

<b>Institution: BRUNEL UNIVERSITY (H0113)</b>
<b>Unit of Assessment: 20 – Law</b>
<b>Title of case study: Legal Issues in Regard of Accrediting Academic Degree Programmes in Germany</b>
<p><b>1. Summary of the impact</b> (indicative maximum 100 words)</p> <p>About 8 years ago, German regional governments agreed to establish a new system for accrediting academic degree programmes which are offered by German higher education institutions ('Hochschulen'). There are more than 400 such institutions in Germany. This research discusses some controversial legal issues relating to this new system. Several judicial rulings in Germany followed the legal reasoning which the research had developed. Thus the research has had impact on the outcome of legal actions in Germany. One of these actions may turn out to be rather significant, should the Constitutional Court rule that the Act establishing the accreditation system is in breach of the Basic Law.</p>
<p><b>2. Underpinning research</b> (indicative maximum 500 words)</p> <p>This research develops a legal argument in favour of the accreditation agencies' activities being designated as public law rather than private law matters. It rejects claims made by the actors involved in the accreditation system to the effect that in particular any decisions taken by the accreditation agencies are private law matters. Even though this sounds like a typical lawyers' quibble about a technicality, it is an important issue. This is because an affected academic institution could have recourse to judicial review in the (German) Administrative rather than the Civil Courts, should decisions taken by the agencies be considered public law matters. This in turn has a significant bearing on the applicable procedural and evidentiary rules, as well as on the applicable substantive law. For instance, procedures in the Administrative Courts are inquisitorial rather than adversarial, and Administrative Court judges tend to have a different task and self-understanding than the Civil Judiciary does. Therefore the Administrative Judiciary is more likely than the Civil Judiciary to develop meaningful legal limitations on the powers of accreditation agencies relating to the refusal of an accreditation, and to stop agencies second-guessing the voluminous documentation that academic institutions have to provide with a view to obtaining an accreditation.</p> <p>In addition, the research argues that the requirement for universities to have their degree programmes accredited constitutes an interference with the constitutional right to academic freedom (Art.5(3) of the German Basic Law) which, however, is in principle capable of being justified by overriding public policy imperatives relating to quality assurance for the benefit of prospective students.</p> <p>Heitsch's research relevant to this case study is embodied in two scholarly articles published in highly-regarded German law journals, one in 2007, and one in 2009. The research for the 2007 article was done elsewhere, and so will not feature much in this case study, other than as background support for the standing that Heitsch has attained in this area of work.</p> <p>Both articles have been cited widely in the German academic literature, of which examples are: <i>Citations of the 2007 article</i>: Joachim Christoph, <i>Kirchen- und staatskirchenrechtliche Probleme der evangelisch-theologischen Fakultäten</i>, (Mohr Siebeck publishers 2009) p.103, 124, 125, 127, 128; Susanne Meyer &amp; Bernd Pfeiffer (eds.), <i>Die gute Hochschule: Ideen, Konzepte und Perspektiven</i>, (edition sigma, 2010), p. 149, 150, 151, 153, 154; Georg Sandberger, <i>Qualitätssicherung</i>, in Volker Haug, <i>Das Hochschulrecht in Baden-Wuerttemberg</i> (Huthig Jehle Rehm publishers, 2009), p. 275; Jessica Stueber, <i>Akkreditierung von Studiengängen</i> (Peter Lang publishers, 2009), p. 25;</p> <p><i>Citations of the 2009 article</i>: Arne Pautsch &amp; Anja Dillenburger, <i>Kompendium zum Hochschul- und Wissenschaftsrecht</i> (de Gruyter, 2011), p.78; Patrick Becker, <i>Studienreform in der Theologie</i>, (LIT publishers 2011), p. 168, 172; Hubert Detmer &amp; Michael Hartmer (eds.), <i>Hochschulrecht: Ein</i></p>

## Impact case study (REF3b)

*Handbuch fuer die Praxis* (Huthig Jehle Rehm publishers, 2010), p.530;

