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**THE INTRODUCTION OF TUITION FEES IN
GERMANY AND THE INTERNATIONAL
COVENANT ON ECONOMIC, SOCIAL AND
CULTURAL RIGHTS
(UN ICESCR)**

**OPINION OF THE GEWERKSCHAFT ERZIEHUNG
UND WISSENSCHAFT (GEW) AND THE FREIER
ZUSAMMENSCHLUSS VON
STUDENTINNENSCHAFTEN (FZS)**

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Acronyms

ABS	Alliance for Action against Tuition Fees (<i>Aktionsbündnis gegen Studiengebühren</i>)
BAföG	Federal Training Assistance Act (<i>Bundesausbildungsförderungsgesetz</i>)
BGBI	Federal Gazette (<i>Bundesgesetzblatt</i>)
BMBF	Federal Ministry of Education and Research
BMF	Federal Ministry of Finance
BVerfG	Federal Constitutional Court (<i>Bundesverfassungsgericht</i>)
BVerfGE	Decision of the Federal Constitutional Court
DSW	Deutsches Studentenwerk
fzs	freier Zusammenschluss von studentInnenschaften
GEW	Gewerkschaft Erziehung und Wissenschaft
GG	Basic Law (<i>GG</i>), the German Constitution
HIS	Hochschul-Informationssystem, private-sector provider of the Higher Education Information System
HRG	Framework Higher Education Act (<i>Hochschulrahmengesetz</i>)
ICESCR	International Covenant on Economic, Cultural and Social Rights
NHG	Higher Education Act of Lower Saxony (<i>Niedersächsisches Higher Education Act</i>)
NRW	North Rhine-Westphalia (<i>Nordrhein-Westfalen</i>)
OVG	supreme administrative court of a federal state (<i>Oberverwaltungsgericht</i>)
SGB	German Social Code (<i>Sozialgesetzbuch</i>)
StKFG	Study Accounts and Financing Act of North Rhine-Westphalia (<i>Studienkonten- und -finanzierungsgesetz</i>)
VG	district administrative court (<i>Verwaltungsgericht</i>)

1 Introduction

The Federal Republic of Germany signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 9 October 1968 (cf. BGBl 1973 II, pp. 1569 ff.) and ratified it on 17 December 1973 (ibid, p. 1569). The Covenant entered into force on 3 January 1976, three months after the 35th instrument of ratification was deposited with the Secretary General of the United Nations. This Covenant has now been ratified by most countries in the world. It recognises that economic, social and cultural rights, which serve to “overcome lop-sided dependencies” (Bielefeldt/Seidenstricker 2004, p. 5), are an important aspect of human rights. Consequently, a part of the Covenant addresses the right to education, and this is the subject of the present Report.

In ratifying ICESCR the Federal German government undertook to submit periodic reports on its progress in implementing social, economic and cultural rights to the appropriate body of the United Nations, the Committee on Economic, Social and Cultural Rights. The last report was due on 30 June 2006 (cf. United Nations 2001, 49) but has not yet been presented. The *Gewerkschaft Erziehung und Wissenschaft* (GEW), which is the education trade union affiliated to the Confederation of German Trade Unions (DGB), and the *freier Zusammenschluss von studentInnen-schaften* (fzs), as the umbrella association for student associations throughout Germany, have submitted the present Report to describe how rights relating to higher education have developed in recent years. The following sections first distil from ICESCR its requirements with regard to higher education, and then compare these with the empirical facts.

The GEW and the fzs request the Committee on Economic, Social and Cultural Rights to take steps to secure an advance in the implementation of the above-mentioned rights.

2 Economic, social and cultural rights

Economic, social and cultural rights are a central component of human rights. This is one reason for the clear formulation in Article 2 (1) of the UN Covenant on Economic, Social and Cultural Rights (ICESCR), viz.: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (UN ICESCR 1973, Art. 2 (1)).

It is a matter for dispute whether the rights enshrined in a Covenant of this nature are judiciable or simply give rise to obligations for States (cf. Schneider 2004). In Germany, however, the Covenant is effective federal law, which means that under Art. 31 GG any legislation enacted by a federal state that runs contrary to it will be null and void. Moreover, the prohibition of regressive steps that follows from Art. 2 (1) of the Covenant is fundamentally incompatible with the (re-)introduction of tuition fees (cf. VG Minden, Judgment of 26 March 2007, AZ.: 9 K 3614/06, p. 22).

2.1 Education as a human right

In general, nobody would question the important value of education. ICESCR draws the conclusion from this by recognising education as a human right. Many different functions have been ascribed to education. It is considered to facilitate the full development of the individual (cf. Prengel/Overwien 2007, p. 29) and awareness of the human personality (cf. Amsler 2007, p. 74). A further aim of education is to form confident individuals who will play an active part in society (cf. ver.di 2007). This furthermore encourages participation in public life and contributions to shaping it (cf. Koch 2007, p. 61). Education is seen as countering existing social inequalities and helping to combat poverty (cf. Bultmann/Himpele 2005, p. 5; Butterwegge 2005, p. 12 f.). Finally, education is regarded as an economic factor that enhances productivity (Hüther 2006) with the aim of achieving a better life.

The functions of education, therefore, substantiate the right to have it. This right is enshrined in Article 13 ICESCR, which states: “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all per-

sons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.” (UN ICESCR 1973) The significance of this right to education is summarised by Fritzsche (2007, p. 80) as follows: “The right to education is regarded as a special right because its realisation must also be seen as a precondition for realising other rights.”

2.2 Higher education

In the present Report the Gewerkschaft Erziehung und Wissenschaft and the freier Zusammenschluss von studentInnenschaften have focused on the sphere of higher education. The International Covenant on Economic, Social and Cultural Rights contains numerous formulations on this. First, there is Art. 2 (2), which covers all spheres of education. This stipulates that rights must be non-discriminatory. The Covenant says: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The central legal provision with regard to higher education is Article 13. This begins by recognising everyone’s right to education. Paragraph 2c then refers specifically to higher education, declaring that, in order to implement this right, “higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”.

This, to conclude, raises the question as to what the federal government of Germany and the governments of the federal states have done in order to realise the right to education in the sphere of higher education. The following section will, therefore, examine the framework conditions for studying and recent political developments which affect them.

3 Access to higher education

As a right, education must be open to everyone. Article 2 (2) ICESCR explicitly states that this must apply without any discrimination as to property. Access to education – and hence also to higher education – must, therefore, be free of financial restrictions. In Germany’s case, however, it is rapidly evident that the system is selective and that opportunities to study are not independent of social origins.

3.1 Social selection in the higher education system

The most detailed description of the social composition of students in Germany is provided by the Deutsches Studentenwerk Social Survey. This has been conducted since 1951, usually at three-year intervals. The latest 18th Social Survey (cf. Isserstedt et al. 2007) shows clearly that access to higher education in Germany continues to depend substantially on social background. Although we cannot here delve into the detailed findings of the Social Survey, a few statistics will suffice to demonstrate that non-discriminatory access to education, as required by Art. 2 (2) ICESCR, has still not been realised in Germany.

Isserstedt et al. (2007, p. 65 f.) point out not only that the transition to higher education in Germany is itself selective, but that this process actually begins much earlier. They identify four thresholds: first, the transition from primary to secondary school, which takes place in most federal states after the fourth year of schooling, when most pupils are 10 years old. Any child that does not manage – for whatever reason – to enter a grammar school or a comprehensive school with a grammar-school stream in the upper years will have a considerably harder task of acquiring the certificate of entitlement to higher education (*Abitur*) via a roundabout route. The second threshold is the transition to upper secondary level (after compulsory schooling ends). Although the type of school the pupil already attends will in many cases determine the options for transition to upper secondary level (a pupil who has attended a grammar school at the lower secondary stage is likely to move automatically into the upper secondary stage), a threshold can, nevertheless, be observed. It is possible, for example, to switch to the upper grammar school with a good report from a *Realschule* or an extended certificate from a *Hauptschule*.¹ The third threshold identified by Isserstedt et al. (op. cit.) is the acquisition of the certificate of entitlement to higher education. This affects not only those who choose the “classical” route (primary school – gram-

¹ Translator’s footnote: The *Hauptschule* or “general school” offers basic compulsory schooling to secondary-age pupils. The *Realschule* was established as a “practical alternative” to the *Gymnasium* or “grammar school”.

mar school – *Abitur*), but also those who work for this certificate at a vocational college or in adult further education. The fourth threshold is activating the option to study, i.e. beginning a course in higher education. This fourth threshold is a key feature in the present Report. Chapter 3.3 will, therefore, consider the reasons why candidates do not take up study having acquired the certificate of entitlement. Apart from these thresholds along the road to higher education, Isserstedt et al. (2007) identify completing a degree as a fifth threshold.

Access to universities in Germany is still characterised by a substantial social bias.² This is partly explained by the selective mechanisms that already underlie the German school system. In 2005, for example, 36% of school students whose father³ had completed his education at a *Hauptschule* stayed on to attend upper secondary school, while of those whose father had acquired an entitlement to enter higher education 83% were in upper secondary school. As there are many “dead-ends” in German education⁴ – once a decision has been taken, correcting the course is difficult – data like this is found throughout the system and it is exacerbated at every new hurdle. This even applies once the entitlement to enter higher education has been obtained. Commenting on the transition to higher education after acquiring the appropriate school-leaving certificate, the 18th Social Survey concludes: “When those who qualified to enter higher education came from families where at least one parent had graduated with a university degree, only 22% failed to make use of their entitlement in 2005, compared with 41% of those whose

² Hartmann (2002) found in a study that this bias does not end upon graduation. Even after successfully completing a doctorate, social origin remains a key factor influencing a person’s career.

