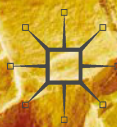


European Higher Education and the Internal Market

Tensions Between European Policy and
National Sovereignty

Edited by Cristina Sin, Orlanda Tavares,
Sónia Cardoso and Maria J. Rosa

ISSUES IN HIGHER EDUCATION



Issues in Higher Education

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Sónia Cardoso · Maria J. Rosa
Editors

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and National Sovereignty

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Abbreviations

AHELO	Assessment of Higher Education Learning Outcomes
BFUG	Bologna Follow-Up Group
CBHE	Cross-Border Higher Education
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority (UK)
DG	Directorate-General
DI	Differentiated Integration
EC	European Commission
ECA	European Consortium for Accreditation
ECJ	European Court of Justice (one of the two courts of the Court of Justice of the European Union)
ECTS	European Credit Transfer System
EEA	European Economic Area
EEC	European Economic Community
EHEA	European Higher Education Area
ENQA	European Association for Quality Assurance in Higher Education
EQAR	European Quality Assurance Register for Higher Education
EQF	European Qualifications Framework for lifelong learning
ERC	European Research Council
ESCO	European Skills, Competencies and Occupations Taxonomy

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ESG	Standards and Guidelines for Quality Assurance in the European Higher Education Area
ESU	European Students' Union
EU	European Union
EUA	European University Association
EURASHE	European Association of Institutions in Higher Education
FQ-EHEA	Framework for Qualifications in the European Higher Education Area
GATS	General Agreement on Trade and Services
HE	Higher Education
HEI	Higher Education Institution
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Cooperation
IMCO	European Parliament's Committee on the Internal Market and Consumer Affairs
INQAAHE	International Network for Quality Assurance Agencies in Higher Education
MIGA	Multilateral Investment Guarantee Agency
MOOCs	Massive Open Online Courses
MS	Member State
NPM	New Public Management
NQF	National Qualifications Framework
OECD	Organisation for Economic Cooperation and Development
OMC	Open Method of Coordination
PIAAC	Programme for the International Assessment of Adult Competencies
PISA	Programme for International Student Assessment
QA	Quality Assurance
SGEI	Services of General Economic Interest
SIGI	Service of General Interest
SMEs	Small and Medium Enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WTO	World Trade Organisation

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Introduction

Sónia Cardoso, Maria J. Rosa, Cristina Sin
and Orlanda Tavares

In October 2016, A3ES (The Portuguese Agency for Assessment and Accreditation of Higher Education) and CIPES (Centre for Research in Higher Education Policies) organised a Douro seminar to discuss the tensions between European competence and national sovereignty in higher education (HE), induced by the creation of a European

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internal market. Bringing together plural perspectives (political, sociological, legal, economic and educational), the purpose was to explore the multiple aspects—forces, drivers and actors—that have been shaping European policy in the area of higher education. This book is the outcome of the seminar and its purpose is to provide a comprehensive account of these various aspects and perspectives.

The European Community has relentlessly attempted to include education in its sphere of intervention since the signature of the Treaty of Rome in 1957. As argued by Corbett (2005), this “is also a tale of persistence, of smart civilian servants and wily bureaucrats seizing every possible opportunity to push the Commission’s proposals forward” (cited in Amaral & Neave, 2009, p. 286). However, whenever the Commission took a bold step forward it was always met with suspicion by the Member States. Examples are the 1961 De Gaulle’s proposal to consider that education and culture were a matter of national sovereignty, the difficulties in implementing the Erasmus programme (De Wit & Verhoeven, 2001) or the negative reaction to the presentation of the *Memorandum on Higher Education* (Commission of the European Communities, 1991), seen as a new attempt of the Commission to develop a formal responsibility in the area of higher education (Petit, 2003).

In the early 1990s national governments were worried with what seemed to be an unstoppable erosion of national sovereignty (Dehousse, 2002, p. 2), which resulted in the revival of the subsidiarity principle in the Maastricht Treaty. The Treaty also limited the activity of the Community in the area of education in its Article 126. The Treaty established that the Community must fully respect the responsibility of Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity and any incentive measures must exclude any harmonisation of the laws and

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regulations of the Member States. In the Nice Treaty this formulation was essentially maintained, now as Article 149, which became article 165 in the Treaty on the Functioning of the European Union (TFEU).

However, despite these legal provisions inserted in the European Treaties the Commission has been able to play an increasing role in education, namely in higher education. As argued by Cram (2001, p. 783) “the Commission has historically been most influential when it makes less grandiose claims and acts quietly and efficiently” and “the Commission needs to learn not simply to act opportunistically in pursuit of its purpose but also how to become a *competent purposeful opportunist*”. Therefore, the Commission has been able to increase its role by moving slowly and carefully, taking advantage of any available opportunity. This has been nicknamed by Pollack (1994, 2000) “the creeping competence of the Commission” (creep—to move slowly, quietly, and carefully, usually in order to avoid being noticed, *Cambridge English Dictionary*). The UK Prime Minister John Major referred to this creeping competence, as early as 1992:

One of the greatest concerns has been what many hon. Members in the past few years have referred to as the ‘creeping competence’ that comes about either by the abuse of articles in the treaty or by judgments of the European Court of Justice. (Prime Minister John Major, House of Commons 1992)

The main argument of the book is that although HE is considered an area of national competence and as such protected by the European Treaties (article 165 of the Treaty on the Functioning of the European Union—TFEU), it comes under the influence and remit of other European Union legislation (Treaties and Directives) meant to drive forward the European integration project and the creation of a European internal market. Therefore, the influence of the European Union (EU) and the European Commission (EC) on higher education can be seen as a collateral effect of this ambition towards the implementation of an internal market.

The internal market is supported on four freedoms of movement—capital, goods, services and people—across borders. The legal provisions related to these freedoms can challenge national authority over higher education through the intervention of the EC and the Court of Justice of the European Union (CJEU). The explicit attempts to consolidate

the internal market have given rise to contradictions between European law and national provisions regulating higher education. Despite the protection of the European treaties, legal provisions not directly related to higher education question the national authority over this area and give rise to tensions between European competence and national sovereignty.

One way of dealing with such tensions and differences is through differentiated integration (Veiga, Magalhães, & Amaral, 2015), which refers to “the possibility for different member states to have different rights and obligations with respect to certain common policy areas” (Kölliker, 2001, p. 125), thus accommodating the preferences of different member states. Indeed, implementing European legislation is a rather difficult task due to the high preference heterogeneity of Member States. To muster the goodwill of Member States there is also frequent reliance on political ambiguity (Chou & Gornitzka, 2014; Neave & Veiga, 2013). The use of ambiguous language, written in the most obscure legal jargon, allows for diverse interpretations of the treaties, which the different Member States use to accommodate the meaning of European legislation to their particular political contexts (Amaral & Neave, 2009).

In this context the CJEU plays a very important role and in general supports the neoliberal stance of the Commission and its staunch promotion of an internal European market:

From the start, the ECJ has regarded it as its supreme duty to realise the fundamental principles of the EU Treaty on the free movement of goods, services, capital and persons. Whatever the politicians cannot – or dare not – clarify, is clarified by the judges in the ECJ. (Fagforbundet, 2008, p. 4)

The CJEU, along the years, has given a very important contribution to building the EU by interpreting European legislation and the European Treaties, always in favour of promoting the four freedoms of circulation. The difficulties raised by the use of ambiguous language are dealt with by the CJEU, which issues binding legal interpretations in response to demands from the EU Commission, in general upholding the

Commission's positions. In the case of higher education, the CJEU has always decided in favour of promoting the free circulation of students and their access to the HE systems of European countries. The Bressol and Chaverot cases, which deal with the fundamental right of equal access to education and the free movement of persons, prove that the CJEU takes national policy demands on quality seriously, but without agreeing with excessive restrictions on the liberty of students to study abroad. Other example is the case *Commission vs. Austria* that questioned the Law on University studies where special requirements for foreign EU students were established. Kwikkers and van Wageningen (2012) have argued that the CJEU has developed a body of jurisprudence that regulates issues such as access, capacity, quality, student allowances and labour market needs, and that should be considered an even more important contribution to the EHEA than the Bologna Process. The CJEU has given so many—implicit—rules about what can be done or not, that these rulings together amount to a single European higher education system as an inseparable part of the single market (de Waele, 2010; Kwikkers & van Wageningen, 2012).

The Member States by implementing the Bologna Process offered the Commission a golden opportunity to enhance its role in higher education. The implementation of the Bologna process and the building of the European Higher Education Area (EHEA) are significant drivers of European higher education policy, which have challenged national traditions of higher education (Veiga & Amaral, 2008). It is true that the Commission was not allowed to sign the declaration and that the term “harmonisation” was carefully removed to eliminate the spectre of uniformity. However, as argued by Amaral and Neave (2009, pp. 287–288), the Bologna Process was also an example of the Commission's creeping competence:

By feigning modesty and assuming a low profile from the very beginning, the Commission was able to take on and take over a central role in the Bologna process. ...Once again the Commission's tactical modesty, its discrete lurking in the shadows ...paid dividends. Thus, the Commission was able to 'buy in', to become an important partner in the Bologna process for only a minor outlay of resources.

A critical view of the trajectory of the Bologna Process betrays the influence of the neoliberal agenda of the EC and the Lisbon strategy (Capano & Piattoni, 2011). The Bologna Process turned into a god-sent gift to the Commission, which could finally play a legitimate role in the agenda setting for higher education. Article 165 of the TFEU explicitly excludes any harmonisation of the laws and regulations of the Member States and determines that the EU should fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. However, the Bologna Process, an initiative of European governments beyond the EU, not from the Commission, has aimed at the convergence of the national European higher education systems. It is true that, as higher education is a domain protected by subsidiarity, hard law cannot be used to steer higher education reform. The use of soft law procedures, however, often entails convergence problems (Sin, 2014; Tomusk, 2011). Therefore, despite the goal of convergence and the fact that soft law has been a powerful shaper of higher education reforms in Europe, there are obvious convergence problems due to supranational, national and institutional levels playing a role in policy implementation. Indeed, soft law is better at promoting change rather than at promoting convergence.

The second golden opportunity came with the 2000 Lisbon strategy, which allowed the Commission to claim that universities were an indispensable component in the new knowledge society and to introduce the economic rationale into the policy agenda of higher education by linking the Bologna objectives “directly to economic gains expected from a common education area” (Martens & Wolf, 2009, p. 91). For Olsen and Maassen (2007, p. 4) the Commission promoted a model of university that “is dynamic and adaptive to consumers and that gives priority to innovation, entrepreneurship and market orientation”, while Martens and Wolf argue “governments paid the double price of making education an economic issue and spreading new modes of governance which weakened their own importance” (2009, p. 91).

This book seeks to discuss to what extent and how higher education has been caught in the European integration efforts and the ambition to consolidate the internal market of the EU. As such, it analyses

European higher education policies and their implementation, shaped by the tendencies coming from a threefold combination of European drivers: the EC, despite the subsidiarity principle provided by the European Treaties (Amaral & Neave, 2009); the CJEU; and the building of the EHEA through the Bologna Process. The European institutions have been proactive in fostering the creation of an internal market, which has ultimately affected higher education, notwithstanding its exclusion from their legislative remit. Other influences, of neoliberal nature, have come from international organisations (e.g. Organisation for Economic Co-operation and Development—OECD, World Bank) affecting education (and higher education) worldwide.

Topics in the book include the role played by European institutions in defining the higher education policy agenda (e.g. the how the CJEU shapes European HE policies and the influence exerted by the Commission's discourse and its legal instruments), as well as the tools towards European integration in higher education. For example, the Commission's position in favour of marketisation is evident in its communications on the role of higher education and in the Directives it has issued to drive forward the free movement of professionals and services. The Services Directive and the Directive on the recognition of professional qualifications affect higher education, even though they have not been directly targeted at this policy area. The growing influence of the EU over national higher education systems also poses challenges for quality assurance (QA) from the member states' perspective because they see their ability to safeguard the quality of education offered in their territories limited by the Services Directive. Finally, the discussion of some major tendencies which have been influencing European higher education policies in recent years is also brought to the fore in the book: training instead of education, neoliberalism, marketisation, limits to university autonomy (Amaral, 2017; Mokyr, 2003; Streickeisen, 2009) or instrumentalisation of higher education (Sin & Neave, 2016).

In sum, the book aims to offer an integrated, comprehensive and encompassing perspective on the forces, drivers and actors of higher education policy in Europe, at the interface between European institutions and member states' competence, all this under the umbrella of integration efforts and the tentative creation of a EU internal market.

The Chapters in Brief

The book is organised in two parts. The first part (chapters by Pauline Ravinet; Peter Streckeisen; Fausto Comandè and Jan de Groof; Amélia Veiga and António Magalhães; Alberto Amaral and Andrée Sursock; and Alma Maldonado-Maldonado) addresses the dominant political agendas in European higher education, including the influence of neoliberalism, the Bologna Process, the proactive efforts of European institutions to put forward an internal market and the globalising role of supranational organisations. In its second part (chapters by Cristina Sin and Orlanda Tavares; Anne van Wageningen; Eva Hartmann; Howard Davies; and Sónia Cardoso and Maria João Rosa) the book focuses on some of the tools that are being used to promote European integration in higher education, namely, the consideration of higher education as a service (and the consequences of both the Services Directive and the Directive on the recognition of professional qualifications), the jurisprudence emanating from the CJEU and the Bologna Process as a potential driver for convergence between the different national higher education system, including through the promotion of QA mechanisms. A final chapter presents the main findings and conclusions of this volume.

Part I opens with **Pauline Ravinet's** chapter. The author reflects on European higher education as an intersecting normative space, by shading light on what is meant by European higher education policy principles and how these have been constructed throughout the time. To Ravinet, these principles are defined as a hybrid between EU policy initiatives and the developments driven by the Bologna Process and the EHEA. The author looks deeper into the normative spaces in which European higher education principles are rooted: European general principles and university principles. She traces the former principles in the legal foundations of the EU and in the non-legal policy principles which have driven the European integration project. As for the latter, the university principles, these are sought in the history of the university and the *Magna Charta Universitatum*. Ravinet concludes that the European higher education policy principles, as reflected in EU policy initiatives, leave out the university principles illustrative of this institution's historical identity and focus narrowly on the economic function,

neglecting the social or political functions. In contrast, European higher education policy principles, as reflected in the EHEA documents, acknowledge the multiple roles of the university; furthermore, they subtly combine references to the philosophical and institutional principles from the university normative space with references to functional principles coming from the Europe normative space.

The analysis of European higher education policy principles is followed by a critical discussion, in **Peter Streckeisen's** chapter, of the development of European higher education policy in a context characterised by neoliberalism. The author tackles the topic of neoliberalism resorting to three different, although combined, aspects: (i) neoliberalism as the ascent of the economy to an ever more powerful position, dictating its rules to society and policymakers; (ii) neoliberalism as the rising power of economic thinking and economic science, and the expansion of its jurisdiction to all kinds of social fields, including education; and (iii) neoliberalism as the changing patterns of power and inequality, reflected in the concentration of economic power in the hands of corporations, owners, managers and investors and sustained by political, cultural and academic powers. Using these three aspects of neoliberalism as the backbone for his analysis, the author discusses higher education policy development in Europe in the last decades at four different levels: the system of higher education; higher education institutions; the academic profession; and the students. The chapter closes with the claim that perhaps neoliberalism comes to universities not only from the outside, as a threat emanating from dangerous external powers, but also from within institutions, with many academics actively contributing to academic capitalism. This leads the author to conclude that a redefinition of the university—which he agrees is an urgent task—involves not only refusing their economic subordination and challenging the power of economic ideas, but also addressing power mechanisms and growing inequalities within higher education itself.

Fausto Comandè and **Jan de Groof** analyse the role of the CJEU as an engine for European integration, including in higher education, while discussing the juridification, judicialisation and judicial activism in higher education in Europe. The chapter takes the view that the activist conducts of the CJEU and its expanding interpretation of the

judiciary role find justification in the need to interpret many clauses of the treaties, which have been drafted in a rather vague fashion in order to build political consensus and deflate the differences of views on critical topics, and in situations where the other institutions fall short of decisional capacity on issues belonging to the Union's competence. Finally, the role of the CJEU in higher education is discussed, by focusing on a limited pool of concepts, which are critical to the evaluation of the Court's attitude when touching issues with an impact on the life of post-secondary educational establishments, their management as well as the rights and obligations of individuals involved therein. In their final remarks, the authors point out that the norms specific to higher education are still resisted to be used as basis for judicial review, as well as the factors promoting or hampering judicial proceedings in higher education. In this light, the authors claim that the viability and willingness of the Court to expand the basis for its judgements, using new parameters as autonomous references for decisions, is a hypothesis that deserves to be considered.

An analysis of the potential of the theory of differentiated integration to explain the difficulties of integration in higher education is conducted in **Amélia Veiga** and **António Magalhães'** chapter. Using differentiated integration theory as a conceptual narrative to explain flexible integration, the authors analyse it as a discursive practice using the case of Bologna. The authors use a meta-analysis of published research about the Bologna Process to understand the extent to which flexible integration leads (or not) to further integration. Making use of the "time", "space" and "matter" variables stemming from the theory of differentiated integration, the authors show that this theory, while displaying conceptual frailties, is more a legitimating narrative of integration rather than a consistent explanatory approach to the processes and accomplishments of integration within the EHEA. In fact, the analysis of "time", "space" and "matter" as discursive elements of differentiated integration allow understanding how the institutionalisation of "flexibility" serves to justify and legitimate the EHEA as a process of (non)integration. Additionally, the authors conclude that conceptual narratives basing academic discourses and policy-making are interrelated, which is of importance as it enhances a reflexive approach towards political coordination.

Actually, since the knowledge about political processes changes the course of the very policies, the narrative approach is useful to put into perspective integration in higher education policy as a dynamic and integrative process.

Another dominant political agenda in European higher education is the one put forward by the European Commission. In their chapter, **Alberto Amaral** and **Andrée Surssock** examine a series of communications by the EC to show how this latter uses “governance by opinion”, one of the three dimensions of governance proposed by Martens et al. (2004) (by instrument, by coordination and by opinion) to shape higher education policies in Europe. After a brief historical overview that describes the progressive engagement of the EC in higher education policies, namely through the Bologna Process and the Lisbon Strategy, the chapter assesses its growing capacity to shape opinions and national and European policies through its influential communications (issued from 2003 to 2013). Special emphasis is given to the main ideas exposed in these communications, considered as drivers for setting up a political agenda and vision for European higher education. Then the authors turn to how universities have responded to these documents through their collective representative body, the European University Association (EUA). They analyse the responses to specific Commission initiatives and the declarations arising from the EUA conventions, coming to the conclusion that the Association has tried to balance an endorsement of the EC hegemonic discourse (i.e. an instrumental view of higher education), mainly as a way to avoid the charges usually targeted at universities that they are ivory towers, with a more humanistic view of higher education. The chapter concludes by stating that higher education should not embrace in the reform rhetoric defended by the EC, which puts forward a utilitarian view of higher education as a key element in a strategy of economic growth and competitiveness, but rather hold on to its humanistic values, remaining above all as a social institution.

The first part of the book closes with a discussion on the globalising effects of supranational organisations. **Alma Maldonado-Maldonado**'s chapter offers a worldwide view of the political agendas modelling higher education nowadays, focusing on the expansion of higher education markets and the rise of the relevance of skills. The author discusses the

current role of some of the most relevant international organisations working on education and particularly those that shape the higher education policy agenda, mainly the World Bank and the OECD. The World Bank's and OECD's messages are analysed through their positions taken in published documents, reports, recommendations, policies, conferences, networks and sponsored projects. Overall, two of these messages emerge as the most important: the relevance of skills (and competences) and the development of higher education markets (mostly private). It becomes apparent, from the discussion in the chapter, that the World Bank, through its private arm (IFC—International Finance Corporation) supports the private demand-absorbing higher education sector and contributes to building a network of stakeholders that support it. Additionally, by emphasising skills and competences and neglecting other ideas and possibilities (such as educating citizens), these organisations reshape the purpose of higher education. However, higher education is too important to solely allow inter-governmental organisations around the world to determine its development. The author concludes by claiming that while the higher education sector may be in the middle of ideological, political and economic storms, there is no doubt that it will certainly continue to be relevant for the future of most societies.

Opening the second part of the book, **Cristina Sin** and **Orlanda Tavares** provide a reflection on the Bologna Process and its potential to act as an instrument for the creation of a European higher education market. As put forward by the authors, in principle, the Bologna Process convergence ambitions would help the integration efforts of the European Union in a policy area explicitly excluded from its legal prerogatives. Nevertheless, such ambitions have been counterbalanced by the prevalence of member states' sovereignty in the implementation of the reforms proposed by the Process. The diversity of outcomes led by the steering through soft law, national traditions of higher education and national political agendas raises questions about the feasibility of a common market. Starting with an analysis of the potential of the Bologna Process to contribute to the establishment of a higher education market, the authors offer a discussion about the marketisation pressures exerted by European institutions. Particular attention is given at this level to the European Commission's agenda of economic growth

and international competitiveness and the Bologna Process subordination to it. The barriers which might hinder the creation of a common higher education market are then discussed, namely those arising from both the peculiarities in the governance of the Bologna Process and the limited convergence resulting from its uneven implementation by the signatory countries.

Anne van Wageningen's chapter analyses the view of higher education as a service, which can be considered as another tool capable of promoting European integration in higher education. The author problematises this view, by discussing some of the issues resulting from the connection of services and higher education, while attempting to clarify the meaning of both concepts. The chapter builds around the analysis of case law and, again, of the role of the CJEU as a way to understand, on the one hand, the role of services within the internal market and the possibilities to liberalise cross-border higher education, and, on the other hand, what is a service and, specifically, a service in connection with higher education. In analysing the liberalisation of cross-border higher education and its connection to services and the internal market, the chapter discusses how the service-oriented approach chosen by the CJEU to deal with higher education affects national policy-making in this area. Some elements of the Bologna Process and the resulting EHEA are also included in the analysis, attempting to grasp the role of member-states and higher education institutions as the offer side of higher education.

Eva Hartmann's chapter introduces in the book the political dimension of skilled migration in Europe, namely discussing cross-border mobility of professionals as a support for the European Union as a political project. Particular attention is paid in this context to the role of universities in the Europeanisation of the professions. The chapter engages with a neo-Gramscian account of European integration, which allows to consider skilled migrants as intellectuals. In order to get a better idea of the role of regulated professions in this context, this perspective is further developed by drawing on two different accounts: a Durkheimian account of professions, bringing their mediation role to the fore; and a Weberian account of professions, bringing power into the discussion and allowing to shed light on the major struggles over the regulation of professions and the implications for Europeanising the

“professional complex” (Parsons, 1969, p. 331). This theoretical framework is used as a resort to understand the different strategies deployed by the European Union with a view to establishing a European market for services in the field of regulated professions. The historical analysis of the Europeanisation of professions suggests that this was marked by many setbacks, which forced the European Union to frequently modify its approach. Due to these difficulties, the EHEA has gained importance in recent years in advancing the European professional complex. However, this has major consequences for the professions and their societal role and risks overburdening higher education with new tasks it does not have the means to carry out.

The role played by the EUA in the alignment of European Union’s legislation with the Bologna Process in regard to the recognition of professional qualifications constitutes the focus of the chapter by **Howard Davies**. In 2007, discussions were initiated by the EUA aiming to resolve the tensions between the outcome-based principles of the Bologna Process and the input-based logic of European Union legislation on the recognition of professional qualifications. The chapter first deals with these tensions to then discuss the background leading to their apparent resolution. Against a background of global financial crisis, European Union enlargements, and the development of competence-based curricula by professional and academic bodies active in the regulated professions, European Union legislation was ultimately amended, in 2013, in a manner compatible with the Bologna Process. The sequence of events that led the EUA to be proactive in driving the convergence of Bologna and European Union law is thus set in context. The chapter argues that, although the convergence has been limited rather than extensive, it has made a modest contribution to the coherence of the European policies on academic and professional recognition. Nevertheless, as it is argued at the end of the chapter, further convergence, namely of professional and academic recognition systems, raises in-principle questions about the potential dominance of higher education by the employability imperative.

To finalise the second part of the book, **Sónia Cardoso** and **Maria João Rosa**’s chapter looks at the European dimension of QA, paying special attention to the challenges it presently faces under the framework of a series of initiatives designed to establish a higher education

market on the one hand and the EHEA on the other. The chapter builds on the analysis of a set of documents (guidelines, reports, communiqués and other official papers) thought to represent the views of the different European and international agents on how quality can or should be assured in the context of the recent European policy implementation regarding higher education. These agents act as “intermediate bodies” in relation to the implementation of European QA and hold different hierarchical positions regarding their power and competence in this field. The chapter starts by putting forward the initiatives taken at European level to build a higher education market. Emphasis is then given to the contributions of different European agents aiming to promote and assure quality of higher education in this new context. Trust and cooperation emerge as “prerequisites” for the establishment of QA as an effective tool towards European integration in higher education. The chapter concludes with an attempt to systematise some of the challenges currently faced by European QA, as well as with some avenues for future debate on the topic.

This overview of the main topics discussed by each author gives the reader a feeling for the multiple accounts and perspectives broached in the chapters and presents a broad view of the drivers and shapers of European higher education policy. We hope that the different perspectives presented in this volume will offer the opportunity to open a debate that is both enlightening and clarifying in relation to the tensions between European policy and national sovereignty in higher education in the context of the advancement of a European internal market.

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Part I

Dominant Political Agendas in European Higher Education



On Principles, Europe and Higher Education: Reflections on European Higher Education as an Intersecting Normative Space

Pauline Ravinet

Introduction

More often than not, notions such as a ‘European model of higher education’, or Bologna ‘principles’ or ‘values’ are used in the debates on European higher education policy. But is there such a thing as a shared understanding of the ‘European model of higher education’? And what are those supposed Bologna or European ‘principles’?

These notions do play a role—they are in a way constitutive of a sector identity. In a context of globalisation and marketisation of higher education, it is indeed easily understandable why it is important to brandish these ‘principles’ and ‘model’. Nonetheless, further examination of the use of these notions shows without difficulty how fluctuant their contours and definitions can be. In the public debate, the ‘European model’ is, for instance, many times used to point out an

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opposition to the (imaginary) ‘American higher education model’, but it is almost never defined in its own right. As for the ‘Bologna principles’, they are largely referred to, but what is behind them remains somehow hazy, as alternatively evoking the 1999 Bologna objectives for policy coordination, the great objectives of the European Higher Education Area (EHEA) (employability, mobility and attractiveness), the Lisbon objectives of building a competitive Europe of knowledge, the specific working culture of this unusual European process (enhancing informality and voluntary participation), or the values of European higher education institutions.

Research on European higher education policy has greatly contributed to making sense of this fluctuant model and principles. Different works have highlighted the ‘polysemy’, ‘malleability’ and ‘ambiguity’ of these policy developments (Corbett, 2011; Keeling, 2006; Ravinet, 2014; Zgaga, 2012). This perspective has, for instance, been important to better understand the rapid crystallisation of the Bologna process: actors with diverging visions were able to gather around ambivalent objectives precisely because they could interpret them according to their own vision and strategies. The focus on malleability was very helpful as well in accounting for the varieties of the reforms taken in the name of Bologna (different works acknowledged how with ambiguous and/or vague initial objectives, there has been ample room for interpretation, which partly explains why domestic implementation and usages of Bologna have been so diverse) (Sin, Veiga, & Amaral, 2016). Yet, by emphasising the malleability of European higher education principles as a key explanatory feature, these works have also fallen short of questioning the bigger picture: Whereas the ‘model’ and the ‘principles’ are always put forward in the debate over European higher education, why is there so much ideational malleability and ambiguity in the story? What about agreed and shared explicit principles? Are there really any? If so, where do they come from?

These questions have both theory and policy relevance. Theoretically, it seems necessary to raise conceptual propositions for analysing the normative foundations of European higher education policy and go beyond the observation of ambiguity mechanisms. But the normative uncertainty of European higher education policy is not only a challenge

for researchers. This, of course, also has crucial policy implications. While the Bologna Process will be 20 years old in 2018, it is time for policy makers to ask, beyond monitoring the implementation of technical objectives, where European HE policy is going, relying upon which principles and defining which new goals for the future.

In this chapter, our objective is to provide a comprehensive framework to answer the question ‘What are the European higher education policy principles?’. Following a first section giving preliminary definitions and details on the method, the second section presents European higher education principles as derived from European general principles. The third section interprets them as embedded in principles and values of the (European) University and proposes to define European higher education as a normative space at the intersection between two normative spaces: ‘Europe’ and ‘University’.

Puzzle and Preliminary Definitions

For a start, and before we consider and cross different perspectives to answer the question ‘What are the European higher education policy principles?’ it is extremely important to characterise what we are talking about and to give precise definitions.

The reflection presented here is first of all one about **principles**. The etymology of the word (properly meaning ‘what comes first’), as well as its common sense (general law or basic position) refers to a form of rule that is not supposed to vary. In our case, and as mentioned above, we are dealing with varying or at least not stable explicit ‘principles’. Our interest is in the connection the notion makes between rule and action. One dimension of it is legal, but our understanding of the category of principle is not strictly legal. It is rather an extensive social science definition: principles are here taken as more or less explicitly agreed reference points for action, which encompass legal principles (dominant) policy paradigms and underlying values.

Following this definition of principles, by **European higher education policy principles**, we refer to the agreed reference points for action of *European level* higher education policy developments (EU initiatives

in the field of higher education and EHEA policy developments). This may include legal provisions, policy paradigms, and underlying values. In this chapter, we argue that these European higher education policy principles are shaped both by ‘European principles’ on the one hand, and by ‘the University principles’ and values on the other hand. Within the category of **European principles**, we understand ‘European fundamental principles’ (as legally defined in the EU treaties), as well as driving principles of the European project at a given period (e.g., the Lisbon strategy or the ‘Europe 2020’ strategy bear a formulation of the European project relying upon principles). We will examine to which extent European higher education policy principles can be derived from European principles in section “[Puzzle and Preliminary Definitions](#)”. But European higher education policy principles are also shaped by another ideational universe that provides distinct reference points for action: the **University principles**, which are also important to take into consideration. The principles and values of the University as a social institution (as stated for instance in the *Magna Charta* 1988) are equally constitutive of the European *higher education/university* principles. This is what we will focus on in the third section. We will conclude with a proposition to define European higher education as an intersecting normative space, i.e., at the intersection between Europe as a normative space and the University as a normative space.

‘Normative space’ is therefore a key notion in this chapter. In accordance with a long tradition of analysing public policies through an ideational perspective, we assume that the principles guiding a given policy sector are not floating freely. Rather, we state that they are anchored to a normative space of reference. If we accept that for a given policy there may be more than one space of reference, then the characterisation of the different normative spaces is crucial in order to analyse how policy principles are formulated, how they might be conflicting with one another, how they resist change or evolve over time.

In terms of method, this chapter will not include direct and systematic analysis of a substantial empirical material collected for the purpose of this study. It mostly consists of a theoretical proposition based upon secondary analysis. The ambition of this chapter is to rephrase the debate on European higher education principles.

From European General Principles to European Higher Education Policy Principles

A first approach to answer the question ‘What are European higher education policy principles?’ is to consider whether they are derived from some more general *European* principles: here, Europe is both what comes first and what is above. Phrased in the wording chosen for this chapter, here the normative space of reference is Europe, and we should therefore expect *European* higher education policy principles to be shaped primarily by their European nature. These general *European* principles might be understood as legal principles or as non-legal policy principles driving the European project. We will consider these two perspectives successively.

Legal Perspective

As already stated dozens of times in works on European higher education policy, there are only very few legal provisions specific to (higher) education in the treaties. Although the idea of a European cooperation in the field is as old as the project of a European community itself (Corbett, 2005), Member States have been reluctant to transfer any proper competence to the EU.¹ In the following paragraphs, we give an overview of European legal principles related to higher education from the more specific to the more general.

The inclusion of (higher) education in European primary law dates back to the establishment of the EU in 1992. Higher education (included in ‘education’) is explicitly concerned by two articles of the Treaty on the Functioning of the EU (TFEU), namely article 6 and article 165 (consolidated version). In the Title of Part I (higher) education appears as a domain of limited competence. Article 6 lists the seven areas in which ‘The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States’, and higher education is included in the fifth area: ‘(e) education, vocational training, youth and sport’. In Part III of the TFEU (on Union policies), Title XII is dedicated to ‘Education, Vocational Training,

Youth and Sport'. Article 165 paragraph 1 states that 'The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action', but also reminds that this should be done by 'fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. Paragraph 2 specifies what 'Union action shall be aimed at'. Among different general aims (for instance 'developing the European dimension in education', 'promoting cooperation between educational establishments'), one more specifically addresses higher education and clearly puts forward European student mobility programmes: 'encouraging mobility of students and teachers, by encouraging, inter alia, the academic recognition of diplomas² and periods of study'.

We can therefore see that articles 6 and 165 of the TFEU do not really define proper European higher education policy principles. They rather consist of a cautious specification of the scope of potential European actions in support of Member States, especially mobility. Yet, we can search for a legal definition of European higher education policy principles in two directions other than the explicit mention of the sector in the treaties: in the jurisprudence of the European Court of Justice (ECJ), and in the statement of general EU principles and values that would also apply to higher education.

As for the importance of the ECJ rulings in creating a space for European higher education initiatives, the story of the 1980s successive rulings (following the famous *Gravier* case in 1985), recognising higher education as a form of training, has often been told in works on the history of European higher education policy (Corbett, 2005; Frazier, 1997). Before the Treaties (TFEU) defined the above-mentioned minimal competence in education, the ECJ interpretation of higher education as 'training' was instrumental in setting the legal basis for the Community education programmes of the 1980s: at that time, the EC had an explicit competence in the market-related domain of vocational training (article 128 EEC), but not yet in (higher) education. More recently, Kwikkers and van Wageningen (2012) have argued that the 'ECJ body of jurisprudence regulating issues such as access, quality, student allowances

and labour markets needs' is contributing to the emergence of a EHEA more than the soft intergovernmental coordination in the Bologna Process. In her work analysing how HEIs are subject to competition law, Gideon (2015) equally showed how legal provisions that are not higher education specific may affect higher education policy. ECJ rulings indeed relate European higher education initiatives to general European principles: even with very limited specific competences in the sector, regulating free movement, labour market or competition may include rules affecting higher education.

This invites us to turn to the most general EU legal principles and values, as situated 'above' and indirectly framing European HE policy principles. The 'values of the EU', as stated in article 2 of the Treaty on the European Union (TEU) can, for instance, be considered as the most general legal principles guiding European initiatives in a given sector: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (...) pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'. What the Charter of Fundamental Rights of the EU explicitly qualifies as 'principles' in its preamble are 'democracy and the rule of law'. No one would deny that these moral and political foundations of course apply to higher education. But they remain somehow general and distant and it must be noted that these precise articles of the TEU and the Charter are almost never quoted in political statements about European higher education. In contrast, the institutionalisation of the 'four freedoms' of the internal market (free movement of goods, services, persons and capital, part III of TFEU) have elevated market and mobility to powerful EU 'principles' (not qualified as such in treaties) that are pervasive in European higher education.