### Citations of both articles:

Benedict Kaufmann, *Akkreditierung als Mikropolitik* (Springer, 2012), p.84; Alexander Merschmann, *Die Rechtsnatur der Akkreditierung von Studiengaengen*, *Neue Zeitschrift fuer Verwaltungsrecht – Extra* 14/2011, p.1 et seq.; Kerstin Wilhelm, *Die Akkreditierung von Studiengaengen im Hinblick auf die anstehende Entscheidung des Bundesverfassungsgerichts*, (Institut fuer Rechtspolitik an der Universitaet Trier, 2011) p.19; Veith Mehde, *Die Evaluation von Verwaltungsleistungen*, 44 *Die Verwaltung* (2011), p.179 et seq; Hermann Josef Blanke, *Rechtsgrundlagen des Akkreditierungswesens*, in Winfried Benz et al. (eds.), *Handbuch Qualitaet in Studium und Lehre* (Raabe publishers 2009), section F.17, 56pp; Daniel Immer, *Rechtsprobleme der Akkreditierung von Studiengaengen* (Goettinger Universitaetsverlag 2013), e.g. p.172; 358, 369; 456 et seq.

### 3. References to the research (indicative maximum of six references)

- Christian Heitsch, *Verfassungs- und Verwaltungsrechtliche Probleme der Akkreditierung von Studiengängen (Constitutional and Administrative Law Issues in Regard of Accrediting Degree Programmes in Germany)*, [2007] *Die Öffentliche Verwaltung*, 770 et seq. Available from Brunel
- Christian Heitsch, *Rechtsnatur der Akkreditierungsentscheidungen / Prozessuale Fragen (Legal Status of Decisions Relating to the Accreditation of Degree Programmes / Procedural Issues)*, [2009] *Wissenschaftsrecht*, 136 et seq. <http://dx.doi.org/10.1628/094802109789069549> (REF2)

### 4. Details of the impact (indicative maximum 750 words)

The impact of the research results from the fact that court rulings in Germany followed legal arguments which Dr Christian Heitsch, Lecturer in Law, Brunel Law School had developed in two journal articles, one of which (*Rechtsnatur der Akkreditierungsentscheidungen / Prozessuale Fragen*, 2009) was finished during the author's tenure at Brunel.

#### 1. Reference to the Constitutional Court

In its order of 16th April 2010, docket no. 12 K 2689708 [available at <http://openjur.de/u/144211.html> (accessed 28/08/2013)], the Arnsberg Administrative Court (Verwaltungsgericht Arnsberg) made a reference to the Constitutional Court as to whether the Act establishing the accreditation system is compatible with the Basic Law. In its opinion, the Administrative Court cited both articles. It used Heitsch's 2007 article as the main authority for the proposition that the duty to have degree programmes accredited constitutes an interference with the constitutional right to academic freedom (Ibid., at [72]).

In addition, the Court used Heitsch's 2009 article as the main authority for the proposition that decisions taken by the accreditation agencies are public law rather than private law matters (Ibid., at[100], [120], [129]).

The Constitutional Court is expected to render its decision in 2013 (Docket no. 1 BvL 8/10, pending, [http://www.bundesverfassungsgericht.de/organisation/erledigungen\\_2013.html](http://www.bundesverfassungsgericht.de/organisation/erledigungen_2013.html) , accessed 28/08/2013).

#### 2. Litigation about the proper avenue of judicial recourse

Heitsch's 2009 article has also been cited in court rulings made in the course of litigation about which avenue of judicial recourse is the proper one for disputes relating to the accreditation of degree programmes. More specifically, in its order of 13th November 2009, docket no. 15 E 1158/09 [available at <http://openjur.de/u/139909.print> (accessed 13/06/2012)], the Administrative Court of Appeal for the State of North-Rhine-Westphalia (Oberverwaltungsgericht Nordrhein-

Westfalen) reversed a decision rendered by the Minden Administrative Court (Verwaltungsgericht Minden) on 30th July 2009, docket no. 2 K 1291/08 [available at <http://openjur.de/u/140842.print> (accessed 13/06/2012)].

The Administrative Court had ruled that the pending dispute about a refusal to confer an unconditional accreditation on a degree programme was a private law matter to be heard by the civil judiciary. Reversing this decision, the Administrative Court of Appeal held that the dispute was a public law matter, and was for the Administrative Judiciary to decide. In its reasoning, the Administrative Court of Appeal cited Heitsch's 2009 article as main authority for the proposition that decisions taken by the accreditation agencies are public rather than private law matters (Administrative Court of Appeal for the State of North-Rhine-Westphalia, order of 13<sup>th</sup> November 2009, at [10 – 11]).