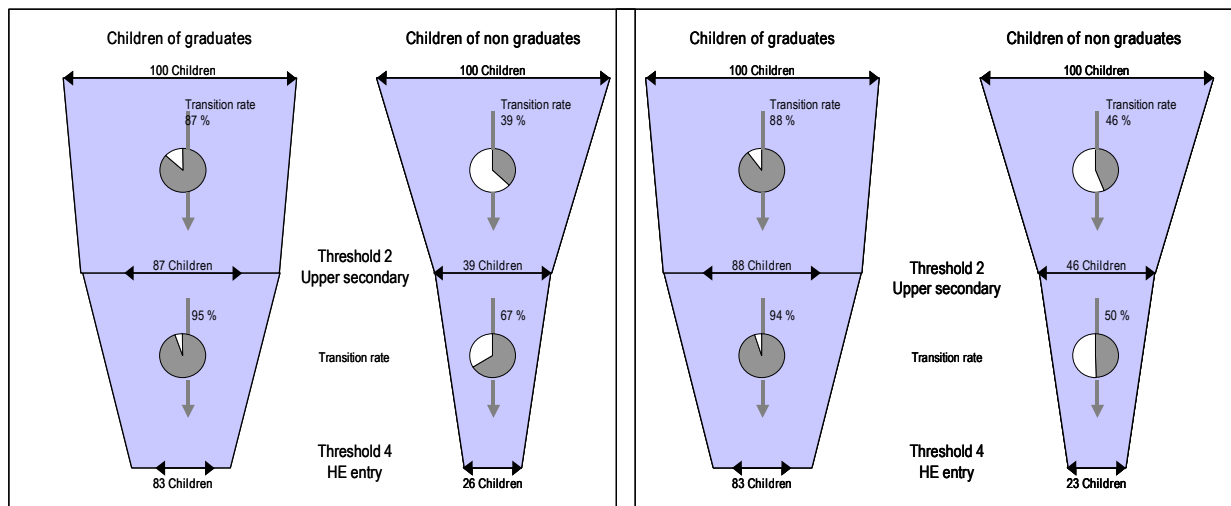
³ Isserstedt et al. (2007, p. 63) note: “Family member of reference: A construct of official statistics which allocates households to certain groups based on the characteristics of a single member of the household. In the overwhelming majority of family households this will be the father, and in one-parent families it is usually the mother. To make things more readable, commentators often simply use the word ‘father’ as shorthand.”

⁴ Vosskamp et al. (2007) have compared the higher qualification strategies of Germany, Austria, Switzerland, Finland, the United Kingdom, the United States of America, Japan and Korea. With regard to Germany, Austria and Switzerland, the authors observe: “The countries with a Dual System of vocational training are simultaneously the countries that operate early selection in schools and hence segregate early into vocational and general school formats. This does not pursue the objective of the highest qualification for all in the sense of enabling as many school students as possible to complete higher education. Anyone who – for whatever reason – is unable or unwilling to take the direct route to university (school – advanced school certificate – study) usually finds himself in a dead-end. If a child opts – often when only ten years old – for the type of school that classically leads to vocational training in the Dual System (such as a *Hauptschule* in Germany followed by an apprenticeship), he or she has – de facto if not de jure – closed the door to higher education.” The authors describe how the countries among their examples that do not operate the Dual System have adopted a different strategy: “The pupils spend many years learning together (under pressure in Japan and Korea, with individualised assistance in Finland, through the high school structure in the United Kingdom and the United States. Moreover, all these systems are oriented towards higher education; in other words, there is a path leading to higher education from almost every point in the individual’s education career – even, and perhaps more significantly, after initial training in a vocational format (...).” (2007, p. 139)

parents had not studied. Over 2002, there was less of a decline in the desire to study among graduates' children than among children whose parents had not completed higher education (down three percentage points v. down seven percentage points)." (ibid, p. 95) This indicates that the bar to entering university after obtaining the entitlement is now higher and not – as the International Covenant seeks to achieve – lower. In 2005 71% of young people aged 19 to 25 years whose father had an academic degree entered higher education. Of those whose father had left education after a *Hauptschule*, only 19% of this age group took up academic study (cf. ibid, p. 96). Chapter 4 will look more closely at the extent to which this may be due to the decision by the Federal Constitutional Court in January 2005 to revoke the nationwide prohibition on tuition fees for students on their first degree course (cf. BVerfGE 112, 226) and, following that ruling, the immediate announcement by various state education ministers that tuition fees would be introduced.

The selection that occurs during transitions, both within the school system itself and between secondary and higher education, logically results in a composition of the student population that does not reflect the composition of the population as a whole, and so equality of opportunity has still not been realised in the German education system. Isserstedt et al. (2007, p. 110 f.) illustrate this using the established funnel metaphor. Figure 1 shows that 83% of the children of graduates entered higher education in 2005 (2003: also 83%), whereas only 23% of the children of non-graduates did so. In fact, the situation for non-graduate children had deteriorated, because 26 out of 100 managed to take this step in 2003.⁵ Although 41% of 19- to 25-year-olds are the children of blue-collar workers whose father completed *Abitur*, they only account for 20% of new entrants to higher education (ibid, p. 114). Overall the odds for working-class children in Germany are still poor, although they have steadily improved since 2000. But since 2003 this process has substantially lost momentum, and despite the gains the child of a salaried government employee is still 3.6 times more likely to go to university than the child of a blue-collar worker (ibid, p. 101 ff.).

⁵ A change in method has meant that the comparison cannot be maintained over a longer period. In previous years the education funnel was not based on whether the father had an academic qualification or not. Instead, it was founded on the notion of social group of origin. It should be noted, however, that the funnels for 1997 and 2000 showed higher participation for strata without a strong history of education – although the participation rates for children from the top of the origin scale grew even faster. In 1997 72% of children from the highest group and 8% of children from the lowest group entered higher education (cf. Schnitzer et al. 1998, p. 83), and in 2000 the figures were 81% of children from the highest group and 11% from the lowest group (cf. Isserstedt et al. 2004, p. 119). However, when we compare the data for 2003 and 2005, following the new demarcation, we see that the children without a graduate father have actually been losing ground.



Source: Isserstedt et al. 2007, page 110f

Figure 1: The education funnel in 2003 and 2005

In summary, education opportunities for the “educationally challenged” strata in Germany remain poor. Over the long term, the situation is improving, but it would be inaccurate to claim that appropriate policies (free tuition, more grants/loans) were being designed and consistently applied to achieve this. The political community is not at present making use of instruments for improvement. Given the huge significance of education, this warrants criticism. The consequences of tolerating such a wide opportunity gap are problematical and incompatible with Germany’s democratic order.

3.2 Trends in the statistics for new entrants

Since the Federal Constitutional Court ruled in January 2005 to revoke the fundamental prohibition in the Framework Higher Education Act on tuition fees for students on their first degree⁶, not for substantive reasons but solely on the grounds of federal competence (Keller 2005), there has been a pronounced decline in the number of new entrants to higher education in Germany. Although last time the data were compiled – on those who began studying in the winter semester 2006/07 – only two states (Lower Saxony and North Rhine-Westphalia; see Table 2 on p. 21, where the states with universal tuition fees are highlighted on grey) were charging fees, matriculation statistics had fallen considerably. In the winter semester of 2005/2006 more than

⁶ Even after the prohibition of tuition fees in the former § 27 (4) HRG as amended on 8 August 2002 (BGBl. I p. 3138) by the previous government coalition of Social Democrats and Greens, tuition fees could be levied on second degrees, even non-consecutive M.A./M.Sc. courses, and on students who had exceeded a certain period of study, as the prohibition related explicitly to students on their first degree course and left room for exceptions (cf. Böttcher/Keller 2000).

356,000 people entered higher education in Germany, but a year later the number was down to under 295,000, a decline of over 17% (cf. Statistisches Bundesamt 2006a; 2007d).⁷ At the same time, the number of school-leavers entitled to enter higher education had actually risen by 3.2% from 2005 to 2006 (cf. Statistisches Bundesamt 2006b; 2007e). No doubt there are several reasons why the number of freshers declined; for example, the winter semester brought a considerable increase in the use of *numerus clausus* to restrict intake. Subjects affected by this increased by 8% (cf. Institut der deutschen Wirtschaft 2007, p. 1).⁸ However, as borne out by the survey on motives for not studying (cf. 3.3), this trend also correlates strongly to the announcement or introduction of tuition fees. This is not at odds with the fact that student numbers also declined in states that have no plans as yet to introduce fees. Firstly, the message is ambiguous in a number of states – where there are coalitions in government, for example, one partner is for tuition fees and the other against. Secondly, potential students are not sure what to expect. Thirdly, the administrative courts have made it clear, in a number of rulings on tuition fees, tuition fees for long-term students and study accounts, that beginning a course without paying tuition fees by no means indicates that the student can expect to complete the course without paying fees (cf. OVG NRW, Judgment of 1 December 2004, AZ.: 8 A 3358/04). In other words, a student starting a course now should reckon with the likelihood of paying tuition fees later on. This lack of legal certainty would doubtless act as a deterrent.

If we compare the number of new entrants to higher education with the number of school-leavers who obtained the certificate entitling them to study, we will again observe a pronounced decline. Table 1 shows that the ratio of 100:60 between the number of school-leavers who obtained the entitlement in summer 2006 and those German students who began studying in the winter semester of 2006/07. Two years previously – before the Constitutional Court declared the prohibition on tuition fees void – the take-up rate had been 79.2%, almost 20 (!) percentage points higher. This decline is echoed in every federal state, but it is far more striking in the city states – which actually had a higher take-up rate originally. Hamburg, one of the states that now charge fees, has seen its take-up rate fall by 41 percentage points within the space of two years.