Policy Perspective

As noted in the introduction, our understanding of principles is not only legal. We understand principles as agreed reference points for action, which also include (dominant) policy paradigms. A policy

perspective should therefore help to understand how European higher education policy principles are a translation of general European policy principles. Such an approach corresponds to very classical ideational perspectives in public policy research (cf. Peter Hall's policy paradigm approach (1993) or Pierre Muller's *référentiel de politiques publiques* approach [1995, 2005]). When discussing European higher education, we include both the EU and the EHEA. In the following paragraphs, we will first consider EU general policy paradigms shaping European higher education policy principles and then (try to) characterise the EHEA principles.

Many works in EU studies have shown how general European policy principles revolve around the building of a European market. There has been, for instance, a rich debate in the field on whether the market is an end itself, or an instrument for a more integrated Europe—or both at the same time (Jabko, 2005); on how a European social policy might develop 'in the name of the market', but be trapped in the end (Jacquot, 2015, on gender equality European policies); or on the variations and adjustments of the market principles as early as in the formulation phase of European policies (Crespy & Ravinet, 2014). Following this perspective, it is interesting to look at how these European market principles have shaped European higher education policy principles over time, and more precisely how the association between the European market and higher education has moved 'from tactical to principled' (Ravinet, 2014).

As stated above, the first connection between higher education and the European market in the 1980s (by interpreting higher education as a form of vocational training) was essentially tactical: the objective was to gain a legal basis in order to have a capacity to develop initiatives in the field. But in the 1990s and the beginning of the 2000s, in the emergence and institutionalisation of the 'Europe of knowledge' discourse, there arose a new ideational context, emphasising the contribution of higher education to economic growth, international competition and social cohesion (yet, partly between the lines, the Europe of knowledge intellectually assigns a key role to higher education, but until the Communication on 'the role of Universities in the Europe of knowledge' in 2003 the EU did not formulate an explicit vision and principles

for the sector [Ravinet, 2014]). From the mid-2000s on, with the revisited Lisbon strategy and the Europe 2020 strategy, higher education clearly became, as other sectors, a terrain for neoliberal restructuring principles. The dimension of higher education and its contribution *for the market* is less prevalent, and more and more the EU vision of the sector is one of higher education *as a market* at all levels (Braband, 2014).

It is indeed obvious that the knowledge discourse has especially shaped European higher education policy principles. While the EU certainly did not invent the knowledge discourse and its promotion of innovation and high-level training as keys to implementing the post-fordist productive model, the EU was an effective sound box for its diffusion in the region. As a sector specialised in creating, applying, transmitting and diffusing knowledge, with the Lisbon strategy and the concept of a 'Europe of Knowledge', higher education was moved 'from the margins of European policy-making to its core' (Gornitzka, 2010). In the reformulation of the Lisbon strategy after its 2004 midterm review at midterm, and even more in the next ten-year strategy 'Europe 2020' for a 'smart, sustainable and inclusive growth', the neoliberal orientation of general European principles is strengthened. The key idea is that, facing a severe economic crisis, the EU should engage in necessary structural reforms to overcome its structural weaknesses and become more competitive. As observable in a series of Communications defining a 'modernization agenda' for higher education (see Braband, 2014; Corbett, 2012a; Harmsen, 2013), the EU general guiding principle of necessary structural reforms also applies to higher education. Universities should 'free their potential', improve their governance, develop partnerships with the private sector, diversify their resources and attract the best researchers and students in the world. (for a detailed analysis of these Commission communications subsequent to the two strategies, see the chapter by Alberto Amaral and Andrée Sursock in this volume).

European higher education policy is, however, not purely shaped by the EU: it is characterised by its hybridity between EU initiatives and the EHEA developments (Vukasovic, 2017). In our attempt to analyse European higher education policy principles, we should therefore also

engage in characterising the EHEA principles. These ‘Bologna principles’, often mentioned in the public debate on European higher education, are anything but obvious. There is no consensually agreed set of EHEA principles, hence in the existing scholarship on the EHEA we can find different interpretations.

A first interpretation is that Bologna principles tend to be closer and closer to the EU ones. Bologna principles are not directly derived from the EU: initiated and developed outside the formal EU framework, the Bologna Process towards the EHEA is totally disconnected from EU legal provisions, and only distantly connected to the EU great policy orientations. As has been well analysed in literature, EHEA borders (now 48 members) go much further than the EU, Bologna objectives reach beyond EU competence (concerning the structure of degrees, for instance, no competence has been delegated to the EU level) and its governance is autonomous from the EU institutions. Some authors have argued that in spite of this initial autonomous character, *in terms of principles*, Bologna has been more and more absorbed by the ‘script’ of the Lisbon strategy (Capano & Piattoni, 2011). This ‘Lisbonisation’ of Bologna means that the EHEA has at least conceptually lost its autonomy and is more and more embedded in the EU project. According to this vision, the reference points for action of the EHEA are not alien to the EU, on the contrary they are aligned with EU policy principles: key EHEA concerns for competitiveness and employability are for instance tightly integrated into the ‘Lisbon script’.

A second interpretation of the evolving Bologna principles contests the absorption argument and states that there is still a distinctiveness of the EHEA in terms of functioning, ideas and principles. Observing that the Commission may have had a *strategy* of absorbing the EHEA does not mean that this strategy succeeded (Ravinet, 2014). Different authors analyse the complexity and the ambivalence of the game between the EU institutions (especially the Commission) and the Bologna Process. National actors within the Bologna structure have developed a ‘vigilant cooperation’ strategy: enjoying resources provided by the Commission, but remaining extremely vigilant to contain its ambitions of power (Muller & Ravinet, 2008), and defending a specific working culture that emphasises the importance of informality and the

persistence of an intergovernmental identity (Lažetić, 2010). Rather than a unilateral takeover of the European Commission, what is striking is the ‘ping-pong game’ between these different actors for the leadership of European higher education policy (Corbett, 2011). Accordingly, the ideological orientation of EHEA principles reflects this distinctiveness. Bologna objectives and principles obviously appear less neoliberal than the ones of the Commission in its different communications. The founding Sorbonne and Bologna declarations can be considered as the antithesis of a neoliberal agenda (Braband, 2014) and, in the successive Bologna declarations, we can find a plurality of references—rather than only indicators of a neoliberal vision of European higher education. Bologna documents do mention employability and competitiveness, but they also refer to non-economic European values (see the famous inception of the Sorbonne declaration in 1998 stating that ‘Europe is not only that the Euro, of the banks and the economy’). As we will elaborate in the next section, EHEA documents equally invoke principles such as academic freedom, institutional autonomy and the social dimension of higher education.

These diverging interpretations of Bologna principles might be reconciled by the interesting characterisation of the EHEA as an ‘agora’ rather than a ‘philosophy’ (Zgaga, 2012). Systematically analysing the Bologna declarations and communiqués, Pavel Zgaga observes that there is ‘no unanimously accepted set of the EHEA principles’, but on the contrary that these vary from one ministerial conference to the other. The main role of this Bologna agora has been to ‘formulate and confront ideas on higher education in Europe and worldwide’ (Zgaga, 2012, p. 31), hence the possible contradicting but coexisting principles mentioned above.

The University Idea and European Higher Education Principles

We have just examined to what extent European higher education policy principles can be derived from European principles. But European higher education policy principles are also shaped by another

ideational universe that provides distinct reference points for action: the **University principles**, which are also important to take into consideration. The principles and values of the University as a social institution (as stated for instance in the *Magna Charta* 1988) are equally constitutive of the European *higher education* policy principles.

In this section, we will first recall that the University is a powerful normative space of its own, and question how its values and principles are shaping European higher education policy principles. We will secondly examine this University normative space addressing the reverse question, namely the presence of Europe within the idea of the University: is it European or universal?

Looking for the University Principles in European Higher Education Principles

European higher education policy principles are not only determined by their embeddedness in Europe's normative space. The University must also be acknowledged as a powerful normative space of its own. As has been well documented by historians of the University (for a concise historical introduction, see for instance Perkin, 1984, 2007), higher education is not only a public policy sector among many others; the University is also a key institution of modernity and its foundations are older than the State itself. Hence the principles for the sector are not only coming from the political centre—be it the national state or the European 'quasi state'. These principles are deeply rooted in a centuries-old history and identity. A few lines in a chapter like this one cannot, of course, claim to summarise nine centuries, but when University principles are addressed, this often implies mythical historical references to this past—the historical perspective hence deserves to be evoked. As often recalled, the concept of the University originates as far back as the medieval times (twelfth century). After a decline and recovery in the late medieval era, the University was at the heart of the Enlightenment in early modern Europe: the history of humanist thought is closely associated to that of the University. There was a second birth of the university in the nineteenth century, witnessing the industrial revolution and

the formation of European nation states. This was a key period in the formulation of the University principles as we understand them today. The idea of the University is about autonomy and academic freedom from any power, but it is also about applied sciences and training of elites. These principles are attached to great names such as Alexander and Wilhelm von Humboldt and their association of teaching and research as the core of the concept of the University. Building upon this past, the history of the University in the twentieth century is, of course, marked by the shift from elite to mass higher education, responding to both socioeconomic needs and social demand. And to qualify the transformation of the idea of the University in an even more recent past, we can observe that even before the notion of *knowledge society* emerged, historians suggested that the university has become a pivotal or 'axial' institution of post-industrial society.

So what are the University principles inherited and reformulated from this history? And to which extent do they frame European higher education policy principles today? The University principles today correspond to a 'normative kit' that is rather easily identifiable. We can take this 'kit' as enunciated in the *Magna Charta Universitatum* (1988), which certainly appears as a global reference: whereas its initial vocation is European (see below), the document has been signed by 805 Universities from 85 countries. To get a confirmation that there is a shared understanding about these principles, we can cross them with the 'fundamental principles' first defined in the constitution (1950) of the UNESCO-based International Association of Universities (IAU).

Relying upon the very remote history of the University institution, the first one of these principles is University autonomy. 'The university is an autonomous institution (...) its research and teaching must be morally and intellectually independent from all political authority or economic power', says the *Magna Charta*. The second principle is clearly linked to the Humboldtian ideal: the *Magna Charta* states that 'teaching and research in universities must be inseparable'. This inseparability elevates to a definitional feature of the institution: universities are institutions of *teaching and research*. The third principle mentioned in the *Magna Charta* is academic freedom: 'freedom in research and training is the fundamental principle in university life'.

We can see that the *Magna Charta* principles deal with the position of the University in society (or more exactly the protection of the University vis-à-vis political and economic influence), its institutional form, and the freedom of its members. As for the ‘fundamental principles’ as defined in the constitution of the IAU, even if not labelled exactly in the same words, we find a common concern for autonomy (‘freedom from political interference’), as well as for academic freedom (‘the right to pursue knowledge for its own sake and to follow wherever the search for truth may lead’).

We can see that the ‘normative kit’ of the University appears as rather stable and consistent. Beyond different national styles and political systems, and diverse legal statuses for universities, there seems to be a relatively wide spread understanding of what a university is and what the core principles of this institution are. More substantially and as highlighted by Stephen Lay in a very interesting in-depth analysis of the *Magna Charta*, what is remarkable about the University normative space is that principles are not articulated to a function-based definition of the University, but rather to a ‘classical definition of the University’ which puts the ‘emphasis on institutional forms over functions’ (Lay, 2008, p. 102). We could add that these principles remain abstract and that the type of means for enforcement are not detailed either in the *Magna Charta* or in the IAU constitution (in many institutions around the world holding the name ‘university’, one could question whether freedom is actually the ‘fundamental principle of university life’). Both this emphasis on institutional form over function and the distance of rather abstract philosophical notions contribute to make these principles widespread and durable.

After characterising these University principles, we are now coming to the core question of our chapter: we want to understand in which ways the above-mentioned fundamental university principles are shaping or framing European higher education policy principles. This is where a basic observation of EU texts reveals a surprising finding: they are not. There are few, if any, mentions of principles from this University ‘normative kit’ in EU texts. Let us first look at the EU *legal* texts listed in the previous section. None of them mentions explicitly the principles from the University ‘normative kit’. Neither the few legal

provisions about higher education in the treaties, nor the jurisprudence of the Court, nor the general provisions that eventually impact the higher education sector refer explicitly to institutional autonomy or academic freedom.

If we turn to EU policy documents that are not of legally binding nature (Communications, European strategies stated in the Conclusions of the Council etc.), and look at the way they characterise higher education and its eventual principles, it is quite clear that, contrary to the *Magna Charta*, the emphasis is on functions rather than on institutional form. To this extent, the very title of the 2003 Communication, *The role of Universities in the Europe of knowledge* (COM (2003) 58), is very significant: it expresses well how the EU discourse on higher education is about the functions the sector should perform to serve the EU, and not about institutional and philosophical principles. The *Magna Charta* is not mentioned even once in the document, nor the notion of ‘university principles’. The word ‘freedom’ is used twice to talk about the ‘freedom of funding’, and the necessary ‘freedom of access to knowledge’ (pp. 16–17), and never to refer to ‘academic freedom’; whereas the few occurrences of the word ‘autonomy’ refer to a different understanding of the notion: they are there to recall that autonomy is necessary to guarantee management efficiency, and *not* to defend the principle of ‘institutional autonomy’ in the sense of the *Magna Charta* or the IAU. The subsequent Communications by the Commission go further in the functional direction, and their titles are no less explicit (for a detailed analysis of the Communications on higher education, see Chapter by Amaral and Sursock, this volume). In 2005, the Communication *Mobilising the brainpower of Europe: enabling universities to make their full contribution to the Lisbon Strategy* (COM (2005) 152), and in 2006 the one on *Delivering on the modernisation agenda for universities—Education, research and innovation* (COM (2006) 208) are about defining a modernisation agenda for European universities which need to be reformed following managerial principles, and overcome their structural weaknesses in order to be able to contribute to EU growth and competitiveness. The definition of the Europe 2020 strategy does confirm the function-oriented perspective on higher education (see the 2011 Communication *Supporting growth and jobs—An agenda for the*

modernisation of Europe's higher education systems (COM (2011) 567), and the 2017 one *On a renewed EU agenda for higher education* [COM (2017) 247]).

In sum, we can observe that the University principles of institutional autonomy, inseparability of teaching and research, and academic freedom—the corner stones of the *Magna Charta*—are *not* shaping EU higher education policy principles. EU principles for this domain are completely function-oriented, and moreover with a narrow understanding of what the functions of the University can be (that can be summarised in this sentence from the press release of the 2017 Communication: ‘what can be done to help higher education contribute more to innovation?’). In EU policy documents, the social and political functions of the University do not appear as principles as such, nor does the role of higher education in the building of Europe. As for ‘knowledge’, it is not of the same kind as the one in the expression ‘pursuit of knowledge for its own sake’ (in IAU Constitution), this knowledge is also defined by its *function*: fuel EU economic competitiveness. In short, the principles for EU higher education policy that emerge from this review are the efficiency and accountability of higher education policies and institutions in performing their function of generating economic growth and competitiveness.

But the picture turns out to be quite different when examining European higher education policy principles as defined in the EHEA documents: there, and contrary to the EU discourse, the University ‘normative kit’ is clearly present, as well as explicit quotations of the *Magna Charta*. From the call to join and build a Europe of universities in the Sorbonne Declaration in 1998 and the Bologna Declaration signed in 1999 to the recent Communiqués, more or less direct references to the University principles and idea are recurrent. We are not going to produce a detailed tracing of these different principles from one ministerial document to the other, nor elaborate reflections on their eventual reformulations, or re-qualifications as ‘principles’ or ‘values’ etc. in the last two decades. This would be the object of a full chapter in itself, and this was already and really well done elsewhere (see Zgaga, 2012; Corbett, 2012b). What these works reveal as a whole is that despite uncertainties and overlaps on what the Bologna

‘principles’, ‘values’, and ‘objectives’ are, and varying emphasis on this or that principle, the University ‘normative kit’ does matter to understand the EHEA policy vision. Contrary to what we have just argued about EU higher policy documents, it is quite clear that University principles do contribute to shape EHEA principles. The founding Bologna Declaration indeed states in its 6th paragraph that European higher education institutions have accepted the challenge to play a main role in ‘constructing the European area of higher education, also in the wake of the fundamental principles laid down in the Bologna *Magna Charta Universitatum* of 1988’. The same paragraph goes on: ‘This is of the highest importance, given that Universities’ independence and autonomy ensure that higher education and research systems continuously adapt to changing needs, society’s demands and advances in scientific knowledge’. If we take the principle of institutional autonomy, for instance, after this initial founding statement, references to it are frequent in the EHEA texts, sometimes as an end in itself, or more often, as a condition for the realisation of the Bologna objectives (for example quality assurance).

Nevertheless, function-oriented principles are far from absent in the Bologna language and EHEA documents. This makes the Bologna normative ‘flavour’ different from that of the *Magna Charta*. Bologna principles are not limited to institutional and philosophical defining traits of an institution, the University. They are indeed explicitly also function-oriented, since the EHEA discourse revolves around the functions or contributions of the Universities and higher education as a policy sector to the building of Europe. But the Bologna normative ‘flavour’ is also very different from that of EU policy. The Bologna definition of Europe, *not only* as a market or economic space, is much broader and more comprehensive than the EU definition in the Lisbon and 2020 strategies. The building of Europe as an economic process is not denied, but it is many times mentioned that building Europe is also a ‘political’, ‘social’, ‘cultural’ or ‘intellectual’ process. Hence, the understanding of the functions of universities and higher education is logically *not only* about serving EU economic growth and competitiveness, it is much more diverse (and much less at odds with the University principles). The different EHEA documents, of course, do mention the

role of universities for the economic competitiveness of Europe, but they extensively evoke as well the ‘European dimension of higher education’, or the universities’ ‘mission in community service’, or ‘engagement in social cohesion and cultural development’. They also, for instance, emphasise the role of higher education in teaching ‘critical thinking’, therefore developing political citizenship and supporting European democratic values—a dimension that is never addressed in EU communications.

This search for the University principles in the Bologna documents therefore leads to the conclusion that EHEA principles are quite hybrid: they subtly combine both references to the philosophical and institutional principles from the University normative space AND references to functional principles from the Europe normative space—but with a broader understanding of European functions of higher education than EU policy documents.

A European or a Universal Idea?

Before concluding this chapter, we would like to shortly address the question of the European-ness of the University idea and principles. The argument that we have tried to unfold all along this development would remain incomplete, or partly biased, if we did not point at some ambiguity on the matter. When we are asking ‘Where do European higher education policy principles come from?’ and ‘In which ways are they rooted in the University normative space?’, we also have to question whether the University normative space, in this chapter thought as distinct from that of Europe, is actually so exogenous to Europe. This is a very important topic at a time of ‘globalization of higher education’, and this would again deserve a longer study. The following paragraphs are just some introductory reflections, as a hint to suggest that reflecting upon Europe and University principles also invites us to question the universality (or not) of the (European) University idea.

Is the University as an institution and as an idea so contextualised that it is European? Or is it universal? The history of the University is European, some would say ‘accidentally’, but does this mean that

the University normative space and principles are European, too? Or are they universal? Accounts from historians of different fields are very helpful to reflect upon this question. Interesting recent works by world historians try to connect the history of the University in Europe to the history of higher learning institutions in other regions and civilisations, therefore questioning its uniqueness or peculiarity (Dmitrishin, 2013; Moutsios, 2012). Relying upon the history of educational institutions in ancient India, Islamic schools or Confucian schools, among others, they argue ‘the University as an institution of higher learning is not exclusively European. Such institutions existed long before the eleventh century in other parts of the world’ (Moutsios, 2012, p. 18). Social historians have for some time made a similar observation, namely that there is no uniqueness in the European University in its functions; to train clerks, administrative experts and professional elites is not specific to the University institution (see, for instance, Perkin, 1984, p. 20).

It seems that, in these works, two elements are put forward to define the European peculiarity of the University. The first element relates, again, to its institutional definition: what is specific (and European) about the University compared to other higher learning institutions is its early constitution as an autonomous and self-governed institution. Comparative historical perspectives apparently show that institutions of higher learning in other civilisations and societies, in spite of reaching a level of institutionalisation sometimes superior to the ones in Europe, did not show this specificity of legal and academic autonomy. The second element, related to the first one, deals with the adaptability of the University as an institution. Perkin, for instance, argues that what is unique about the University is that it is ‘an immensely flexible institution, able to adapt to almost any political situation and form of society (...) it was able to survive for eight centuries and migrate, eventually, to every country and continent in the world’ (2007, pp. 159–160). The same Perkin also wrote about ‘its protean capacity to change its shape and function to suit its temporal and socio-political environment while retaining enough continuity to deserve its unchanging name’ (Perkin, 1984, p. 18). This ‘protean capacity’ of the

University is, for instance, visible in its relation to political power: the University emerged in a context of weak political power in Medieval Europe, but became an instrument of the European states and the capitalist economies in the nineteenth century (while always stating its autonomy). The ambivalent relationship between the University and European colonisation is another example of this protean capacity: it was the European colonisation that spread the University to other continents, but the University also turned out to be the ‘instrument of the anticolonial reaction against western domination of Asia and Africa’ (Perkin, 2007, p. 160).

In other words, we can see that the University is not a fixed European institution by essence. Its European history rather demonstrates that its autonomous flexibility is its main defining feature. This flexibility would therefore be what makes it possible for the University to be both European and universal. Nevertheless, at a time of ‘globalization of higher education’, a more articulated discourse on what is universal about the University idea and principles beyond its European history is certainly needed. In the *Magna Charta*, often presented as a document that has acquired a global dimension (there are hundreds of non-European signatories), this tension between the European-ness or the universality of the University actually transpires. Some elements would argue for the European-ness of the University principles, like the context in which the *Magna Charta* was written and signed. Different authors (for instance Corbett, 2012a) usefully recall that the *Magna Charta* was written at the period of the Single European Act and can be understood as a statement from the European Universities (‘the undersigned Rectors of European Universities’) to counterbalance the project of Europe as solely the completion of a single market. We can also note that the document explicitly positions the University within the European centuries-old history (by stating ‘A university is the trustee of the European Humanist tradition’). Yet, the general emphatic tone and different sentences in the text also suggest that the constitutive principles are valid not only for Europe, but for the whole world; the *Magna Charta* indeed includes evocations of notion such as ‘international society’ or ‘future of mankind’.

Conclusion: European Higher Education as an Intersecting Normative Space

In this chapter, our objective has been to answer the question ‘What are the European higher education policy principles?’. We have adopted a definition of European higher education policy principles including principles both from EU policy initiatives and EHEA developments. Our analytical perspective has been to consider that principles guiding a given policy sector are not floating freely, but rather that they are anchored to a normative space of reference and that, for a given policy, there may be more than one space of reference.

We have first examined how European higher education policy principles can be derived from European general principles, i.e., how they are embedded in the Europe normative space. This could be represented in a vertical way (Fig. 1). This first perspective has led us to observe how European market principles have shaped European higher education principles. In the EU policy vision, higher education has become, as other sectors, a terrain for neoliberal restructuring principles—contrasting with the EHEA principles, which also refer to non-economic European values and appear less neoliberal.

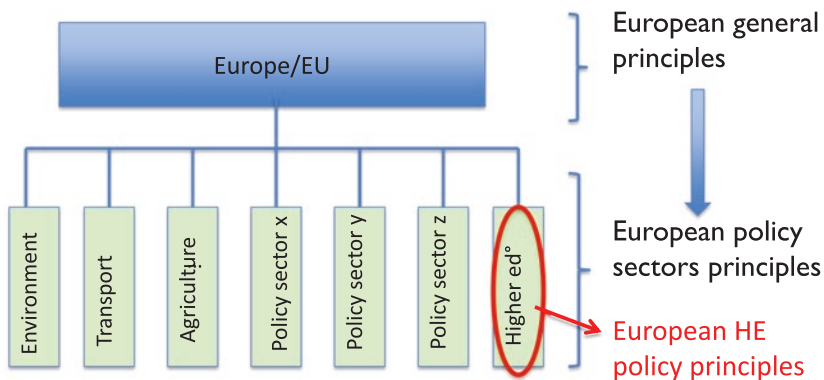


Fig. 1 From European general principles to European higher education policy principles

We have then examined how European higher education policy principles, especially the EHEA ones, are also shaped by another ideational universe, that of the University, which provides distinct reference points for action. Adopting this second perspective, we characterised the University ‘normative kit’ (covering institutional autonomy, academic freedom and inseparability between teaching and research principles). We were able to observe that these principles are absent from the EU policy vision—or used with a different *functional* understanding (i.e., *servicing* the objective to make the EU more competitive), but frequently mentioned in EHEA documents. We finally raised the question of the European-ness of the University idea in itself, which remains an open and fascinating question that would deserve more investigation.

In conclusion, we can say that European higher education is better understood as a normative space at the intersection between the Europe and the University normative spaces. This intersecting space could be represented in a horizontal way (Fig. 2).

This reflection leads us to revisit from a different angle the tension between EU driven higher education policy initiatives and the EHEA, since EU higher education policy principles remain primarily anchored to the Europe normative space, while EHEA principles are hybrid and anchored to both the Europe and the University normative spaces.

From this perspective, ‘Bologna’ is not only an agora (Zgaga, 2012), it is also a meaningful label for this intersecting space, which epitomises the whole European higher education policy. This labelling, or

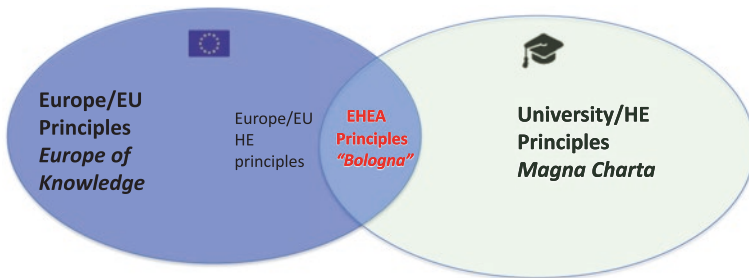


Fig. 2 European higher education as an intersecting normative space

even ‘branding’ effect around Bologna bears a plurality of normative references. Bologna is not the random place where the eponymous 1999 Declaration was signed; Bologna is the city where one of the oldest universities in the world was founded in 1088. This institution was the very first one in history to bear the name ‘university’. In the recent history, Bologna is of course also the place where the *Magna Charta Universitatum* was signed at the occasion of the 900th anniversary of the University. In the end, from the perspective of European public policies, Bologna both refers to the Europe of Knowledge and to the University principles.

Notes

1. We can for instance observe that there is not a single occurrence of ‘higher education’ or ‘university’ (and only one of ‘student’) in the 154 pages of the Treaty on the Functioning of the EU.
2. ‘Recognition of diplomas’ is also mentioned in article 53 of the TFEU related to the right of establishment. Diplomas are not understood there as part of higher education policy; rather the objective of mutual recognition of professional diplomas (for self-employed persons) is a condition of the right of establishment. This is why there has been a series of directives on the recognition of professional diplomas for self-employed professions starting from the 1970s on (see chapter by Howard Davies).

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Neoliberalism in European Higher Education Policy: Economic Nexus and Changing Patterns of Power and Inequality

Peter Streckeisen

Neoliberalism is a complex and multidimensional phenomenon. This contribution focuses on three different, although combined, aspects of the topic. First, the term neoliberalism designates the ascent of the economy to an ever more powerful position, dictating its rules to society and policymakers. This perspective is in line with Polanyi's (2014) concept of 'disembedding.' We are talking about the economy as a social system proper. Polanyi showed that the emergence of such a system was a sociohistorical innovation bearing tremendous consequences on the functioning of the social fabric. The process might lead to a situation where society would be a mere appendix of the economy. However, Polanyi also highlighted the fact that society defended itself against the market. For example, labour laws were issued in order to

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protect workers against the laws of the market. Thus, there is a back and forth movement in the conflictual relationships between market and society. In this perspective, neoliberalism appears as an era when the economy reaffirms its power and expands its domination. Since the 1980s and 1990s, we observe a displacement in the overall balance of power between the economy on one side, and society, politics, and culture on the other side. Among the factors triggering this displacement, globalization may be mentioned, as well as new information and communication technologies, or the rise of finance capital.

Second, neoliberalism means the rising power of economic thinking, and more specifically, of economic science. This perspective is in line with Foucault (2008). Economic science is not limited to the analysis of the economy any longer. It has expanded its jurisdiction to all kinds of social fields, from politics to culture, from the family to education. The conquest of hitherto inaccessible research and policy fields is called economics imperialism (Fine & Milonakis, 2009; Radnitzky & Bernholz, 1987). Human capital theorists such as Gary S. Becker are leading economics imperialists. While Pareto limited economics to the study of rational behavior (leaving irrational behavior to sociological scrutiny), Becker and his friends have extended the notion of rationality to such a degree that no field of human action may escape from it. Furthermore, economic science comprises not only economics, but also business administration. In many respects, these are antithetical disciplines. With reference to Bourdieu's (1998a) field of higher education, they can be situated in a twofold opposition: economics represents the autonomous pole, displaying theoretical coherence and mathematical modeling, whereas business administration is situated at the heteronomous pole, displaying conceptual eclecticism and a pronounced proximity to practical matters. Likewise, economics appears to be a matter of technical power (the power of numbers and models), whereas business administration can be described as a power technique. Whatever the differences, both disciplines have shown imperialistic tendencies during the last decades. Economics has expanded its scientific jurisdiction, whereas business has expanded its conceptual and practical jurisdiction to organizations outside the economy. Moreover, there has been some economization of business during the last decades, at least in the U.S.

(Fourcade & Kurana, 2013). At any rate, the relationships between the economy and economic science have been contingent and changing. If globalization of the economy goes hand in hand with globalization of economic science (Fourcade, 2006), these are distinct, although interconnected, processes: it is impossible to infer one from the other. Hence there is a need to focus on economic science as a specific dimension of neoliberalism, not reducible to the power of the economy as a social system.

Third, the term neoliberalism designates the changing patterns of power and inequality. Marxists such as Harvey (2005) are right to insist on social class: neoliberalism is not only about the power of the economy, but even more about the concentration of economic power in the hands of corporations, owners, managers, and investors. But Marxists tend to neglect other forms of power, notably political, cultural, and academic power sustaining neoliberalism. Wacquant's (2010) analysis of the neoliberal state helps us understand that neoliberalism is not only a bunch of policies, but also a dramatic transformation of the state itself, reaffirming the power of the state nobility opposed to the lower ranks of public sector staff, producing a remasculinization of the state, merging workfare and prisonfare, and so on. His description of the centaur-state, with a liberal face turned toward the middle classes and an authoritarian policy when it comes to control the poor, might show some analogy with tendencies in higher education policy. For today, universities are more and more constrained to deal with very heterogeneous audiences, and pushed to separate a higher academic track for a small elite from the very crowded degree programs resulting from extended access to higher education.

With these three aspects of neoliberalism in mind, this contribution discusses European higher education policy with respect to the following four levels: the system of higher education, higher education institutions, the academic profession, and the students. Special attention will be paid to the European Commission's communications: in a policy field where sovereignty rests with member states, European discourse proves to be an indispensable policy instrument (Sin, Veiga, & Amaral, 2016, pp. 48–56). However, notably concerning the academic profession and the students, the Commission's papers are not very substantial and my analysis draws on a variety of additional sources.

The System of Higher Education

In today's Europe, higher education systems are quite different from one country to the other. Since the rise of the nation state in the nineteenth century, universities have been nationalized. They have become part of national systems of education, culture, and knowledge, moving away from a more European medieval tradition. Having this long history of universities in mind (Välilmaa, 2014), the Bologna Process appears to be an ambitious project, aiming at reversing the secular trend from nationalization back to Europeanization. However, the implementation of Bologna faces many problems and shortcomings (Sin et al., 2016).

In this process of making a European system, a powerful economic nexus exists with regard to the relations between the economy and the higher education system. Every paper of the European Commission insists on the same urgency: universities must change in order to increase the competitiveness of the European economy. The EU universities modernization agenda is part of the Lisbon strategy, with its target of Europe 'becoming *the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion*' (EC, 2003, p. 2), and of the Europe 2020 program. Thinking about the future in terms of a knowledge society inevitably leads to focusing the role of universities, because they are 'situated at the crossroads of research, education and innovation' (EC, 2003, p. 5). Therefore, the European Commission was eager to start a debate on higher education in the aftermath of its 2000 Lisbon conference. 'Making European universities a world reference' (EC, 2003, p. 11) is not an end in itself. Rather, universities should contribute to the success of this Europe of knowledge that policymakers are imagining: 'The knowledge society depends for its growth on the production of new knowledge, its transmission through education and training, its dissemination through information and communication technologies, and on its use through new industrial processes or services. Universities are unique, in that they take part in all these processes, at their core, due to the key role they play in the three fields of research and exploitation of its results, thanks to industrial cooperation

and spin-off; education and training, in particular training of researchers; and regional and local development, to which they can contribute significantly' (EC, 2003, p. 2).

The subordination of higher education to economic policy is a key feature of neoliberalism. Foucault (2008, pp. 215–238) shows that in neoliberalism, the goal of promoting economic growth addresses very diverse policy areas: with human beings conceived of as machines investing in their human capital, every aspect of social life must contribute to economic competitiveness. Education is particularly important in this regard, and human capital theory first developed with reference to this policy field. In EU higher education policy, urgency is claimed because Europe is supposed to face a serious threat of lagging behind its most prominent contenders, the U.S., Japan, and other emerging Asian countries. In its communication about 'mobilizing the brainpower of Europe,' the Commission (EC, 2005a, p. 3) makes the point on 'human capital and investment gaps': in EU countries, 'only 21% of the working-age population has achieved tertiary education, significantly lower than in the US (38%), Canada (43%) or Japan (36%), as well as South Korea (26%).' Regarding enrolment rates, the EU (52%) is 'slightly ahead of Japan (49%) but lags behind Canada (59%), and far behind the US (81%) and South Korea (82%).' Worst of all is 'research performance': 'While the EU educates more graduates in science and technology and produces more PhDs overall, it employs only 5.5 researchers per 1000 employees, which is marginally less than Canada and South Korea, but much less than the U.S. (9.0) and Japan (9.7).' This communication was released in the aftermath of the publication of the first Shanghai Academic Ranking of World Universities, displaying an overwhelming dominance of U.S. institutions.

With this urgency in mind, several points concerning the relations between universities and the economy score high in the EU modernization agenda. According to the European Commission, universities must produce more human capital (i.e. more graduates and researchers), better match labour market skills, and engage much more in business partnerships. In order to achieve this, they need more autonomy and higher funding. The Commission acknowledges that many European universities are severely underfunded. The funding gap between Europe,

the U.S. and Japan is said to be primarily due to the weak contribution of private funding in Europe. While private funding reaches 0.6% of GDP in Japan and 1.2 of GDP in the U.S., figures for the EU show a meagre 0.2% of GDP (EC, 2003, p. 12). For this reason, the European Commission urges universities to diversify their funding base. In a context of austerity, nation states will not spend more money on higher education. Universities therefore are supposed to increase income through higher tuition, business partnerships and cooperation with philanthropic foundations. It is interesting to see how the U.S. has become the leading example for European universities today, whereas at the beginning of, and still in the middle of the twentieth century, American universities tried to follow the path invented by the European research university (above all, the German model).