### 3. Further evidence of Heitsch's standing with the German judiciary

In its order of 19<sup>th</sup> November 2008, docket no. 12 L 576/08, para. 20 (available at <http://openjur.de/u/134585.html>, accessed 28/08/2013), Arnsberg Administrative Court (Verwaltungsgericht Arnsberg) rejected a petition from a German academic institution for an interim injunction to order the provisional accreditation of a degree programme. A German court may only grant an interim injunction after it has made a finding that that the pending principal action has good prospects of success. The Arnsberg Court felt unable to make such a finding in the accreditation case, because in the judges' view the case raised a wide range of difficult procedural and substantive issues which could not be meaningfully addressed in the context of a proceeding for interim relief. The Court cited Heitsch's 2007 article to illustrate the relevant legal issues (ibid. at [20])

### 4. Significance and Reach of Impact

Heitsch's 2007 article was the first thorough investigation into whether the requirement for accreditation of degree programmes interferes with the fundamental right to academic freedom and whether decisions taken by accreditation agencies are public or private law matters. Similarly, his 2009 article was the first proper study of the various procedural and substantive issues relating to judicial review of decisions relating to the accreditation of degree programmes. True, there had been two previous journal articles about the new accreditation system (Pautsch, [2005] *Wissenschaftsrecht* 210; Lege, [2005] *Juristenzeitung* 698). The Pautsch article dealt with the practicalities of the accreditation system from a university administrator's perspective, took the assertion that accreditation was a private law matter at face value, and only in passing addressed the doctrinal issues. The Lege article was more of a polemic rather than a thorough legal investigation.

Apart from the impact that Heitsch's research had on the development of judicial doctrine, it also will almost certainly lead to significant cost savings for academic institutions. This is because, until recently, the accreditation agencies firmly believed that they were acting on a private law basis and that they were entitled to review applications for accreditation and the supporting multi-hundred-page paperwork very intrusively. This manner of second-guessing the higher education institutions' documentation has significantly distracted academic staff from their core tasks of teaching and research.

As was criticized by State Courts of Auditors, the way the accreditation agencies fulfil their task has also led to costs of several million Euros per year just for the accreditation of degree programmes (see, e.g., Supreme Court of Auditors for the Free State of Bavaria, Annual Report 2012, Ch. 17, available at <http://www.orh.bayern.de/berichte/jahresberichte/aktuell/jahresbericht-2012/wirtschaftlichkeit/723-tnr-17-akkreditierung-von-studiengaengen-guetesiegel-und-geschaeftsmodell.html>, accessed 28/08/2013; Court of Auditors for the State of Thuringia, Annual Report 2008, Ch. 7, pp.114 et seq., available at <http://www.thueringen.de/de/rechnungshof/veroeffentlichungen/jahresberichte/>, accessed 01/10/2013).

**Impact case study (REF3b)**

The prospect of reasonably thorough Administrative Court review triggered by Heitsch's research will rein in the accreditation agencies in the future, and will have a direct impact on how they do their work. It will also lead to significant financial savings for all higher education academic institutions in Germany. The impact of such savings will be felt by over 400 higher education institutions all over Germany, by hundreds of thousands of German students and their families, and by the state governments which fund higher education.

**5. Sources to corroborate the impact** (indicative maximum of 10 references)

- Administrative Court of Appeal for the State of North-Rhine-Westphalia (Oberverwaltungsgericht Nordrhein-Westfalen), order of 13th November 2009, docket no. 15 E 1158/09 [available at <http://openjur.de/u/139909.print> (accessed 28/08/2013)];
- Arnsberg Administrative Court (Verwaltungsgericht Arnsberg), order of 16th April 2010, docket no. 12 K 2689708 [available at <http://openjur.de/u/144211.html> (accessed 28/08/2013)];
- Arnsberg Administrative Court (Verwaltungsgericht Arnsberg), order of 19<sup>th</sup> November 2008, docket no. 12 L 576/08 (available at <http://openjur.de/u/134585.html> , accessed 28/08/2013).

**Contactable source:**

Professor at the University of Trier, Germany, can corroborate the research impact on the development of judicial doctrine in Germany