⁷ It is interesting to note, especially in the light of efforts to make higher education a more international affair, that the number of non-nationals starting to study in Germany has fallen by 28% (!).

⁸ It is not clear to what extent this may be an artefact. As a large number of courses are allocated by lottery by the ZVS (Zentralstelle für die Vergabe von Studienplätzen), applicants must apply to several universities at once to stand the same chance of a place as through the ZVS. It may primarily have been these multiple applications that led to greater *numerus clausus* restrictions, as universities were receiving far more applications than they had places.

Overall, both the states that charge tuition fees and the states that do not have witnessed a sizeable decline.

	2002/03		2003/04		2004/05		2005/06		2006/07	
	total	female	total	female	total	female	total	female	total	female
Overall	77.8%	71.2%	78.7%	75.0%	79.2%	71.0%	72.8%	66.4%	60.0%	55.5%
Baden-Wurttemberg	77.4%	75.4%	77.4%	77.5%	80.5%	76.8%	71.7%	69.2%	55.8%	55.2%
Bavaria	89.2%	82.2%	91.5%	90.2%	96.9%	87.8%	87.2%	83.9%	84.7%	79.4%
Berlin	117.3%	110.9%	112.2%	104.7%	105.0%	92.5%	87.4%	76.2%	70.0%	63.0%
Brandenburg	42.1%	37.3%	44.6%	41.0%	42.7%	34.4%	42.0%	36.5%	39.2%	35.2%
Bremen	147.9%	132.8%	138.1%	130.9%	147.0%	123.3%	125.0%	114.1%	111.7%	99.2%
Hamburg	116.0%	95.8%	135.5%	118.6%	132.6%	106.4%	129.8%	108.1%	91.5%	73.7%
Hesse	81.0%	77.6%	81.7%	78.8%	87.5%	80.2%	81.9%	74.1%	68.9%	65.8%
Mecklenburg-W. Pomerania	62.6%	47.7%	65.4%	70.2%	79.8%	72.7%	76.7%	74.3%	62.7%	57.7%
Lower Saxony	73.8%	69.8%	72.5%	71.1%	72.6%	68.3%	61.7%	58.8%	50.6%	50.2%
North Rhine-Westphalia	71.2%	65.5%	71.3%	65.9%	67.2%	59.4%	63.0%	56.5%	49.8%	45.0%
Rhineland-Palatinate	80.1%	77.6%	86.6%	83.9%	86.2%	78.8%	87.5%	81.0%	59.7%	57.7%
Saarland	56.0%	51.2%	58.1%	52.3%	57.9%	52.6%	48.0%	42.7%	45.7%	45.3%
Saxony	85.0%	69.5%	87.8%	78.1%	88.6%	73.5%	81.7%	69.0%	68.3%	55.0%
Saxony-Anhalt	63.8%	50.0%	62.0%	67.3%	79.3%	72.2%	75.1%	66.1%	57.3%	51.5%
Schleswig-Holstein	67.5%	61.7%	69.4%	67.8%	65.2%	60.3%	61.2%	54.3%	49.9%	46.6%
Thuringia	69.1%	60.7%	64.6%	58.1%	64.6%	56.4%	63.3%	57.4%	60.0%	54.8%

Sources: Statistisches Bundesamt 2006a; 2006b; 2007d; 2007e; authors' calculations

Table 1: Ratio of entitlements to new entrants for higher education across Germany

This is a huge fall in numbers and it is incompatible with the objectives of Germany's federal government (cf. Deutscher Bundestag 2007a, p. 2), which has set a target of 40% for the number of school-leavers per year who enter higher education. The Scientific Advisory Council (Wissenschaftsrat 2006, p. 5 f.) has formulated the following national policy aims: "For reasons of labour market and economic policy, the relative percentages of school-leavers entitled to study, new entrants to higher education and higher education graduates in each year must grow over the medium term. The target must be for 35% of each school year to complete higher education. To this end, the number of students commencing study needs to be clearly more than 40% and at least 50% must acquire the entitlement to study." This expansion would also call for greater permeability in the education system, reflecting the objectives of the International Covenant.

3.3 Reasons for not beginning to study

An interesting indication of the impact of tuition fees is the transition from leaving school with a certificate of entitlement to study and actually entering higher education. Those who have not taken up the option to study merit particular attention in this respect. The software house HIS Hochschul-Informationen-System carried out a survey of people who were entitled to go to university but chose not to (cf. Heine/Willich 2006). The people they interviewed ticked the following reasons, summarised in Figure 2, for not wanting to study (multiple answers were permitted).

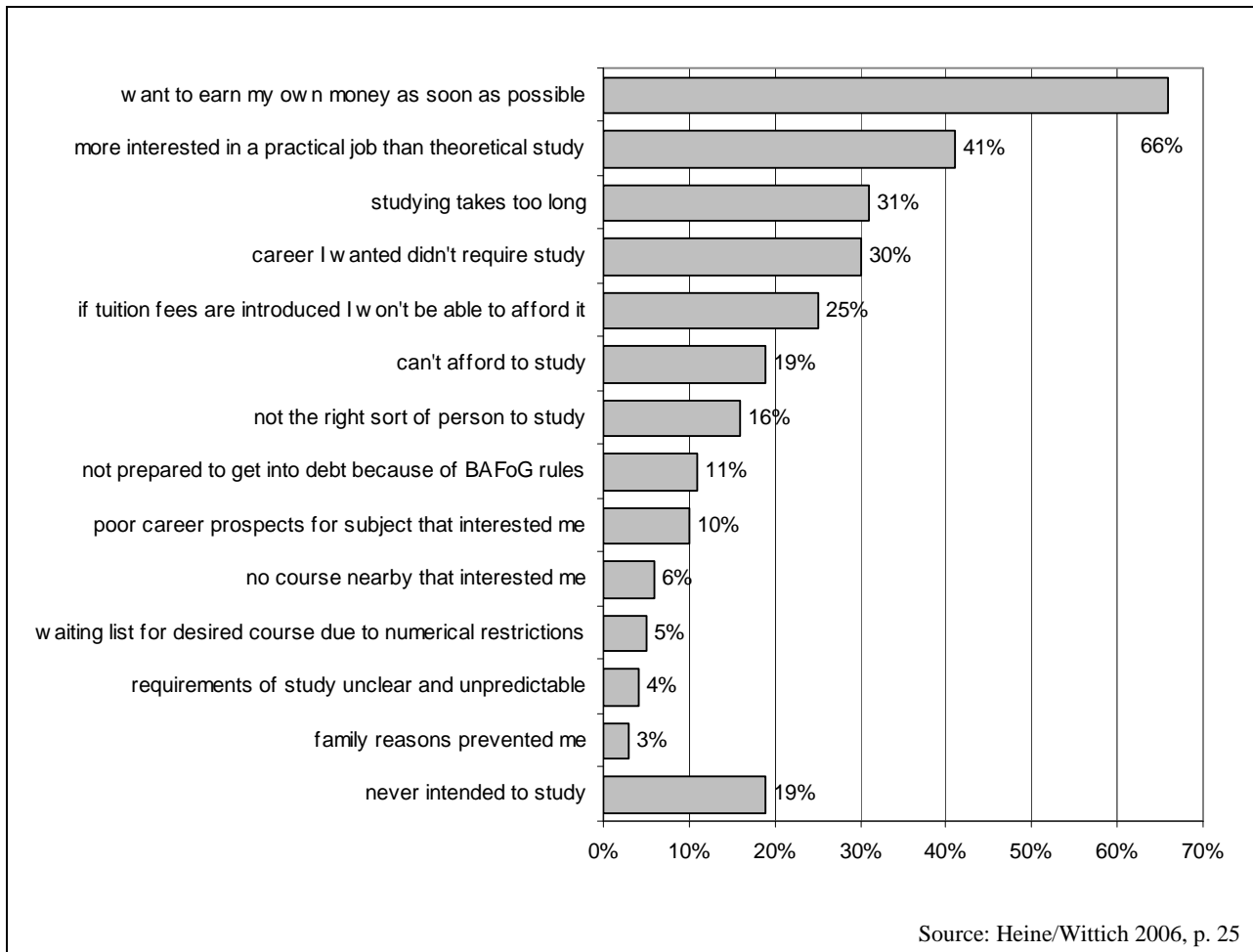


Figure 2: Reasons for deciding not to study

Figure 2 shows very different reasons for not studying. It is striking that a range of financial motives were reported. Once again, the desire to earn one's own income as quickly as possible is rooted in the Dual System of vocational training in Germany.⁹ It is interesting to note, however, that back in 2005 – when tuition fees had not yet been introduced anywhere, but some states had announced them – 25% of those who did not take up their entitlement to study gave the threat of fees as their reason. It is also interesting that 31% of women but “only” 19% of men named tuition fees as a reason (ibid, p. 26).

Apart from tuition fees, 11% of those surveyed said they were not prepared to incur debt as a result of the proportion of potential BAföG support that is awarded in the form of a loan. Here again, women are affected far more frequently than men (13% v. 8%).

⁹ Austria also supplies evidence that remuneration is a major incentive for choosing dual training (i.e. work-based practice with college-based teaching). Cf. Schlögl/Lachmayr 2004.