Competition, an economic notion of crucial importance, figures as a key word of European higher education policy today. But there is no clear-cut answer to the following question: Is the European higher education area supposed to be a competitive market or an area of cooperation, aiming at increasing the common attractiveness of European universities facing their American and Asian competitors? In the European Commission's communications one finds more reason-of-state thinking than economic reasoning about markets and competition within Europe. The Bologna Process rests on political rather than market coordination in the sense of Clark (1983, pp. 145–171). Nevertheless, several priorities of the modernization agenda concerning academic governance and funding aim at creating a more competitive environment within the European higher education area. The institutional autonomy of universities is supposed to be enhanced in order to allow for more entrepreneurial behavior. Funding mechanisms are to become more performance based, replacing the old regime of historically evolving budgets. Research shows that university reform in many member states followed this kind of orientation already between 1995 and 2008, that is before the Commission launched its modernization agenda (Jongbloed & de Boer, 2012).

A trade-off between political coordination and market coordination might be at stake in the debate about system differentiation. The U.S. has a highly differentiated system. There is competition between

public and private universities, and there exists a very strong hierarchy between a large number of institutions for the mass and a small number of research universities for the elite. The U.S. has some 4000 higher education establishments, but only 550 issuing doctorates, and 125 being considered as research universities (EC, 2003, p. 5). Thus, elite formation and high quality research are strongly concentrated. In sharp contrast to this situation, the European higher education area is far less differentiated. There is a lot of diversity between national systems, but each national system is rather homogeneous. In communications of the European Commission, this 'uniformity' and 'egalitarianism' are perceived as obstacles: '(T)here are deficiencies stemming from insufficient differentiation. Most universities tend to offer the same monodisciplinary programs and traditional methods geared toward the same group of academically best-qualified learners—which leads to the exclusion of those who do not conform to the standard model. Other consequences are that Europe has too few centers of world-class excellence, and universities are not encouraged to explain at home and abroad the specific value of what they produce for learners and society' (EC, 2003, pp. 3–4).

Maassen (2012) argues that market competition often tends to decrease differentiation because of isomorphism, each university trying to imitate the leading institutions. Therefore, there is a case for political coordination (a 'master plan') if the Commission wants to promote system differentiation. But what kind of differentiation does the European Commission aspire to? Reading its different papers, one hardly finds an answer to this question. In its 2006 communication, the Commission seems to subscribe to a thorough Americanization of the European system: 'Research should remain a key task of the system as a whole, but not necessarily for all institutions. This would allow the emergence of an articulated system comprising world-renowned research institutions, plus networks of excellent national and regional universities and colleges which also provide shorter technical education. Such a system would mobilize the substantial pool of knowledge, talent and energy within universities and would merit—and be in a position to generate—the increased investment needed to make it comparable with the best in the world' (EC, 2006, p. 4). However, in its 2011 communication,

the Commission hardly insists on system differentiation anymore (EC, 2011; see also Winckler, 2012). In the meantime, the EU sponsored a new ranking system reflecting the variety of higher education institutions. This tool, called U-Multirank, compares institutions not only with reference to research, but also to teaching quality, university business partnerships and contribution to regional development. While U.S. universities outperform their European and Asian competitors in research, they score less good in the other categories. On grounds of such diversified comparison, a case can be made in order to defend European specialties, for example, the comprehensive Humboldt university model or the universities of applied sciences. At any rate, and regardless of its current technical shortcomings, U-Multirank is an example of European policy trying to create alternatives to international competition based on criteria of American dominance. However, it relies on values (such as teaching, cooperation with business and contribution to regional development) which have a lower standing than research within the academic world. Hence, there is a dimension of making a virtue of necessity, and such a tool will not be able to challenge the hegemony of U.S. universities (Marginson, 2008).

Higher Education Institutions

If at the system level, neoliberalism tends to subordinate higher education to economic policy, this means that universities are urged to develop closer ties with the economy. In the eyes of the European Commission, however, the aim is not to subjugate public institutions to private interests. Rather, university–business cooperation is supposed to create new opportunities for universities to enhance their agency and impact: ‘Structured partnerships with the business community (including small and medium enterprises) bring opportunities for universities to improve the sharing of research results, intellectual property rights, patents and licenses (for example through on-campus start-ups or the creation of science parks). They can also increase the relevance of education and training programs through placements of students and researchers in business, and can improve the career prospects of

researchers at all the stages of their career by adding entrepreneurial skills to scientific expertise. Links with business can bring additional funding, for example, to expand research capacity or to provide retraining courses, and will enhance the impact of university-based research on SMEs and regional innovation' (EC, 2006, p. 6). This optimistic outlook is based on the assumption that convergence of interest between higher education institutions and private business outweighs the conflict of interest. A recent EU survey on university–business cooperation describes eight types of cooperation: collaboration in R&D, academic mobility, student mobility, commercialization of R&D results, curriculum development and delivery, lifelong learning, entrepreneurship and governance. Ninety-two percent of all institutions were engaged in some kind of cooperation, with approximately 65% of institutions displaying at least a medium level of engagement. As for individual academics, however, 40% were still not engaged in any cooperation at all (Todd, Baaken, Galan Muros, & Meerman, 2011, p. 10).

Economic nexus at the institutional level, however, is not only about closer ties with the business community, but even more about transformation of universities themselves. They are supposed to become enterprises, or at least enterprise-like organizations. This is a case of business imperialism: models and philosophies of management are transposed from private business to higher education. It is true that thinking of universities as enterprises is not entirely new. Clark (1983, pp. 116–119) already noted that American universities had a long tradition of enterprise-based forms of authority. In the U.S., higher education institutions have been far less integrated to public administration than in most European countries. Boards of trustees and university presidents with strong leadership, supported by a solid management apparatus, are important forms of enterprise-based authority in this context. But even in the U.S., critical scholars observe a radicalization of enterprise-like behavior (Slaughter & Leslie, 1997; Slaughter & Rhoades, 2000), notably in the aftermath of the Bayh–Dole Act permitting publicly funded research institutions to claim ownership on their inventions and to make business based on intellectual property rights. The tradition is very different in continental Europe, where universities strongly rely on discipline-based and bureaucracy-based forms of authority.

In many European countries, the chair system prevailed for a long time. It leads to the creation of very small academic units, each one headed by a single professor, whereas in the U.S., departments form the basic unit, gathering several professors. The tradition of bureaucratic authority is most important in countries where senior academics are civil servants. Thus, transforming universities to enterprise-like organizations has different meanings from one country to the other.

The European Commission deplores political overregulation and micro-management of universities. In this perspective, higher education institutions are currently under-managed: governments must grant more autonomy to universities, and universities must build up stronger management and leadership. In the same vein, universities must become accountable for their performance, according to policy goals. A recent EU report on university governance reform (Enders & File, 2012, pp. 10–11) describes four types of institutional autonomy. Organizational autonomy allows universities to decide on internal organization and leadership; policy autonomy refers to staff and student selection, and to the ability of universities to develop teaching and research programs on their own; financial autonomy includes the ability to decide on the internal allocation of funds, to diversify income sources, to build reserves and to borrow money from capital markets; and interventional autonomy protects universities from accountability requirements. The authors state that institutional autonomy of European higher educations increased ‘to different degrees in different countries’ between 1995 and 2008 (Enders & File, 2012, p. 101). While financial autonomy in many cases reached high levels, organizational autonomy often remains rather low. Interventional autonomy of universities has decreased because of ever stronger quality control and reporting requirements. The authors conclude that ‘the balance between autonomy and accountability needs to be re-visited. What seems to have been gained in terms of autonomy might too easily be lost to excessive accountability requirements. Traditional means of state regulation and state micro-management tend to be replaced by new methods of accountability and reporting to other authorities. It is timely to assess the means and ends of accountability in European higher education’ (Enders & File, 2012, p. 101).

Business imperialism in university governance reform is related to new public management (NPM). Ferlie, Musselin, and Andresani (2008) argue that transformations in higher education are similar to those of other public services, because they are related to a broader redefinition of the role of the nation state in society. Nevertheless, they see NPM only as one out of three narratives of governance reform. While NPM brings to the fore a stronger top-down control of the public sector, network governance favors a hollowing out of the state, and neo-Weberian concepts advocate ideas of democratic revitalization (for instance by the way of decentralization). Clearly, the network concept creates more possibilities for universities to behave like enterprises, whereas NPM somewhat paradoxically calls on entrepreneurial behavior without granting much institutional autonomy. A survey among academics in 12 European countries indicates substantial differences between countries with regard to governance reform: 'In conclusion, while the tidal wave of NPM-inspired reforms has swept over the European higher education landscape, it broke differently and with varying intensity in each national context, partly also dismantling academic self-governance along its way. While some countries have been hit earlier (UK), some are in the midst of a reform process (AT, IRL) and some were barely touched by reforms at the time of the survey (HR, IT). In some countries, reforms encountered resistance by more resilient structures and traditions (DE); in others, this wave met with strong countercurrents such as network governance (NL, CH). In many countries, only certain elements of NPM were implemented, with each system adapting in its unique and specific way, resulting in an array of institutional provisions across Europe' (Park, 2013, p. 202).

Both the European Commission and the OECD put forth an entrepreneurial university concept which insists on the necessity to strengthen the agency of universities, not subordinating them to state control or economic influence (see their 'Guiding framework for entrepreneurial universities' (EC & OECD, 2016)). The entrepreneurial university concept was first elaborated by Clark (1998). According to his model, university reform must address five critical issues. First, the 'steering core' must be strengthened, that is universities should build up stronger management and leadership. Second, they must expand their

‘developmental periphery,’ reaching across traditional boundaries in order to better cooperate with outside organizations and groups. This includes different aspects, from outward-reaching research centers and technology transfer to interdisciplinarity, life-long learning, fundraising or alumni affairs. Third, entrepreneurial universities look for a diversified and discretionary funding base. They recognize the current trend of shrinking government funding and ‘turn it to advantage. They step up their efforts to raise money from a second major source, research councils, by more vigorously competing for grants and contracts. They set out to construct a widening and deepening portfolio of third-stream income sources that stretch from industrial firms, local governments and philanthropic foundations to royalty income from intellectual property, earned income from campus services, student fees and alumni fundraising. Third-stream resources represent true financial diversification. They are especially valuable in providing discretionary money, beyond overhead charges and top-sliced sums extracted from research grants.’ Fourth, it is very important to stimulate the ‘academic heartland,’ that is the traditional academic units which are most likely to oppose change. They must be transformed into entrepreneurial units too. Finally, yet importantly, successful transformation requires the development and the incorporation of an ‘integrated entrepreneurial culture,’ a new system of beliefs shared by the whole university community (p. 6).

More and more higher education institutions have adopted shared governance models. Whatever the differences may be, all of these rely on cooperation between internal and external actors in some kind of university boards. Veiga, Magalhães, and Amaral (2015) argue that in Europe most often these reforms ‘are decreasing the academics’ power in governance practices, while in the United States a shift in power balance is moving in the opposite direction’ (p. 402). In other words, whereas in the American context shared governance often stimulates the academics’ participation in governance practices, in European universities, the same concept generally weakens traditional forms of collegial governance by senior academics. According to the authors, the United Kingdom and the Netherlands are forerunners in Europe, displaying a strong pattern of top-down new public management reform, whereas Norway and

Portugal are latecomers in ‘boardism,’ and in France, Germany and Italy the weakening of the academics’ power has been more limited. At any rate, far-reaching governance reforms might still come in the future. They will probably reflect a growing diversification of business models in higher education: for instance, a recent OECD chapter outlines four basic business models according to different ‘value propositions’ and funding models (Mangeol, 2014, p. 76). Between the ‘comprehensive university (public or private) with government or tuition as main source of revenue’ (traditional model), the ‘vocational college focused on fields with high local labour market demand’ (mixed model), the ‘comprehensive university (public or private) with diversified funding sources and shared services with partners’ (mixed model) and the ‘online provider delivering pay-as-you-go competency-based programs targeted to life-long learners’ (innovative model), there will be important differences in governance. Thus, there can be no general conclusion concerning the autonomy of higher education institutions vis-à-vis the market: the degree of autonomy will vary strongly according to business models and governance forms (see also the typology in Marginson, 2008, p. 306).

The Academic Profession

The Commission advocates more entrepreneurship for the academic profession: universities should stimulate ‘an entrepreneurial mindset among students and researcher’ (EC, 2006, p. 7). ‘Cross-fertilization with the business community’ is supposed to stimulate entrepreneurial behavior. The Commission deplores a current ‘lack of openness to the business community [which] is also seen in the career choices of doctorate holders, who tend to pursue their whole careers in either academic circles or industry, and not as entrepreneurs’ (EC, 2006, p. 4). But what does it mean for academics to behave like entrepreneurs? At the core of the academic profession’s traditional ethos, we can find an ostentatious negation of material or economic profit. The academic world is one of those fields of action where disinterested acts are very profitable, because they increase the social and symbolic capital of agents. In such an economy of symbolic goods (Bourdieu, 1998b, pp. 92–126),

everybody wants to work with colleagues in search for truth, not profit. Academic prizes and honors go to scholars with outstanding scientific performances, not for university–business cooperation, nor patenting research results. The question therefore arises if this academic world is withering away today, under ever-stronger pressure from the economy. Is Homo economicus replacing Homo academicus? (see, for instance, Münch, 2011, pp. 94–131).

I do not think so. Neoliberal higher education policy does not want to bury Homo academicus. Its aim is a reinvention of this traditional character, rearticulating it with the figure of Homo economicus. This interpretation is consistent with a growing literature on academic capitalism in the U.S. and elsewhere in the world (Cantwell & Kauppinen, 2014). Certainly, a growing number of academics engage in market-like behavior. Competition for research grants has spread across all disciplines, whereas the development of marketable products, research and technology transfer or the creation of spin-offs and start-ups remains more limited. The surge of these activities shows that the taboo of combining economic and academic practices is weakened. The literature on academic capitalism is stimulating because it shows that neoliberalism comes to universities not only from the outside, but is also promoted from within. The emerging academic entrepreneur resembles the managerial heroes described by Boltanski and Chiapello (2007) in their book on the ‘new spirit of capitalism.’ They are in search of maximizing their academic capital through projects and partnerships ignoring traditional frontiers. They engage in network cooperation bypassing bureaucratic or hierarchical structures. However, this academic entrepreneurialism does not equal any fading away of Homo academicus. It is not just imposed from the outside but created by new structures and struggles within the academic field. For all the changes, the old opposition between an autonomous and a heteronomous pole in the scientific field remains crucial. Academic capital remains the currency needed to climb at the top of academic positions and honors. The opposition between pure academic capital and institutional academic capital (Bourdieu, 1998c, pp. 31–37) still helps to explain many things when it comes to analyzing universities. Nevertheless, there are growing opportunities to engage in academic competition by accumulating economic resources.

The reason for this is evident: today, the endowment of academics, and academic units, with financial resources is predetermined to a far lesser extent than before by bureaucratic or political decisions.

The debate on academic capitalism highlights not only the spread of market-like behavior, but also a dramatic recomposition of academic and university staff. Two main trends are the rise of managerial professionals and the growth of contingent academic staff (Rhoades, 2014). The rise of managerial professionals is closely linked to governance reform and university–business cooperation. Higher education institutions recruit an increasing number of staff who are professionals but non-academic. They are needed in order to build up internal management capacity, to develop evaluation and accountability practices, student and career services, technology transfer, marketing and branding and other non-academic activities (i.e., not teaching and research). These staff claim professional authority, but their autonomy is more limited than the one granted to academics, who often perceive them as a threat to academic freedom. Because of the influence of managerial professionals, academics see themselves more and more as ‘managed professionals’ (Rhoades, 2007, pp. 120–125), losing part of their traditional influence and autonomy. This feeling of reduced professional prominence might help explain why, at least in the U.S., unionism is gaining ground among academic staff.

While the rise of managerial professionals can be seen as an expression of business imperialism, the surge of contingent academic staff reflects a more general trend in capitalist labour markets at the beginning of the twenty-first century: the spread of precarious or part-time employment without secure future perspectives. In U.S. higher education, the problem concerns primarily the denial of tenure to a growing number of faculty working on (short-)term contracts and/or with part-time arrangements (AAUP, 2016). In some European countries, we observe a rapid growth of junior academic positions without any reasonable future perspectives. Many of these staff are doctoral students. In Austria, Switzerland, Germany and Norway, 62–74% of junior academics have fixed-term contracts without long-term prospects, whereas this concerns less than 10% in Ireland, Poland and the UK (Ates & Brechelmacher, 2013, p. 27). The problem seems to be most acute in countries with very long career ladders such as Germany and Switzerland, where after

doctorate a second thesis is required for senior positions, and where professors represent less than 20% of academic staff (Ates & Brechelmacher, 2013, p. 25). If there is a proletarianization of the academic profession, it is not linked so much to a declining status of university professors (even if some countries may show signs of that phenomenon) but concerns primarily the growing number of contingent staff.

To what extent senior academics really have lost influence and power due to recent governance reforms? Based on a large survey among academics in Europe, Aarrevaara and Dobson (2013) present some interesting findings. Where academics have lost influence, this is most often for the benefit of university managers rather than external stakeholders like the state or private firms. Loss of control can be observed at the level of higher education institutions, whereas at the faculty or department level academics still control their work to a very high degree. In many cases probably governance reform mainly affected the institutional level and did not, or only to a lesser extent, transform basic units. There are differences between countries: academic self-governance seems to remain strong in Croatia, Italy, the Netherlands or Portugal, whereas Austria, Germany and other countries show a more mixed picture. Teaching seems to be far less exposed to external reviewing than research. There is a relationship between the proportion of direct public funding and external stakeholder influence. But the overall conclusion is clear and somewhat at odds with many widespread ideas about the consequences of university reform. The ‘academic core’ of activities remains largely under the control of senior academics. ‘External stakeholders are not threatening academic freedom in the first place, but internal management practices could do so’ (Aarrevaara & Dobson, 2013, p. 179). In the light of these findings, threats to academic freedom might emanate as well—if not more often—from the inside rather than from the outside.

Students

In the 1990s when I was a student in Lausanne, we mobilized against university reform, claiming that neoliberalism would restrict access to higher education (Alternative Solidaire, 1996). Today the picture is

quite different: European neoliberal policy advocates higher enrolment rates. Almost 20 years ago, the OECD (1998, p. 37) already adopted the slogan 'tertiary education for all.' The 2009 Leuven European ministerial conference on the Bologna Process included this sentence in its declaration: 'The student body within higher education should reflect the diversity of Europe's populations.' In line with the 'new spirit of capitalism' (Boltanski & Chiapello, 2007) mentioned above, neoliberalism responds to certain claims of the student movement of the 1960s, just as it has included feminist concerns (Fraser, 2009). If there is a 'business case for diversity' (EC, 2005b), there are also economic reasons for enlarging access to higher education. Opening universities toward society, another claim of the student movement at the time, now means to make them better servicing the economy. Historically speaking, the mission of universities was the training of small elite groups: the liberal professions and academics, and later on civil servants too. Now more and more graduates are trained for the private sector. A growing part of graduates does not or cannot aspire to high leadership positions. In some countries, unemployment among graduates has reached considerable levels. According to the OECD (2017), the unemployment rate among 25- to 34-year-olds with tertiary education reaches 6.6% in its member states. In some countries such as Germany, the United Kingdom and the United States, graduate unemployment is around only 3%, whereas France (6.7%) scores close to the average and Italy (15.3%), Spain (16%) and Greece (28%) display very high unemployment rates (p. 103).

As universities have evolved toward mass production, the training of students is seen as human capital production, increasing the competitiveness of the economy. European Commission papers insist that this production must become far more effective and efficient. Two major concerns are 'a high dropout rate among students, standing at an average of around 40% in the Union,' and 'a mismatch between the supply of qualifications (...) and the demand for qualified people' (EC, 2003, p. 14). Hence, the call for higher enrolment rates does neither include the idea that everyone should engage in university education, regardless of academic vocation, nor the willingness to let students choose their disciplines without setting incentives from above. There is a tension

between the competition aiming at attracting ‘the best and the brightest’ students on the one hand, and mass production of graduates on the other. This tension is difficult to deal with for university teachers in institutions with a very diverse student body. In order to cope with this problem, the European higher education system might well evolve in a way which gives it two very different faces, like Wacquant’s (2010) neo-liberal ‘centaur-state’: a liberal face turned toward the future elite, and a bureaucratic face turned toward the future mass human capital stock. Whether these two faces will be separated institutionally or integrated in the same institutions remains to be seen.

Employability of graduates has become a central topic. This reflects the fact that university degree does not guarantee job access or job security anymore. In the meantime, it expresses the economy’s affirmation of power vis-à-vis the higher education system. A recent EU study tries to summarize the perspective of employers (Humburg, van der Velden, & Verhagen, 2013) on employability. Accordingly, general academic skills are not very high on the agenda. Employers consider them important but expect all graduates to have them anyway. What makes a difference is professional expertise, that is subject-specific knowledge and expert thinking. It is considered to be the most important skill for employability ‘but there are concerns among employers about the extent to which higher education curricula develop specific knowledge alongside more general academic skills.’ Interpersonal skills (communication, teamwork, etc.) are becoming more and more important. Work experience can be of some importance, as well as international orientation and experience. Strategic and organizational skills are needed not to get a job but to climb career ladders. Somewhat at odds with current debates, employers do not consider innovative and creative skills as well as commercial and entrepreneurial skills to be essential for all graduates: ‘Employers indicate that in an organization or in a team it may be sufficient to have just one or two persons who are strong in innovative/creative skills or commercial/entrepreneurial skills, so here there is clear room for specialization among graduates’ (pp. v–vi).

A central concern in European higher education policy is mobility. The Bologna Process aims at increasing student mobility in Europe. Beyond this perspective, the European Commission sees mobility as

a means of competition among Europe, Northern America and Asia: 'European universities are functioning in an increasingly globalized environment and find themselves competing with universities of the other continents, particularly American universities, when it comes to attracting and keeping the best talent from all over the world. While European universities host only slightly fewer foreign students than American universities, in proportion they attract fewer top-level students and a smaller proportion of researchers' (EC, 2003, p. 21). Thus mobility, too, is not just about attracting many students, but the best ones first of all. The Erasmus Mundus program (EM), created in 2004, serves this goal. 'EM is a regional scholarship program aimed at recruiting the best and brightest non-European talent to pursue graduate-level study (masters and doctorates) in the European region. One distinct characteristic of the EM program includes joint degree programs, wherein at least three partner universities (in the European region) coordinate curriculum, a student mobility plan, and joint recognition of credits leading to a joint degree. This unique joint degree programs, coupled with a lucrative scholarship scheme, attract many international students seeking master's and doctoral degrees. The EM program does not have regulations requiring participating international students to return to their home country, providing students the opportunity to stay within the region after graduation' (Kauppinen, Mathis, & Weimer, 2014, pp. 254–255). These authors describe mobility as an international market where governments and universities are selling education and buying students, whereas students are buying education and selling themselves.

The ever-stronger economic nexus in higher education policy constitutes students in a contradictory, twofold manner, corresponding to the double meaning of the term subjectivation: students are seen not only as raw material exposed to economic valuation, but also as entrepreneurial selves investing in their human capital. Even if not all employers consider entrepreneurial skills essential for all graduates, the Commission exhorts universities to stimulate an 'entrepreneurial mindset among students and researchers' (EC, 2006, p. 7). In practice, this will mean different things for different fractions of the student body. While in the mass production field, entrepreneurship rhymes

with adaptation to changing labour market situations, at the level of elite production the challenge consists of articulating entrepreneurial mindset with academic vocation and ambition. Following the academic career path, from student to junior academic to senior academic, the Foucauldian figure of the entrepreneurial self will gradually lose its prominence for the benefit of the academic entrepreneur fitting the 'new spirit of capitalism' (Boltanski & Chiapello, 2007). The enlargement of access to higher education has created a deep class divide inside the student body, and universities in their present state of mind and functioning are neither willing nor able to ease this fracture. A growing number of students from lower social origin currently do not feel at home in higher education institutions, they behave like 'big pupils' searching for skills to get a job rather than 'real students' expressing academic vocation. In the meantime, an economic approach to discrimination, largely consistent with human capital theory, replaces sociological critique of inequality reproduction (Streckeisen, 2009, 2013): Neoliberalism opposes discrimination only to the extent that it violates the principle of the individual's free and rational choice. This way of looking at inequality makes its workings largely invisible.

Conclusion

Neoliberalism is both more and less than privatization, or marketization. It does not necessarily need privatization in order to be effective, and the market (to be more precise: a specific conception of markets) is only part of its workings. Table 1 presents a summary of the findings carved out in this contribution. We should not think of neoliberalism as a uniform reality. Rather we observe a bunch of forces and ideas often converging, but sometimes also at odds or even conflicting.

Regarding the power of the economy, universities certainly face a serious threat to be forced to simply servicing the economy through human capital production, university–business cooperation and so on. On the other hand, let us not ignore the fact that the knowledge society paradigm assigns a crucial role to them, including opportunities to reaffirm academic power. At any rate, the economic subordination of

Table 1 Neoliberalism in European higher education policy (summary of findings)

	Power of the economy	Power of economic ideas	Power and inequality
System	Lisbon Strategy and Europe 2020 Economic subordination of universities vs. higher education as a strategic economic sector	Economics Imperialism Higher education as a market vs. European Higher Education Area as a space of cooperation	System differentiation: elite vs. mass; general vs. vocational education EU–USA–Asia competition, U.S. world dominance U–Multirank vs. ARWU Shanghai Ranking
Institution	University–business cooperation Technology transfer Services to students, stakeholders and so on	Business Imperialism: universities as enterprise-like organizations NPM, network governance, entrepreneurial university, Boardism	Strengthening senior management Institutional autonomy vs. accountability Growing influence of external stakeholders Academic core still under academic control
Profession	University–business cooperation Academic mobility, spin-offs, patenting	Academic entrepreneurship (new spirit of capitalism) Market-like behavior and competition for economic resources	Managerial professionals and managed professionals Contingent/precarious (junior) staff, trends to proletarianization
Students	Employability: students must better match labour market skills Precarious work and unemployment of graduates	Foucauldian entrepreneurs (human capitalists) Effective and efficient mass production of graduates Economic approach to discrimination displaces sociological critique of inequality reproduction	Elite vs. mass divide, 'big pupils' vs. 'real students' Mobility: competition for the best and brightest Higher tuition disadvantages students from lower social origin

higher education institutions is no all-over process. The more powerful universities are able to defend their autonomy or even to strengthen it. There is no reason to think that the opposition between an autonomous pole and a more heteronomous pole in the academic field will simply disappear. In this respect, differences of power and inequality within higher education matter more than ever. Neoliberalism strongly accentuates inequalities between countries and institutions, rendering a growing number of universities particularly vulnerable to economic subordination. In the same vein, the subordination to economic imperatives does not attain all students to the same degree or with the same force: It depends on university, discipline and grade. In the future, critique of neoliberalism should be more concerned with the problems of mass production rather than solely defending academic freedom for the academic elite.

Maybe the most important finding of this contribution is that neoliberalism comes to universities not only from the outside, as a threat emanating from dangerous external powers. First, the power of economic ideas has been fostered by economists and business scholars, as well as by many other scholars from a broad variety of disciplines, introducing economic reasoning into their own fields of academic work. It comes from within rather than from the outside. What is more, many academics actively contribute to academic capitalism, because it provides them with career opportunities and additional money. Senior management, which usually consists of (former) academics, has been strengthened through governance reform. More generally, senior academics benefit from the growth of contingent faculty and junior academics in precarious positions placed largely at their disposal. In the 1960s, the defense of academic freedom was a weapon turned against the more radical claims of the student movements. Today it serves to not only confront neoliberalism, but also the growth of the student body comprising more and more students from lower social origin. Certainly 'redefining the public university' (Burawoy, 2010) is an urgent task. It involves not only refusing economic subordination of universities and challenging the power of economic ideas, but also addressing power mechanisms and growing inequalities within higher education.

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Juridification, Judicialisation and Judicial Activism in Higher Education: Views from the CJEU

Fausto Comandè and Jan De Groof

Introduction

Dealing with the role of the Court of Justice of the European Union (CJEU) in shaping EU higher education law and policy would be too ambitious a task if taken as a whole. It would include a discussion of the historical emergence and influence of the Court's jurisprudence, as well as a contemporary assessment of the instruments available to judicial actors.

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The enormity of a similar goal becomes apparent if we consider that a historical overview would risk embracing the entirety of EU education law, given the pre-eminent role of the CJEU's case law in the early birth of the discipline. A comprehensive analysis of the existing body of sentences should be conducted. This would consist both of a thematic classification of cases—which should have the priority in a subject-matter-identified area of law—and of underlining the methodological trends adopted by the Court. The prerequisite of any such work should be a panoramic understanding of the general performance of the Court throughout the European integration process and its material contribution to the building of the EU. At the same time, the ground level situation of higher education institutions in different domestic contexts should also be taken into account, including how receptive (or resistant) such institutions are to solicitations originating from the European Union, and from its Court in particular, on the basis of their expertise and capacities, their experience-related background and their own institutional setting.

For the sake of accuracy, this contribution will focus on a limited pool of concepts, which are critical to the evaluation of the Court's attitude when touching upon issues with an impact on the life of post-secondary educational establishments, their management, as well as the rights and obligations of individuals involved therein. A certain level of knowledge will be assumed with respect to themes typical of higher education. Nevertheless, the consideration of phenomena such as judicial activism, judicial creativity and judicialisation will be reconnected to the evergreen debate about the Court's role in general EU law and political science. Going through the elements which make such a discussion a sensitive and often divisive one will allow for a second view on a debate which already features an abundance of scholarly literature. We will consider the concepts of juridification, legalisation, judicial activism, judicial creativity and juridification, highlighting the multiplicity of meanings and stressing their reciprocal differences.

Of course, these profiles compose only a part of a wider picture. Higher education is currently a restless working site, where policy-makers are sometimes engaged in building educational, research and administrative facilities, sometimes in demolishing them in order to secure space for newer instruments. What role the Court of Justice should play

in this enterprise is yet to be concluded, but the answer arguably lies somewhere in the nature of its own statutory ‘job description’: ensuring that ‘in the interpretation and application of the Treaties the law is observed’.¹

Debating and Redebating an EU Institutional Commonplace: The Court of Justice as the Engine of Ever Closer Integration

According to Rasmussen’s *On Law and Policy in the European Court of Justice* (Rasmussen, 1986), the first scholar whose work was principally devoted to the peculiar impact of the Court’s activity in the European integration process was Stuart A. Scheingold, with his 1965 *The Rule of Law in European Integration*. Of course, he was not the only author to pay attention to the Court’s work (even though those were just the heydays of the European project) but he was arguably the first to raise reflections around the issue of judicial policy-making by the Court itself, taken as a theme worthy of autonomous attention. Based on Scheingold’s own research perspective, he attempted to transpose the paradigm of the school of legal realism to which he belonged to the factual material offered by the Luxembourg judges, the goal being to identify ‘the extra-judicial, largely economic, social and political circumstances which affect the Court’s interpretative handling of conflicts’ (Rasmussen, 1986, p. 155) and which, as such, may have turned crucial in the judicial outcome of the single case before the Court. In the author’s view, the space enjoyed by the judges to accommodate circumstances external to the proceeding was principally due to the vagueness of provisions contained in the Rome treaty. The institutional balance within the system put in place by the six founding Members needed to be assessed, in Scheingold’s view, just with regard to that initial vagueness, which was specially designed to build a consensus among the High Contracting Parties which could not have been reached otherwise. The idea was that too wide a distance existed among the signatory States with respect to what Scheingold called ‘the fundamental

principles' on which the Community should have been devised. Pivotal questions about the foundational, constitutional and juridical aspects of the institutional framework coming to light would have had 'explosive' results, and could not therefore be disentangled. Hence, pragmatism prevailed. This consisted of dealing with the practical problems of the Community's construction, while agreeing on a legal setting sufficient to make forthcoming decisions workable (Scheingold, 1965, p. 19).

It goes without saying that such a choice from the Member States of the newly founded EEC was merely a deferral of major decisions. However, it will never be possible to spot if the intention was to produce a deferral *in time*—where those knots would have been solved at a later moment, by the signatories themselves—or a deferral *in place*, where, conversely, the governments were conscious that leaving crucial points unsettled amounted to a green light for some other authority to solve them instead.² Regardless of which was the correct alternative from a historical viewpoint, the temporary decision to freeze disagreement involved adopting clauses featuring a great deal of vagueness and meant transplanting the existing political doubts on certain core aspects of the construction from the negotiation into the legal text. Reasoning about spaces left open by the drafters of the Rome treaty, Scheingold conjectured that '[I]t is, of course, in instances of textual ambiguity that the Court's opportunities to influence the development of the political system are most marked' (Scheingold, 1965, p. 19).

After more than 60 years from its formulation, this sentence sounds to us as the plain admission, however obvious it may seem in retrospect, that the Court of Justice unwillingly found itself in a privileged position to leverage its role as mandatory jurisdiction for controversies on EEC law. As a result, the Court defined several main characteristics of the Community and steered its future evolution. The first necessary condition to transform the judges of Villa Vauban (see endnote 2) into major strategic players in the European integration process occurred: the opportunity to do so.

Pushing the reasoning further in the same direction, Scheingold argued that 'the extent of judicial activism is likely to be a reflection of the judges' conception of the nature and function of courts and law'. While conceding that 'the continental judge does not conceive of his

role as expansive and directive', he nevertheless opposed that 'the Court of Justice has engaged on occasion in its own variety of judicial activism' (Scheingold, 1965, p. 19). His analysis, though coming well in advance of expectations for an age when the Court was still a newcomer in the European legal panorama, is marked by a great deal of precision. There we find, clearly spelled out, the terms of what would later be the core of the criticism about the EU judges trespassing the institutional limits usually associated with the judicial authority.

Those considerations indicate how the earliest judgements issued by the Court already suggested concerns about the role which the judges intended for themselves, when facing particularly sensitive cases. Moreover, it did not pass unnoticed that the most-forward-pushing Court's jurisprudence featured a dual profile in terms of 'expansion' and of 'direction', in Scheingold's own words (1965, p. 19). These concepts are distinct and may well be separated, but in his analysis they are associated in a hendiadys. 'Judicial activism' seems to be the common denominator of the two; although this was described not as an attitude of the Luxembourg Court alone, but a common denominator of an ever-spreading vision in the judicial culture. Today's scholars, so focused on the CJEU alone, seem sometimes to lose this wide perspective on the evolution of judicial activity (Bossuyt, 2015, p. 31). Such an inquiry led to the conclusion that, establishing a 'stable pattern of norms', the Court contributed to the creation of an 'integrated social order at the supranational or regional level' (*ibid.*, p. 297) and that in order to prompt further steps on the putatively irreversible road of integration it had to show 'a vigorous federal image' (*ibid.*, p. 308) of itself as an institution.

