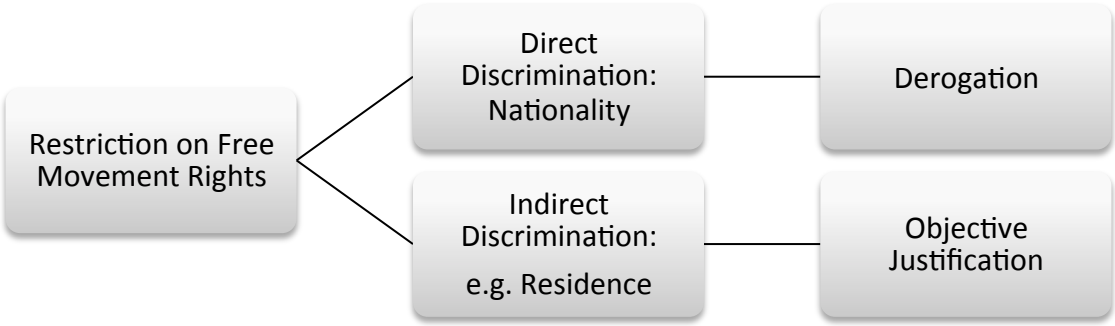
[2] The text of this opinion is available here: http://www.universities-scotland.ac.uk/uploads/briefings/Note%20for%20Universities%20Scotland%288025053_v4%29%20DOC%288033180_3%29.pdf

[3] The text of both the question and the response is available here: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-014162+0+DOC+XML+V0//EN&language=en

[4] See the view provided for Universities Scotland at p2 and p5 on this point; the relevant text of the Commissioner's written response is quoted in para. 18 below.

19. As emphasised in para. 9 of this document, a policy on tuition fees would need to apply to *all* students – i.e. EU nationals (which would, in the event of independence, include rUK nationals) *and* Scottish nationals – in order to constitute indirect discrimination. Moreover, these legal principles (explained in more detail in paras 5-6 of this document) apply in a parallel and not in an overlapping way. That point can be represented as follows:



20. Second, as also explained in para. 9 above, only grounds specified *expressly* in the Treaty can be invoked if a Member State wishes to derogate from free movement rights by applying directly discriminatory restrictions. It was also explained there that the idea of 'public policy' is a much narrower concept than its phrasing might suggest, the French phrase (from which the English was translated) being *ordre public* (public order).

21. Third, if the Scottish Government were to change its policy and to consider, instead, the application of indirectly discriminatory restrictions on tuition fees, the nature of the public interest at issue would need to be clarified in order to assess the amended policy in light of the EU proportionality test (outlined in para. 7 above). For example, if the Government is mainly concerned with ensuring access to university irrespective of a student's financial status, then a means-tested tuition fees policy that applies to all students including Scottish students might be relevant. If, however, the underlying public interest is about the opening up of Scottish universities in a more general educational sense, then a residence requirement applied to all students (and not to rUK students alone) might be more pertinent.

22. It should still be borne in mind that the scale and scope of such conditions would be new terrain for EU law. This point was confirmed in the Commissioner's written response: '[a]cording to the information available to the Commission, no Member State is charging different university tuition fees to EU students not residing within its territory'. The narrower limits – i.e. entry conditions placed *only* on access to

certain medical courses – in *Bressol*, for example, stand as another point of contrast in this respect (see paras 11-12 of this document). Moreover, as emphasised in paras 12 and 13 above, even policies that are accepted as legitimate public interest considerations in principle have to meet the proportionality and proof requirements of EU law.

23. Finally, even though it cannot be applied in any event to the direct nationality discrimination actually proposed there, it is worth recalling the rationale for objective justification that has been articulated in the White Paper: i.e. the 'unique and exceptional position of Scotland in relation to other parts of the UK, on the relative size of the rest of the UK, on the fee differential, on our shared land border and common language, on the qualification structure, on the quality of our university sector and on the high demand for places'. The Austrian and Belgian cases discussed in paras 11-12 of this document are instructive in this respect, since both concerned the problems faced by two relatively small countries in protecting certain university programmes against an influx from German and French students respectively. The comparable issues addressed in these cases could therefore make it difficult for the Scottish Government to sustain a justification argument based on uniqueness, even if it were minded to pursue the application of indirectly rather than directly discriminatory tuition fee restrictions.

24. However, it should also be recalled that the ethos of the European Union is precisely the opposite of going it alone. EU law is about achieving balance through compromise and negotiation, while respecting the fundamental principles on which the Union is based and the rights that are conferred on Union citizens. The current British Advocate General at the Court of Justice, Advocate General Sharpston, captured this balancing requirement perfectly in her Opinion for the *Bressol* case, in text that is worth extracting in full:

> 141. … while [Article 165(1) TFEU] provides that Member States remain responsible for 'the content of teaching and the organisation of education systems and their cultural and linguistic diversity', the Court has made it clear that the conditions of access to vocational training fall within the scope of the Treaty. Moreover, it is settled case-law that, even in matters which do not fall within the scope of the Treaty (which is the case as regards certain aspects of education policy) the competences retained by the Member States must be exercised consistently with [Union] law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article [21(1) TFEU].
>
> 142. The prohibition on discrimination should indeed be seen as the cornerstone of the Treaty precisely because it leaves Member States' regulatory autonomy intact – provided that their laws apply equally to nationals and non-nationals. The key underlying principle is that all citizens of the Union must be treated as individuals, without regard to their nationality. 'Free and equal access to education for all' therefore means

> exactly what it says. It may not mean 'free and equal access to education for all my nationals'.
>
> 143. I accept that the problems faced by the French Community are not insignificant. However, they must be resolved in a way that is not a variant of 'equality for those inside the magic circle' (in this case Belgian nationals), but that respects the 'fundamental status' of EU citizenship by ensuring equal access to education for all EU citizens regardless of nationality.
> …
> 151. I have emphasised the importance, for the development of the Union, of freedom of movement for students based on equality. Equally, however, the EU must not ignore the very real problems that may arise for Member States that host many students from other Member States.
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> 152. The Protocol on the application of the principles of subsidiarity and proportionality provides that action at [Union] level is justified where, 'the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the [Union]'. It also provides for the following guidelines to be used in examining whether that condition is fulfilled: (i) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; (ii) actions by Member States alone or lack of [Union] action would conflict with the requirements of the Treaty or would otherwise significantly damage Member States' interests; (iii) action at [Union] level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.
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> 153. I invite the [Union] legislator and the Member States to reflect upon the application of these criteria to the movement of students between Member States.
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> 154. Finally, I recall that one of the objectives of the [Union] listed in Article [3(3) TEU] is to promote solidarity among the Member States, and that the Member States have a mutual duty of loyal cooperation on the basis of Article [4(3) TEU]. It seems to me that those provisions are very pertinent here. Where linguistic patterns and differing national policies on access to higher education encourage particularly high volumes of student mobility that cause real difficulties for the host Member State, it is surely incumbent on both the host Member State and the home Member State actively to seek a negotiated solution that complies with the Treaty [*citations omitted*].

25. If an independent Scotland were to become a Member State of the EU, it could pursue these issues cooperatively through the Union's law-making processes.