Moreover, Heine and Willich show that the reasons for not taking the study option correspond to social background: “Not very surprisingly, educational origin has an often pronounced influence on the reasons for not taking up a place in higher education. Whereas potential students from an academic background are more likely than those who are not to make a non-academic job their conscious choice (36% v. 29%[..]) or to stress the excessive duration of university study (36% v. 28%) as a reason for not entering higher education, interviewees who were not from an academic family were more likely than average to give financial motives: one fifth altogether lack the financial wherewithal to study (20% v. 14%). Besides, potential students from a non-academic background are more frequently not prepared to incur debt because of the loan component of BAföG (11% v. 6%) and more frequently do not commence a degree because they would not be able to afford universal tuition fees (27% v.18%).” (ibid, p. 27)

In summary, we can already say that tuition fees and the inadequacies of state support systems (BAföG) are major reasons for people not making use of their entitlement to enter higher education. Moreover, these motives are sensitive to both gender – women are more often concerned than men – and origin. These violations of the International Covenant must, therefore, be countered.

3.4 Studying and gender

In Germany 49% of new entrants to higher education are female, which is a relatively balanced proportion. However, Dohmen and Himpele (2007, p. 71 f.) point out that the take-up rate for women is substantially lower than for men, as girls account for 53% of the school-leavers who acquire an entitlement to study. When we compare the number of those entitled to study with those who actually begin a course, we find a take-up rate of 96% for men and merely 83% for women.¹⁰

It is worth noting that women with a certificate entitling them to study give other reasons for not entering higher education from those given by men. For one thing, they are more likely to opt consciously for a faster way of earning their own income. For another, women are more often deterred by formal and financial restrictions: only 2% of men but 8% of women report restricted intake in their chosen subject as a motive. “And the possible introduction of universal tuition

¹⁰ The overall values are probably too high, as students who acquired their entitlement to study abroad and students without a conventional higher education entitlement from school contribute to a slight distortion. However, this in no way undermines the basic assertion.

fees, which many federal states have already decided upon, deters women from study more frequently than men (31% v. 19%). They more frequently lack the financial basis for higher education (20% v. 17%) and they are more often not prepared to incur debt due to the loan component of BAföG (13% v. 8%). In other words, across the board women are more likely than men to name financial restrictions as their reason for choosing not to study or for being prevented from studying.” (Heine/Willich 2006, p. 26; see also Chapter 3.3)

3.5 Trends in tuition fees

We must distinguish between different kinds of charges that are levied in Germany in conjunction with studying. On the one hand, there are charges for using libraries, lecture notes and books. These are usually raised because the departments and faculties concerned need the money as a consequence of universities being, for the most part, underfunded over many years (cf. Pasternack 2003, p. 5 f.). Registration (matriculation) and “re-registration” fees are charged for similar reasons. These “re-registration” fees (that may be charged at the beginning of every semester) are designed to compensate universities for administrative effort (cf. BVerfGE 108, 1), and usually they are coupled with a sum for students to use local public transport.¹¹ In addition to this, each student contributes a proportion to funding the students’ self-governing body (*Studentenwerk*). In recent years the contribution paid by the students to maintaining this body has been increasing as the federal states, who felt responsible for this in the past, have gradually withdrawn their financial resources. All these fees must be distinguished from tuition fees. Tuition fees (referred to in German as “study fees” or *Studiengebühren*), are not levied for any specific purpose, like the re-registration charge or dues to the *Studentenwerk*, but for the general fact of studying. The governments of the federal states express the view that these fees serve to relieve the strain on their cash-strapped state budgets and to involve students in financing institutions of higher education.

When the International Covenant on Economic, Social and Cultural Rights entered into force in Germany, studying at university was free of charge.¹² Tuition fees were introduced in Germany inch by inch: First of all the federal state of Baden-Württemberg introduced fees for stu-

¹¹ This is usually negotiated by the local student governance body with the local transport operator on behalf of all the students registered at a particular higher education institution. In Bavaria and Baden-Württemberg, where there is no formal representation structure for student self-governance, the institutions themselves are empowered to play this role. The “semester ticket” is a relatively cheap option for using local public transport and it finances itself because the student bodies buy in bulk.

¹² Lecture fees were abolished by decision at a conference of state first ministers in 1970.

dents taking longer than usual to complete their course. The fee was charged after a certain number of semesters had been exceeded. This number was based on the notion of a “standard duration”, which assumed that a course must as a general rule be completed within that period. Apart from fundamental objections, this move also encountered resistance because, for example, it was impossible to organise part-time courses without incurring the fees (on fees for “additional time” cf. ABS 2006; Barbaro 2004). Several states then followed Baden-Württemberg’s example, either by introducing their own fees for additional time (as in Lower Saxony) or by charging for additional time but calling the arrangement “study accounts” (as in North Rhine-Westphalia). North Rhine-Westphalia also required payment after a student had been registered for the standard duration plus X semesters.¹³ Then Rhineland-Palatinate introduced study accounts which at least in part are geared towards the student’s actual demand. The idea is that the charge is not levied after a certain number of semesters, but when the student has attended a certain number of teaching modules based on a formula of hours per week of semester. Once this contingent of hours has been used up, a fee is payable. This mechanism should make part-time studying feasible, except that Rhineland-Palatinate simultaneously applies a rule that all students must pay a fee once they have registered for 1.75 times the standard duration. (For more on the discussion about different fee models, cf. Himpele 2006).

As the debate over the introduction of universal tuition fees heated up, the federal government of the time intervened in 2002 with a law which sought to enact a universal prohibition on tuition fees. However, the judgment by the Federal Constitutional Court in 2005 declared that the federal government had no competence in this matter, rendering the prohibition null and void (BVerfGE 112, 226). The Court did not consider whether a prohibition of tuition fees was substantively constitutional, nor did it answer the question as to whether the legal provisions should have been approved by the *Bundesrat*. [The “upper” chamber of Germany’s parliament is in fact a body that represents the federal states – Translator.] The Court’s reasoning was founded exclusively on the legal distinction of competence. In other words, the federal tier had exceeded its legislative competence by codifying the non-application of tuition fees. According to the Court, Art. 75 of the Basic Law (GG) restricts federal competence in this sphere to enacting framework provisions for “general principles respecting higher education”, and hence no basis could be

¹³ In NRW the formula is 1.5 x the standard duration, in Baden-Württemberg standard duration plus 4 semesters. A distinction is hence made on the whole between the different concepts (“fees for additional time” versus “study accounts”).

sought in Art. 72 GG for the necessity to prohibit tuition fees. Art. 72 GG states that the federal legislative may only enact such framework provisions as are required to “establish equal living conditions throughout federal territory” or “maintain legal or economic unity”. The federal judges were thereby denying that applying tuition fees in some federal states could lead to unequal living conditions (for more details cf. Keller 2005).

The judges do, however, refer in their decision (BVerfGE 112, 226) to ICESCR and its status as federal law: “In particular, nevertheless, it is to be assumed that the federal states will themselves exercise responsibility for the task incumbent upon them – just as it is upon the federal organs – of regulating any introduction of tuition fees in a manner befitting a social state with a view to preserving equality of opportunity in education (Art. 3, Art. 7 (4, iii), Art. 12 (1) GG; Art. 13 (1 i; 2 c) of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 <BGBI II 1973 p. 1569>; cf. BVerwGE 102, 142 <147>; 115, 32 <37, 49>) by taking the concerns of lower income sections of the population appropriately into account.”

Since the Constitutional Court pronounced this judgment, seven federal states have already introduced universal tuition fees or at least decided to do so: Baden-Württemberg, Bavaria, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia and Saarland (see Table 2, where these states are highlighted on a grey background). These fees affect almost 70% of the students matriculated at higher education institutions in Germany (cf. Statistisches Bundesamt 2007d). The detailed provisions vary widely from one state to another. They have been outlined briefly in the Annex (Chapter 6).

Baden-Württemberg	universal tuition fee	€ 500	summer semester 2007
Bavaria	universal tuition fee	up to € 500	summer semester 2007
Berlin	no tuition fee		
Brandenburg	no tuition fee		
Bremen	fee for external students taking additional time	€ 500	winter semester 2006/2007
Hamburg	universal tuition fee	€ 500	summer semester 2007
Hesse	universal tuition fee	€ 500	winter semester 2007/2008
Mecklenburg-W. Pomerania	no tuition fee		
Lower Saxony	universal tuition fee	€ 500	winter semester 2006/2007
North Rhine-Westphalia	universal tuition fee	up to € 500	winter semester 2006/2007
Rhineland-Palatinate	study accounts (fees for additional time, older people, second degree course)	€ 650	summer semester 2007
Saarland	universal tuition fee	€ 500	winter semester 2007/2008
Saxony	fee for second degree course	up to € 450	
Saxony-Anhalt	fee for additional time	€ 500	
Schleswig-Holstein	no tuition fee		
Thuringia	fee for additional time	€ 500	

(Note: States highlighted on grey have introduced or plan to introduce universal tuition fees)

Table 2: Tuition fees in German federal states

One argument given by federal states for introducing tuition fees is that they are compatible with social principles. For the most part this is substantiated by the option of borrowing money. According to this logic, the tuition fees are only payable later on, when the loan and the interest on the debt has to be repaid. The Annex in Chapter 6 describes the arrangements prevailing in different states, which are very dissimilar. Some place a cap on the maximum amount of debt. Nevertheless, it should be noted that in all cases recipients of BAföG money have to incur two debts in order to study. In some of these states, the cap covers both debts together, although here too BAföG recipients are quicker to reach the maximum. It is also worth noting that non-EU nationals are not usually entitled to draw loans.