Having said this, the impression of a contemporary reader is to find in these statements not much other than 'obvious truths' (Feeley, 2013). Nonetheless, we should neither misunderstand the exact meaning of those early reflections, nor underestimate the fertility of the years which Scheingold was working on. On the one hand, with the term 'judicial activism', reference was made to a teleological interpretative method which substantiated resorting to the final goals expressed by the treaty when the text alone was seen as not satisfactory (Scheingold, 1965, p. 19). Remarkably, this hermeneutic technique is nowadays commonly undisputed—rightly or wrongly—in legal practitioners' circles.

On the other hand, at the completion of that study the Court of Justice was already 13 years in existence, considering its first inauguration as the judicial organ of the European Coal and Steel Community in 1952. Based on a cautious approach, we may leave out the initial years of work under the ECSC, by virtue of the thesis that a discontinuity exists between that first lapse of time and the EEC Court which would be established later (Tamm, 2013). Even so, the covered period would amount to almost a decade of judicial practice. Most notably, the first cases which would then be seen as landmark stones in European Community law, up to the point of being regarded as a sort of second birth to its constitutional building, had then already been pronounced. Namely, both the sentences of Van Gend and Loos (Case 26/62) and Costa vs. ENEL (Case 6/64) had been released and their legal effect and prospective significance were starting to reverberate. Such material, together with the already abundant (Scheingold, 1965, p. vii) academic production about the Court itself, was surely enough to draw ambitious conclusions. What remains striking is, conversely, Scheingold's ability to formulate such far-reaching intuitions and with such a foretelling vocabulary.

The fact that his study was essentially neglected by his contemporaries must be attributed to a series of reasons. The most understandable (and yet stunning) one might be Scheingold's American nationality, due to which he was seen with diffidence, as an outsider. His background of political science probably contributed to this, whereas the scholarly environment that was supposed to be the audience of his work was mainly made of lawyers rather than legal sociologists. The first study by a European 'indigenous' author of juridical extraction was published the next year under the emblematic title *Le gouvernement des juges dans les Communautés européennes* (Colin, 1966). Notwithstanding the relatively numerous scholars who had been working on similar themes from a legal viewpoint, this fact cannot divert from the admission that the overall attention attracted by the Court must have undoubtedly been limited. The unlikelihood of the Court itself and of the EEC as a whole to gain prominence in the research trends of the 50s and 60s should be seen as a matter of fact of those decades.

The Court as a Focal Point for General EU Studies

The contemporary critique about the way in which the Court of Justice has intended its own role in the EU institutional framework started in the late 1980s and flourished in the next decade into a fully fledged debate, in the context of a wider analysis of the legal evolution of the technical and political structures associated to the European project. Here the assessment of the CJEU's work became pivotal for the appreciation of the understated dynamics of integration, which appeared to clash with the traditional notions of judicial review and separation of powers.

The image of a Court of Justice exercising an expansive judicial role emerged with reference to a number of features which were interpreted as evidence of the attitude of the Luxembourg judges to go beyond the boundaries of the existing law in their activity of interpretation. Equally, the Court was seen as pushing its work beyond the scope of the single case submitted to its attention. This tendency to expand either its own role and the field of its jurisdiction, or the relevant area covered by EU primary or secondary legislation, was eventually seen as having the unitary output of enhancing the power vested with the EU 'supranational'³ institutions, including the Court itself, at the expense, typically, of Member States. Accordingly, a certain kind of pro-active judgement promoted by the Court got the national governments in a corner, either taken as self-standing international actors or as Council members.

As such, if imbalances had been caused by the Court's judicial attitude, they also had an extensive impact on the shape of the Community as initially conceived by the founding Members. Specifically, a jurisprudence overlooking, misreading or altering the terms of the treaties entailed not only a shift from the institutional model set forth therein, but also a departure from the allocation of decisional capacity between national and European-level actors, where the Court was instead demanded to do nothing more than its job: to judge and not to legislate.

The negative connotation of the discourse is quite apparent. It depicts a judiciary that abuses its position, modifies the margins of manoeuvre of the regular owners of political decision in the EU setting and,

ultimately, misrepresents the sovereign will of the ‘masters of the treaties’. Even without such a dissenting undertone, the peculiarity of the resulting institutional construction is noteworthy, showing an unexpected distance between the order prospected in the treaties and the actual balance of powers in the real world. A similar discrepancy is always of relevance for lawyers and attracts the attention of researchers for the purpose, at least, of its better understanding. The typical outcome of such analysis is the outline of new paradigms in the existing conceptions of constitutional systems and the juridical techniques of expressing them. This is to say that, even with the most positive attitude possible towards judicial activism and judge-made law, a European Court of Justice behaving as a heavyweight in the EU rule-making system could not have gone unnoticed, and has been the subject of extensive coverage.⁴

Underlying Disputes About Judicial Leadership

Today the view that the Court of Justice has historically assumed a most prominent role in the evolution of the European Union is commonly accepted, and describing it as the ‘driving force’ or the ‘engine’ of European integration summarises this reality. However, such expressions hide a variety of conjectures about what this in fact means: the preference for the expansion of its jurisdiction, even in those territories being explicitly precluded to its activity, such as the Common Foreign and Security Policy (Case C-91/05) or in cases raising serious theoretical doubts about the existence of jurisdiction, such as in cases of treaty reforms operated by means of procedures internal to the treaties themselves (Case C-370/12); the preference for the expansion of the scope of application of EU primary and secondary law and, in particular, the expansion of the decisional competence of the Union’s institutions to the expense of Member States; the availability to enforce solutions to specific problems which could not be achieved in the legislative branch of the Union, for example for lack of consensus among the involved political actors or in situations of deadlock; the attitude to promote solutions accentuating the ‘federalist’ or ‘supranational’ (see endnote 3)

or ‘majoritarian’⁵ characters of the Union and to marginalise those of ‘intergovernmental’ inspiration. Famous are the words by Pescatore, according to whom not only has the Court shown a pro-active approach in furthering solutions which are not contemplated in the treaties but, in doing so, its policy orientation has been so specific that one can claim that the judges pursue ‘une certaine idée de l’Europe’ (Pescatore, 1983, pp. 155, 157). While allowing that it would go too far to sustain that the Court’s activity responds to the motto ‘When in doubt, opt for Europe’,⁶ de Waele underlines the virtually uninterrupted series of verdicts embodying the judges’ stance for centralisation of decisional power (De Waele, 2010, p. 22).

Now, it would be redundant to cover for the umpteenth time the whole sequence of rulings which are usually considered the turning points in the history of European integration or those marked by a non-hidden activism of the Court to put forward far-reaching solutions. A number of these impactful decisions could have well been avoided, resorting to the most classical judicial restraint. Authors have already successfully contended with the compilation of overviews of case law.⁷ Instead, it is useful to our analysis to draw some transversal considerations before moving on.

Nowadays it is taken for granted that CJEU case law has been a major propulsive factor in the shaping of the Union’s configuration, due to its activist behaviour. However, it should be pointed out that this very recognition is the (rather generic) distillate of an academic discussion which has seen scholars featuring as reciprocal opponents for a certain time. On one side, it has always been quite unlikely to refuse the idea that a number of Luxembourg’s judgements played an important part in the forthcoming EU juridical framework from the early days of the EEC. Yet the multi-faceted aspects encompassed in the label of ‘judicial activism’ make everything more complicated.

Assessing whether in advancing European legal integration the judges have exceeded their duties, created institutional imbalances or frustrated the expectations of Member States has proven a highly divisive task. It entails the evaluation of what the limits of the EU judicial function effectively are, to what extent the Court is bound to attain the objectives provided for by the treaties, and how the Court’s decisions

have eventually impacted the EU legal and institutional setting. Unfortunately, much of the terminology related to these issues implies a high degree of ambiguity. This is the case, strikingly, with the very concept of ‘judicial activism’.

Associating the CJEU with ‘judicial activism’ may be too far-reaching for some, and too little for others. In this sense, it should be no surprise that the debate over the exact definition of the Court’s involvement in the EU construction has been flourishing in subsequent waves.⁸

Political Sensitivity

There is another reason for divergence, though, which should be spelled out: political sensitivity. This is something that should also lead to caution. The increasing awareness of the centrality of the Court’s steady influence in determining the actual power balance in the EU and the range of different tones employed in ‘judging Europe’s judges’ (Adams et al., 2014; Arnull, 2006, Chapter 18) have become so widespread that they have left the academic circles and reached the general public.⁹

Varying with the sensitivity of the audience, the activist role of the EU judiciary in delivering decisions which, on occasion, contrast with the previous determinations by the political bodies may have sometimes been seen as the demonstration of an inability to act by politicians themselves. In this view, the political inability to act originates in turn an undesired but inevitable substitutive role for the Court. Equally frequent, to say the least, has nevertheless been the discourse that the judges would be grabbing a power which was not assigned to them. The result would be an encroachment of the democratically expressed will of Europe’s peoples, as voiced by their national governments in their quality of signatories of the treaties. This view, which may in fact be well founded even if rarely expressed with sufficient clarity, does not refer to the intrinsic ‘undemocratic’ character of an unelected judiciary body (De Waele, 2010, p. 21); this is something that is inherent in any judicial system based on unelected professionals, appointed to their office on the basis of their juristic qualification.¹⁰ It refers, instead, to the foundational relationship of obedience linking the European magistrates

as individuals, and the CJEU as an institution, to the provisions set forth in the treaties. One has to assume—the argument goes—that this obedience may well lessen, as has been the case in several adventurous pronouncements.¹¹ From a similar remark the idea arises that at the heart of a number of landmark sentences, that then assumed the value of constitutional cornerstones of the Union's system, there may be a betrayal in the exercise of the judges' power and responsibility.

Needless to say, this makes any analysis of the Court's role in the integration process, even when put forward in academic environments, subject to an eminent risk of being misread or attached an additional meaning which it did not intend to have. This can be extraordinarily frequent in times of fierce polarisation on the overall assessment of the Union's construction and on the direction where the block should be heading to: the more forceful the polarisation is, the more insisting attempts will be to pull any possible reflection into one of the contender's fields. Moreover, the academic community should not presume to be immune to the temptation of favouring one side or the other at any step. Scholars may on occasion more strongly perceive the public relevance of the topics they deal with, and they may feel in an authoritative position to exercise a leverage to influence other people's views. While a passionate debate often impels us to side with one of the opponents, yet there are occasions when we do not really see the need to do so, and where reflections pertaining to a specific topic should not be misrepresented as arguments in other, more popular discourses.

Reasons (or Justifications) for the Court's Attitude

The reasons invoked by those apologising for an expanded interpretation of the judiciary function respond to various instances and could hardly be encapsulated into a unitary claim. Several of them are covered by the general supposition that the Court assumes an activist conduct with respect to its hermeneutic activity because of an impossibility to behave otherwise. Gaps in the legal framework designed by political actors, who would in theory be in a better position to assume pivotal decisions, is often crucial in those arguments.

One consideration is that (positive) primary law has proved unable or insufficient to supply solutions to the many legal questions which the Luxembourg judges are faced with. The reference is, therefore, to the 'open nature' of many clauses of the treaties, which have been drafted in a rather vague fashion in order to build political consensus and deflate the differences of views on critical topics. The conception of the treaties as a 'traité-cadre' (De Waele, 2010, p. 9), as opposed to 'traité-loi', highlights the alleged necessity to go beyond a literal approach to the legal text and integrate its provisions with a jurisprudential law, in order to deliver case-by-case rulings.

A comparable position, but shifting the reasoning from primary to secondary legislation, is that the Court has intervened with far-reaching verdicts in situations where the other institutions fell short of decisional capacity on issues belonging to the Union's competence. This may in fact have been quite a persistent situation, based on the political climate in the bodies involved in the legislative procedure, including the Council (Annull, 2006, pp. 639, 644–645). The case is best represented by political deadlocks for the lack of any positive majority among the Member States (or, especially in the pre-Lisbon framework, the insurmountable veto of a Member where unanimity was required). Of course, such hypothesis is grounded on the assumption that a great deal of the Union's action is needed to attain general or sectoral objectives as set forth, again, by the treaties. Namely, this need of action can easily clash with the inability to shape a common position by the legislature. On this ground, no inaction shall be tolerated, and it would be up to the Court, as the occasion arises, to draw a solution addressing any particular failure to act.

Another argument, closely connected to the previous one, lies in the inclusion of the Court of Justice in the list of the EU institutions provided for by Article 13 TEU. According to the provision, the Union's institutional framework 'shall promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions'.¹² If this Article is to be applied to the full extent and on an equal standing with all the enlisted institutions, including the Court, then Kirchberg's judges could be under a legal constraint to pro-actively

promote the Union's objectives and, in the light of the ever closer Union clause, ultimately to advance European integration as such.

If the previous arguments engage with the reasons for which the Court showed a prominent attitude towards judicial law-making, another set of reasons argues that the very peculiarity of an activist Court is, upon deeper research, unfounded, poorly demonstrated or, if existing, completely physiological in judicial activity, especially for higher instances.

In short, the fundamental job of any judiciary consists in interpretation of law, which always comes with an unavoidable amount of discretion, a marginal unpredictability, and therefore gives way to ineluctable but undeserved criticism. The recognition of such inherent character of judicial activity should be the starting point of any further consideration. It follows that a judicial decision cannot be dismissed as invasive or abusive only because it appears unexpected or not intuitive in light of the interpretation given until then to the pertinent provisions. In substance, this approach invites 'a second look' at those decisions having been hastily categorised as proofs of activism, and tends to narrow the number of decisions with an evolutive or creative imprint to a level which is natural in legal practice.

A similar suggestion certainly meets our contemporary attitude to accept innovative or landmark judicial rulings as part of the functioning of the legal system. Still, it cannot be conclusive for all the cases under fire. There is, in fact, a core of sentences which resists this test, because the principles affirmed therein by the Court admittedly have no bond with any norm of positive law: the whole case law on fundamental rights, especially prior to the entry into force of the Lisbon Treaty and Article 6 TEU, is highly emblematic.

The assessment of the effects of the most forward-pushing decisions, and notably of national governments' reaction to them, seems pivotal to many. Finding that the content of major rulings from Luxembourg has met a substantial acceptance from the Member States, albeit with some range in terms of enthusiasm, strengthens the conviction that the creative dynamic put in place by the judges is eventually a healthy one. It should thus be narrated with more leniency, if not as a 'success story'.

The fact that principles of paramount constitutional nature such as the supremacy of EU law, vertical responsibility of the State and direct effect have been implemented at national level is a sign of ultimate agreement with the merit of the solutions. It is indeed true that, in case of radical opposition, States' executives could have found ways to build insurmountable walls against them, instead of placidly letting them pass. The same goes when, after certain courageous rulings, the political choices which followed around the same issues did not put themselves on a contrastive line, but virtually shared the same vision which had inspired the Court. That is the case of the numerous action programmes inaugurated by the Council upon the proposal of the Commission, after the Gravier ruling (Case 293/83). And again, the later insertion (De Waele, 2010, p. 17) in the body of the treaties of various Court's predicaments, although with light adjustments, is the best confirmation of an *ex-post* approval of the outcome of judicial activism. This is arguably the admission that a 'mine of legal expertise' such as the Luxembourg machinery was sometimes in a favourable position to decide questions deeply entrenched with juridical considerations. While serious confrontations on fundamental principles of EU law affirmed by the Court have taken place over the years, national governments let such episodes be raised by domestic courts,¹³ usually abstaining from fuelling or interfering and waiting for each case to deflate on its own.

Such description would require much deeper analysis around the interaction between a controversial judgement and the attitude of Member States to counteract. The two interconnected points on this profile are the dynamics of amendment of primary law and, additionally, the overall position of a supreme court in constitutional systems (Stone Sweet, 2011, pp. 128–131). However, it should be noticed that unequivocal signals have already been sent by the States.

In detail, Lisbon's High Contracting Parties introduced in the final act of the intergovernmental conference and in its annexes numerous clauses aimed at circumscribing the phenomenon of 'competence grabbing'.¹⁴ It would be naïve to believe that these formulas, which all together form a persistent and emphatic voice pervading all the treaties, are not addressed also to the Court of Justice, among others. Even the notorious declaration 17,¹⁵ concerning the principle of primacy of EU

law over national law, can be considered either as an implicit recognition of the jurisprudence of the Court or as a testimony of the unwillingness to draft it as a binding rule of positive law.

Conjectures on a Recurring Controversy

The debate about the role of the CJEU has known several ‘rounds’—to use the word by de Waele—all taken place in a narrow time frame, approximately corresponding to the last 15 years of the past century and later followed only by occasional contributions in a season when collective attention was caught by more cumbersome constitutional events. Therefore, it sounds obvious that such a flare-up of interest for the Court does not go along with the wider life story of the judicial organ and it does not match with the multiple phases outlined by Arnall in order to describe a body which was reacting to different environmental stimuli during its history (Arnall, 2006, pp. 639–667). The Court’s practice has grown from an early age when the most compelling necessity was ‘making the system work’, dealing with questions which were ‘self-evidently fundamental to the functioning of the Treaty system’ (ibid., p. 639), to a phase when the challenge is to discover the applications of the systematic approach to institutional design adopted in the Lisbon treaty.

One should conclude that the phases of the Court are shaped by the general evolution of the EU rather than by the judges’ own isolated policy stances.¹⁶ Nonetheless, the widely discussed critical review which the CJEU’s work underwent has concerned cases from the full repertoire of its decisions. Commentators keep on engaging, with equal strength, both with recent rulings and with rulings from the early decades of activity, especially those traditionally regarded as cornerstones of Community law.

What strikes one’s attention is, eventually, the unexpected perseverance in resurrecting old landmark cases which previous scholars had taken for granted, in order to contest their soundness and their legitimacy. In effect, this is even more surprising to anyone aware of the usual legal culture underpinning the wider lawyers’ and legal scholars’ community.

In detail, this is known to be informed by an attitude which is virtually opposite to a stubborn resentment for any unsatisfactory ruling; that is, the attitude to generally and rather uncritically welcome unexpected sentences, as a sign of anti-dogmatism and anti-legalism. A similar openness is rooted in the sense of appreciation typical of those waiting for the positive law to be redressed so as to better suit the needs of the real world. This is possible due to the fact that commentators usually feel to belong to that same homogeneous intellectual group to which the judges also belong. Therefore, the two professional categories are conscious to share, approximately, the same world view and set of preferences.¹⁷

Instead, it looks here that a rift exists between the CJEU judges, on the one hand, and legal scholars promoting a literature of criticism and delegitimation on the other. One would conclude that either the two categories do not share the same ideological ground anymore, or academics have all of a sudden grasped the importance of judiciary compliance with the law and thus common belonging to a same lawyers' guild no longer matters.

In this sense, it is remarkable that the 1990s were the decade of Maastricht and its rather distressed ratification process, which has today been forgotten just because of the even worse breakdown of the 2004 constitutional treaty. That was the moment when a newly discovered 'mood of public scepticism created a climate among some specialists in European law in which the legitimacy, not only of new developments but also of well-established doctrines, began to be questioned' (Arnull, 2006, p. 653). As such, it is arguably a new orientation from the public opinion, and not a change in the Court's attitude, to bring about the urgency to re-examine retrospectively the judges' activity with renewed attachment to the limits proper to the judiciary function. Stone Sweet, discussing the commitment of the Court to an individual rights-based approach, underlines that, without such approach, 'Article 267 TFEU does not develop into a decentralized enforcement mechanism; the legal system does not organize the kinds of feedback effects that have given European integration its inherently expansionary character; the Single Act is not signed in 1987; the common market is not completed in 1992; and the social provisions of the Treaty of Rome may well have

remained virtual dead letters, instead of evolving an extraordinary life of their own' (Stone Sweet, 2011, p. 143). Taking stock of the tremendous evolution which general and substantive EU law has experienced is thus the point of departure for any further reasoning involving the Court as a legal and policy player.

Multiple Tiles of the European Judiciary's Role in Higher Education

Discourses regarding the performance delivered by the Court of Justice of its own function seem especially suited for discussions of general profiles, addressing issues of a constitutional kind, the first of which is the nature of the relationship between the EU institutional setting, where the Court is such a heavyweight, and each Member State.

As a result, sectoral analyses are sacrificed. Even when the attention is focused, e.g. on the rather generic area of internal market, such restrictions may turn out uncomfortably. Notwithstanding the traditional special status which the implementation of market-related objectives has always had among the crowd of existing policy fields, it looks that all assessments of the invasive or self-constrained activity of Kirchberg's judges touch, by vocation, chords so transversal to potentially cover every EU policy, and none in particular.

Even so, a slightly more meditative sight is sufficient to spotlight a certain degree of conceptual confusion, which sometimes seems to constitute the very thread of the debate. As already mentioned (see p. 81), the ambiguity of certain terms commonly employed in the debate is itself the origin of much misunderstanding. This is even truer when transposing the discussion from the general level to a narrower field such as EU higher education, insofar as it is largely dominated by sector-specific issues which do not intuitively relate to ampler dynamics of governance. What happens in these cases is that a gap exists between the issues lived at the ground level of higher education institutions, especially by insiders, and a general narrative on the theory and practice of EU judicial function which, in the absence of further specification, risks

appearing unrelated to perceived reality. Furthermore, several topics higher education establishments deal with effectively entail governance capacity, in terms either of executive delivery or of strategic planning. Topics of this kind frequently require reference to juridical categories. Yet, the relation between these themes and those described above is most of the time not apparent, and a bridge needs to be built, an explanation to be provided.

Juridification

The propagation of legal paradigms and their sometimes penetrating character in higher education institutions is a well-known phenomenon, and in principle it has no strict relationship with the interpretive job of the EU Court of Justice on European primary and secondary legislation.

The juridification of universities has been observed as an ongoing process for at least three decades (Durand-Pringborgne, 1988, p. 105), regardless of their governmental or non-governmental status, albeit with differing modalities and intensities based on the specificity of the higher education system of each country. Its diffusion has been part of a wider trend which has invested the whole operational and legal setting of public administrations, consisting of a shift in the conception of authoritative activity by lawyers and decision-makers. This has meant, in part, the introduction of juridical modules where they had never existed before, and in part the external enforceability of those modules allowed by a new overall legal framework that viewed public powers as fully and definitively subject to the imperative to respect the law. Needless to say, this process of transformation is arguably not completed yet, and it relates to a consolidation of the rule of law as a doctrinal and a legislative ideal.¹⁸

This has notably raised widespread impatience among university staff and more generally in individuals already involved in the institutional machinery. It is not uncommon to spot such disappointment still nowadays; while it originally flowed from a radical lack of sharing of the positive value that the administration could be held accountable for public or private law infringements,¹⁹ it persisted under the

opinion that informal arrangements or discretion exercised resorting to the special sensitivity of the academic personnel would still be the best instruments to resolve an internal controversy or assume decisions having impact on the whole university community.²⁰ Such views are clearly grounded in the existing experience in the daily management of the educational establishment.

On one side, as already claimed in the 1990s, ‘administrators, counsel, public policy makers, and scholars have increasingly reflected on law’s role on the campuses’ and as a consequence their initial criticism, ‘while frequent, is becoming more perceptive and more balanced’ (Kaplin & Lee, 2013b, p. 15). On the other side, though, distress is often voiced for the overload of provisions coming from the central government or anyway from outside the institution, sometimes on highly detailed issues (De Groof, 2012a, pp. 29–30). A crowded, highly specific and fast-changing normative environment makes an unfortunate formula for a grasping management and an ineffective compliance.²¹

These practical reasons, and the paramount necessity to strike the right balance between the multi-faceted phenomenon of institutional autonomy and public accountability of educational establishments, have long paved the way to an armamentarium of regulatory modules alternative to an over-regulated and centralised administration. Deregulation strategies have widely been enacted, together with enhanced delegation of powers to the single institutions (De Groof, 2012a, p. 29; 2013, p. 81), with the goal of both expanding the scope of university autonomy and better fulfilling the autonomy which had possibly been set forth by constitutional or legislative provisions. Contractualisation and use of private law models have largely spread (De Groof, 2012a, p. 29) coherently with an analogous process that has invested the public sector as a whole.

It should be said, however, that this has not erased the proliferation of norms in higher education contexts, as it has sometimes even turned into an increase of their overall amount and complexity. Deregulation is not equal to delegification. The first is to be intended as a general reduction in the number and extent of norms applicable to higher education institutions and therefore as a form of dejuridification, while the second is meant here as a reduction in those sources of law coming from the national level of government, or anyway from policy-makers external

to single institutions. In this sense, strengthening university autonomy is connected with delegification, but it does not automatically produce deregulation.

The reason for this is dual. The deflation in the number and invasiveness of national rules usually matches a parallel and opposite move of autonomous institutions to regulate the areas left uncovered by the State. In a way, this should be seen as a natural evolution, as single institutions take profit from the possibility to shape provisions better fitted to the specific needs of their own educational community, to their strategic vision and to the material and human resources concretely available in each context. This means, ultimately, that when the local culture is one acquainted with an intensive regulatory model, it is not immediate that the implementation of higher education autonomy will immediately bring a less complicated and more straightforward legal framework. Local educational managers, indeed, tend to replicate, to a certain extent, the pre-existing normative and organisational modules, and it may even result that more regulation is produced than the one existing before under a national unitary codification (De Groof, 2012a).

In the second instance, the withdrawal of the government from its traditional directive role should not be confused with a sudden abdication of any possible centralised control on the way the whole higher education system works, as well as on how single academic institutions are run. It rather consists of a move from a model where the centre supplied the periphery with uniform and detailed instructions on how to carry out their duties, to a model of external assurance on performances to be delivered by each educational establishment, where the central authority is 'steering from a distance' (De Groof, 2012a, p. 28; 2013, p. 81; in De Groof, 2012b, p. 131, this is referred to as 'remote steering'). This does not entail the plain and simple cancellation of existing legislation, but conversely the introduction of national legal frameworks designed to enact such a pattern, which institutions equally have to abide by. In this sense, the increasing delegation of powers to the institutional level is accompanied by an increasing power and number of norms issued by the central authority. Even in times of decentralisation, life on campuses has hardly ever been so dominated by rules (De Groof, 2012a, p. 30; 2013, p. 82).

It has been noticed that the term ‘juridification’ usually bears pejorative overtones, affecting the capacity of each administration to supply decisions and settle its own disputes internally, according to practice, traditions and customs proper of the academic guild and its bureaucratic machinery (De Groof, 2012a, p. 27; 2013, p. 89). This is consistent with the view of juridification as involving ‘recourse to legal judgement to enforce, under the threat of penalty, what has otherwise proved unacceptable by negotiation’ (Neave, 1994, pp. 115, 124). Kaplin and Lee attribute the development of a ‘legalistic and litigious environment’ to ‘an increasing adversarial mindset, a decrease in civility, and a diminishing level of trust in societal institutions’ as well as to strategic litigation tactics by advocacy groups (Kaplin & Lee, 2013b, p. 12). However, juridification is also related to a broader process which brought education institutions into the formal ambit of either administrative or constitutional law (De Groof, 2012a, p. 27; 2013, p. 80; De Groof, Neave, & Svec, 1998, p. 19) and as a pathway to shape autonomy, its boundaries and its modes of accomplishment (De Groof, 2012a, pp. 27–28; 2013, p. 80).

Nonetheless, the concrete unfolding of legalisation and juridification seems to vary according to the organisational background of each educational institution, usually shaped around country lines. It follows that some authors name certain phenomena, such as extensive coverage by meticulous legislation and administrative directives, as quintessential of European continental systems (De Groof et al., 1998, p. 19), where an ‘avalanche of ministerial circulars, decrees and *arrêtés*’ forms a ‘plethora of instruction and demands which ensured cohesion, compliance and the continual distraction of the University President’ (Neave, 1998, pp. 118, 134). The weight of the judiciary in these dynamics, and more narrowly that of the EU Court, is yet to be explored but it cannot be underestimated.

It has been written that ‘[O]f all the forums available for the resolution of higher education disputes, administrators are usually most concerned about court litigation’ (Kaplin & Lee, 2013b, p. 65). This is due to manifold reasons, including the high risk linked with the unforeseeable outcome of any serious proceeding, as well as the deeply penetrating and extensive impact which a verdict can turn out to have on the life

of an academic community. The implications of ‘going to court’, which are nowadays part of the natural horizon of post-secondary establishments, are typical of controversies where the reference to legal parameters reaches a maximum of intensity and eventually absorbs the entire question on the table. Unsurprisingly, lodging a judicial suit scraps all profiles of discussion oriented towards finding a concrete balance of interests or pursuing the best form to attain the institutional functions of the university. This is why litigation usually coincides with ‘a peak in juridification’.

However, it should be made clear that addressing the point of the judiciary’s role under the label of litigation refers to a judicial activity of a confrontational kind. This can take the form of the judicial review of an act issued by the educational institution, or of a civil law dispute where the administration, either as plaintiff or as defendant, has the same judicial standing of the other parties in the trial. In both options, the proceeding is of foremost significance because the institution is usually among the addressees of the final decision. The outcome of the judicial procedure is therefore specific and individualised.

Needless to say, such features are unlikely in proceedings in front of the CJEU. Here, even when considering both the Court of Justice and the General Court, the room for direct litigation directly involving single higher education institutions is negligible. The completely different paradigm of preliminary rulings, where on occasion educational establishments have played a role in their capacity of parties in front of the referring national judge, is designed to make the most of the general reach of the answer provided by the Luxembourg judges. The pre-eminent consideration is that a preliminary ruling procedure is configured as a trail *on the law*.

What remains common, though, to the two kinds of proceedings is the nature of the contribution of the court from the viewpoint of the higher education institution. The judiciary body works, at the end of the day, as a transmission shaft from the law to the institution. In this light, the final perception gained by the administration is arguably that the sentence is an instrument of enforcement of that ‘rule of law’, sometimes still not completely digested by universities and other post-secondary establishments. This is even truer insofar as rule of law is

commonly at risk to be shaded in organisations perceiving themselves as communities. Here, it tends to be substituted by different arrangements and it is hardly seen as a top priority by academic circles.

The juridification brought about by the ruling either corresponds to the scope of the substantive law which has been applied in the proceeding or strictly depends on the way the magistrates have used their interpretive power in the single case. The (putative) transmission of the normative message from the law to the institution is delivered directly to higher education administrations in the case of national litigation, because of the individual character of the suit. Conversely, when a ruling is issued by the European Union Court of Justice on higher education issues, the degree of juridification injected in the educational establishment by a single verdict is to be assessed with respect to every sentence. In particular, the scope of the interpreted primary or secondary legislation, as read by the judges, and the avoidance from or the willingness to create new obligations from no self-evident legal basis are pivotal for understanding if new rules are actually forged by the Court's activity, in each single case.

Judicial Activism, Creativity

The fact that 'judicial activism' is not a unitary concept has been fairly demonstrated by Kmiec with reference to the US experience, moving from a historical excursus on the enduring use of the expression, and outlining a number of definitions (Kmiec, 2004, p. 92). What is important to underline from that research is that such definitions attempt to define different paradigms of activism by judiciary organs, i.e. different modalities which judicial activism can operate through. This means, concretely, that such definitions are, so to say, alternative to one another, in the sense that they consist of distinct notions of activism, provided in order to pin down and put an order in the proliferation of ideas on a topic central in many scholarly discussions. What is not suggested by Kmiec's analysis is, instead, a transversal approach to all the outlined meanings. There is, in fact, no aspiration to identify what is, ultimately, the character shared by all the definitions, their common

denominator, the one which gathers all of them under the umbrella of 'judicial activism'.

More precisely, no reference is made to an evaluation of the judicial activity carried out by means of confrontation between the principles stated in the sentence, on one side, and those emerging from the legal basis of the case, on the other. No hypothesis is made, in other words, to use as parameter the law itself, as plain as simple, and with that sole regard to decide 'if activism took place, or not'. Adopting such a method would point straight to the assessment of the quality of the judges' work and, virtually, their loyalty to the law. The substantive and procedural provisions applicable to each proceeding initiated in front of the court would therefore be the reference for 'judging the judges' performance'. Do the judges abide by the law which shall form the basis for their decision? Otherwise, are the judges practising 'judicial activism'?

Admittedly, this is a test we are hardly willing to perform. Various reasons are discouraging. First: the unreliability of any normative and interpretative appraisal, even if with the ambition of being a definitive one. The consideration that the behaviour of a judging organ should be evaluated by entering the full merit of the question under review arguably touches a sore point. Such an intellectual operation is, at the same time, a requirement for the understanding of the case and the ground for the alternative formulation of the sentence 'how it should have been decided'. It requires, in the last instance, a virtual interchange or an identification with the court itself by the commentator.

Moreover, a split should be drawn between the two faces to which such an endeavour gives rise: the objective evaluation of the case 'as if you were the judge' (1) and the subjective rating of the judges' delivery (2). It should be self-evident that, while we can perfectly decide to 'play judges' and, in that capacity, to put forward the solution which we deem the correct one, we cannot expect the 'true judges' to agree with us. Our personal solution cannot be bullet-proof. This means, conclusively, that, while in the first phase—the one where the allegedly correct decision is outlined—we can safely presume to be 100 percent right, in the second phase—the one where we dwell on the judges' conduct—a great deal of flexibility is needed. Our fancy game is likely to end up

discovering that this margin of appreciation is of difficult determination, and that we may anyway conclude that the Court were 'in good faith' in pursuing the allegedly wrong settlement. In short, no method could be more demanding to perform and more uncomfortable for subsequent discussions on the appropriateness on the one settlement or the other.

There is no reason to believe that this method should not be valid for the EU Court of Justice. It is a case-by-case process that only at a later moment can lead to global considerations on the general attitude or mode of reasoning²² of the Court, by connecting a constellation of sentences into a one single greater landscape. Of course, any current discussion on the Luxembourg Court being an activist judiciary does nothing more than rely on previous analyses of this kind, carried out on the existing body of jurisprudence and providing evidence-based assurance that the research outcome has been determined solely by systematic observation. Putting aside for an instant the negative connotation attached to the concept of activism (Kmiec, 2004, p. 1442), the fact that several degrees of judicial pro-activity are possible should be a paramount factor here. The existing dichotomy between activism and self-restraint may be less linear than usually depicted.

There is sometimes the unspoken idea that a judicial body's approach to legal interpretation should be as flat and as mainstream as possible, given the impact that a judgement has on 'real cases' concerning 'real people'. Remarkably, the idea of 'how flat' a court should be in interpreting or applying the norm apparently refers to a strict abidance to the contents of the normative material itself, but eventually turns out to be based on the *expectations* concerning that material. Do we label a specific solution elaborated by the Court as 'activist' or 'restrained' on the basis of its punctual observance of the legislative text, or instead on the basis of what the attended result was to our eyes?

In other words, we like to imagine an ideal judge supplying a non-upsetting sentence in a case where the facts, however complex or emotively controversial, must and can be subsumed under the provisions provided for in EU primary or secondary law. However, reassuring the picture of a Court writing a predictable verdict may be, saying to the parties 'This is the law, you knew it, and now you have to comply',

what is relevant in such a vision is not the correctness of the decision *per se*, but its foreseeability, its adherence to pre-established beliefs on how a certain legal framework should be read.

Still, self-restraint does not necessarily coincide with a low profile. In a way, the expectation that the Court of Justice follows an approach whose primary aim is to ‘minimise earthquakes’ in the application of EU law derives from its misunderstood international setting. The parties in the trial before the Court are often the Member States and the common institutions, either as main parties of the trial or by the way of intervention. Even if they do not participate in the procedure, still the idea that the Member States are anyway viewing the trial from afar, although not formally involved in it, leads to a sense of oversight by the ‘masters of the treaties’ in any proceedings. The procedural equality of the parties is maximised by the sovereign quality of Member States and European institutions. This gives rise to the impression that the magistrates, caught in between such heavyweights, should have little space left for *prima-donna* behaviours and for coming up with inventive solutions, and they should instead grab on to a literal interpretation of the treaties, which may even be a lifeline against hypothetical reprisals from the States. Even so, the idea that an international tribunal should avoid at all costs rulings containing unexpected solutions, and ‘resort to sedatives’ when writing sentences, should be regarded with suspicion.

Article 128 of the Rome treaty, one of the few mentioning vocational trainings, represented, in the Court’s view, a self-standing legal basis for the adoption of fully fledged juridical acts by the Community’s institutions (Case 242/87). This conclusion contravened the common sense—or, better, the expectations—of legal counsels of the time, but from the Court’s perspective this was arguably the plain consequence of an honest reading of that provision. Such a decision represented the acknowledgement that Article 128 would not remain a dead letter. A plenty of judicial decisions regarding the prohibition of discrimination in a variety of profiles in higher education (Case 9/74; Case 293/83; Case 24/86; Case 263/86; Case C-337/97; Case C-224/98; Case C-184/99; Case C-65/03; Case C-147/03; Case C-209/03; Case C-158/07) have been driven by the same premise.

The drafting of that Article of the treaty suggested, at a first reading, that its future implementation would take place through positive actions undertaken by the competent institutions other than the Court, and therefore the instinctive reaction had been to conceive of these prospected initiatives as the only reasonable effect allowed by the provision. Notably, a previous theoretical category came into play here: vocational training was identified as a social-oriented area of policy, which could be enacted in no other way than through measures left to the diligent but unquestionable discretion of political bodies—a construction well known in constitutional theory. In front of Article 128, a sort of ‘erudite resignation’ came into play. Implementation of such kinds of clauses was left to the goodwill of the Member States and, as a result, it would prove highly unlikely. Resignation changed into incredulity when the Court explained that would not be the case.

The critical impact of the principle of effectiveness in the CJEU’s case law should at least be mentioned. Its centrality and versatility in the method of the Court has widely been spotlighted by doctrine and it has been raised to the status of ‘garant de l’intégrité de l’ordre juridique de l’Union Européenne’. Regarding its legal foundation in the treaties, it is described as ‘indissociable du devoir de coopération loyale qui s’impose aux États membres et à leurs autorités’, but more correctly it is stated that ‘c’est la nature même de l’ordre juridique de l’Union [...] qui confère au principe son importance singulière et lui réserve un rôle décisif dans la réalisation des missions de l’Union’ (Cruz Vilaça, 2013, pp. 279, 280). Having a multi-faceted meaning, it impacts on the scope of application of the treaties (*ibid.*, pp. 303–304) with the result of including therein all concrete situations possibly responding to the definitions of the concerned norms. This turns into as extensive an interpretation of law as possible, given the normative basis for each decision of the Court.

It remains true that the boundary between a positively pro-active behaviour and the misinterpretation of judicial functions is often a blurred one. Trespassing that distinction means, for a court, developing into a ‘judicial legislator’ (Kmiec, 2004, p. 1441). This boundary should be identified resorting to an unequivocal and pertinent legal basis in each case, that legal basis being the guiding criterion for spotting abuses. This is why it can be useful to refer to a notion of ‘judicial

creativity', narrower than 'judicial activism', in order to signify the extraction of complex and self-executive sets of rules from unsatisfactory legal parameters in primary or subordinated legislation, or their outline from possibly no positive legal basis, or even in explicit disregard for the need of a specific legal basis to spell out substantive obligations.

The Court's case law is notoriously abundant with such kind of decisions, and the aforementioned jurisprudence on the protection of fundamental rights at the EU level makes a prominent example of this phenomenon. In the field of higher education, one example particularly exposed to critique of judicial creativity is arguably the *Cassis de Dijon* case law (Weale, 2010, pp. 6–7; Torchia & Clarizia, 2010, p. 361).

Judicialisation

This is also an 'umbrella-like' (Hirschl, 2011, pp. 253–254) expression which gathers a plurality of different meanings. This is due sometimes to non-meditative usage by legal and political science commentators, sometimes to the objective borderline character of some of these meanings and the subsequent attitude to generate confusion. However, some conceptual distinctions have already been proposed before and, therefore, we can capitalise on what has already been pointed out.

Hirschl names three diverging definitions of 'judicialisation', of which the first refers to 'the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making fora and processes' (ibid., pp. 254–255). Under this meaning, '[M]atters that were formerly negotiated in informal—or non-judicial—ways gradually come to be dominated by legal rules' (Sieder, Schjolden, & Angell, 2005, pp. 1, 5). This notion signifies nothing else than juridification (Hirschl, 2011, p. 255) or legalisation of political life. In this sense, using the expression 'judicialisation' instead of 'juridification' is just the verbal consequence of the perception that advancement of law in areas formerly not dominated by law proceeds chiefly by judicial activity. This eventuality with reference to the CJEU, in contrast with national litigation and judicial review, has already been spelled out above (p. 93).

Further distinctions seem more a question of niceties, but can be addressed conceptually. Vallinder alludes, at least in principle, to a duality of the concept of judicialisation, putting on one side 'the spread of judicial decision-making methods outside the judicial province proper' and, on the other, 'the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts' (Vallinder, 1994, p. 91). In this second connotation, in particular, the dichotomy between the judiciary and the legislature stands for the juxtaposition between a dimension of protection of individual rights (entrusted to the courts) and that of promotion of collective aspirations (the field of politics) (ibid., p. 92). In this speech, the legislature should be identified with democratically representative bodies at large, governed by majoritarianism.

Apart from this sketch taken by far, Vallinder's intuition is arguably in distinguishing between a move from the judiciary organs, on the one hand, and a move from political decision-makers, on the other. We may intend judicialisation as an advancement operated by the courts, and in this case by the Court of Justice, in a decisional area pertaining to political representative bodies, to wit the Union's legislative institutions for higher education issues or, on a higher level, the Member States themselves in their capacity as signatories of the treaties. In this case, we are embracing the idea of a tribunal deciding, instead of those allegedly legitimated to do so by means of political investiture. This is the case where a court 'judicialises politics'. Conversely, judicialisation can be intended as a form of delegation to assume decisions, with regard to topics falling institutionally and legally within the ambit of competence of representative bodies. In this case, we are describing a move which is virtually opposite. In this second hypothesis, it is not the court grabbing policy-making capacity but rather the legislature creating formal or factual mechanisms according to which concrete or abstract determinations will be assumed by the judges. This happens, it is presumed, because the latter ones are believed to be in a better position to do so than politicians, in light of their better knowledge of law, their fact-checking capacity, as well as for a number of other considerations typical of the principal-agent theory (Stone Sweet, 2011, p. 123).

The question may well be the following: ‘Judicialization of politics or politicization of the judiciary?’ (Domingo, 2004, p. 104). Translating this through our previous reasoning, the alternative is between a move from the European Court to appropriate land belonging to political bodies or to assume political overtones, and quite the opposite move from political bodies to delegate decisions to the Court.

A politicised judiciary (1) incorporates in its decisional logics valuations and reasons pertaining to options of opportunity (and, as such, extraneous to legal assessments and proper of political debates) or (2) extends its jurisdiction to themes falling outside its judicial competence (and, thus, belonging to other constitutional branches).

We are already acquainted with the last of these concepts with reference to the CJEU’s general expansionary attitude. This, concretely, occurs either in broad sectors of the Union’s legislation excluded from its scrutiny where, nevertheless the Court asserts its jurisdiction (p. 80) or, more subtly, with the application, especially in preliminary rulings, of existing norms well beyond their scope, even when they are read through the *effect utile* methodology (p. 99). But the first option might be familiar as well, if one recalls criticism of the centralising preference by Kirchberg’s judges, or otherwise their alleged federal standing (p. 77). Insofar as those accusations were confirmed, and were not contradicted by the recourse to the ‘ever closer union’ clause,²³ such positions should be regarded as implying choices proper of the political domain. They would appear as forms of, to some extent, arbitrary judgement and, therefore, alien to the Court’s ‘job description’. It should be clear that these two symptoms of politicisation of the judiciary complement the phenomenon of judicial activism or creativity.

The other profile remaining from the question above—‘judicialisation of politics’—splits the two opposite processes of appropriation by the Court and delegation by legislative bodies. In the first case, politics as a domain finds itself judicialised because of an invasive or aggressive approach by judicial chambers who climb over certain limits and, as a result, create an issue for other institutional decision-makers. On other occasions, a Court’s ruling restricts or extends the options available to the legislature, or sets the agenda and priorities of Member States or other common institutions. It follows that ‘the expansion of the

province of courts and judges in determining public policy outcomes', which Hirschl mainly associates with 'administrative review, judicial redrawing of bureaucratic boundaries between state organs, and "ordinary" rights jurisprudence' (Hirschl, 2011, p. 255), features a Court engaged in steering politics from the outside. It consists, in particular, of a variable degree of judiciary influence or control on forthcoming decisions by the Commission, the Parliament or the Member States, either in the Council or in intergovernmental or domestic settings when higher education issues arise.

This conception sees judicialisation as concerning 'how judicial law-making—defined as the law produced by a judge through normative interpretation, reason-giving, and the application of legal norms to facts in the course of resolving disputes—influences the strategic behaviour of non-judicial agents of governance' (Stone Sweet, 2010, pp. 1, 7). Upon a closer look, a similar situation should be expected every time judicial activism is exercised effectively, and with results that do not leave the political establishment unresponsive. As a consequence, the two concepts of 'activism' and 'judicialisation of politics', the latter being described as above, should be regarded like phases of a unitary sequence, with post-secondary education policies, too.

A couple of things should, however, be added here. The first is that EU political choices may be affected by the CJEU's decisions not only in a conflicting direction, but also in agreement with the pathway indicated by the judges. One could reasonably expect that, in those cases where the Court provides for arrangements which have been undertaken or endorsed neither by the Member States nor by the EU legislature, some initiative should be put in place to restore the situation as it was originally desired. This belief is grounded in the double assumption that, on one hand, the mechanisms of political decision-making are absolutely efficient and invariably bring about a decision every time and only when that decision corresponds to the preferences of those in charge and that, on the other hand, effective procedures are available to dismantle at will the impact of the Court's rulings. Since none of the two conditions are in place, it is well possible that no initiative is launched to contrast the effects of unwelcome sentences, including episodes of judicial activism.

While this means that no reaction occurs and therefore, by definition, no judicial influence on policy-makers can be identified, in other instances it may well be that a reaction exists, but, rather than pulling in the opposite direction of the ruling, it heads in the very same one. Political evaluations on the merit of a sentence do not necessarily cross those on judicial activism as a general phenomenon, and may well result in appreciation of a certain evolutive trend in the case law. The impact of the Gravier sentence on legislative activity has already been referred to (p. 86), where subsequent political initiatives started to use Article 128 of the Rome treaty as an initial, although insufficient, legal basis for operating the first action programmes. This is indeed an example of judicial influence on the legislature, and thus of ‘politics judicialised’, where, however, the Court and the Member States turned out to be in substantial agreement, at least from a retrospective viewpoint (Pépin, 2006, p. 103).

The second point to be noted is that judicial influence on other institutional players does not occur only in cases of invasive or abusive judicial creativity. It can also flow from a judiciary who sheds light on the actual scope and meaning of previously issued rules and, for the part of EU legislative judicial review, scrutinises and invalidates legal acts by virtue of a recognised contrast with hierarchically superior norms. This undoubted expression of judicial influence is physiological in constitutional systems, as far as ‘constitutional law, as it unfolds, creates the conditions for the judicialisation of policy-making’ (Stone Sweet, 2011, p. 130).

A much debated example, destined to attract increasing attention, is the impact of the Court of Justice’s sentences on the freedom of movement of students and the prohibition of discrimination with respect to the access to university education. As exactly pointed out by Kwikkers and van Wageningen, such decisions raise interrogatives that ‘concern more than it would appear’, as the ‘key question is whether or not a Member State should pay for students from another Member State’. To put it harshly, ‘[I]t is about money’ (Kwikkers & Wageningen, 2012, pp. 39, 41). Similar decisions hide a potential to re-orient higher education policies and internationalisation strategies which is huge, and can provoke major shifts in the allocation of resources to territorial areas,

services collateral to the teaching activity, attribution of funds to single academic establishments and even the financing and operational management of specific educational tracks. All of these consequences do not derive automatically from the implementation of a sentence, but may come as immediate or long-meditated reactions to one or more Court's verdicts.

Let us come now to the opposite form of 'judicialisation', where some legal or de facto competence of the judicial branch to settle certain issues of non-judicial nature is a repercussion of choices enacted by political decision-makers themselves. As such, this hypothesis deals with those cases where a transfer of decisional power and policy-making capacity willingly happens from representative bodies to the courts. Here judicialisation is conceived as 'the reliance on courts and judges for dealing with [...] core political controversies that define (and often divide) whole polities' (Hirschl, 2011, p. 254). The conceptualisation of this eventuality under the principal-agent theory has already been cited. 'Judicialization is a dynamic process organized by trigger mechanisms and feedback effects' (Stone Sweet, 2010, p. 7)²⁴ and thus it can well encompass not only the influence from the judiciary to the political, but also the contrary. Nevertheless, apart from this rather generic proposition, this dimension seems largely and questionably neglected by doctrine.

When dealing with the choice of delegating law-making power to international courts, it has been said that three situations can occur: explicit delegation, implicit delegation and non-consensual law-making (Ginsburg, 2004, pp. 631, 640). While leaving behind the third category, it appears that the most common kind of delegation is the implicit one, enacted through the mere attribution of interpretative and applicative tasks upon the judicial organ (*ibid.*, p. 643).

To be more precise, the most popular fast track for empowering judges is the adoption of a series of textual tools, well-known by legislative drafters, heightening the degree of unpredictability of the application of a provision or a set of provisions to a real case. Techniques exist to force a tribunal to carry out tasks normally performed by parliamentary committees, and to ultimately determine the scope and content of an obligation established by law. They often consist of checked

textual vagueness or ambiguity, and the insertion of the so-called 'blank clauses'. Analogous results can be attained, more sophisticatedly, through the elaboration of a whole normative framework which is conducive to a central role of the interpreter and where the effect of the single provision dropped therein remains hardly foreseeable even to the trained reader because it depends on its interaction with a wider network of norms.

This can plausibly be the case of Articles 13 and 14 of the EU Charter of fundamental rights, respectively providing for the right to academic freedom and the right to education. Here, the general drafting technique and the overall outline of the Charter are crucial for any pre-assessment of how the document is meant to be read in judicial fora. What is striking about the Charter is that it has been drafted as a plain and simple catalogue of rights, with no apparent indications on how these relate to one another. The whole normative outline is intertwined with astounding, almost totemic statements such as 'Academic freedom shall be respected', 'Everyone has the right to education', 'The Union shall respect cultural, religious and linguistic diversity' and the like. By virtue of their immense purview and of their unconditional wording, these propositions represent a safe guarantee of overlap both with other articles of the Charter, and with the provisions set forth in the treaties, which—it should be kept in mind—share the same legal value of primary law. A large, virtually unlimited room is left to the judges in Kirchberg to determine the balance among contrasting provisions. There exists an explicit link between the EU Charter of fundamental rights and the European Convention of Human Rights, as long as all the rights enshrined in the Charter which correspond to rights guaranteed by the convention shall have the same meaning and scope as those laid down by the convention itself (according to the Article 52 of the Charter). Of course, this supplementary value attributed to the provisions of the Strasbourg treaty works as a partial compensation to the great discretion left to the Luxembourg judges in interpreting the Charter. This is also valid for the articles of the Charter relating to educational rights, whose interpretation should be oriented by the jurisprudence of the European Court of Human Rights on Article 1 protocol 1, equally relating to education. One could hardly pretend, however, that

this element represents any serious restriction to the EU judges' positioning to assume a quasi-political role.²⁵

The Room for Silence in Higher Education Policies

As mentioned earlier (p. 84), one of the reasons often invoked to explain an intrusive or creative behaviour by the Court of Justice is the alleged inability of the competent institutions of the Union to assume decisions. In particular, a situation of systematic disagreement among political players, a deliberative deadlock on specific topics or the impossibility to form political majorities due to bargaining dynamics are sometimes taken as sufficient justifications for the Court to enact its own point of view, where necessary decisions are unable to emerge from other 'more competent' bodies.

Such reasoning is arguably founded on the recognition that the Union's institutional and juridical construction is designed around the inescapable duty to attain the objectives set forth in the Treaty on the European Union and, for the part relating to each EU domain of action, in the various sections of the Treaty on the Functioning. It follows from this framework that any inability or ineffectiveness to issue a decision which is required with a view to fulfilling those goals would represent a failure of the involved institutions to carry out their primary law obligations. Those advocating for the legitimacy of pro-active Luxembourg jurisprudence argue that on such occasions the Court has, if not a duty, at least the viable option to affirm that certain normative requirements are inherent in the already existing obligations, and they shall therefore be enforced by operation of law.

A similar analysis, however, asks for a careful consideration of the meaning of inactivity by the legislature. In fact, this argument fails to address the complexity and specificity of multi-layered regulation, especially when coming to sectors such as higher education. In particular, there are occasions when a given policy proposal has been put forward in the public or legislative debate and, as a result, the Court is tempted to take it into consideration when dealing with a case regarded by that proposal (see, for instance, De Waele, 2010, p. 5). Still, a failure to

reach a consensus among decision-makers about any such policy cannot be assumed, almost by definition, as a failure in attaining the Union's objective. A similar conjecture does not take into account the evidence of political disagreement, connected with diverging opinions on the opportunity or usefulness of a definite action. No automatic conclusion can be inferred that a given solution was in fact the needed one. A thorough multi-faceted comparison between the proposal and the legal objectives to be pursued by it appears unavoidable to embark on a similar hypothesis. Furthermore, any commentator aware of general categories of CJEU procedural law would recognise in such an analysis the typical conceptual elements of the action for failure to act.²⁶ This judicial procedure, unduly overlooked by scholarly doctrine, is the proper 'way to go' for raising similar concerns.

The main point of doubt, however, is not procedural but substantive. It relates to the viability of non-deliberative options in the context of higher education policies. The very core activity of academic establishments is education and research delivery, much of which is actually left to the ability, sensitivity and vision of the staff, both as single professionals and as a collegial entity. This should draw attention to the peculiarity of higher education institutions and to their resistance to in-depth regulation by an external authority. Usual regulation in the higher education sector deals with all sorts of organisational profiles, covering administrative and financial issues, external juridical and financial powers, internal governance, staffing, public procurement, general requirements for accreditation of courses, release of official titles, general, thematic and territorial planning of educational and research activity. Even so, the bold impact of all of these aspects on teaching, learning and research performances is always at the forefront of policy assessments. Major parameters indicate that a restrained and attentive legislative and regulatory sensibility is the safest way to undertake modifications in the existing normative environment, especially if the envisaged direction is to create new obligations or requirements or expand those already in place.

Autonomy of post-secondary establishments is invariably discussed at this point, both as a past and an ongoing European-wide trend. In essence, it introduces and safeguards areas of decision-making

reserved for the single institutions, at the same time facilitating a major re-shaping of the relationship with governmental authorities competent for education and research policies. It involves detailed aspects of services supplied by universities as much as the definition of strategic orientations on the educational offering and the research directives of each academic community. It equally includes the substantive margins of decision vested with each administration and the operative instruments to act, either in terms of administrative delegation or in terms of statutory imputation of powers (De Groof, 2012b, p. 131). In this sense, there should be no hesitation to acknowledge that ‘no go’ areas exist for legislators, as well as for national authorities charged with supervisory tasks.

It has been pointed out that the adoption of institutional autonomy-driven models does not necessarily match with a globally de-regulated environment, nor does it originate an indiscriminate withdrawal of the government from issues pertaining to the higher education sector. Indeed, autonomy of post-secondary education institutions has never meant an absence of law or rules (*ibid.*, p. 130). The fierce juxtaposition of the concepts of autonomy and accountability has been the key to relocating centralised regulation, control and steering capacity with regard both to general objectives and to the legal tools. The penetrating character of external supervision has not been erased (De Groof, 2012a, p. 28; 2013, p. 81).

Autonomy and academic freedom are distinct concepts (De Groof 2013, pp. 153, 157) and there should be no attempt to put one of the two under the encompassing umbrella of the other, yet their interrelation underlines the fact that institutional autonomy is instrumental to a variety of prerogatives attached to universities (Easterman & Nokkala, 2009, p. 7). ‘As a crucial guarantee of academic freedom, institutional autonomy is simultaneously the best insurance of the freedom to provide for education and the right to education’ and ‘instrumental both for the interpretation and application of laws and for the resolution of competing claims between governments, universities, scholars, administrative staff and students’.²⁷ Consistently, ‘independence’ of academic institutions comes into play as a general consideration in the higher education field (De Groof, 2012b, p. 87) and the fact that different

approaches to the same issues can be found in different national regulatory contexts should be seen as a demonstration that multiple options are possible when it comes to sketching a balance between centralised assurance and local specificities. In this light, calls for proportionality of governmental interventions assume a special weight.

Deregulation has been identified as an overall goal (De Groof, 2012a, p. 29; 2013, p. 81), transforming higher education at all governance layers. Furthermore, the legal framework for the action of the EU in the field of education and vocational training, to which university teaching notoriously belongs by a large part, is particularly conducive to a restrictive approach in issuing new rules by the common institutions.

Mentioning every limitation to legislative and non-legislative initiatives in the field of higher education, provided for in the EU primary law corpus, would already make a long list. Taking into account the discrepancies between the provisions regarding education and those on training, specific restrictions include the obligation to limit the Union's action to encouraging cooperation²⁸ and to supporting and supplementing Member States' actions,²⁹ the duty to respect national responsibility for the content of teaching and training and the organisation of higher education systems,³⁰ the constraint on any EU action to pursue specifically enlisted goals.³¹ Additional limitations exist regarding the preservation of cultural and linguistic diversity,³² the safeguard and enhancement of Europe's cultural heritage,³³ the respect of Member States' national identities,³⁴ the prohibition of harmonisation of laws and regulations,³⁵ the prohibition to supersede higher education national competences³⁶ and the impossibility to cover higher education other than at the European level,³⁷ as well as the applicable principles of subsidiarity³⁸ and proportionality.³⁹ The aforementioned Articles 13 (academic freedom) and 14 (right to education) of the Charter work as further restrictions to the EU legislative and executive bodies.

Far from stating that no regulatory initiative can take place at the European level, common normative guidance is indeed required by the overall treaties framework applicable to higher education, in order to attain the aims set therein to the fullest. Still, the point made here is that, given a legal basis so influenced by such a multitude of limits and deterrents, invoking legislative inactivity as a ground for legitimising a

creative case law by the CJEU appears highly audacious, especially when post-secondary education matters are concerned.

Putting Tiles Together and the Sectoral Perspective

Two major, interconnected risks emerge from the above discussion of concepts and terminology commonly employed when coming to the Court of Justice's role in the higher education sector.

The first risk is an excess of theoreticism. Assessing the general parameters for evaluation of judicial activity and applying them to the European case law on post-secondary education issues may easily result in a focus on notions that seem, on one hand, rather descriptive, and, on the other, possibly unrelated to one another. Of course, there is nothing bad in this approach if it is functional to methodological considerations on the analysis of case law, its impact on legislation and the political agenda. Yet, it may cause some distress if giving the impression of detaching those arguments from perceived reality—especially when otherwise admitting that the influence of the Court's jurisprudence on educational management is huge. Unfortunately, the concepts analysed before are often provided a different reading by different authors and in any different situations they come into play. This brings about confusion and misunderstanding, and calls for treating those concepts with special care.

The second risk is that this discussion be one of a general kind. The substance of the topics debated before belongs to a general theory on judiciary, judicial activity and its relations with the other branches of power. As such, one may pretend that they do not refer to the field of higher education except marginally. It is true that various explanations can be provided from a general viewpoint rather than from a sectoral one, and arguments on judicial activism, judicialisation and to a certain extent even on juridification seem to embrace an appreciation of the legal system as a whole, as they even exceed the scope of EU law framework. On one hand, though, a purely general approach would be deceptive, since it would fail to recognise implications and meanings which are specific to educational and academic regulation.

This is particularly relevant for those characteristics which are traditionally regarded as peculiar marks of the world of universities and other higher education institutions: cultural, economic and social relevance; processes of self-representation of society with respect to education; autonomous and communitive organisation. These are the elements by virtue of which this sector of policy is rightly depicted as a non-purely technical one.

On the other hand, as this contribution aims to underline, the fact that certain judicial outcomes observed in the higher education field can be described as part of a wider picture sheds a different light on them. Notably, it helps to understand that judicial activism is not to be seen as an attack targeting the world of universities alone, but should be intended as a transversal attitude of the Court of Justice and beyond. Moreover, such an awareness does not impede stressing those concerns which are specific to higher education instances.

Pondering the legality of the EU's involvement in higher education, Tomusk critically argues that the CJEU 'seems to have adopted an ideological approach to making justice in Europe', not simply because of the attitude to promote its own solutions to claims of integration in education-related cases, but because its rulings appear 'less driven by the ideas of justice than the interests of a particular vision of the European integration—federalism' (Tomusk, 2011, p. 40). This speech resumes one of the typical allegiances formulated against the Court (p. 80). Nevertheless, a conviction sometimes emerges that, plain and simple, no legal basis would exist for the Union's initiative in higher education, and as a result the whole EU's action in the field would be abusive. When a similar argument becomes the basic assumption lying behind indisposition towards the Court's job, then the global reliability of such criticism is severely called into question.

A great effort has been made to stress the distinct and autonomous nature of juridification, judicial activism and creativity, and judicialisation. The relationships existing among these phenomena are uneven and often asymmetrical. Judicial activism and judicial creativity belong to a same progression of judicial pro-activity, where a straight line should however be drawn between those cases where the Court formulates judgements which simply contravene what could be predicted by its

audience, and those cases where it effectively delivers rulings which do not find correspondence with the applicable legal basis. It is true that judicial creativity can turn out to be a form of judicialisation of politics. This occurs when having a judiciary in a position to influence the agenda of EU political institutions as well as Member States, and one willing to use this position accordingly. At the same time, though, this invasion of the legislature's land is particularly likely to happen when the judiciary is 'politicised'. It goes without saying that this expression does not refer to the fact that judiciary organs may share concerns for those kinds of issues making the political headlines in newspapers. Instead, 'politicisation of the judiciary' should be seen in a rather more technical sense, as the adoption by judges of logics extraneous to their compliance with EU primary law.

When tackling 'competence creeping', it has correctly been observed that '[T]he use of ambiguous language, written in the most obscure legal jargon, allows for diverse interpretations of the treaties' and that this 'enhances and reinforces the supranational role of the European Court of Justice' (Amaral, Tavares, Cardoso, & Sin, 2016, pp. 48, 52; Amaral & Neave, 2000, p. 282). This fact, largely acknowledged with respect to primary law, matches with the observation that today's universities increasingly show a 'hybrid' nature which tends to place them in a position of 'ambiguity' regarding their status under secondary legislation, too.⁴⁰ This strengthened role for the EU Court due to certain features in primary and secondary legislation should be seen as a form of judicialisation consisting, in its essence, of the conscious shift of decision-making power from Member States (for primary law) and the common institutions involved in the ordinary legislative procedure (for secondary law) towards the magistrates. It is, therefore, a technique of implicit delegation.

Needless to say, the latter phenomenon, so pivotal in areas where a consensus can hardly be reached either on general principles or on detailed provisions, incorporates an inherent attitude to induce in the Court a more active or creative standing, especially if reiterated as a general blueprint of legislative drafting. The consequences of delegation-like judicialisation can be far reaching and go beyond the single regulation where more room for judicial discretion was intended to be left by legislators. This process results in an enhanced readiness for activist or

creative ruling on the side of the Kirchberg's judges. This readiness, in turn, highlights the availability of the judiciary as a systemic resource to which the elaboration of case-tailored decisions in complex or contentious topics can be entrusted. The nexus between the two aspects can prove to be recursive.

While it has been argued that, in principle, juridification of academic life is independent from performances by judicial bodies, and by the CJEU in particular, it must be said that, almost by definition, a Court acting as a 'judicial legislator' gives a crucial contribution to the normative environment and, thus, to the advancement of law on campuses, too.

Furthermore, the perception may vary significantly depending on the point of view we adopt to look at the whole picture. Juridification and legalisation have long been important trends in higher education institutions, and continue to operate as factors of innovation. From the perspective of a post-secondary education administration, this fact is easily seen as the true 'distillate' of everything said up to here, and as the only distinguishable 'morale' at the end of the day. After many words, we should not be surprised that a university manager perceives the implications of European judicial activism or of judicialisation at the EU level just as phases of a wider fact, to be labelled as 'juridification of higher education'. Ultimately, it can easily happen that all legal directives coming from outside the academic community, regardless of their source, are viewed as belonging to one single corpus of rules which educational establishments shall abide by.

On the contrary, it seems more intuitive to link critical assessment of the Court's role in post-secondary education to a perspective of general governance of the sector. This coincides, concretely, with the national government's perspective. It is the Member State's government who is in an institutional position to supervise the activity of the EU institutions, including the Court, and to spot abuses when they occur. It is the Member State's government who has the statutory right to intervene in any proceeding in front of the Court of Justice and the General Court⁴¹ and who shall be notified of each case lodged.

This discrepancy between the university and the governmental perspectives assumes a double meaning. A university whose only worry was

the intensification of punctual obligations and legal requirements might well be committed to its everyday delivery of educational and research services, but would appear as an actor largely unaware of institutional dynamics governing the higher education sector as a whole. Such an academic establishment would therefore be dramatically alienated from the prominent role which it would be supposed to perform in the public arena according to the specific degree of independence recognised to it. Perhaps, one could even conclude that an administration so centred on its own delivery would be unfit to bear the responsibility associated with general educational planning and strategy. It is no surprise that certain strategic and analytical functions are often assigned, within the administration, to personnel attached to internal governing bodies and specifically designated to attend to corporate, institutional and legal issues.

Indeed, the efforts by single educational establishments to address high level issues regarding higher education policy are paramount, and are often expressed in networks and associations of universities with national and continental reach. Yet, national governments remain the first interface between the CJEU's work and the internal reality of each State. This suggests a second consideration: in a governance system featuring academic autonomy among its cornerstones, the central administration retains a set of competences renovated but still highly material. If an autonomy-oriented governance, as it has been said before (see p. 107) entails a certain 'distance' between the government, on one side, and decisions taken on the ground by universities on the other, such a distance also consists of an ongoing prominent role of central national authorities in EU affairs. While autonomy is afforded to single institutions, in the framework of surveillance 'from afar', the government retains its full role of national representative in front of the Union's instances. In this sense, it seems appropriate to view governmental positioning as a form of limitation of university autonomy when dealing with high level policies. This is why any consideration about the role of the Court of Justice and the need to preserve the Union's institutional balance belongs more easily to the perspective of governments than to the one of academic establishments.

Final Remarks

A thesis exists that the Court of Justice is not the ‘engine of European integration’ anymore, but it has assumed the role of ‘guardian of the constitution’ of the Union (Schwarze, 2013, p. 258). Even so, its centrality seems not destined to fade, for also in this presumptive new capacity the Court would function as a point of contact among different EU and domestic institutional actors, and would provide a synthesis in each new situation. In this regard, a paradigm is sometimes introduced, according to which the essence of the Court’s work is to provide a balance among diverging interests, and chiefly between the evolutive pathway of an ever closer European integration, legally incorporated by the attainment of the institutional aims set forth in the treaties, and domestic interests of Member States on the other side (*ibid.*, *passim*).

This thread of reasoning is borrowed from the experience with national constitutional courts, which are today largely depicted as balancing interests, both in constitutional litigation concerning rights and in cases of inter-institutional or centre–periphery conflict. Although we have repeatedly referred to the proper performance of the judicial function as an ideal which the Court’s activity should be tending to, the very idea of what the judicial function consists of is uncomfortably disputed. The approach viewing the CJEU as balancing opposite interests is plainly different from one centred on the punctual analysis of the legal basis applicable to each case and, virtually, in a process of identification with the judge’s position of interpreter of the norm (p. 96).

Namely, the divergence is not only theoretical. Comments of case law laying on the assumption that the final aim of the Court should be to strike a balance between domestic and Union interests, if read with the glasses of the punctual legal analyst, result in a loud dissonance. It immediately turns out that the proposed ‘best balance’ between existing interests easily clashes with applicable provisions of law, or simply overlooks to take the latter in full consideration⁴² and vice versa.

The two approaches, however, are fed by the complexity of the normative material, on one hand, and of the extent of the area covered by it, on the other. These elements should be viewed, ultimately, as the fertile soil enabling judicial activism to grow in Luxembourg.

Nonetheless, the correlation between the importance of positive EU higher education law, on the one hand, and judicial production in the same area, on the other, is rather disappointing. Innovation brought by the Maastricht treaty in the field of education and vocational training, then transplanted to the Lisbon treaty, overtly covered post-secondary education, both in the light of previous Court rulings and of explicit primary law clauses. As from 2009, the entry into force of the Nice charter in its new binding status has represented a wave of new life-blood for European regulation on academic, research and educational activity. As a result, an increase in the Court's jurisprudence would be expected on higher education issues, either through the lens of education-tailored primary norms or through those regarding the internal market when interacting with the newly drafted parameters.

This has not been observed in any remarkable proportion. Article 13's academic freedom has never been activated, and Article 14 has been inconclusively quoted only a couple of times (Case C-523/12 §19; Case T-52/15 §107). A mine of information such as Articles 165 and 166 TFEU has largely remained a terrain cultivated by statutes commentators rather than by barristers. Instead, the Court's judgements touching higher education profiles have remained anchored to the traditional paradigms associated with such segment of law. Remarkably, the prohibition of discrimination based on nationality features in the first place. The attitude or resistance of the norms specific to higher education to be used as basis for judicial review and, more widely, factors promoting or hampering judicial proceedings in higher education are points as relevant as still unattended. In this light, the viability and willingness of the Court to expand the basis for its judgements, and to use new parameters as autonomous references for decisions, is a hypothesis deserving specific attention in future legal analyses.