Apart from the issue of different rules, we are bound to ask how postponing the payment of tuition fees – to which interest must then be added – resolves the problem of social selection, especially as it has been recognised that people are already deciding not to take up their study option because they fear BAföG debts (cf. Heine/Willich 2006). Women, for example, usually remain indebted for longer because they earn less and therefore require more time to service the loan (cf. on Australia: Jackson 2002). This caused Himpele and Schewe (2004) to summarise the issue of financing fees as follows: “The compliance with social principles is merely theoretical,

because all the models under discussion require a greater willingness to incur debt. This exacerbates the social, ethno-cultural and gender-specific forms of discrimination which all prejudice individual decisions about education. Delayed tuition fees are fair, claim their advocates, because those who benefit directly from the degree should pay towards it. This merely reveals the strangely short-sighted political understanding of education and justice that characterises the proponents of such ideas.” (p. 38)

The second argument commonly used to support compliance with social principles is that exemptions can be granted in cases of social hardship. The first thing to be said is that there is little consistency to these. The second is that experience with fees for students who take longer to complete their course has already shown that those concerned can sometimes be asked sensitive questions – often in the large, busy offices where student bodies conduct their business. Besides, we know from this experience that the students concerned are often unable to predict whether their application will be successful. Finally, the definition of social hardship is often restrictive. All in all, these exceptions cannot in any case resolve the problem of deterrence, especially as a state can change the rules at short notice. That is why ICESCR correctly calls for a right to study without fees and not for exceptions to be granted.

3.6 Financing a course: BAföG

Apart from the question of tuition fees, access to higher education also raises the issue of financing one’s own upkeep. Even before the advent of fees, Dohmen and Hoi (2004, p. 51 f.) calculated that the proportion of overall costs that an individual would have to bear for studying was 49% (above all on maintenance). The introduction of tuition fees increases the private burden further.

The provision of scholarships by private foundations, church organisations and political parties with state support is rather modest in Germany. Estimates suggest that only 2% of students can draw on such resources (cf. Wernicke 2007). Moreover, the recipients have no legal entitlement to this support. On the public side, the Federal Training Assistance Act (BAföG) – which does entail a legal entitlement – is the key instrument for aiding students from families with less education. The level of BAföG depends on parental income, and at present half is given as a grant and half as a loan. The Act itself entered into force in 1971. In the 35 years of its existence about 3.8 million students in higher education and 4.4 million school students have benefited. In accordance with the objectives of the International Covenant, the introduction of BAföG was

intended to generate greater equality of opportunity in the education system, and this was an important pillar of the expansion in education that took place in the 1970s.

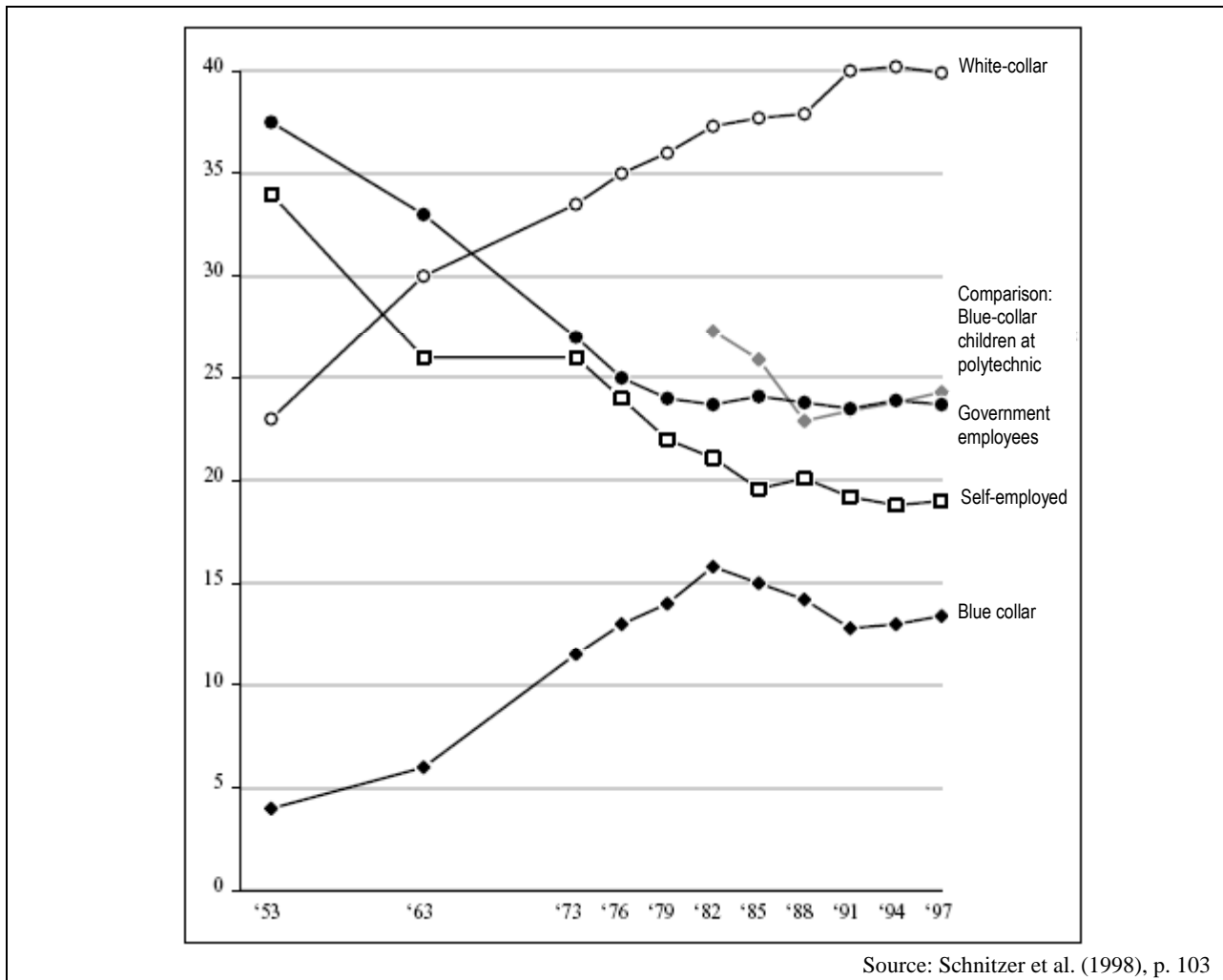


Figure 3: Fathers' career status for university students in former West Germany 1953–1997 (%)

Initially BAföG was paid entirely in the form of a grant. In 1982 the system was changed and for a while it was paid entirely in the form of a loan. This legislative measure had a negative impact on the proportion of students receiving BAföG¹⁴ as recipients were now required to pay back the full amount.¹⁵ There was a particularly sharp fall in the percentage of working-class children, as Figure 3 illustrates. One decisive factor was the huge burden of debt: after studying for the average ten semesters, a student receiving the full amount would run up a debt of up to 70,000 DM (just over € 35,000). Hence BAföG lost one of its major functions, as choosing to

¹⁴ Cf. BMBF 1986, p. 255.

¹⁵ This obligation is given by 11% of those school-leavers who do not take up their entitlement to study as a reason for their decision, see Chapter 3.3.

study depended on the individual's willingness to incur debt. Support for the less educated strata consisted simply of making a loan available under special terms, notably the eligibility criteria.

After German unification the arrangement was changed again so that half the sum was paid as a grant and the other half as a loan for repayment. "Evidently East German students, familiar with the standard basic grant that all students in the GDR (...) had received since 1981, were to be spared an excessively abrupt confrontation with the education policies of real existing capitalism." (Keller 2002, p. 23) However, the risk of debt derived from this arrangement was constantly raised as a problem with funding study, especially for the less educated strata. This prompted the federal government to respond in 2001 by limiting debt to € 10,000. The reasoning behind the Act reads: "As students from the lowest-income families are entitled to maximum assistance, they should no longer also have to assume the greatest burden of debt as a result of the 50% loan. In future, therefore, debt will be limited to a fixed sum of 20,000 DM, which is the most that any BAföG recipient must repay out of the assistance provided in the form of a state loan. In this the Bill draws the conclusion from concern expressed by all experts that above all young people from lower-income families might be deterred from commencing higher education by a looming mountain of debt or obliged to accept gainful employment alongside their studies and hence prolong their duration. The cap on loan repayments will ensure a maximum of security, transparency and calculability in order to make it easier, especially for those who rely on maximum BAföG- assistance, to take the decision to study." (BMBF 2001, p. 36 f.)

However, the reduction in assistance to students through BAföG has not only been due to the conversion to a loan format, first fully then partially, but also to a failure to adjust the rates (cf. BAföG Reports¹⁶). In its recent opinion, the BAföG Advisory Board asked the federal government for a tangible upward adjustment in the scale of maintenance needs and personal allowances and a moderate increase in the social insurance allowance that students may deduct before

¹⁶ These were published as parliamentary documents for the *Bundestag*: First Report of 13 December 1973 – Bundestagsdrucksache 7/1440, Second Report of 30 December 1976 – Bundestagsdrucksache 8/28, Third Report of 9 November 1978 – Bundestagsdrucksache 8/2269, Fourth Report of 26 February 1981 – Bundestagsdrucksache 9/206, Fifth Report of 21 December 1983 – Bundestagsdrucksache 10/835, Sixth Report of 2 January 1986 – Bundestagsdrucksache 10/4617, Seventh Report of 2 October 1987 – Bundestagsdrucksache 11/877, Eighth Report of 2 October 1989 – Bundestagsdrucksache 11/5524, Ninth Report of 14 January 1992 – Bundestagsdrucksache 12/1920, Tenth Report of 17 January 1994 – Bundestagsdrucksache 12/6605, Eleventh Report of 21 December 1995 – Bundestagsdrucksache 13/3413, Twelfth Report of 16 December 1997 – Bundestagsdrucksache 13/9515, Thirteenth Report of 23 December 1999 – Bundestagsdrucksache 14/1927, Fourteenth Report of 14 December 2001 – Bundestagsdrucksache 14/7972, Fifteenth Report of 15 April 2003 – Bundestagsdrucksache 15/890, Sixteenth Report of 21 February 2005 – Bundestagsdrucksache 15/4995.