Notes

1. Article 19, paragraph 1, sub-paragraph 1, TEU.
2. Villa Vauban, an elegant neoclassical mansion just outside Luxembourg's city centre, was the first seat of the Court, from 1952 to 1959.

3. The concept of ‘supranational’ opposed to ‘intergovernmental’ can be spotted, for instance, in Alec Stone Sweet (2011). The European Court of Justice. In Paul Craig and Gráinne de Búrca (Eds.), *The Evolution of EU Law* (pp. 121, 134). Oxford: Oxford University Press.
4. See, just to cite a few, Takis Tridimas (1996); J. Bengoetxea, N. MacCormick and L.M. Soriano (2001); Jürgen Schwarze (2013).
5. Compare the use of the expression ‘majoritarian activism’ standing for the systematic approach of the Court to label as a quantitative restriction on imports any measure which is not shared by Member States, by broad lines and at large, under the Cassis de Dijon case law. The empirical analysis and formulation of this conclusion is carried out by M.P. Maduro (1998, Chapter 3).
6. Im Zweifel für Europa’ *Frankfurter Rundschau* (Frankfurt, 7 December 1992). Commented in G.F. Mancini (2000, pp. 31, 44).
7. A somehow sharp and effective overview of the Court’s activist case law from the first landmark decisions to the first decade of the new millennium can be found in De Waele (2010, pp. 4–9).
8. De Waele refers to three different ‘rounds of debate’ around the function performed by the Court of Justice and the related accusation of ‘judicial activism’ and of ‘running wild’. The first started in 1986 with the study from Rasmussen (1986), the second in 1995 and the third in the following year, where all the academic commentators engaged in responding to the critiques raised by the others. De Waele seems to aspire to inaugurate the fourth one. See De Waele (2010, p. 3) and footnotes 1 and 2 therein. The notorious claim about the Court ‘running wild’ comes from Mauro Cappelletti (1987, p. 4).
9. In the recent press, see Kate Day (2016) and James Crisp (2016).
10. On the impact of different and contrasting factors in the procedure for the appointment of the CJEU judges and advocates general, including the pivotal role retained by national governments in the selection process, see Jean-Marc Sauvé (2013, p. 99), and the bibliography therein.
11. The attitude of a supreme court to conform to the limits of its mandate, especially when bounded by a limited accountability to other actors of the institutional framework, is discussed both in Arnall (2006, pp. 27–32) and Stone Sweet (2011, p. 122).
12. Article 13, paragraph 1, TEU reads: ‘The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the

Member States, and ensure the consistency, effectiveness and continuity of its policies and actions. The Union's institutions shall be: [...] the Court of Justice of the European Union [...]'.

But compare paragraph 2: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.

13. Paul Craig and Gráinne de Búrca (2011, Chapter 9, paragraph 3); Mattias Kumm (2005). Episodes of conflict between the CJEU and national tribunals did not involve national constitutional courts only, but also judges at lower levels: Case 112/83 *Société des produits de maïs SA v Administration des douanes et droits indirects*.
14. Article 3 paragraph 6, Article 4 paragraph 1 and Article 5 paragraph 2 TEU; Declaration 18 in relation to the delimitation of competences; Article 51 paragraph 2 Charter of Fundamental Rights; declaration 1 concerning the Charter of Fundamental Rights of the European Union.
15. Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, concerning primacy.
16. This idea is well represented, for instance, by the self-restraint observed in the Court's activity after the de facto loosening of the Luxembourg compromise that had so heavily impeded a majoritarian competition within the Council, and even more after the Single European Act; see Arnulf (2006, pp. 644–645).
17. Compare Shapiro (1999, pp. 321, 325), pointing out that judicial policy-making 'is successful in part because it is disguised, protected, and furthered by a powerful, quasi-autonomous lawyer community with strong ideological and material interests in protecting the judiciary'.
18. Compare Jan De Groof (2012a, pp. 25, 27), Jan De Groof (2009, pp. 79–80).
19. Going back to the nineteenth century and a large part of the twentieth, Kaplin and Lee (2013b, p. 6) observe: 'Those in the higher education world, moreover, tended to think of themselves as removed from and perhaps above the world of law and lawyers' and again, 'Higher education (particularly private education) was often viewed as a unique enterprise that could regulate itself thorough reliance on tradition and consensual agreement'.

20. Compare, again: ‘Not only was the academic environment perceived as private; it was also thought to be delicate and complex. An outsider would, almost by definition, be ignorant of the special arrangements and sensitivities underpinning this environment’. William A. Kaplin and Barbara A. Lee (2013a, vol. 1, section 1.2).
21. Interestingly, scholars have long underlined how an overabundant and confused normative production is one of the factors, although not the only one, contributing to the downward trend in the legislature’s reputation, also in the educational sector. See: ‘In our time we find a strong distrust of legislators and in the law-making process. In a certain way we are familiar with some inconvenient consequences of legislative action: too many laws and lack of coordination, sometimes the result of political consensus, but not possible to implement in daily practice. That justifies proposals for de-codification, de-legalization and de-regulation’. António Pedro Barbas Homem (2000, pp. 155, 161).
22. Failure to use appropriate interpretive tools is referred to by Kmiec as a cause for judicial activism (Kmiec, 2004, p. 1473). Specifically, on the legal reasoning and interpretation by the CJEU, see Bengoetxea et al. (2001) and Arnull (2006, Chapter 16).
23. This eventuality was earlier discussed at p. 84.
24. Compare: ‘judicialization is spillover: it proceeds only to the extent that specific feedback loops—connecting judicial law-making to policy processes and back again—institutionalize as stable practises’ (Stone Sweet, 2011, p. 145). The analysis proposed by Stone Sweet, however, does not focus specifically on cases of attribution of powers on purpose from the Member States or common institutions to the CJEU.
25. Compare Roland Winkler (2005, pp. 60, 61–63).
26. Article 265 TFEU.
27. Case *Tarantino and others v. Italy*, no. 25851/09, 29284/09 and 64090/09, ECHR, 2013, partly dissenting opinion of judge Pinto de Albuquerque.
28. Article 165, paragraph 1 TFEU.
29. Articles 165 and 166, paragraph 1, TFEU.
30. Articles 165 and 166, paragraph 1, TFEU.
31. Articles 165 and 166, paragraph 2, TFEU. See also Article 5, paragraph 2, TEU.
32. Article 165 TFEU; Article 5, paragraph 3, sub-paragraph 3 TEU.
33. Article 5, paragraph 3, sub-paragraph 3 TEU.

34. Article 4, paragraph 2 TEU.
35. Article 2, paragraph 5, sub-paragraph 2, 165 paragraph 4 and 166 paragraph 4 TFEU.
36. Article 2, paragraph 5, sub-paragraph 1 TFEU.
37. Article 6 TEU.
38. Article 5, paragraph 3, sub-paragraph 1 TEU.
39. Article 5, paragraph 3, sub-paragraph 2 TEU.
40. See, for instance, Jan De Groof (2016, p. 117), paragraphs 5 and 7.
41. Articles 40 and 53, protocol 3 annexed to the Lisbon treaty.
42. See, for instance, the discussion in Schwarze (2013, p. 273).

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Differentiated Integration in the Field of Higher Education: Between Theory and Practices of (Non)Integration

Amélia Veiga and António Magalhães

Introduction

The creation and consolidation of the European Higher Education Area (EHEA) has been a privileged policy driver for European integration in higher education. Research on the EHEA and on the Bologna Process has shown that European integration has been developing at different rates and paces (e.g. Heinze & Knill, 2008; Veiga, 2012; Veiga, Amaral, & Mendes, 2008; Witte, 2006). European integration is a process led

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by the European Union that aims to combine into an integral whole the industrial, economic, social, political and cultural dimensions of the member states. In spite of its common use, the meaning of integration is far from consensual and it is continually redefined (e.g. the Europe 2020 strategy for growth and jobs). In higher education, this redefinition is being shaped by setting up of targets related to the principles of competition, efficiency, competence-based education, developing ties—regional, national and transnational—with the community, institutional development of economic resources and responsiveness to industry-based requirements for skills, research and retraining.

Differentiation is at the core of integration, and the literature on European studies refers to differentiated integration (DI) as

the process whereby European states, or sub-state units, opt to move at different speeds and/or towards different objectives with regard to common policies. It involves adopting different formal and informal arrangements (hard and soft), inside or outside the EU treaty framework (membership and accession differentiation, alongside various differentiated forms of economic, trade and security relations). In this way relevant actors come to assume different rights and obligations and to share a distinct attitude towards the integration process – what it is appropriate to do together, and who belongs with whom. (Dyson & Sepos, 2010b, p. 4)

DI developed at the national and sub-national levels involving time scaling, the concern over bringing together heterogeneity of member states, the assumptions on differentiating rights and obligations and on the designing models of flexibility. DI as a theory aims to understand both the decisions that are made by the states under the unanimity rule, and the role of ‘state-level factors’ and ‘sub-systemic factors’ (Schimmelfennig, Leuffen, & Rittberger, 2011) in managing flexibility.

The theory of DI has been used to analyse the Bologna Process as a vehicle of European integration in the field of higher education (Furlong, 2010; Veiga, Magalhães, & Amaral, 2015). Bologna is a major case of flexibility as variations and disparities between the member states, higher education institutions and disciplinary areas are at the core of the political goal to further European integration. The categorisation of different forms or models of flexible integration, as proposed by the theory of DI

(Holzinger & Schimmelfennig, 2012), was explored in a previous study that brought to the fore inconsistencies between the EHEA as an integration project and Bologna as a set of differentiated integration practices developed at the national and institutional levels (Veiga et al., 2015).

DI is construed, legitimised and justified by policy processes working under a pragmatic form. Practices of DI are policies embedded in a range of discursive processes and instruments materialised in the social contexts (Wodak & Fairclough, 2010). DI discursive practices comprehend practices and discourses as the latter actively and dynamically construct, in a continuous interaction among the narrative, the audiences and the contexts they share (Wagenaar, 2011), i.e. practices are discourses and vice versa. The discursive construction of higher education policies is a key to understanding the workings of the political processes and their (in)coherences and contradictions.

This chapter assumes the theory of DI as a conceptual narrative to understand practices of DI. Conceptual narratives are used by social scientists and researchers to approach their subjects (Somers & Gibson, 1996) (e.g. systems, institutions, organisations, actors and so on). Narratives are construed on the basis of discursive ‘constellations of relationships (connected parts) embedded in time and space’ (Somers & Gibson, 1996, p. 59) and reflect how discourses are appropriated by actors or institutions to make sense of social action and the decisions actors make in social contexts.

To analyse the potential of the theory of DI to explain integration in higher education, we start by identifying the features of this theory as a conceptual narrative. In what follows, we analyse DI as a discursive practice using the case of Bologna. Drawing on a meta-analysis of published research about the Bologna Process, we argue that the explanatory potential of the theory of DI is subsumed to its legitimising function in building the EHEA.

Differentiated Integration as a Conceptual Narrative

DI emerged in the political science and European studies literature to pinpoint a strategy of integration aiming to reconcile heterogeneity of member states (Stubb, 1996). It refers to ‘the possibility for different

member states to have different rights and obligations with respect to certain common policy areas' (Kölliker, 2001, p. 125) and it is expected to be a means to achieve more integration in the long run (Kölliker, 2001). As a political strategy, it was translated into discursive practices, i.e. policies and instruments, pushing forward, legitimising and justifying the political processes of European integration. DI is also a theoretical endeavour that emerged as a heuristic construct to understand European integration policy processes (e.g. European Monetary Union, Schengen agreement).

Flexible integration mechanisms (flexibility or DI) are often used interchangeably. Leo Tindemans used economic and financial contexts to explain variation in the integration processes and the need to assume flexibility in EU policy decision-making:

It is impossible at present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time. The divergence of their economic and financial situations is such that, were we to insist on this progress would be impossible and Europe would continue to crumble away. (Tindemans, 1976, p. 20)

Variations and disparities between the member states are often associated with the diversity of interests, the growing complexity of decision-making and diverging expectations with regard to integration (Emmanouilidis, 2007). Literature also refers to cultural, institutional and socio-economic factors as relevant for cross-national policy convergence (Heinze & Knill, 2008).

The theory of DI, as a conceptual narrative, convenes elements such as 'time', 'space' and 'matter', often referred to as 'variables' in the literature, to give substance to the diverse strategies of flexibility (e.g. multi-speed: time, variable geometry: space, *À la Carte*: matter). In line with Alexander Stubb, 'the result is that flexibility has taken on its own language, which is partly theoretical and partly practical' (Stubb, 2002, p. 27). As argued by Goetz referring to 'time':

If we try to think systematically about the nature of the linkages between time and differentiated integration, at least two facets deserve exploration: the temporal properties of differentiated integration; and the analytical status of time in explanatory accounts of differentiated integration. (Goetz, 2010, p. 67)

‘Time’ refers to the idea that each country is bound by agreement to the common final objective of integration (Tindemans, 1976) and it is used to manage the integration processes. In the theory of DI, it is a key to identify who is responsible for setting a time scale for countries to reform. This responsibility extends beyond the nation-state as judgments based on the supranational and cross-national comparison of performance act as a lever for reform. Those countries most advanced in reforming their own systems were also most advanced in the benchmarking process. This form of comparison can be seen as a substantial move both towards forging the concept of DI and, more to the point, a fundamental change in the techniques, points of application and the agencies in charge of setting up indicators of institutional performance, administering and circulating them. The time element of DI emphasises the operationalisation of national differentiation at the cross-national level.

In the theory of DI, ‘space’ allows understanding permanent or irreversible separation between hard-core and lesser-developed integrative achievements of EU countries with regard to specific policies (e.g. Schengen Agreements). In turn, ‘matter’, allows for understanding strategies whereby ‘Member States are able to pick-and-choose, in which policy area they would like to participate, while at the same time holding only to a minimum number of common objectives’ (Stubb, 1996, p. 285), as in the cases of the UK and Denmark with regard to the European Monetary Union.

In the literature on European studies, an excess of terminology (e.g. two-speed, multi-speed, step-by-step, strengthened solidarity, graduated integration, hard core, variable integration, concentric circles, two-tier, multi-tier, multi-track, two-track, ‘swing wing’, circles of solidarity, variable speed, imperial circles, pick-and-choose, overlapping circles,

structural variability, opt-in, opt-out, opt-up, opt-down, bits-and-pieces, ad libitum integration, multilevel, two-level, restrained differentiation, flying geese, magnetic fields, hub-and-spoke and many circles) highlights the conceptual contested nature and underpins the debates on DI. DI is, in this sense, a floating signifier ‘replete with terminological and semantic confusion (Edwards and Phillipart, 1997, p. 1)’ (Dyson & Sepos, 2010b). A floating signifier is a sign that ‘different discourses struggle to invest with meaning in their particular way’ (Phillips & Jørgensen, 2002, p. 28), contingent to contexts (Laclau, Mouffe, & Žižek, 1999). The relationship between DI as a conceptual narrative and DI as a discursive practice triggers a mutual legitimating process between descriptive and explanatory perspectives. While reinforcing the explanatory potential, practices of DI reflect a tactical ‘use of differentiation as a tool in the pursuit of state interests in securing their power and influence within Europe’ (Dyson & Sepos, 2010b, p. 12).

Katharina Holzinger and Frank Schimmelfenning (2012, p. 296) further developed the elements of ‘time’, ‘space’ and ‘matter’ and proposed 10 models of DI (see Table 1) based on polar dimensions such as:

Table 1 Models of differentiated integration

Dimensions										
1	Temporary				Permanent					
2	Territorial								Functional	
3	Differentiation at national-level						Multi-level differentiation			
4	Only inside EU-treaties				Also outside EU-treaties			Only inside EU treaties	Also outside EU-treaties	
5	EU-decision making					Club-decision making (intergovernmental)				
6	Only member states			Also non-member states	Only member states	Also non-member states		Only member states	Also jurisdictions outside EU	
	1	2	3	4	5	6	7	8	9	10
Models	Multi-speed	Multiple standards	Avantgarde Europe	Core Europe, Concentric circles	Flexible integration	Variable geometry	Europe à la carte	Optimal level of jurisdiction	Flexible co-operation	FOCJ
Examples	Many in secondary law	In secondary law, e.g. environmental policy	EMU, basic rights charta	EMU; EEA; associated states	Enhanced co-operation, Bologna (at the start)	Schengen	Bologna	Competence allocation in Lisbon Treaty	EUREGIOS	No example
References	Grabitz (1984); Stubb (1996, 2002)	Scharpf (1999)	Club von Florenz (1996)	Schäuble and Lamers (1984)	Centre for Economic Policy Research (1995)	Stubb (1996)	Dahrendorf (1979)	Fischer and Schley (1999)	Holzinger 2001	Frey and Eichenberger (1996, 1999?)

Source Holzinger and Schimmelfenning (2012, p. 298)

1. 'Permanent' versus 'temporary differentiation' underlining that the pursuit of European goals by member states can have different rates and paces;
2. 'Territorial' versus 'purely functional integration' bringing in the territorial range of authority and control;
3. 'Differentiation across member states' versus 'multi-level differentiation' underlining the role of institutions placed at different levels;
4. 'Differentiation takes place within the EU treaties' versus 'outside the EU treaties' bringing in differentiation in the enactment of European goals outside EU borders;
5. 'Decision-making at the EU level' versus 'at regime level' bringing in the issue of legitimacy and the workings of non-hierarchical systems;
6. Differentiation 'only for member states' versus 'also for non-member' underlining the geographical blurring of borders.

It is interesting to note that nine out of the 10 models assume 'permanent differentiation', while 'temporary differentiation' is covered by only one model, which might reveal the importance of the discursive struggle to fix the meaning of DI as an explanation and legitimization of the integration project. In fact, 'permanent differentiation' puts at risk integration in the long run. In a previous work (Veiga et al., 2015), we argued that these models hardly cover the complexity of the implementation processes of integration in higher education as the EHEA cannot be explained by only one or two models of DI as proposed by Holzinger and Schimmelfennig (2012). Actually, the authors built the grid with polarised dimensions that do not conceal all the features of policy enactment of the Bologna Process. Bologna was pointed to as an example of *Flexible Integration* (at the start) and as *Europe à la carte* model (Holzinger & Schimmelfennig, 2012). In these models, Bologna is featured as 'permanent differentiation' (see Table 1). However, since the deadline of 2010 was established to set up the EHEA, we might question Bologna as 'permanent differentiation'. Actually, the emphasis on time landmarks induces a contradiction between 'permanent differentiation' and 'temporary differentiation' that grounds the expectation for higher levels of integration in the long run.

As argued by Paul Furlong:

Differentiated integration is built into Bologna. The process now is multi-speed, and variable in format. Participants have agreed criteria in HE teaching standards, but they progress at different paces and in different ways depending on a variety of factors. What will be important in future developments in Bologna is how this differentiation relates to the aim the ‘Sorbonne Four’ shared at the outset, to use the approach to promote the emergence of a small number of world-class universities. It is not clear now to what extent Bologna can still help towards this aim. The differentiated integration achieved so far is not what was envisaged in 1999. (Furlong, 2010, p. 306)

Bologna as a policy process is featured simultaneously by ‘differentiation at the nation-state-level’ and ‘multi-level differentiation’, by ‘club decision-making (intergovernmental)’ and ‘EU decision-making’, suggesting that dichotomies should be replaced by a continuum between the polar dimensions (Veiga et al., 2015). This underlines the contested nature of the concept of integration and the struggle to fix its meaning in higher education policy. As argued, DI as a conceptual narrative brings together ideas, concepts and perspectives whose internal consistency must be questioned.

The EHEA as a political endeavour is the ground on which different discourses invest in feeding and fixing their meaning. The fixation of the meaning of DI can be found in the tension between the integration discourse and the DI discursive practices. These practices might, or might not, undermine the coherence of the integration project. This is why it is important to look more thoroughly at the concept of flexibility and its translation in the theory of DI as *Europe à la carte*, *Multi-speed*, *Variable Geometry*, *Flexible Cooperation* to refer only these models.

DI as a conceptual narrative aims to explain the processes of differentiated integration and at legitimising these very processes. On the one hand, the theory of DI convenes ‘time’, ‘space’ and ‘matter’ to explain the political management of non-integration. On the other hand, the theory of DI is used to legitimise the process itself. Whether its

explanatory potential is subsumed to its legitimising function is what will be discussed in the next sections.

Differentiated Integration as a Discursive Practice: The Bologna Case

The development of a EU system of governance ‘is the result of a process guided by the logic and practice of differentiated integration’ (De Neve, 2007, p. 504) also visible in the political coordination of higher education. In spite of the fact that European higher education has been assumed as an area of national remit, in the last 15 years, the EU concern with the political coordination of the sector has increased. This brought to the fore a multi-layered system of decision-making responsible for enacting and taking stock of the processes of integration and, simultaneously, persuading relevant policy actors at the national and institutional levels to coordinate the fulfilment of European policy goals.

European higher education policies have been coordinated on the basis of soft law, namely the Open Method of Coordination (OMC). The Bologna policy framework, while prescribing the degree structure as a recommended configuration, acts and responds to the beliefs and expectations that actors have at the different levels. Bologna illustrates what has been designated as *framing* integration as it

neither prescribes concrete institutional requirements nor modifies the institutional context for strategic interaction, but affects domestic arrangements even more indirectly, namely by altering the beliefs and expectations of domestic actors. (Knill & Lehmkhul, 1999, p. 2)

This *framing* integration may put at risk the establishment of a more complete and far-reaching Europe, as indeed Bologna has ‘resulted in 47 Bolognas with common traits’ (Rudder, 2010, p. 18). This process of establishing the EHEA is a case of a practice of DI as Bologna policies and instruments are discursively construed in the tension between further integration and non-integration.

The Bologna Process, although voluntarily enacted, has been supported at national and institutional levels and has been promoting discretionary decisions and practices nuancing integration based on flexibility. Actually, national agendas reflect, more or less directly, cultural, institutional and socio-economic factors that might promote integration or differentiation depending on the ‘cognition and perceptions concerning problems and their solution’ (Heinze & Knill, 2008, p. 495). From the perspective of integration, the specificities of national higher education systems emerge as ‘an illegitimate brake upon the drive by Europe towards a multinational system of higher education’ (Neave & Amaral, 2012, p. 15). These national brakes correspond to the enactment of national discretionary decisions and practices feeding differentiated integration. Therefore, critical attention must be paid to the fact that the theory of DI has pointed out Bologna as illustration of the model of *Flexible Integration* (at the start) and, later, of the model of *Europe à la carte* on the assumption that differentiation is a long-lasting feature.

Promoting Bologna’s principles is foremost a primary responsibility of national institutions (e.g. governments) as they set up the legal framework. However, higher education institutions transpose and interpret the Bologna precepts according to their own priorities. As Johan Olsen (2001) pointed out:

A major historic development in Europe is the emergence of differentiated and partly autonomous institutional spheres with distinct logics of action, meanings and resources. Each sphere legitimizes different participants, issues, and ways of making, implementing and justifying decisions. (Olsen, 2001, p. 340)

Actually, at the institutional level, policy actors reconstruct policies, as they adjust the policy framework to their own agendas (Veiga & Neave, 2013).

DI discursive practices at the national and institutional levels allow legitimising both integration and differentiation as illustrated by the Bologna case. However, as the theory of DI is not explicitly referred to in the scholarship on the EHEA, it is necessary to look at other

conceptual approaches to identify the role of ‘time’, ‘space’ and ‘matter’ in explaining and legitimising integration in higher education research.

Conceptual Narratives Between Theory and Practices

To establish the *corpus* of the meta-analysis, we built a database of the scientific production indexed in Web of Science, using ‘Bologna process’ as a keyword. We collected 1,666 works and we have selected 25 articles on the basis of two criteria: number of publications in the journal and its scope. The journals *Revista de Educación*, *International Journal of Engineering Education* and *European Journal of Education* published 34, 26 and 25 articles, respectively. On the basis of the scope of the journals, we have selected the *European Journal of Education* as it publishes the results of European research projects and explores the key topics of concern to policy makers and international organisations in Europe and further afield. As the *Revista de Educación* and the *International Journal of Engineering Education* are either very much focused on the Spanish higher system or on a specific disciplinary field, we assumed that *European Journal of Education* would be more adequate for the purpose of this chapter. However, it must be underlined that the Spanish case can be later on used as a diagnosis case for the national/institutional implementation of the EHEA and engineering education as a case of teaching and learning reforms promoted by Bologna.

In this chapter, political coordination of European policies convenes ‘time’, ‘space’ and ‘matter’ as elements giving substance to the workings of the EHEA. In the analysis, these elements are used as analytical categories to examine the research on the EHEA. Between 1999 and 2016 (April), more than 1000 indexed papers were published on the topic of the EHEA using a wide range of theoretical and methodological frameworks. In this chapter, we undertook a meta-analysis of the articles published in the *European Journal of Education* (see Appendix 1) to identify how the conceptual narratives on the

establishment of the EHEA mobilize their discursive elements to deal with the issues brought about by ‘time’, ‘space’ and ‘matter’. In other words, in the thematic meta-analysis, the tension between the major goal of convergence and the institutionalisation of ‘flexibility’ is inherent to the development of EHEA.

‘Time’, ‘Space’ and ‘Matter’ in the Analysis of the EHEA

‘Time’ and Flexible Strategies Towards Integration

In the surveyed articles, ‘time’ appears both as an instrument to manage the integration process of HE and as an explanation for the (non) integration of higher education. Actually, the temporal properties of DI, using Goetz’s argument, focuses on ‘Sequencing—notably the order in which member states assume political commitments and integrate into the EU-wide institutional arrangements’ (Goetz, 2010, p. 67)—being of central importance for the progress of Bologna in identifying which states advanced first and which were the laggards. The initiative taken by a core of member states (Germany, Italy, France and the United Kingdom), in 1998, to build the EHEA based on comparable degrees, aiming to promote student mobility and employability and making Europe more attractive for non-European students, was expected to be followed by other countries as a principle:

we argue that it comes as no surprise that all the countries representing the ‘leading group’ in the development of national qualifications frameworks are member states of the EU. They represent powerful systems that have been central in creating images of the new architecture of higher education. It appears unthinkable that Georgia, Turkey, Estonia and Russia could have been among the ‘founding fathers’. This means that the different nation-states may be embedded in the same cultural scripts, even though how they act and the space of action offered to act upon are not the same. This represents certain power relations that set the norms for others as well as for oneself. (Karseth & Solbrekke, 2010, p. 573)

Hence, the temporal properties of DI in the context of Bologna underline the political 'time' of the integration process in higher education marked by countries' power relationships. These relations reflect on the speeds of policy implementation as there is the risk of losing political momentum by the laggards:

there was increasing awareness of the gap between countries in the North-West of the continent which implemented many higher education reforms and other countries mostly in the East of the EHEA which struggled to reform their systems. (Lazetic, 2010, p. 557)

Non-member states look at 'time' as a strategic approach for the project of their integration in EHEA as they (e.g. Turkey) 'do not want to risk being left out' (Yagci, 2010, p. 589).

Furthermore, timing and speed are important when making use of the OMC. The impact of the OMC methodology in the stocktaking process, used to measure the progress of the implementation of the Bologna Process, also raised the question of further integration in higher education policies opening the way to accept a 'soft' notion of convergence even if at the expense of some of the strategic objectives of the Bologna declaration, such as the establishment of the EHEA (Veiga & Amaral, 2009). Actually, as argued by Pauline Ravinet:

These tools and activities [OMC] are not officially binding, but they are also far from neutral. They allow for comparison, and create effects of socialisation, imitation, and shame – which can be powerful means of coercion. These mechanisms are even more effective because they are made legitimate by the myth of the Bologna Process as a mode of voluntary, extra-EU intergovernmental cooperation, in which obligations are elastic, and elaborated collectively, not just by the four major European powers. (Ravinet, 2008, p. 365)

Timing and speed are the key in the implementation process as, on the one hand, they allow locating countries in the progress of Bologna and, on the other hand, provide instruments for the pursuit in their integration process, as:

Implementation according to development in other European countries was certainly relevant for the progress of policy as discourse, which itself stemmed from the forging of policy instruments based on normative and cultural-cognitive dimensions. (Veiga, 2012, p. 383)

As argued, ‘time’ also assumed an explanatory account of DI. In the surveyed articles, the political issues associated with the tension between the assumption of ‘flexibility’ *versus* the goal of unity, are explained using the concept of cooperation to justify both flexibility and further integration. In fact, ‘flexible cooperation based on voluntary participation of 1999 slowly evolved into a system of monitored coordination’ (Ravinet, 2008, p. 365).

Additionally, the analyses of DI political practices underlined the institutionalisation of flexibility endangering or challenging the achievements in building the EHEA. Karseth and colleagues underline that:

There is an embedded contradiction in the rhetoric of the policy documents: diversity on the one hand and a ‘common face’ and compatibility on the other. (Karseth & Solbrekke, 2010, p. 571)

And Gornitzka reinforces that:

to understand the developments of such governance sites we should take into consideration that periods of transition and attempts of coordination can produce inter-institutional imbalances and invasions, but also contestation and defence against intrusion (...) (Gornitzka, 2010, p. 544)

As recognised by Goetz (2010), DI must consider ‘time’ to better understand it as a political strategy for deepening and enlarging the EU. The analysis showed that one needs to consider a spatial differentiation in time as, on the one hand, national contexts matter in the pace of reforms. For instance, referring to Russia, Telegina and Schwengel identified:

a range of systemic factors influences the speed of internationalisation. These include: substantial differences in the degree systems; the heterogeneous character of the educational system; the lack of a coherent strategy for human resources development, supported by adequate budgets; the misbalance between the graduation degree structure and the demands of the national and global economies. (Telegina & Schwengel, 2012, p. 46)

In turn, different timings in developing the Bologna Process are justified on the basis of national and political contexts. Within national systems, there are specific institutional arrangements that influence the speed of the reforms:

Turkey has almost doubled the number of its universities. 68 (almost half) were established in the last five years. This created two speeds of implementation of the reforms. The new universities developed according to the Bologna reforms and are able to avoid many overlaps that older universities are experiencing. However, many lack human and financial resources and physical infrastructure. (Yagci, 2010, pp. 589–590)

‘Space’ and Flexible Strategies Towards Integration

According to Keating (2010), the spatial dimensions relevant to understand the social, economic and political processes of DI are useful taking into consideration the case of Bologna and the building of the EHEA. ‘Space’ takes into account geostrategic issues (e.g. the enlargement of the EU), economic developments (e.g. the single market and the mobility of labour and capital), national/cultural factors (e.g. specificities and domestic agendas), and political–institutional characteristics (e.g. arrangements focusing on the emergence of institutions at new spatial levels, above and below the state (Dale, 2007)). These dimensions of ‘space’ open up new spaces ‘giving rise to a complexity that calls for a differentiated response’ (Keating, 2010, p. 56).

In terms of geostrategy, ‘space’ is pointed out by West and Frumina (2012) as representing moves from the Russian system towards European standards. As a key element of the EHEA, the economic

dimension of 'space' is underlined by Schmidt and Gibbs (2009) as an imagined space. Actually, the common European framework for work-based learning is legitimising the links between EHEA and the economic sustainability of the EU:

An expanding network of interactive spirals is generated as university, industry, and government promote economic development and academic research. An entrepreneurial university created from this constellation has missions which encompass and transcend any previous academic missions of education and research, and which increasingly add economic development on top of reproduction of the knowledge base and systematic production of scientific novelty. (Schmidt & Gibbs, 2009, p. 403)

The national and cultural dimensions of 'space' appeared as key in the articles we analysed (Ballarino & Perotti, 2012; Giret, 2011; Sin & Saunders, 2014). On the one hand, they refer to national appropriations and recontextualisation of the EHEA and of Bologna; on the other hand, they assumed the national borders as a taken-for-granted element of DI.

The reform processes of the degree structure, lifelong learning and the political governance of the EHEA (e.g. institutional autonomy and quality) are envisaged from within, i.e. from the configuration of national contexts. For instance, the specificity of the Spanish degree system is underlined (Mateo, Escofet, Martinez-Olmo, Ventura, & Vlachopoulos, 2012) and the implementation of European Standards and Guidelines (ESG) assumed to 'recognise the primacy of national systems of higher education and the importance of institutional and agency autonomy within those systems' (Stensaker, Harvey, Huisman, Langfeldt, & Westerheijden, 2010, p. 579).

Furthermore, the centrality of national/cultural 'space' is visible in the comparisons made between states:

We compare the vocational and higher education systems in France and Germany as they implement endogenous reforms and respond to the Bologna and Copenhagen initiatives. The effects of European policies seem to go deeper in Germany than in France, yet it is too early to

measure all the (un)intended consequences of on-going internationalisation and Europeanisation processes. (Powell, Graf, Bernhard, Coutrot, & Kieffer, 2012, p. 405)

As for the role of political and institutional dimensions of ‘space’ in DI, the articles under analysis used this dimension to explain flexibility as an instrument in practice:

In order to accommodate a wide diversity of higher education traditions and cultures and overcome the fear of standardisation, the quality culture offers flexibility within universities, in a particular context either at the institutional, faculty, subject or programme level. (Gvaramadze, 2008, p. 454)

Moreover, diversity is assumed as a ‘principle’ guiding the development of practices within the EHEA. In the case of quality, Gvaramadze (2008) underlines that:

diversity of higher education is the main principle in implementing the Quality Culture project—Diversity of higher education in this case implies diversity of institutional profiles, missions as well as legal regulatory frameworks. (Gvaramadze, 2008, p. 445)

This concern with diversity is pointed out as a cornerstone for the development of political coordination within the EHEA. Flexibility is to be counterbalanced by more structured governance, aimed at further integration (Ravinet, 2008). At the same time, flexibility is convened to explain the emergence of an (imagined) ‘space’ to manage DI as ‘The Bologna Process provided a fine new platform because it was intergovernmental and not subject to the constraining processes of the EU’ (Corbett, 2011, p. 49).

This (imagined) ‘space’ is built as constituted of new and rescaled institutions and actors triggering the reconfiguration of (new) locations for further integration. For instance, European higher education institutions are

positioned in a zone of tension between different understandings of their role: between their cultural and economic role and between a utilitarian and non-utilitarian idea of the university and between a national, regional or global role. (Gornitzka, 2010, p. 535)

This relocation process impinges on the national and institutional contexts as the articles surveyed underlined. The perceptions of the actors about Bologna impact on their work and on their perceptions on the policy process (Sin, 2012; Veiga, 2012). The role and the status of academics, students and staff are relevant for the consistency of the EHEA. For instance,

the role of university lecturers is key to the success of European convergence. It requires new habits and, above all, a change in the perception of academics and their role. (...) The teacher's job does not only consist in the transmission of knowledge, but is also aimed at promoting learning skills, offering guidance and acting as a tutor. (Salas Velasco, Sanchez Martinez, & Rodriguez Ferrero, 2012, pp. 463–475)

‘Matter’ and Flexible Strategies Towards Integration

According to Kölliker, ‘matter’ refers to issues of policy implementation, issue areas, and policies framing DI (Kölliker, 2010). These issues encompass goals, instruments and drive justifications for the integration processes. In the articles surveyed ‘matter’ is reflected in the identification of issues that Bologna reforms brought to the front stage: pedagogical reform, lifelong learning and vocational education and training, internationalisation, evaluation, quality and the strategic use of the EHEA by non-EU countries.