declaring any earnings (cf. Deutscher Bundestag 2007b). Basically, this demand would simply compensate for the failure since 2001 to adjust student support to price inflation, although many experts have called for this (cf. Deutscher Bundestag 2007c). The federal government has in recent years continued to justify not increasing BAföG rates by claiming pressure on budgetary resources (cf. Deutscher Bundestag 2007b). This is noteworthy, given that Germany's GDP and with it the country's disposable wealth has been growing continuously. GDP rose 9.3% between 2001 and 2006 (cf. Statistisches Bundesamt 2007a), which means that assuming the pattern of wealth distribution remains unchanged BAföG funding should now be 9.3% higher than in 2001. However, the thresholds used to calculate need have not been adjusted at all during this period. This is due to the priorities set by the federal government, especially as local authority, federal and state taxes rose 6.5% between 2001 and 2006 (cf. BMF undated; BMF 2007).¹⁷

Current political discussion is raising the prospect that the maintenance needs and personal allowances used to calculate assistance will be increased by about 5% in 2008. If we bear in mind that maintenance needs have not been adjusted since 2001, a hike of this order will not suffice to cover the rise in consumer prices. From 2000 to 2006 – this being the latest available six-year period – consumer prices in Germany rose by 10.1% (cf. Statistisches Bundesamt 2007b). So if BAföG increases by 5% in 2008 its purchasing power will be more than 5% lower than in 2001. This leaves students to fill the funding gap themselves, and usually they do this by seeking gainful employment (cf. Isserstedt et al. 2007).

All in all the proportion of students receiving BAföG has never exceeded 20% (of the entire student population) in the last twelve years. If we take the present statistical boundary, the year 2006, only 16.8% of students – based on the average number of persons assisted per month – received any BAföG support, which is not exactly an indication of a well developed student funding system. It is worth mentioning that in the early years (1972–1975) over 40% of students received assistance (cf. Deutscher Bundestag 1976, p. 5).

¹⁷ The fact that tax revenues did not grow at the same rate as GDP is partly due to tax reforms. Since 2000 both corporation tax and income tax have been reduced. Although we cannot describe these reforms in detail here, a few brief comments may be useful. The reduction in corporation tax and its reform (split taxation of dividends) have resulted in a substantial fall in revenue from company taxation. The reduction in income tax has particularly benefited higher earners. Because Germany applies progressive taxation and also marginal rates, top earners profited from the reforms three times over: from the increase in the basic personal allowance, from the lower starting rate and from the lower top rate.

3.7 Conclusions: Access to higher education in Germany

Access to higher education in Germany is still strongly influenced by social origin. The link weakened, especially during the 1970s, probably due above all to the abolition of lecture charges (tuition fees) and the adoption of the Federal Training Assistance Act (BAföG), which originally provided a full grant. But this process of opening up higher education from a financial perspective was not pursued. First of all BAFöG was gradually devalued (cf. Keller 2002), and since the judgment by the Constitutional Court in January 2005, tuition fees have been introduced in various federal states. This is too recent for detailed impact data, but since the Court's ruling there has been a massive drop in the percentage of students taking up their option to study, which means that fewer and fewer school-leavers entitled to higher education are actually entering it. Financial motives play a part in this. Surveys by HIS Hochschul-Informationen-System show that women and people from families with lower education attainment have been particularly affected.

4 Tuition fees and student financing in the light of ICESCR

From Art. 13 (2 c and e) of ICESCR we can derive what we might call a dual strategy for realising the right to higher education. On the one hand, there is a call for free education, and on the other the duty to establish a fellowship or grant system to provide active support for those who wish to learn.¹⁸ We have considered the development of both in Germany. The following section offers a brief concluding analysis of whether Germany is reflecting the requirements of the International Covenant on Economic, Social and Cultural Rights.

4.1 Student financing: dwindling state support

When BAföG was first introduced, it was a success story. 44.6% of students benefited (cf. Keller 2002, p. 22). Figure 3 describes the breakdown of the student population according to their father's employment status. It shows clearly how the proportion of children from working-class homes rose substantially when BAföG began in 1971.¹⁹ "The percentage of working-class children, 4% in 1953, tripled over the next 20 years up to 1973 (and by 1982 it had even quadrupled)" (Schnitzer et al. 1998, p. 104). With the massive cutbacks in 1981 and the BAföG's conversion in 1982 from a grant to a loan, the road to improving access to higher education petered out. This is also reflected in the participation of the "less educated strata". In 1981 the proportion of working-class children in Figure 3 starts to fall again after rising for many years. This trend was not halted until BAföG was restructured again. The new mechanism, by which half the support was given as a grant and the other half as a loan, brought some improvement, and the capping of BAföG debt at € 10,000 in 2001 also boosted the participation of the less educated strata.

4.2 Tuition fees

Alongside the "fellowship system" the International Covenant dwells upon tuition fees as an important factor. They are discussed below. § 13 (2 c) ICESCR requires the "progressive introduction of free education" in higher education. This is plain language. Tuition fees, after all, always exert a socially selective impact because they relate to the financial conditions in which study can commence (cf. ABS 2005). Interpretations that suggest tuition fees are acceptable un-

18 § 13 (2) ICESCR: "The States Parties to the present Covenant recognize that (...)

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (...)

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

19 BAföG thereby made an important contribution to achieving the defined aim of the federal government of making more effective use of the country's "education reserve" to cater for rising labour requirements.

der certain conditions (e.g. Riedel/Söllner 2006) must be refuted. The next section illustrates how the Federal Republic of Germany is violating § 13 (2 c).

The Committee on Economic, Social and Cultural Rights was established to monitor the implementation of ICESCR. The Committee is empowered to issue more detailed pronouncements about the substance of the obligations derived from ICESCR, and it does so in its “General Comments”. The Committee has observed in General Comments that the identical formulations in Art. 13 (2b) and (2c) give rise to interpretations in the same vein. In particular, its comments on the “progressive implementation of free education”, although formulated for schools, also apply to higher education. In General Comment 11 (1999) on Art. 14, the Committee has the following to say about the concept “free of charge”: “The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category.” (United Nations 1999, 7).

It results from these observations and their applicability to higher education that, in the light of the General Comments of the UN Committee, the introduction of universal tuition fees violates the requirement to progressively introduce free higher education. The Committee has already, in past appraisals of the Federal Republic of Germany, stated its position on the introduction of tuition fees. In Section E of its Concluding Observations of 4 December 1998, the Committee “notes with concern that tuition fees for university education are increasing, despite the fact that article 13 of the Covenant calls for the progressive introduction of free higher education” (United Nations 1998, 22). In Section F, the Committee “recommends that the State Party avoid increases in university tuition fees, in compliance with article 13 of the Covenant” (ibid, 37). Finally, in the Concluding Observations on the most recent implementation report by the German government, we read: “The Committee recommends that the State party's Federal Government introduce a reduction of tuition fees in the national framework legislation regulating higher education, with a view to abolishing them” (cf. United Nations 2001, 47)

Germany has not taken these recommendations to heart. Although an attempt was made, by amending the Framework Higher Education Act, to enact a statutory prohibition on tuition fees for a certain amount of higher education, these efforts broke off after the Constitutional Court judgment of 2005 and were not resumed at a later stage. In fact, the federal organs drew consequences from the judgment and handed over further areas of educational competence, so there are currently no efforts underway at federal level to implement Art. 13 ICESCR. There is no basis for justifying tuition fees on the grounds that they open the door to higher education for broader sections of the population by ensuring a wider provision of courses, nor has Germany reached a point whereby financing study courses would be impossible without tuition fees. Quite the reverse: GDP has been rising steadily in recent years.

Back in 1972, when a large number of people eligible and willing to study could not do so because of a lack of places, owing to the state not creating enough training capacity, the Constitutional Court declared: “Due to these effects it cannot be disputed that absolute numerus clausus is verging upon the margins of what is constitutionally acceptable.” (BVerfGE 33, 303) Last year saw the spread of numerus clausus (cf. Institut der deutschen Wirtschaft, Köln 2007) when various federal states substantially extended the number of disciplines that are subject to stringent numerical restrictions on intake. Taken in conjunction with tuition fees, it is clear that access to higher education in Germany is by no means free.

Riedel and Söllner (2006, p. 277) argue that tuition fees are admissible within the spirit of ICESCR “if these fees are compatible with social principles and permit non-discriminatory access, in particular for applicants of more modest finances”. They substantiate this view by asserting that the true objective is unimpeded access to higher education, not tuition fees in themselves. Hence, if it were possible to design them in a way that precluded any socially regressive impact, tuition fees would be no problem.

However, in the short span of time since tuition fees have been applied in Germany it has emerged that their introduction certainly has had and continues to have an impact on people’s willingness to study, and that they therefore do not satisfy the requirements of Riedel and Söllner (2006). We cannot attempt here to resolve whether tuition fees can ever be applied without the problems of deterrence and social selection arising, but the survey of motives for not studying carried out by HIS Hochschul-Infomations-System clearly illustrates the supreme importance of financial considerations (cf. Heine/Willich 2006, see also Chapter 3.3). Quite apart from other

financial concerns, 25% of those interviewed said the financial burden of potential tuition fees would prevent them from taking up their place in higher education.²⁰

It is interesting that the number of people starting to study has fallen for the last three consecutive years in Germany, reversing the previous trend. This could be accounted for by factors unrelated to tuition fees, such as *numerus clausus*. Nevertheless, the timing and the HIS survey tend to suggest that tuition fees could also be a factor in this decline. Besides, the extension of *numerus clausus* rules to additional subjects in various federal states should be seen in the same context, as this is one way federal states protect themselves from “too many” students. The higher statistics are occurring because of a student “exodus” from the states that charge fees.²¹ It is also worth noting that requests for Bafög increased as soon as the federal government placed a cap on debts in 2001, restricting the debt students could potentially incur to € 10,000 (cf. Chapter 4.1).