The pedagogical reform appears as an issue at least in four out of the 25 articles analysed. On the one hand, the changes in the teaching and learning processes are pointed out as a mean to promote further integration, i.e. to understand ‘the extent to which the perceptions [at the institutional level] are contributing to achieving the policy goal associated with Bologna’ (Veiga, 2012, p. 379).

On the other hand, the articles focus on the monitoring processes of convergence:

The evaluation of policy implementation dominated the context of practice of Bologna. The exercises (e.g., stocktaking) used assumptions of linearity of policy implementation giving primacy to the national level, while from the perspective of those surveyed interaction between institutions at different levels of analysis revealed the institutional level. In contrast, pedagogical considerations dominated policy interpretation in the surveyed universities, thus reflecting the possibility of having distinctive policy cycles of Bologna at different levels of analysis. (Veiga, 2012, p. 387)

Furthermore, lifelong learning and vocational education and training appear as a policy driver of Bologna underlining the economic relevance of higher education:

For most EU Member States, the WBL approach to learning and its implications for the relationship between academic learning and learning in the workplace present a tremendous challenge to the traditional concept of knowledge acquisition through classroom and textbook learning, which still prevails in higher education institutions. Much of the resistance to the introduction of work-based learning programmes is due to academia's reluctance to accept knowledge acquired outside the university, a reluctance which may be motivated by its claim for exclusive knowledge transmission. (Schmidt & Gibbs, 2009, p. 408)

Nemeth (2010) also recognises the impact of this policy driver in the national context:

In Hungary, higher education institutions have recognised a role for lifelong adult learning. Yet it is used to increase the number of students and change structure through the Bologna reform. Another requirement of lifelong learning is to work closely with the community and with economic organisations and institutions. (Nemeth, 2010, p. 454)

Flexibility drives the national reforms and promotes DI across countries and disciplines, e.g., economics (Salas Velasco et al., 2012).

The Process was thus interpreted flexibly and used as a reform lever in the overhaul of the Portuguese higher education system. Not least, Bologna was

creatively invested with a pedagogical dimension at a time when European discourses still had a weak pedagogical focus. (Sin & Saunders, 2014, p. 539)

While looking at further integration, the articles also enlarge the scope of pedagogical reforms to other political issues associated, for instance, with the configuration of the degree structure and employability:

The recent Finnish policy discussions do consider the possibility of limiting students' access to master's level studies after completion of the bachelor's degree. Whether or not this course of action will be taken in the future and the effect it will have on the graduate employment remains to be seen. (Lindberg, 2014, p. 259)

One of the objectives of the Bologna Process was to boost the power and the attractiveness of the EHEA, an objective closely linked to policies for the internationalisation of higher education. This policy area is driven by economic rationales, as attractiveness and competitiveness of European higher education systems were acknowledged within the Bologna Process. Simultaneously, it reinforced the functional imperatives related to the idea of competition between higher education institutions. In the articles surveyed, internationalisation appeared both as a political goal and as a strategic instrument for nations, higher education systems and institutions:

The effects of European policies seem to go deeper in Germany than in France, yet it is too early to measure all the (un)intended consequences of on-going internationalisation and Europeanisation processes. (Powell et al., 2012, p. 406)

Internationalisation is also summoned as a strategic instrument for non-EU countries:

As in Europe, the Bologna Process in Russia was driven by at least three relatively independent agendas: the cultural, political and economic. These three major impulses have generated specific reactions in Russian society, illustrated by the directions of internationalisation: top-down and bottom-up. (Telegina & Schwengel, 2012, p. 47)

Another issue emerging from the articles surveyed is quality. The contested nature of the concept is being dealt with by a pragmatic approach narrowing its meaning to accreditation and quality assurance devices:

Specifically trained teaching and tutoring staff with high academic qualifications as well as social awareness and human sensitivity must be employed in this field. They must be familiar with both the concepts and procedures of accreditation of prior experiential learning and European developments in adult education and lifelong learning. (Schmidt & Gibbs, 2009, p. 408)

Evaluation also appeared as a political issue associated with the concept of quality:

The new era of higher education requires the establishment of a comprehensive quality assurance system at every European educational institution. As part of this new system, universities and programmes must demonstrate that their graduates have achieved a set of learning outcomes in each discipline. (Mateo et al., 2012, p. 435)

Quality is also perceived by the non-EU countries as a strategy to cope with the challenges of Bologna in the broader higher education landscape. This political issue plays a major role in driving and justifying the adoption of quality procedures not explicitly aligned with the ESG. These standards are to promote further integration of quality assurance systems in higher education:

Russia has begun to develop procedures for carrying out regular, systematic and objective university evaluations that are comparable to those of the UK's Quality Assurance Agency for Higher Education: expanding participation in international education also requires changes in the system used to evaluate education quality. (West & Frumina, 2012, p. 51)

Finally, with regard to the strategic use of the EHEA by non-EU countries, there are two articles that underline Kölliker's assumption that 'when non-EU members adopt EU policies, a differentiated participation is the rule rather than the exception' (Kölliker, 2010, p. 49).

Even though the Bologna Process and the political goal of establishing the EHEA was not originally an EU policy, but rather an intergovernmental initiative, it was perceived as having an echo beyond European higher education, as it is the case of Ibero-America:

This analysis may lead us to think that the region is disregarding the Bologna experience. However, if we observe the phenomenon more closely, we see certain echoes of this process. Between 2004 and 2006, the Tuning-Latin America project was developed to identify and exchange information and improve cooperation between higher education institutions to promote quality, effectiveness and transparency (González, Wagenaar, & Beneitone, 2004). A total of 62 institutions in 18 countries took part in the project, motivated by the need to improve the compatibility, comparability and competitiveness of higher education. (Tiana Ferrer, 2010, p. 606)

And in the United States, Adelman, analysing the US response to Bologna, refers to the Tuning project as

the most felicitous entry point to the task of rendering the meaning of degrees more transparent and learning-outcome oriented because it involved faculty in the roles with which they identify most strongly, the roles for which they were trained, and the roles in which they are organised: as instructors and researchers in their disciplines. Tuning is thus seen as a 'bottom-up' path to that portion of the Bologna portfolio that addresses accountability issues in the US. (Adelman, 2010, p. 620)

Questioning the Added Value of Theory of DI in Explaining Integration in Higher Education

In spite of the fact that the articles under analysis did not use the theory of DI, their thematic meta-analysis showed that the research focusing on the development of the EHEA highlight 'time', 'space' and 'matter'. These elements of DI were a key to grasping the practices and the explanatory potential of the theory of DI. Actually, by mobilising theoretical frameworks such as institutional and organisational

studies (Karseth & Solbrekke, 2010; Stensaker et al., 2010), governance (Gornitzka, 2010) and governmentality (Karseth & Solbrekke, 2010) theories, and the 'triple helix' metaphor (Schmidt & Gibbs, 2009), the added value of the theory of DI is to be questioned.

While underlining the relevance of collaboration between industry and the academy, the use of 'triple helix' metaphor emphasised a policy issue that can be identified as 'matter'. For instance, Schmidt & Gibbs (2009), by convening the demands of economic pragmatism to promote the collaboration for further integration, underlined DI practices, namely that:

As the documentation from the EU shows, there is an intense need to develop skills and knowledge in the workplace where skills are used, as well as in higher education institutions. This economic pragmatism of the triple helix will encourage collaboration between industry and the academy which will spark changes in the form of knowledge that is created. (Schmidt & Gibbs, 2009, p. 407)

In turn, Gornitzka (2010) mobilised the governance theories to underline how the political driver of a 'Europe of Knowledge' impacted on higher education and other sectors. To this account, 'space' is brought forward to emphasise the DI effects of rescaling governance activities:

European level differentiation can be observed in the organisation of political administrative institutions, in the ideational underpinnings and in the differentiated sets of instruments used for HEIs. (...) This has been interpreted as a sign of sectoral differentiation at the European level that has taken place incrementally and led to several governance sites that pertain to European HEIs, some directly, others indirectly. (Gornitzka, 2010, p. 544)

Furthermore, Karseth and colleague (2010) looked at the policy issue related to the development of national qualifications frameworks. While recognising cultural differences across countries, in their study of Scandinavian cases, they found that, beyond national and institutional 'footprints', there is a main political rationale driving reforms:

(...) by drawing on Meyer's approach, one can conclude that, although we find national 'footprints' which need to be factored into the makeup of national qualifications framework, they are all embedded in the same transformation process which represents a scientised logic which constructs a rationalised and empowering script of action. (Karseth & Solbrekke, 2010, p. 572)

Therefore, neo-institutionalism appeared as supporting research to explain the processes of integration, while national and institutional 'footprints' justify flexible strategies of DI.

The analysis also revealed that the meaning of EHEA appeared simultaneously as a taken-for-granted objective and a political goal, and a process to be governed at the European, national and institutional levels (e.g. Gornitzka, 2010; Karseth & Solbrekke, 2010; Powell et al., 2012; Ravinet, 2008; Salas Velasco et al., 2012; Stensaker et al., 2010; Veiga, 2012). Furthermore, the EHEA emerges as possessing consensual subjective or ideal value as it is viewed as (i) a reference for national higher education reforms beyond Europe (e.g. the United States of America and Ibero-America) (Adelman, 2010; Tiana Ferrer, 2010); (ii) an opportunity for national and institutional strategic action envisaging the political integration in the EU (e.g. Turkey and Russia) (Motova & Pykko, 2012; Telegina & Schwengel, 2012; West & Frumina, 2012; Yagci, 2010); and (iii) legitimating national specificities within the EHEA (e.g. France, Italy, Germany) (Ballarino & Perotti, 2012; Lindberg, 2014; Powell et al., 2012; Sin & Saunders, 2014).

Interestingly enough, 14 of the 25 articles focused on an instrumental perspective, confirming previous research that underlined the pragmatic use of ideas in implementing the EHEA (Veiga, 2015). The analysis identified policy drivers that ascribed meaning to the EHEA, i.e. they assume issues of policy implementation, such as pedagogical reform, lifelong learning and vocational education and training, internationalisation, evaluation, quality and the strategic use of the EHEA by non-EU countries. Furthermore, three articles addressed specifically the appropriation of Bologna (Ballarino & Perotti, 2012; Giret, 2011; Sin & Saunders, 2014) to legitimate national reforms, on the one hand and, on the other, to underline the weight of national specificities.

The analysis also showed that the Bologna Process is shaped by discursive practices promoting a set of implementation tools: national qualifications frameworks (Karseth & Solbrekke, 2010), quality (Gvamadze, 2008; Motova & Pykko, 2012), guidelines and standards (Schmidt & Gibbs, 2009; Stensaker et al., 2010), learning outcomes and evaluation systems (Mateo et al., 2012), changes of teaching methodologies (Salas Velasco et al., 2012) and changes in the teaching languages (West & Frumina, 2012), the degree systems (Lindberg, 2014; Powell et al., 2012), and the flexibility and informality as an agreement and incentive-based approach (Lazetic, 2010).

Looking at the Bologna Process as a vehicle towards the EHEA, it is visible that 'flexibility' challenges convergence within the EHEA. The reason is that while the meaning of the EHEA is being fixed by the instruments identified above, it turns it into a pragmatic endeavour hindering the prime goal of higher education further integration.

Conclusion

This chapter analysed the potential of the theory of DI in the field of higher education. As a conceptual narrative, it proposes models to explain flexible integration based on 'time', 'space' and 'matter'. Drawing on a meta-analysis of published research about the Bologna Process, we aimed to question the relevance of the theory of DI in explaining the processes of European integration in higher education.

Actually, the analysis on the basis of 'time', 'space' and 'matter' contributed to understanding how the institutionalisation of 'flexibility' serves better to justify and legitimate the EHEA as a process of (non) integration. These findings are not in line with the theory of DI that assumes 'flexibility' as the cornerstone of common policy areas, key for more integration in the long run.

The theory of DI is a conceptual narrative more prone to legitimising political practices of flexible integration rather than a consistent theoretical framework to explain integration in higher education as a political major goal. Actually, the analysis showed that the theory of DI is not as helpful in explaining national and institutional integration; it appears

to have little persuasive grip in promoting integration and, ultimately, risks making (non)integration legitimate. Furthermore, the process to fix the meaning of DI results from the tension between its strategic use 'that domestic and European actors make of space and time' (Dyson & Sepos, 2010a, p. 350) and the need to provide a political rationale concealing the European Union project and the national and institutional agendas and priorities.

This chapter also emphasised how conceptual narratives stemming from academic discourses and policy-making are interrelated. This is of importance as it enhances a reflexive approach towards political coordination. Actually, since the knowledge about political processes changes the course of the very policies, the narrative approach also contributed to put into perspective integration in higher education policy as a dynamic process.

Appendix

Corpus of the Meta-Analysis

1. Adelman, C. (2010). The US Response to Bologna: Expanding knowledge, first steps of convergence. *European Journal of Education*, 45(4), 612–623. <https://doi.org/10.1111/j.1465-3435.2010.01448.x>.
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The EC Communications, the Knowledge Society and Their Influence Over Higher Education

Alberto Amaral and Andrée Sursock

Introduction

This chapter examines a series of communications by the European Commission (EC) to show how it shapes higher education policies in Europe. Its starting point is the work of Martens, Balzer, Sackmann, and Weyman (2004) who distinguish three dimensions of governance—by instrument (e.g. issuing legislation), by coordination (e.g. organising initiatives) and by opinion (e.g. generating visions and values that shape policy-making). Because the EC is bound by the Treaty of Maastricht, it cannot directly apply ‘governance by instrument’ in higher education but can use the other two methods. After a brief historical overview that

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describes the progressive engagement of the EC in higher education policies, the paper assesses its growing capacity to shape opinions and national and European policies through its influential communications; it then turns to how universities have responded to these developments through their collective representative body, the European University Association (EUA).

Dimensions of Governance

Martens et al. (2004) distinguish three dimensions in governance: governance by instruments, governance by shaping opinion, and governance by coordination. These dimensions correspond roughly to those of the classification proposed by Bemelmans-Videc and Vedung (1998), namely sticks (regulation), sermons (information) and carrots (economic means). To what extent does the EC deploy these three dimensions?

Governance by instruments ‘encompasses the regulations to which states need to adhere due to their membership in the organization’ (Majone, 1996, p. 230). This includes the capacity of passing legislation and the power of the purse, that is, the capacity to provide financial support. It is true that the Commission cannot resort to passing European-level legislation as education is protected by the subsidiarity principle (see Sin, Veiga, & Amaral, 2016). However, it can pass legislation in areas not protected by the subsidiarity principle, which have an indirect influence over education, such as the Services Directive.

Governance by coordination is the ‘ability of an international organisation (IO) to provide the means of organising and handling procedures which promote certain initiatives in a policy field’ (Martens et al., 2004, p. 2), which includes ‘managing, directing and speeding up programmes and projects’ (ibid.). The role of the Commission in the implementation of the Bologna Process is a good example of governance by coordination. Initially excluded from the Sorbonne meeting, and even not allowed to sign the Bologna Declaration, the Commission was invited to join the Bologna Follow-Up Group (BFUG) under the Swedish presidency as it was necessary to have a coordination organ.

Governance by opinion formation is the capacity of an IO to ‘initiate and influence national discourses on educational issues’ (ibid.) by laying down a set of distinctive norms and practices, grounded in what is desirable and appropriate (Henderson, 1993). It sets out the role institutions should assume in developing and handing on those norms that cause actors in a given community to switch to the logic of appropriateness (March & Olsen, 1998). Given the Commission’s restricted capacity of statutory intervention—passing European legislation is not possible—the use of communications stands as an exhortation and persuasion vehicle by which the Commission takes position and exerts influence on member states’ higher education policies (Sin et al., 2016).

In this chapter, we analyse how the Commission uses communications to govern by opinion formation. Communications make public and promote the Commission’s vision for higher education and, as such, are policy instruments based on information. Following Vedung, information is not to be understood exclusively as objective knowledge and facts; it also covers ‘judgements about which phenomena are good or bad, and recommendations about how citizens should act and behave’ (Vedung, 1998, p. 33). Keeling (2006, p. 209) described the Commission’s discourse on higher education as ‘a widening pool of “common sense” understandings, roughly coherent lines of argument and “self-evident” statements of meaning about higher education in Europe’—all features indicative of its normalisation.

A Brief History of European Law

European law has limited the prerogatives of the EC in matter of higher education (it is not the case for research, which is not the focus of this chapter, although this is addressed in passing). However, the Commission has used available opportunities—particularly the Bologna Process and the Lisbon Strategy—to shape and influence European higher education policies.

From the Treaty of Rome to the Treaty of Maastricht

The role of the EC in the definition and promotion of education policies has always been a contested matter. Initially, it was agreed that its intervention would be limited to the area of vocational training (Article 128 of the Treaty of Rome):

Article 128

The Council shall, acting upon a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market.

However, the rulings of the European Court of Justice considered that higher education, in general, was also a form of vocational training. In the *Gravier and others vs. city of Liège* case (case 293/83), the European Court of Justice referred to vocational education as follows: ‘any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary skills for such a profession, trade or employment is vocational training whatever the age and level of pupil or student’. In the *Blaizot vs. University of Liège* case (case 24/86), the Court maintained this sweeping definition of vocational education, the only exceptions being ‘certain special courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation’.

These rulings of the Court, combined with the new possibility of enforcing legal acts by majority vote, substantially increased the power of the Commission in the higher education sector. The Commission took advantage of this situation to present the *Memorandum on higher education in the European Community* (European Commission, 1991). This was probably too much for the Member States who feared an increasing intervention of the Commission in what was traditionally an area of national sensitivity (Gornitzka, 2009). Therefore, the Maastricht Treaty, signed in 1992, reconsidered the idea of a common vocational training policy and proposed instead:

Article 126

1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

.....

Article 127

1. The Community shall implement a vocational training policy, which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

.....

4. The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.

The Treaty of Maastricht clearly protected higher education, which was maintained under the exclusive political control of the nation state and even excluded any attempt at the harmonisation of national laws and regulations. However, in the late 1990s, the field of higher education policy came suddenly to the fore due to a number of initiatives such as the Sorbonne declaration, the Bologna Declaration and, above all, the Lisbon strategy.

The Sorbonne Declaration, the Lisbon Strategy and the Bologna Process

The Sorbonne *Joint declaration on harmonisation of the architecture of the European higher education system*, signed by the four Ministers in charge of higher education from France, Germany, Italy and the

United Kingdom in Paris, in 25 May 1998, solemnly stated that 'Europe is not only that of the Euro, of the banks and the economy: it must be a Europe of knowledge as well'. Almost one year later, on 19 June 1999, the Bologna Declaration went further by stating:

A Europe of Knowledge is now widely recognised as an irreplaceable factor for social and human growth and as an indispensable component to consolidate and enrich the European citizenship, capable of giving its citizens the necessary competences to face the challenges of the new millennium, together with an awareness of shared values and belonging to a common social and cultural space.

In April 2000, the European Council held a special meeting in Lisbon to agree a new strategy for the European Union (EU), aiming to strengthen employment, economic reform and social cohesion as part of a knowledge-based economy. This became the well-known Lisbon strategy, which promised to transform the Union into 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion' (Lisbon European Council, 2000). However, for some, 'Lisbon looks like the quintessential contemporary utopia' (Creel, Laurent, & Le Cacheux, 2005, p. 4), while others (Iversen & Wren, 1998) argued that offering simultaneously employment, income equality and fiscal restraint was just impossible.

The emergence of knowledge-based economies makes a well-educated workforce the major resource of the post-industrial society and explains why the Lisbon strategy, aiming to implement a knowledge-based economy, had a pressing need to include a component of human capital development (Lisbon European Council, 2000):

People are Europe's main asset and should be the focal point of the Union's policies. Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty. Europe's education and training systems need to adapt both to the demands of the knowledge society and to the need for an improved level and quality of employment.

The Lisbon strategy was a heaven-sent opportunity, allowing the Commission to play a more important role in higher education policies that were apparently protected from Brussels influence due to the subsidiarity principle. This allowed the Commission to come back into play after the initial flop of the *Memorandum on Higher Education in the European Community* (European Commission, 1991).

In 2002, the European Council approved a *Detailed work programme for the education and training systems in Europe* (European Council, 2002) aiming to bring 'coherence to the various sectoral policies in education and training while respecting the input and the particular focus of each' (European Council, 2002, p. 6). The programme had three major strategic objectives: (a) improving the quality and effectiveness of education and training systems; (b) facilitating the access of all; and (c) opening the education and training systems to the wider world. The Commission proposed the application of the Open Method of Coordination¹ to education and training.

In parallel, the EC got involved in the Bologna Process, which strengthened the role it could play in higher education and its capacity to influence European and national higher education policies. This went against the political expectations of those governments who tried to use the Bologna process to overcome internal opposition to reform their higher education systems. As explained by Martens and Wolf (2009), some governments resorted to:

international organisations not only to pursue substantial policy goals but also because it was in their strategic interest to use the intergovernmental policy arena to manipulate the existing distribution of formal institutional competencies in their domestic political systems. They thereby sought to enhance the sovereignty of their respective nation's executive in order to outmanoeuvre domestic opposition to their own policy goals. (Martens & Wolf, 2009, p. 77)

Contrary to expectations, the Bologna Process made the economic rationale 'more important than the political, educational and cultural rationales' (Huisman & Van der Wende, 2004, p. 350). Although the boomerang of instrumentalising the EU was intended to strengthen the initiating national governments at the expense of their domestic

institutional opponents, it landed in economic territory ‘bringing a new rationale of degovernmentalisation to policies of higher education which is likely to weaken the role of *government* steering at all levels, including the national level’ (Martens & Wolf, 2009, 87). And, as argued by Huisman and Van der Wende, the EU exerted tremendous influence, as ‘national views on the role of higher education gradually grew closer—not necessarily intentionally—to the EC’s perspective’ (Huisman & Van der Wende 2004, p. 350).

Indeed, the Bologna Process was initially associated with the generous idea of a unified landscape of European higher education, honouring the European character of unity in diversity and looking beyond economic objectives. In the words of Rüttgers, ‘higher education has to be connected to values... with the foundations of our western culture’ (Rüttgers, 2013, p. 2). The Lisbon strategy, however, introduced an economic rationale to the creation of the European Higher Education Area, which ended up permeating the Bologna Process and distorting its loftier inspiration.

The EC Capacity to Shape European Higher Education: The Communications

Following the approval of the 2001 work programme (European Council, 2002), the Commission presented, in 2003, two communications: *Investing Efficiently in Education and Training: An Imperative for Europe* (10.01.2003) and *The Role of Universities in the Europe of Knowledge* (05.02.2003). The first communication addresses the objective of ‘making the most efficient use of resources’ set in the *Detailed work programme on the objectives of education and training systems* (European Council, 2002), and analyses the implications of the Lisbon European Council’s call for a substantial annual increase in *per capita* investment in human resources. This call was made more pressing by the 2010 work programme which aimed at making the EU ‘a world reference for the quality and relevance of its education and training and (...) the most attractive world region to students, scholars and researchers’, an ambitious objective already proposed in the Barcelona European Council (2002).

Investing Efficiently in Education and Training: An Imperative for Europe

The communication (European Commission, 2003a) recognises the need to increase the level of investment in human resources, although it shows that the gap between Europe on the one hand and the US and Japan on the other results mainly from a deficit of private funding, public funding being at the same level as in the US and higher than in Japan. However, the communication discusses ways of making investment more efficient by focusing on priority areas such as training and retention of education staff, new basic skills, ICT, social inclusion, guidance and counselling and avoiding inefficiencies such as high failure and dropout rates, graduate unemployment, low achievement levels, excessively long degrees and educational dead ends. Moreover, the communication considers that efficient investment needs to be anchored in the European context, which the Commission considers a critical factor for efficiency.

The Role of Universities in the Europe of Knowledge

The second communication (European Commission, 2003b) presents a critical analysis of the problems of European universities which, in general, have less to offer and lower financial resources than their counterparts in developed regions of the world, such as the US and Japan. The Commission proposes 'to start a debate on the role of universities within the knowledge society and economy in Europe and on the conditions under which they will be able to play that role' (European Commission, 2003b, p. 2).

The communication lists a number of problems such as lack of sufficient and sustainable resources and a low level of private funding, lack of efficient management structures and practices, lower capacity than their American counterparts to attract students and researchers and to offer post-doctoral opportunities, absence of career prospects for young people from scientific and technical studies and difficulties with trans-disciplinary work. The Commission considers it is necessary to reinforce the cooperation between universities and industries. Available data show

that only a very small percentage of innovative companies consider research institutes and universities as an important source of information; the creation of spin-off companies is considered insufficient and European universities in general do not have adequate structures for managing research results.

The European university landscape is still very fragmented, with a high level of heterogeneity, as it is primarily organised at national and regional levels, which is a challenge for the capacity of the Bologna Process to become an efficient instrument for organising ‘that diversity within a more coherent and compatible European framework’ (European Commission, 2003b, p. 5).

The Communication recognises the importance of universities for the Lisbon strategy and proposes several measures to make European universities a world reference, which include increasing the funding level of universities and providing multiannual budgets; increasing the efficient use of financial resources (decreasing dropout rates, avoiding mismatches between the supply and demand of qualifications, reducing the excessive duration of studies and eliminating the disparity and conditions of recruitment and work of pre- and post-doctoral levels); promoting a more effective use of research results; increasing the quality and efficiency of management; and promoting interdisciplinary capacity.

However, the document also contains some inconsistencies such as arguing, on the one hand, that ‘the aims must be to bring all universities to the peak of their potential, not to leave some behind’ (European Commission, 2003b, p. 16), while proposing, on the other hand, to create centres and networks of excellence with the ‘concentration of research funding on a smaller number of areas and institutions [leading to] increasing specialisation of the universities’ (European Commission, 2003b, p. 18).

Mobilising the Brainpower of Europe: Enabling Universities to Make Their Full Contribution to the Lisbon Strategy

In 2005, the Commission produced a new communication (European Commission, 2005). This communication reiterates the argument that ‘European universities, motors of the new, knowledge-based paradigm,

are not in a position to deliver their full potential contribution to the relaunched Lisbon strategy' (European Commission, 2005, p. 2) and considers that European higher education faces three main challenges: achieving world-class quality, improving governance, and increasing and diversifying funding. And it concludes by proposing a modernisation agenda for universities.

The document identifies a number of important challenges, some of which had already been identified in the earlier communications, such as the pressures for uniformity in several Member States, difficult access of disadvantaged social groups to higher education, mismatches between graduate qualifications and the needs of the market, high unemployment rate of graduates in many European countries, administrative obstacles to mobility, lack of interdisciplinary research, deficient cross-fertilisation with the business community and society and a huge funding deficit for both education and research. The Commission clearly abandons, however, the idea that no universities should be left behind by proposing that 'research should be a key task of the systems as a whole, but not necessarily for all institutions', leading to 'an articulated system comprising world-renowned research institutions, plus networks of excellent national and regional universities and colleges which also provide shorter technical education' (European Commission, 2005, p. 4).

The Commission suggests a number of measures, such as achieving the major Bologna reforms by 2010, in order to promote mobility; ensuring real autonomy and accountability for universities which also need to be provided with new internal governance systems based on reinforced professional management; recognising the strategic importance of links with the business community; providing the right mix of skills and competencies for the labour market to enhance the employability of graduates; and reducing the funding gap. Other recommendations propose enhancing interdisciplinarity and transdisciplinarity, reinforcing the dialogue with stakeholders, rewarding excellence to attract the best academics and researchers and making the European Higher Education Area more attractive.

In 2007, the Council of the EU adopted a resolution on *Modernising Universities for Europe's Competitiveness in a Global Knowledge Economy* (European Council, 2007). This resolution upholds the findings and recommendations of the Commission's communication.

Supporting Growth and Jobs—An Agenda for the Modernisation of Europe’s Higher Education Systems

In 2011, the Commission published a new communication (European Commission, 2011a), which does not contain significant new ideas. The communication, referring to the Europe 2020 strategy, considers that higher education ‘plays a crucial role in individual and societal advancement, and in providing the highly skilled human capital and the articulate citizens Europe needs to create jobs, economic growth and prosperity’ (European Commission, 2011a, p. 2). However, it considers once more that ‘the potential of European higher education institutions to fulfil their role in society and contribute to Europe’s prosperity remains under-exploited’ (ibid.). The Commission argues that to maximise the contribution of higher education to smart, sustainable and inclusive growth, a number of reforms are necessary to increase the number of graduates, enhance the quality and relevance of human capital development, create effective governance and funding mechanisms and strengthen the knowledge triangle between education, research and business.

The Commission proposes a number of key issues for member states and higher education institutions. These include increasing student participation in higher education (attracting disadvantaged and vulnerable groups), reducing dropout rates, increasing the number of researchers by attracting more doctoral candidates and imparting research skills to the existing workforce. Improving quality and relevance of higher education is a recurrent theme closely linked to the need of aligning the curricula with labour market needs, occasionally involving employers and labour market institutions in the design and delivery of programmes. At the same time, researcher training also needs to be industry-relevant and coherent with the needs of the knowledge-intensive labour market, including the requirements of Small and Medium Enterprises (SMEs). Mobility comes again to the fore with the aim to ‘attract the best students, academics and researchers from outside the EU and developing new forms of cross-border cooperation’ (European Commission, 2011a, pp. 8–9). Creating ‘close, effective links between education, research and business’ (ibid., p. 10) is once more an objective associated with the development of entrepreneurial, creative and innovative skills and the

encouragement of the development of ‘partnerships and cooperation with business as a core activity of higher education institutions’ (ibid., p. 11). Lastly, the theme of improving governance and funding is addressed without new proposals.

The Communication also includes a reference to the EU contribution:

The Commission can support transparency and excellence through evidence-based policy analysis. It can support mobility of learners, teachers and researchers. It can support strategic cooperation between European institutions and, in a context of increasing global competition for talent, provide a common framework to support the interaction of European higher education with the rest of the world. (European Commission, 2011a, p. 14)

The Commission equates evidence-based policy analysis with the implementation of U-Multirank, ‘a performance-based and information tool for profiling higher education institutions’ (European Commission, 2011a, p.15). However, sometimes very poor results of U-Multirank transforms this suggestion into a sad joke.² Mobility promotion encompasses the traditional ERASMUS and Erasmus Mundus programmes and there is a proposal of a ‘European Framework for Research Careers’ (European Commission, 2011b), which is just another piece of European bureaucracy. Fostering the central role of higher education in innovation, job creation and employability will be regulated in the 2011 Strategic Innovation Agenda of the European Institute of Innovation & Technology, while the Marie Curie actions will include a European Industrial Ph.D. Scheme. As for internationalisation, the Commission makes a pledge to explore the possibility of designing a ‘specific strategy for the internationalisation of higher education’ (European Commission, 2011a, p. 21).

European Higher Education in the World

In 2013, the Commission issued a last communication (European Commission, 2013), which ‘analyses the mutually beneficial opportunities offered by the broader international context and promotes,

where appropriate, the use of European processes and tools to a global audience' (European Commission, 2013, p. 2). After considering that many higher education institutions have defined internationalisation strategies primarily focused on student mobility, the communication argues that a comprehensive internationalisation strategy should include three areas: 'international student and staff mobility; the internationalisation and improvement of curricula and digital learning; and strategic cooperation, partnerships and capacity building' (European Commission, 2013, p. 4).

To promote mobility the communication refers to transparency and recognition of learning acquired elsewhere as a key priority, raises the problem of rules on immigration of third-country nationals and proposes to change 'Directives 2005/71/EC (on the conditions of admission of third-country nationals for the purposes of scientific research) and 2004/114/EC (on the conditions of admission of third-country nationals for the purposes of studies, student exchange or unremunerated training) to make it easier and more attractive for non-EU national researchers and students to enter and stay in the EU for periods exceeding 90 days' (European Commission, 2013, p. 5). On the internationalisation and improvement of curricula and digital learning, the communication refers to the need of integrating a global dimension in the design and content of all curricula, increasing multilingualism and widening the use of digital learning with a special focus on the emergence of Massive Open Online Courses (MOOCs). Lastly, the communication stresses the economic importance of international higher education and suggests that European higher education institutions should develop partnerships within and outside Europe, without ignoring cooperation with developing countries. Reference is also made to the importance of joint and double degrees.

The communication also refers to the EU contribution to the internationalisation of higher education by focusing on 'increasing the attractiveness of European higher education by improving quality and transparency; and by increasing worldwide cooperation for innovation and development through partnerships, dialogue and capacity building' (European Commission, 2013, p. 11). On the first objective, the Commission wants to improve the recognition of foreign qualifications, increase cooperation in quality assurance and complement information

to market Europe as a high-quality study and research destination. Moreover, the Commission insists in presenting U-Multirank as a tool to increase the transparency, comparability and benchmarking opportunities between higher education institutions, despite the obvious flaws of this instrument.

On the second objective, the Commission proposes to increase the support of joint and double programmes and the establishment of knowledge alliances, to pursue bilateral and multilateral policy dialogues with non-EU countries or regions, to support international capacity-building partnerships with non-EU countries and to strengthen evidence-based policy-making in the field of international education (hopefully not using U-Multirank).

The Position of European Universities

How did European universities respond to these developments? Two types of documents from the EUA are analysed: the responses to specific Commission initiatives and the declarations arising from the EUA conventions.

The EUA is an organisation of about 850 members (universities and national associations of universities) located in 47 countries. Its two decision-making bodies are the Council, which gathers the presidents and executive heads of national associations of universities, and the Board, which includes nine current and former university heads. The association seeks to ensure that the voice of universities is heard in European higher education policy discussions. EUA has reacted, on behalf of its members, to some of the Commission's communications and responded to its consultation exercises. Both the responses to the EC communications and the declarations resulting from the EUA conventions are prepared by the EUA Board and approved by the EUA Council. The conventions gather a good part of the EUA membership; they take into account Bologna Process developments, EC policy-making (on research) and pronouncements (on higher education) and international developments in higher education. Thus, they have a much broader scope and do not necessarily constitute a response to a specific EC position.

EUA's Positions

EUA's founding convention took place in Salamanca in 2001, at a time when the notion of creating European areas for both higher education and research was still very new and before a wave of reforms increased the scope of university autonomy in many European countries. The convention affirmed the following four principles:

- 'Autonomy with accountability': given the autonomy deficit that existed in 2001, the Salamanca participants voiced what seems like a basic demand today, namely that 'universities must be able to shape their strategies, choose their priorities in teaching and research, allocate their resources, profile their curricula and set their criteria for the acceptance of professors and students' (EUA, 2001, p. 7). This was in line with the EUA's mission statement at the time, which opened with the aim 'to promote and safeguard values and the case for university autonomy' (EUA, 2001, p. 1).
- 'Education as a public responsibility': this is about promoting access and fostering education for personal development and citizenship 'as well as short- and long-term social relevance' (EUA, 2001, p. 7).
- 'Research-based education': convention participants gave support to the creation of a European Research Area and emphasised the link between research and education.
- 'Organising (the) diversity... of languages, national systems, institutional types and profiles and curricular orientation' (EUA, 2001, p. 7), i.e. finding the right balance between diversity, on the one hand, and harmonisation and comparability, on the other.