²⁰ When the survey was conducted it was evident that tuition fees would be introduced in some states at least. They were not yet being charged at that point.

²¹ For more on the problems of funding higher education in Germany’s federal system cf. Himpele 2007.

5 Conclusions

In conclusion, we have sought to summarise what federal and state governments have done to implement the right to education in the field of higher education. To this end, we have outlined the framework conditions for studying and the relevant political developments.

Educational opportunities for what are known in Germany as the “education-distant” strata remain very small. While there has been some improvement over the longer term, there has not exactly been any focussed consolidation of appropriate policies (free education, fellowship systems). The legislative organs are not currently taking advantage of the available instruments for enhancing equal opportunities. Given the tremendous significance of education, this warrants criticism. The consequences of not countering the opportunity gap are problematical and cannot be reconciled with Germany’s democratic order. After all, “for a democracy, failing on equal opportunities is not a trivial offence” (Lauterbach 2007, p. 44).

Access to higher education in Germany is still strongly influenced by social origin. The link weakened, especially during the 1970s, probably due above all to the abolition of lecture charges (tuition fees) and the adoption of the Federal Training Assistance Act (BAföG), which originally provided a full grant. But this process of opening up higher education from a financial perspective was not pursued. First of all BAFöG was gradually devalued (cf. Keller 2002), and since the judgment by the Constitutional Court in January 2005, tuition fees have been introduced in various federal states. This is too recent for detailed impact data. The social composition of the winter semester 2006/2007, in particular, has still not been published. Nevertheless, since the ruling by the Constitutional Court there has been a massive drop in the percentage of students taking up their option to study, which means that fewer and fewer school-leavers entitled to higher education are actually entering it. Financial motives play a part in this (cf. Heine/Willich 2006). Surveys by HIS Hochschul-Informationen-System show that women and people from the “education-distant” strata have been particularly affected.

The developments described demonstrate that neither the federal organs nor the federal states are complying with the obligations derived from ICESCR. This applies in particular to Article 13 (2 c) and (2 e). The Gewerkschaft Erziehung und Wissenschaft and the freier Zusammenschluss von StudentInnenschaften request the competent UN Committee to reprimand the federal government of Germany as a State Party to the Covenant for knowingly persisting in contravening the International Covenant on Economic, Social and Cultural Rights.

6 Annex: Tuition fees in the federal states

The following overview of the 16 federal states demonstrate the persistent breaches of § 13 (2 c) ICESCR that have occurred at federal level and in the federal states due to the increasing introduction of fees for pursuing courses in higher education rather than their abolition.

6.1 Baden-Württemberg

In December 2005 the parliament of Baden-Württemberg passed a law introducing universal tuition fees. From the summer semester of 2006 students have had to pay € 500 per semester in universal tuition fees. Since 1997 students requiring additional time had already been paying € 500 and a re-registration fee of € 40 per semester had also been in operation.

Universal tuition fees have not resulted in more places. This is an explicit requirement of § 4 (2) of the state's Higher Education Fees Act, which reads: "The measures financed from tuition fees will not be taken into account when assessing intake capacity." Tuition fee exemptions may be granted to:

- students caring for and raising a child that has not obtained the age of eight years at the beginning of the semester;
- students with two or more siblings who are also matriculated at a higher education institute in Baden-Württemberg and are paying tuition fees there or have paid them for at least six semesters;
- students with a disability defined in § 2 SGB IX as a considerable handicap to studying;
- foreign students whose exemption from fees has been guaranteed by a state, federal or international agreement.

Pursuant to § 7 of the Act and the Regulation implementing, students from Germany or another member state of the European Union are entitled to a loan subject to interest under private contract law in order to fund their tuition fees. The debt incurred jointly from BAföG and this private borrowing may not exceed € 15,000.

6.2 Bavaria

The government of Bavaria decided to introduce universal tuition fees from the summer semester of 2007. These fees are collected by the higher education institutions as regulated by § 71 of the Higher Education Act. The precise level of tuition fees is determined by the institutions on

the basis of a byelaw. § 71 (1, iii) of the Bavarian Higher Education Act provides that the fee per semester at a university or art college shall be at least € 300 and at most € 500, and at a *Fachhochschule* (or “university of applied science”) at least € 100 and at most € 500 per semester.

Furthermore, Art. 71 (3) provides that these fees may not be used to increase the capacity of the institution: “...to ensure improvements in the conditions for study, improvements to human and material resources financed from study fees shall not be taken into account when assessing training capacity”. The Higher Education Act also provides for possible exemptions.

Art. 71 (5 ii) exempts the following from payment subject to application: students caring for and raising a child that has not obtained the age of ten years at the start of the semester or a child with a disability; students with a civil law obligation to maintain another person; foreign students matriculated under a bi-/multilateral or international agreement guaranteeing exemption from fees; students for whom, as a result of specific individual circumstances and having regard for the provisions of paragraph 7, the payment of such a fee would entail an unacceptable hardship. In addition, Art. 71 (5 iii) provides that institutions may determine for themselves to exempt up to 10% of their students from the fee as a consequence of particular achievement. Students can take a loan under private contract law to finance their fees. Institutions must pay 10% of their income into a guarantee fund to secure these loans.

6.3 Berlin

Berlin levies an administrative fee of € 50. Two students obtained a partial victory in the courts when it was ruled that the administrative input was much less in financial terms than the required fee. The case has now been appealed, and so students in Berlin are still paying the old rate. Depending how long they have been studying, students must pay a mark-up on their service fee to the *Studentenwerk*. Following the judgment of the Constitutional Court in Karlsruhe that the federal government is not obliged to help the state of Berlin pay off its debts, plans for levying tuition fees have repeatedly been debated in the state parliament. The agreement between the two governing parties, the SPD and the Left Party, rules out this option. Berlin’s Berliner Higher Education Act also stipulates in § 2 (9) that tuition fees shall not be levied.

6.4 Brandenburg

Brandenburg charges a matriculation or re-registration fee of € 51.13. Tuition fees are not allowed under the Higher Education Act for initial and follow-on degree courses, but they are standard for continuous education courses. The amount is set by the institution.

6.5 Bremen

Bremen has implemented an Act on Study Accounts, which provides that students must pay € 500 from the 15th semester onwards. Plans for a non-resident rule whereby students from outside the state of Bremen would be charged tuition fees from the first semester were nullified by an injunction from the Administrative Court (cf. e.g. AZ: 6 V 1583/06). The court in Bremen has referred the relevant Act to the Federal Constitutional Court for review. Its reasons were described this in a press release from the court: “The Chamber regards the unequal treatment in the fee legislation as an unlawful attack on the mobility, enshrined in Article 11 GG, of students from outside the state. Moreover this unequal treatment is not sufficiently substantiated by appropriate arguments as demanded by the freedom of training (Article 12 (1) GG) in conjunction with the universal principle of equality (Article 3 (1) GG)” (VG Bremen, press release of 17 September 2007). The decision of the Constitutional Court is pending.

6.6 Hamburg

Parliament decided to introduce universal tuition fees from the summer semester of 2007. There had previously been a fee of € 500 for students requiring additional time and an administrative fee of € 50.

In Hamburg tuition fees of € 500 per semester are levied in accordance with § 6 b (1) of the state’s Higher Education Act. As in other states, Hamburg recognises exceptional circumstances. The obligation is waived for students

- working for a year as part of their medical degree;
- studying on the basis of a training contract with the Free Hanseatic City of Hamburg (except teachers on work placement);
- on exchange programmes who matriculated under agreements guaranteeing exemption from fees.

Under § 6b (3) institutions will upon application exempt students

- who are caring for and raising a child that has not reached the age of 14 at the start of the semester;
- who have a disability classified under § 2 SGB IX as a considerable handicap to studying.

Students may also be exempted from tuition fees if payment would result in unacceptable hardship for reasons other than those cited above.

Higher education institutions may under § 6 b (5) provide in their own byelaws to exempt students from this duty if their academic achievement is outstanding or if they are taking a practical semester out of college required by their course rules. Foreign students under 35 who have no entitlement to a loan under § 6 c of the Act may have their tuition fees deferred. According to § 6 b (9) institutions may use the revenue from tuition fees to exercise their study and teaching functions. § 6 b (9 iii) provides: “To ensure improvements in study conditions improvements to human and material resources financed from study fees shall not be taken into account when assessing intake capacity.” Students are entitled under § 6 c of the Act to a loan equivalent in value to the tuition fee they are required to pay. This loan is subject to contract under private law.

“The following persons are eligible for the entitlement in paragraph 1:

1. German nationals as defined by the Basic Law,
2. nationals of another member state of the European Union or another state party to the Agreement on the European Economic Area,
3. members of the family of a national of another member state of the European Union or another state party to the Agreement on the European Economic Area if they have the right to reside temporarily or permanently under Chapter III or IV of Directive 2004/38/EC of the European Parliament and the Council of 29 April,
4. displaced aliens as defined in the Act on the Legal Status of Displaced Aliens on German Territory of 25 April 1951 (BGBl. III 243-1) in its most recent amendment of 30 July 2004 (BGBl. p. 1950, 2000),
5. foreign nationals and stateless aliens who obtained their higher education entitlement (§ 37 (1)) in Germany.” (§ 6c (6) Hamburg Higher Education Act)

6.7 Hesse

In Hesse tuition fees were introduced from the winter semester of 2007/2008 on the basis of the Act introducing study fees in higher education institutions, adopted on 16 October 2006. Students “requiring additional time” must pay additional charges. Hesse had already been charging long-term students € 500 to € 900 as well as a universal administrative fee of € 50.

Under § 1 (1) of the Act higher education institutions shall charge study fees.

Under § 1 (2 iii) measures financed from these study fees shall not be taken into account when assessing training capacity. The revenue from study fees shall be retained by the institutions, with the exception of the fees paid by students requiring additional time.

There is no requirement to pay for students who

- have been granted official leave,
- are spending a period abroad performing an activity relevant to their occupation or training that is required by course rules,
- are spending a year working as part of their medical studies,
- are parent to a child that had not obtained the age of 14 at the start of the semester; upon application they may be exempted from the duty to pay tuition fees and this entitlement applies for up to six semesters for each child.

Foreign students matriculated under bi-/multi-lateral or international agreements guaranteeing exemption from fees on a reciprocal basis are exempted from the duty to pay fees. Other foreign students, insofar as they are not entitled to obtain a loan, may be exempted from the duty to pay by the institution if that institution is pursuing a particular development policy or has a particular interest in cooperation with the country of origin.

Under § 6 (3) institutions shall exempt as a rule 10% of their students from the duty to pay study fees if they can demonstrate that their achievements at school were considerably above average or if their achievements during study are considerably above average. Students shall be exempted from the duty to pay or else their fee will be reduced if levying it will result in an unacceptable hardship. This shall apply in general where a student suffers any effects of a disability as classified in § 2 SGB IX that prolongs the period of study or can demonstrate that s/he is caring for a relative certified by a medical board as in need of care.

Students are entitled to obtain a loan to pay the tuition fees. § 7 (2) of the Study Fee Act grants this entitlement to German nationals. The entitlement is also granted to nationals of another member state of the European Union, relatives of a national of another member state of the European Union insofar as they have the right of mobility, displaced aliens and stateless persons who acquired their higher education entitlement in Germany and non-nationals and stateless persons who are eligible for BAföG.

The entitlement to a loan is subject to the condition that the first degree did not commence after the student's 45th birthday. § 8 (1) provides that the loan must be repaid within 25 years at most after the course has ended. If a person has incurred more than € 15,000 debt from tuition fees and BAföG, there is no further obligation to repay the loan.

6.8 Mecklenburg-Western Pomerania

The Higher Education Act of Mecklenburg-Western Pomerania currently prohibits tuition fees. The coalition agreement between the two parties now in government, the CDU and the SPD, rules out the introduction of tuition fees. Higher education institutions have, however, been levying a re-registration fee.

6.9 Lower Saxony

Tuition fees are charged in Lower Saxony. § 11 (1 ii) NHG sets tuition fees for each semester of standard study duration plus an additional four semesters at € 500. § 11 (1 iv) provides that where additional teaching staff are financed from this revenue they shall only carry out such duties as add complementary value to the teaching required to complete the course or else enable this to be explored in greater depth. In other words, they may not be deployed to expand study capacity. § 11 (2) NHG exempts students from payment who

- are in practice caring for a child that had not obtained the age of 14 at the start of the semester,
- are caring for a close relative certified by the medical board of a health insurance provider as in need of care,
- are exercising the position of an Equality Officer without being granted leave of absence to do so, up to a limit of two semesters,
- are simultaneously registered with another higher education institution to study on a joint course and are paying the tuition fee there,
- are studying abroad for a period envisaged in the course rules,
- are spending a year on work experience as envisaged in the course rules,
- are spending a year working as part of their medical studies or else processing the input,
- have already been exempted from paying the administrative fee.

§ 11a (1) grants students an entitlement to a loan from a publicly owned bank to the value of the tuition fee.

Also eligible are nationals of a member state of the European Union and their family members insofar as they have the right of mobility in the European Union, displaced aliens, and stateless persons and foreign nationals who obtained their entitlement to enter higher education in Germany. The institutions must contribute to financing potential loan defaults. The maximum value of the loan combined with the loan component of BAföG is € 15,000.

6.10 North Rhine-Westphalia

In North Rhine-Westphalia higher education institutions are empowered under § 2 of the Act on Levying Study Fees and Higher Education Charges to adopt a byelaw requiring tuition fees of up to € 500 per semester. Students in their first semester were first required to pay tuition fees in the winter semester of 2006/07. For all other students the charges came into effect from the summer semester of 2007. The senates of the higher education institutions in North Rhine-Westphalia have chosen with few exceptions to levy these charges. Previously, the Study Accounts and Financing Act (StKFG) meant that students on their second course and students over 50 were charged € 650 after studying for 1.5 times the standard duration.

§ 2 (2) of the new Act defines the proceeds from tuition fees as “third-party resources” which institutions must devote specifically to improving teaching and study conditions and also for contributions to the loan default fund. The grounds for the law explain that this classification as third-party resources means the fees may not be used to increase intake capacity.

The grounds clearly state the purpose of the law:

“§ 2 explicitly provides that revenue from the fee is a third-party resource. This highlights the character of the study fees, by means of which the higher education institution is acquiring financial resources from a third-party to improve teaching and study conditions. In the light of this, revenue from the fee exerts no influence on capacity.”

The state law also provides that exemptions from fees are to be governed by byelaws similar in essence to the rules applied in Baden-Württemberg, although the precise nature of the rules is a matter for the byelaw of the institution concerned.

As in Baden-Württemberg, students in North Rhine-Westphalia may take out loan to finance their tuition fees. This is a loan with interest. Only persons who may apply for BAföG support

under § 8 (1) and 2 BAföG are eligible for this loan. This means German nationals and the children of parents who have been resident in Germany for a long time. EU citizens are not normally entitled to obtain the loan. The overall debt incurred from the loan component of BAföG support and tuition fees may not exceed € 10,000, i.e. debt exceeding this figure need not be repaid.

6.11 Rhineland-Palatinate

Under its Study Accounts Act Rhineland-Palatinate charges a semester fee of € 650 after a student has been registered for 1.75 times the standard duration. Although rules that distinguish between residents and non-residents of the state have been contested in the courts (cf. Chapter 6.5), the state government has agreed to charge students from outside Rhineland-Palatinate € 500. However, this law has not yet entered into force. As in Bremen, where the law has been subject to judicial review, the decisive factor is “place of primary residence”. The first semester is to be free for non-residents, but thereafter any student who has not transferred his or her primary residence to Rhineland-Palatinate will have to pay tuition fees.

6.12 Saarland

Tuition fees can be charged in Saarland from the winter semester of 2007/08 following the state’s Higher Education Fee Act of 12 July 2006. § 2 (1 i) provides that institutions will charge students € 300 for the first and second semester and € 500 for each following semester. Students are exempted from tuition fees if they:

- are on leave,
- are spending a period working or abroad as part of their course.

The fees may be waived upon application for students

- who are caring for a child that had not obtained the age of 10 at the start of the semester,
- who suffer from a disability defined in § 2 (2) SGB IX as a handicap to study,
- who are competitive athletes or outstanding young musicians or winners of national art awards,
- who are non-nationals studying under a state, federal or international agreement or partnership between institutions which guarantees that no fees will be charged.

Institutions are empowered, in individual cases upon application and in accordance with the Rules on Fees, to reduce or defer the charge or allow for payment in instalments. They may defer

the payment of fees for foreign students under 35 who are not entitled to obtain a loan to finance their tuition fees. Students may be exempted from fees upon application if

- their achievement is outstanding (an institution may exempt up to 5% of students for this reason),
- they participate to an appropriate extent in the work of institutional committees defined in the Rules or student self-governance bodies in accordance with the byelaws, for a period of at most two semesters.

Tuition fees are defined in § 4 (1) as third-party resources and consequently must be dedicated to improving the quality of study and teaching. § 4 (3) states that, as third-party resources, tuition fees shall not be taken into account when calculating the institution's intake capacity.

To finance their studies, students are entitled to obtain a loan under a contract of private law. The following are eligible:

- German nationals, nationals of another member state of the European Union,
- family members of a national of a member state of the European Union insofar as they have the right of mobility,
- displaced aliens,
- foreign nationals and stateless persons who obtained their higher education entitlement in Germany.

The entitlement ceases upon obtaining the age of 40 and when the student has been matriculated for the standard duration of study plus four semesters. The total debt incurred from this debt and the BAföG debt component is limited by § 7 (4) of the Act to € 15,000.

6.13 Saxony-Anhalt

In Saxony-Anhalt there are charges for students requiring additional time to complete. A student who exceeds the standard duration by more than four semesters must contribute € 500. Institutions of higher education may also, at their own discretion, charge for the use of facilities or materials.

6.14 Saxony

In Saxony a tuition fee of € 300 to 450 is payable for students on their second course if the new course is not an essential complement to the first. So far universal tuition fees are ruled out by Saxony's Administrative Costs Act (§ 3 (3)).

6.15 Schleswig-Holstein

The Higher Education Act of Schleswig-Holsteins continues to proscribe tuition fees. According to the coalition agreement between the SPD and CDU, the federal state "does not intend to assume a pioneering role, but nor to contemplate a go-it-alone solution" on tuition fees (CDU Schleswig-Holstein / SPD Schleswig-Holstein 2005, p. 30). The state is hereby drawing attention to the situation that arises when no nationwide approach has been adopted. States are more or less forced by a heavy influx of students either to charge tuition fees or to broaden the scope of *numerus clausus*.

6.16 Thuringia

Tuition fees are currently charged in Thuringia when students exceed the standard course duration by more than four semesters.

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