Furthermore, the Salamanca convention identified 'Quality (as) the basic underlying condition for trust, relevance, mobility, compatibility and attractiveness in the European Higher Education Area' (EUA, 2001, p. 8). These themes would resonate in subsequent EUA communications. Thus, two years later, the Graz Convention developed in more detail the Salamanca themes by stressing:

(...) universities need (...) to ensure that they remain central to the development of European society by:

- maintaining universities as a public responsibility,
- consolidating research as an integral part of higher education,
- improving academic quality by building strong institutions,
- furthering mobility and the social dimension,
- supporting the development of a policy framework for Europe in quality assurance, and, of course,
- pushing forward the Bologna Process. (EUA, 2003a, p. 5)

Central to many of these aspects was the notion of institutional autonomy.

The same year, EUA responded to the EC's communication on *The role of Universities in the Europe of Knowledge* (European Commission, 2003b) by emphasising the following aspects (and implicitly criticising the EC document for its economic rationale):

(...) the role of the universities in the wider debate on the construction of Europe, and the promotion of European values, culture and linguistic diversity which we consider particularly important in the present international environment. When it comes to building Europe and ensuring the well-being of its citizens, we firmly believe that promoting cultural and social innovation is as important as the purely scientific and technical progress emphasised in the Communication. (EUA, 2003b, §2)

EUA criticised the EC communication for its loose use of the term universities, which, it argued, should be confined to the institutions awarding the doctorate, and for a skewed view of higher education systems focused on a limited number of top research-intensive universities. The association noted the imprecise use of international benchmarks and the need for Europe to '*develop a specific European approach, and its own framework and models for its universities*' based on diversity, shared European values, higher education as a public responsibility, equity and access, the link between teaching and research, quality, inter-institutional partnerships and networking (for joint degrees and research).

EUA also pointed to the need of preparing carefully the enlargement of the EU (it should be noted that EUA members at the time came from 45 countries in Europe) and laid down a picture of how the system should look like: ‘the goal in Europe should be *to increase the number of universities which are excellent in what they do* in specific areas, and not merely to concentrate more resources on an increasingly limited number of institutions at the expense of the others’ (EUA, 2003b, p. 13).

While acknowledging the economic rationale (particularly for the research activities), the EUA tipped the discourse towards a more humanistic view of higher education and demanded—once again—university autonomy, as well as a stable policy and funding environment in order to ensure that higher education was capable of responding to societal demands.

The Glasgow Convention, in 2005, marked a change in the EUA Board. The new leadership expressed a clear commitment to strengthening the governance and leadership of European universities. This was reflected in the title of the Glasgow Declaration *Strong universities for a strong Europe* (EUA, 2005). This third declaration, like the first two, underlined both a humanistic and instrumental view of higher education:

Universities’ multiple missions involve the creation, preservation, evaluation, dissemination and exploitation of knowledge. Strong universities require strong academic and social values that underlie their contributions to society. Universities share a commitment to the social underpinning of economic growth and the ethical dimensions of higher education and research. (EUA, 2005, p. 2)

In effect, the Glasgow Declaration appealed to policy-makers to ensure the appropriate conditions for universities to deliver on their policy agenda, as in the following statement for instance: ‘Universities are open to working with society. Institutional autonomy and mission diversity are essential prerequisites for ensuring effective engagement’ (EUA, 2005, p. 2). However, the Declaration also exhorted policy-makers to focus on the ‘social dimension’ when it stated:

In refocusing the Bologna Process, universities undertake to give a higher priority to the social dimension as a fundamental commitment, to develop policies in order to increase and widen opportunities for access and support to under-represented groups, and to promote research in order to inform policy and target actions to address inequality in higher education systems. (EUA, 2005, p. 3)

The EUA reaffirmed the need to provide research-based education and welcomed the plan to create the European Research Council (ERC). It implicitly acknowledged that this new player would be changing the rules of the game and introduce more competition. Therefore, it recommended that policy-makers recognise the importance of research activities for all universities:

Universities accept that there is a tension between the necessary strengthening of research universities and the need to ensure resources for research-based teaching in all universities. Governments are called upon to recognise the particular role of universities as essential nodes in networks promoting innovation and transfer at regional level and to make the necessary financial support available to strengthen this process. (EUA, 2005, p. 4)

The Glasgow Declaration also stressed the need to invest at a higher level in higher education. This issue became central two years later in EUA's Lisbon Declaration (EUA, 2007), which reiterated the same themes as in Glasgow, albeit with a new emphasis on internationalisation. The latter theme received a more important treatment than before (no reference in Graz, one reference in both Salamanca and Glasgow vs. three paragraphs in Lisbon) as an acknowledgment that the EUA—six years after its creation—was ready to play an active role internationally and recognised the growing importance of both internationalisation and globalisation for its members.

While expressing a commitment to democratic values (access and equity), the EUA's Lisbon Declaration tilted to a somewhat more instrumental view of higher education, although in speaking about universities in the knowledge society it purposely avoided referring to the knowledge economy:

The central task is to equip Europe's populations—young and old—to play their part within the Knowledge Society, in which economic, social and cultural development depends primarily on the creation and dissemination of knowledge and skills... Universities therefore look forward to playing a pivotal role in meeting the innovation goals set by the Lisbon Agenda and in particular through their commitment to the European Higher Education and the European Research Areas. (EUA, 2007, p. 2)

University–enterprise partnerships also received a larger treatment in the EUA's Declaration, notably at the doctorate level:

University-business collaboration is a process of 'Co-Innovation' with knowledge transfer seen as a core mission of universities. EUA will continue to work to improve the university-business dialogue including, for example, in relation to doctoral programmes and in helping to develop the EU-proposed European Institute of Technology (EIT). (EUA, 2007, p. 5)

The notion of collaborative doctorates was further promoted in the *Salzburg II Recommendations* for doctoral education:

All stakeholders should engage in measures to facilitate cooperation between providers of doctoral education and the non-academic sectors to the mutual benefit of all partners. It is essential to create awareness about the qualities of doctorate holders as well as to build trust between universities and other sectors. Such trust is, for example, built on formalised but flexible research and research training collaboration between industry and higher education institutions, including joint research projects, industrial doctorates or similar schemes. (EUA 2010, p. 7)

By 2009, the impact of the financial and economic crises became evident in many parts of Europe as universities in some countries were starting to see drastic reductions of their budgets. The Prague Declaration (EUA, 2009) was written under the responsibility of yet again a new board. In the first part of the document, it targeted its message to policy-makers asking them to take a range of measures to alleviate the economic crisis, while "The second part of the Declaration sets

out a long-term strategic agenda for universities identifying 10 factors that will determine [its] future success' (EUA, 2009, p. 3). To justify continued financial support for higher education, the Declaration started out by stating the 'humanistic' role of higher education:

... through knowledge creation and by fostering innovation, critical thinking, tolerance and open minds we prepare citizens for their role in society and the economy and respond to their expectations by providing opportunities for individual development and personal growth. Through research-based education at all levels we provide the high-level skills and innovative thinking our modern societies need and on which future economic, social and cultural development depends. (EUA, 2009, p. 4)

Paragraph 2, however, appealed to decision-makers in setting out an instrumental view of higher education and talking of universities as 'motors for economic recovery':

... by striving for excellence in teaching, research and innovation, by offering opportunities to diverse groups of learners, and by providing the optimal creative environment for the talented young researchers that Europe needs, universities are increasingly central to future growth and to the consolidation of Europe's knowledge society. (EUA, 2009, p. 4)

Two years later, the EUA membership met in Aarhus to celebrate EUA's 10th anniversary in the context of a deepening economic crisis and at a time when the EC set out its 2020 agenda, driven by great challenges (such as the energy crisis, the environment, etc.). The Aarhus Declaration (EUA, 2011) echoed the structure of the Prague Declaration by speaking about the humanistic view of higher education in its first paragraph, and balancing it with the next one, which states that universities are 'motors for economic recovery' (EUA, 2011, p. 1).

Now that the EC had identified the great challenges (European Commission, 2010), and given the financial crisis, there was an urgent tone to the Aarhus Declaration in appealing to governments to invest in the future by investing in higher education. The universities for their part committed to 11 goals, starting with 'widening access' to higher

education (EUA, 2011, p. 3). Many of these commitments had been expressed in previous declarations but they found slight variations as when the Aarhus Declaration spoke about the need to promote vibrant academic communities and to provide attractive careers to all university staff (EUA, 2011, respectively, pp. 3 and 5).

This was followed by the Antwerp Declaration (EUA, 2015), which basically reiterated the Prague Declaration. Universities had been hurt by the economic crisis; they could contribute to economic growth but they needed a stable policy framework and adequate funding. EUA also warned about growing funding disparities across Europe that hindered Europe's competitiveness and endangered the cooperation that was the bedrock of quality higher education and research.

Finally, EUA's response to the revision of the EU modernisation agenda (2016) reiterated the same arguments about the growing disparities in Europe in the context of a weakened Union, the need to increase funding of public higher education, and to be mindful of institutional autonomy (which had been eroded through the economic crisis). It proposed to focus on increasing access through lifelong learning and inclusiveness (notably of migrants and refugees), digitalisation of research and learning, prioritising global citizenship, strengthening the link between research and teaching, regional social and economic regeneration, and international cooperation.

Observations About EUA

It is clear from the preceding analysis that EUA's positions have had to avoid several pitfalls and overcome a number of constraints. The Association has sought to reflect a consensual view of all types of universities (from the most research-active to those that lack that capacity) that are the products of vastly different trajectories and political and economic circumstances. Thus, on the hot-button issues, it has not been unusual to have heated discussions within EUA's decision-making bodies that reveal a split between north and south or east and west. The results have been statements that reflect a compromise between somewhat opposing views. Furthermore, EUA's positions have needed to

avoid the charges that are systematically levelled at universities when they oppose policies, however misguided these might be: that these are defensive institutions, ivory towers, resistant to change, etc. Therefore, many EUA's statements appear to be endorsing the hegemonic discourse (i.e. an instrumental view of higher education) only to find that these are balanced by other statements that promote a more humanistic view of higher education.

To understand why the EUA's discourse shows quite a bit of continuity it is important to consider the changes that have occurred in Europe since EUA's creation in 2001. The most important change driver has been the economic crisis, which has had an effect not only on higher education budgets but also on European governance (with a renewed struggle between the EC and the Member States). Perhaps, because all the recent economic and political developments weakened the EC, its initiatives have not been as ambitious as they were at the turn of the twenty-first century and the Commission has tended to present the same proposals in a recurrent manner. The nature of European policy-making has been such that EUA has been bound to repeat over and over again the same principles and reaffirm the same values. The continuity in the message was also helped by continuity in the EUA Board membership for the past 15 years, with overlapping members who served in two different boards.

Conclusions

The role of the EC in European higher education has gone through several phases, with several ups and downs, but with the overall result of creeping competence. As argued by Amaral and Neave:

Rarely does the European Commission concede defeat. Rather, it returns time and again with new proposals for the same agenda, tirelessly questing for, and alert to, the favourable opening that will allow it to slip past the sometimes lowered guard of member states whose opposition is neither persistent nor obdurate and still less systematic. (Amaral & Neave, 2009, p. 282)

The Bologna Process and the Lisbon strategy were just two of those favourable openings that have allowed the Commission to set a firm foot into the European Higher Education Area despite the provisions of the Maastricht Treaty. In this chapter, we have analysed one of the policy instruments used by the Commission: its communications or, as Bemelmans-Videc and Vedung (1998) call them, its ‘sermons’, which can be either affirmative (encouragements) or negative (warnings).

The Commission is worried with ‘the perceived incapability of her [Europe’s] universities to meet the fast-growing demand for higher-level skills and competencies, and research-based commercial technologies’ (Olsen & Maassen, 2006, p. 3) and claims to know the recipe for solving the problem: ‘The challenge for Europe is clear, but so is the solution’ (Schleicher, 2006, p. 2). The solution lies in a new organisational paradigm, derived from the New Public Management and neo-liberal reforms (Hood, James, Peters, & Scott, 2004) or, as argued by Commissioner Figel: ‘We need a new model—we need something which can demonstrate to countries where university models still hark back to the days of Humboldt, that today there are additional ways of doing things’ (Figel, 2006, p. 12). The proposed model ‘emphasizes leadership, management and entrepreneurship more than individual academic freedom, internal democracy and the organising role of academic disciplines’ (Olsen & Maassen, 2006, p. 8). However, there is little hard evidence showing that New Public Management reforms have successfully contributed to academic success (Amaral, Fulton, & Larsen, 2003, pp. 292–293).

The new model also proposes ‘the differentiation of the functions of the higher education sector and the diversification of the activities of the university’ (Dale, 2014, p. 25), ‘with the first element of the knowledge triangle (skills, competences) being labour market-related and ‘inward-looking’ and the other two (interdisciplinarity and competition) research-oriented and operating in a global context, possibly to a point where the differentiation of the sector becomes more likely’ (Dale, 2014, p. 34). Or, as argued by Olsen and Maassen: ‘The Commission also opens for a further separation of teaching from research and for more differentiation and stratification among universities’ (2006, p. 9).

The reform rhetoric pays far more attention to the knowledge economy than to the knowledge society. The Commission has a utilitarian view of higher education as a key element in a strategy of economic growth and competitiveness (Sin & Neave, 2016). Higher education institutions are supposed to supply the labour market with the graduates having the skills needed for the short-term needs of the economy. Research is seen as producing direct benefits for society, which explains the Commission's preference for applied research. As argued by Keeling, 'a key message embedded in the Bologna objectives and the EU's research policy is that higher education leads somewhere—for the individual and for wider society' (Keeling, 2006, p. 209)—even if Commissioner Figel felt the need to say 'I don't want to give the impression today that I see universities as a purely economic instrument' (Figel, 2006, p. 10).

For Keeling, the Commission propagates a discourse that constructs higher education as purposeful, its activities and outputs as measurable and higher education institutions 'as organisations like any other, participating in and competing on an open market, and measurable in terms which transcend the education sector' (Keeling, 2006, p. 209). This discourse leaves little space for other objectives of higher education beyond the economic ones, as proposed by Newman—socialising students for their role in society, encouraging social mobility and providing a safe place for disinterested scholarship and unfettered debate (Newman, 2000).

The Commission was able to combine the Bologna Process with the EU's research agenda as indispensable ingredients of the Lisbon strategy, which was reflected in a decisively economic-led agenda. Its policy texts present a view of higher education where 'knowledge is produced and then traded' while 'education is presented as a product, the researcher as a manufacturer, the student as a consumer, and ECTS credits as the currency of exchange' (Keeling, 2006, pp. 209–210). However, 'the Commission has still not articulated a coherent vision of European higher education... Driving concepts such as 'globalisation', the rise of the 'knowledge economy', the ageing workforce, international mobility and the 'information revolution' are presented variously (and vaguely)

as threats, as solutions and as context' (Keeling, 2006, p. 215), which makes the Commission's argumentation frequently inconsistent.

Furthermore, the Bologna Process has lost momentum, particularly since 2010. As this cooperation framework weakens, European higher education has seen the growing importance of internationalisation and global competition (partly signalled by the emergence of international rankings). This makes the work of EUA particularly challenging, as it tries to represent vastly different universities with different ambitions and capacities. Nevertheless, the principles enunciated in Salamanca have endured—autonomy, public responsibility, research-based education and diversity—even when EUA has had to find a compromise position, particularly with the deepening of the economic crisis. While embracing the instrumental view of higher education, EUA has nevertheless tried to hold on to these principles and to the humanistic values of higher education. Now that the economic crisis has been replaced by multiple political crises, the notion of global citizenship and a humanistic view of higher education are reappearing as one of the best ramparts to ensure a peaceful future and an opportunity to recognise the role that universities—everywhere and together—can play in meeting this formidable challenge.

Guy Neave (1995) warned about the risky nature of the activity of prophets and seers, as too short-span prophecies run the risk of being contradicted by reality, while too-long span prophecies run the risk of being seen as irrelevant. Making predictions about the future of the EU is indeed a risky business due to worrisome signs of disaggregation (Brexit) and increasing signs of discontent of many of its citizens. The economic crisis, the recent and still unsolved crisis of immigration, a sense of incapacity to deal with terrorism, the rise of populist movements against the Euro and even against the EU, the lack of solidarity and, in many cases, the lack of political tact of the Commission, all create a sense of discomfort. There is an obvious lack of confidence in the capacity of European politicians and institutions to solve the successive crises and to transform Europe in the promised 'most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment'.

It is in this time of uncertainty and disaggregation that universities may play an important role in the promotion of European ideals, offering a critical view of the present political difficulties and presenting new and innovative solutions. In his inaugural speech at the celebrations of the 900th anniversary of the University of Bologna, Giovanni Agnelli (1988) argued that modern society is the final product of a stable relationship between universities and society and that our debt to the university is visible in our level of civilisation and well-being. Neave (1995, pp. 8–9) has written that ‘the university was in the world but was not of it’ and that this detachment from society allowed the university ‘to entertain a view on society and its own part in it, sub *specie aeternitatis*—that is, from a long-term perspective. Put succinctly, the university was the major institution through which society, before an age of planning, viewed itself in a long-term perspective’.

However, to do this, the university must remain a social institution, avoiding the trap of being transformed into a mere social organisation (Amaral & Magalhães, 2003). This means that the university needs to avoid the trap of the Bologna Process that ended up promoting a utilitarian view of higher education as a key element in a strategy of economic growth and competitiveness (Sin & Neave, 2016), looking instead to more sublime objectives.

Notes

1. The Open Method of Coordination is a soft law mechanism used in the EU. The OMC does not produce binding agreements or rules and, as argued by the delegation theory, may under certain circumstances be an effective way for states to control their uncertainty over the future desirability of legal rules adopted today (Guzman & Meyer, 2009).
2. U-Multirank produced some unbelievable results in the Portuguese case. For instance, the best-ranked Portuguese university in research is a small public institution where more than 50% of the Ph.D. programmes did not get accreditation due to insufficient research production; and the best-ranked school of medicine is an institution with recruitment problems of medical academic staff. In its first edition U-Multirank even

placed a private university located in Porto as the worldwide leading university in regional relevance, which is the result of poorly chosen indicators. The indicator for regional relevance of publications is authorship by people from at least two institutions located in a radius of 50 km. While that university publishes mainly in Portuguese and there are many research institutions in Porto, one of the very regionally relevant polytechnics placed in isolated regions near the border of Spain does not have another research institution in a radius of 50 km. The indicator for funding considers the contribution of regional funds which, in the case of the mentioned private institution, come from the fees of students who are mainly local, while those public polytechnics get most of their budget from the central government, as there are no regions in Portugal.

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The Expansion of Markets and the Rise of Skills: Two Roads Leading to the Same Place—Higher Education in the Current Agendas of the International Organisations

Alma Maldonado-Maldonado

Introduction

Current robust challenges to the idea of globalisation (not only economic but also cultural and social) have not come from thinkers, scholars or philosophers from the left or the right wings, but from people who voted for very conservative politicians who, for example, question the economic integration of countries. There are at least four recent examples. Firstly, the Brexit vote in the United Kingdom on 23 June 2016 resulted in 51.8% of voters casting their ballots in favour of leaving the European Union. Second, on 8 November 2016, Donald Trump was elected as the 45th President of the U.S. in a shocking result for many people inside and outside the country. Trump won with a very aggressive political agenda on issues regarding immigration, free trade, economic integration and globalisation in general. Third is the rise of the ‘Alternative for Germany’ (AfD) in the latest local German elections, which is an arch-conservative coalition that in the last elections

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(24 September 2017) won more than 13% of the total vote becoming the first overtly nationalist party with an important victory in German elections in over 60 years. The AfD is clearly against Angela Merkel's positions, who is well known for her support of the European Union, her promotion of economic integration and her strategies to try to solve the European immigration crisis (Mudde, 2017). Finally, France held presidential elections in 7 May 2017, and the far right candidate Marine Le Pen gained more votes for her political party (the National Front) than in the past elections; in a period of five years, she doubled the support of her political party from obtaining 17.8% of the national votes to 35% (Schultheis, 2017). Le Pen has been recognised as a politician who uses hate speech against immigrants and what she defines as the 'enfettered' globalisation, implying an opposition against the idea of 'open globalisation' (Pasha-Robinson, 2016). The movements of the far right or the so-called 'alternative right' (alt-right) are gaining unexpected electoral victories while employing hostile anti-globalisation and nationalist messages.

In this context, the role of the international organisations [e.g. the World Bank (WB), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the Organisation for Economic Cooperation and Development (OECD), among other], together with other traditional stakeholders of globalisation (such as the Group of Seven or the World Economic Forum), is questioned. International organisations have been criticised for their participation in promoting a certain paradigm of development, economic growth and worldwide integration closely related to the free market. More specifically, international organisations have had an important role in shaping educational policies around the world, including higher education (Bassett & Maldonado-Maldonado, 2009; Coraggio & Torres, 1997; Ilon, 1996; Samoff, 1996). Considering the large diversity among the governmental international organisations in terms of scope and mission, for instance between those that provide financing and those that only offer ideas and recommendations (e.g. think tanks), the understanding of what their influence has been in education worldwide deserves much more attention and research given their increasingly controversial presence. The storm concerning their work did not reach its highest intensity

when they were facing public protests in Seattle in 1999 or in Madrid in 2002, but as Stephens (2016) summarises: ‘The liberal rules-based system established after 1945 is under unprecedented strain, including the role taken by Vladimir Putin in Russia, Marine Le Pen in France, Nigel Farage in the UK among others’ (p. 9). Since all the international organisations are post-war institutions, there is no doubt that they are part of this umbrella of the questioned liberal rules-based system, and it is an opportune time to critically examine their contributions.

The aim of this chapter is to discuss the current agendas of some of the most relevant international organisations working on education and particularly those that shape the higher education policy agenda, mainly the World Bank Group [formed by five institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Cooperation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID)] and the OECD. The chapter contributes to the debate of their presence and future in the European (but also in a worldwide) context. It is important to remember that while the higher education sector is in the middle of ideological, political and economic storms, it will certainly continue to be relevant for the future of most societies; more specifically, these two international organisations emphasise in some ways the role of higher education markets and skills impacting the economic competence and growth of countries.

International Organisations: What Is Next in Higher Education?

On paper, ‘education’ has always been important for most of the international organisations but the amount of resources these international agencies truly invest in education is a different story. As it is known, only development banks (e.g. regional banks such as the American, Asian and African Development Banks and of course the World Bank) provide loans, credits, grants and technical assistance.

International foundations operate differently since they are non-governmental organisations. In the case of the World Bank, in the fiscal year 2016, education represented only 6.6% of the total IBRD and the IDA lending (World Bank, 2016a). In the case of the Inter-American Development Bank (IDB), it only allocated about 8% of its budget to education in 2015 (IDB, 2016). The Asian Development Bank (AsDB) reported having spent 4.3% on education loans and about 4.1% on education grants (AsDB, 2016). Finally, the African Development Bank (AfDB) reported having assigned only an estimated 9.4% of its budget to the social sector, which may include education spending (AfDB, 2016). But even organisations that do not provide funds to education demonstrate similar trends in terms of financing educational projects. For example, the only international organisation that has the word ‘education’ in its name—UNESCO—only spends about 18% on educational projects (UNESCO, 2014). In the case of the OECD, human and social capital (where education is included) represented 1.8% of the total final budget in 2015 and 3.8% of the total expenditure. The final budget of programmes related to education accounted for 18% of the total OECD budget and 14% of the total expenditure; the programmes included are the Centre for Educational Research and Innovation, the Programme for the International Assessment of Adult Competencies, Programme on International Student Assessment and the Programme on Institutional Management in Higher Education (OECD, 2016b). Independently on who decides, the amounts provided to education and higher education it is not only responsibility of the international organisations but also of its boards and country member’s; however, these percentages do reflect the place education has within these institutions.

One difference between the World Bank and other organisations is that it periodically publishes an *Education Sector Strategy* (1995, 1999, 2005 and 2011). These documents, unlike the hundreds of publications by the World Bank, are considered strategic as they set priorities for the organisation as a whole. According to Verger and Bonal (2012): ‘The education sector strategies are probably the most outstanding policy documents contributing to positioning the Bank as the intellectual leader of education reform in the field of development aid’ (p. 125).

The *Education Sector Strategy 2011* establishes the agenda for the next 20 years and stresses a change in the idea of ‘education for all’ towards ‘learning for all’ (World Bank, 2011). This slight shift in the policy education agenda makes sense because of its implications for educational effectiveness: learning is assumed to be something that can be measured. The World Bank’s positions on higher education have changed historically, as do the policies of most international organisations. These organisations are many things but static. The 1994 publication of *Lessons of the Experience* by the World Bank (World Bank, 1994) placed the institution at the forefront of key criticisms of the classic idea of public universities. The document indicates that higher education institutions need to diversify, find other sources of financing besides public funds, modify governance and improve evaluation and assessment mechanisms. Then *Peril and Promise* (Task Force on Higher Education and Society, 2000), written by external people but jointly published by the World Bank and UNESCO, modified that position. This report brought back the relevance of higher education for developing countries and strongly criticised the most important approach used by the World Bank to understand higher education: the rate of returns. Later, with the publication of the report *Constructing Knowledge Societies* (World Bank, 2002), the World Bank focused the discussion on the role of knowledge as a main economic driver, which in many ways was implied in the notion of ‘knowledge-based economies’ promoted by the OECD. This summary of different positions on education by the World Bank demonstrates that the term ‘learning for all’ is not accidental and its use has many implications.

Wording is not used naïvely in the space of international education and can generate some tensions, which occurred at the last World Conference of Higher Education in 2009 organised by UNESCO that debated whether higher education should be considered a public good or not (Maldonado-Maldonado & Verger, 2010). In the case of the World Bank, the organisation has preferred to use ‘knowledge’ instead of ‘education’. Stiglitz—quoted by Olssen and Peters (2007, p. 336)—argues that ‘knowledge is a public good because it is non-rivalrous, that is, knowledge once discovered and made public, operates expansively to defy the normal ‘law’ of scarcity that governs most commodity markets’.

However, the debate over knowledge concerns the point at which it materialises and acquires some value:

Yet once material embodied or encoded, such as in learning or in applications or processes, knowledge can be differentiated from the low cost of its dissemination, resulting from improvements in electronic media and technology, although there may be congestion effects and waiting time (to reserve a book, or download from the Internet). (Olssen & Peters, 2007, p. 336)

Indeed, Samoff (2012) points out that the World Bank regularly uses the term 'knowledge' when in common language it means 'information'. In any case, the debate over the definition of knowledge currently seems to be 'learning' and 'skills', which is discussed below.

In the case of the OECD, the organisation does not publish any educational strategy like the World Bank, but it does publish documents with frameworks on educational reforms, such as the one on evaluation and assessment that has been followed in studies in many countries since 2011. More than learning, the OECD particularly emphasises 'skills' and has developed three instruments that target different populations in order to assess learning and the most important skills. The first is the Programme for International Student Assessment (PISA), which has become an instrument of global governance shaping many educational reforms. Its latest edition in 2015 compares the assessment of about 540,000 15-year-old students across 72 countries in the areas of reading, mathematics and science (OECD, 2016d). The second instrument is the Programme for the International Assessment of Adult Competencies (PIAAC). Its first round took place in 2008 with the participation of 23 countries, and it is currently conducted in 40 countries with the participation of about 200,000 individuals between 16- and 65-years old (OECD, 2016c). PIAAC measures 'the key cognitive and workplace skills needed for individuals to participate in society and for economies to prosper (such as literacy and numeracy skills and the ability to solve problems in technology-rich environments)' (OECD, 2016c, para. 1). The third initiative has been the Assessment of Higher Education in Learning Outcomes (AHELO), which currently is on

a pause and perhaps it is a project that will not be implemented ever. The purpose of AHELO is to have an assessment that ‘aims to be direct evaluation of student performance at the global level and valid across diverse cultures, languages and different types of institutions’ (OECD, 2017, para. 2). The test included three areas: generic skills, economics and engineering. It was implemented in 249 higher education institutions in 17 countries with the participation of about 4900 faculty members and 23,000 students (OECD, 2017). The OECD’s Institutional Management in Higher Education (IMHE) proposed AHELO in January of 2010 which was an expensive project: according to Altbach (2015, p. 2), its cost was about 10 million dollars and ‘this comes at a time when the OECD has systematically cut its programming in higher education by eliminating *Higher Education and Policy*, an excellent journal, and other initiatives’ (established in 1997 and closed in 2012). Many questions about AHELO were concerned with how viable the project was. The main problems reported in AHELO were: lack of student interest in responding the tests; securing full financing, a representative sample and the appropriate time frame for the tests; making sure to have an adequate translation of instruments; adapting to culture and contextualise the tests (OECD, 2013). The OECD decided to close its Higher Education Programme (IMHE) in December 2016, which was substituted by a new one named ‘Enhancing higher education system performance’. It has two components: benchmarking higher education systems performance and in-depth analysis of higher education topics. The reasons to not renew the IMHE and change the programme are not clear but seem to be related to the need to offer better services to the country members, develop a more relevant agenda and perhaps the aforementioned problems AHELO experienced.

The Rise of Skills

According to the OECD (2016e, p. 18), ‘skills have become the global currency of twenty-first-century economies, but this “currency” can depreciate as the requirements of labour markets evolve and individuals lose the skills they do not use’. The Secretary General of the OECD,

José Ángel Gurría, has also stated that ‘poor skills severely limit people’s access to better-paying and more rewarding jobs’ (OECD, 2016e, p. 3), and on the other side, ‘that future innovators and entrepreneurs will require a large range of skills to be able to meet the demands of the changing economy’ (Hoidn & Kärkkäinen, 2014, p. 7). The World Bank also stresses the relevance of learning and skills; the best example is the recent publication of the World Development Report focusing on learning (World Bank, 2018).

The Bank suggests classifying skills in cognitive, social and behavioural and technical areas (Bodewig et al., 2014). The World Bank has expressed that every region is facing challenges in terms of skills and most countries need to develop assessment systems, from Asia to Latin America or Africa. The European and Central Asia region has been recognised as having a shortage of skilled workers, which has become an important constraint (Sondergaard, et al., 2012). In particular, regarding Eastern Europe and Central Asia, the World Bank classifies countries in groups in the following manner:

- Group 1: ‘Not started, very early stages, no, or rare participation in international assessments’. This group includes Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Kazakhstan, Kosovo, Kyrgyz Republic, Tajikistan, Turkey, Turkmenistan and Uzbekistan.
- Group 2: ‘Early piloting of own assessment instruments, some participation in international assessments’. It includes Albania, Croatia, Czech Republic, Estonia, Georgia, FYR Macedonia, Moldova, Montenegro, Poland, Russian Federation, Slovak Republic and Ukraine.
- Group 3: ‘Several years of experience with own assessments and regular participation in international assessments’. It includes Bulgaria, Hungary, Latvia, Lithuania, Romania, Serbia and Slovenia.
- Group 4: ‘Several years of experience in measuring, analysing, and making use of learning results to improve education policy’. The countries in Eastern Europe and Central Asia do not have any countries in this group (Sondergaard et al., 2012, p. 10).

A recent OECD higher education project *Enhancing Higher Education System Performance* considers the relevance of skills as the ‘intermediate

outcome' of the educational performance dimensions (OECD, 2016a, p. 17). One important question is to what extent the promotion of quality assurance systems implemented in Europe is related to the same idea of skills promoted by the OECD. At least in both cases there are continuous references to each other. In the last 30 years, the OECD has worked on a major international study of evaluation and assessment policies in school systems with heavy participation of some European countries. In the preparation of country background reports, there were 25 countries participating, 20 of which were European: Austria, Belgium (Flemish and French), the Czech Republic, Denmark, Finland, France, Hungary, Iceland, Ireland, Italy, Luxemburg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Sweden and Northern Ireland (the UK). Only five European countries of those previously mentioned by the World Bank are also working with the OECD in this project (the Czech Republic, Hungary, Poland, Slovenia and Slovak Republic). Additionally, 11 European countries out of 20 have presented a country review on the same project. Actually, the document *The State of Higher Education* states that even when this framework on evaluation and assessment is not directly related to higher education, it has served as a background to discuss what to do in other educational levels (Glass, 2014).

It is possible to say that the OECD's conception on skills and their evaluation coincides with that of the European Union than the World Bank. There are many similarities between the OECD agenda, in particular PISA and the Definition and Selection of Competencies (DeSeCo) Programme, and the European Union agendas, specifically the European national qualifications frameworks (NQS) developed in 39 countries and also the European Centre for the Development of Vocational Training; all of them centre on the idea of skills and competences. An OECD document actually uses the definition of skills and competences from a document by the European Commission. Skills are defined as 'the ability to perform tasks and solve problems' while the authors seem more comfortable with the word 'competence', defined as:

the ability to apply learning outcomes adequately in a defined context (education, work, personal or professional development). A competence is not limited to cognitive elements (involving the use of theory, concepts

or tacit knowledge); it also encompasses functional aspects (involving technical skills) as well as interpersonal attributes (e.g. social or organisations skills) and ethical values. (Ananiadou & Claro, 2009, p. 8)

The European Higher Education Area (EHEA) currently consists of 47 countries with different political, cultural and academic traditions that ‘cooperate on the basis of open dialogue, shared goals and common commitments’ (Yerevan Communiqué, 2015, p. 1). Indeed, the case of European higher education not only becomes more complex because part of the debate in the region has to do with academic mobility but also goes beyond that to include the recognition of professional qualifications and the equivalence of professional education (Davies’ chapter in this book). In many ways, the debate is concerned with the possibility of creating a European higher education market.

Some of the criticisms of the European Commission’s work are related to its priorities. As Amaral and Sursock (chapter in this book) point out that there is a utilitarian view on the purpose of higher education and its role in terms of economic competence. Higher education has been appreciated by its role producing graduates to supply the labour market more than contributing to the common good of society.

Other chapters in this book discuss the meaning of these instruments in Europe more in depth; what this paper stresses is the connection between the OECD’s and the European Commission’s discourse on skills, and additionally that the analysis of higher education markets inevitably involves discussing skills (and competences). While the OECD stresses the importance of skills, in its more recent World Development Report, the World Bank (2018) decided to focus the report on ‘learning’. The World Bank decided to put in the centre of its flagship report a topic that is closely related to the ‘sustainable development goals’, specifically the fourth goal—‘Ensure inclusive and quality education for all and promote lifelong learning’—but also this report is coherent with the Education Sector Strategy 2011 and its agenda of ‘learning for all’. In any case, some of the main international organisations are paying more attention to what can be compared, tested, showed, used and/or measured (learning or skills) than to how this

knowledge is better taught or transmitted, the conditions in which such processes take place or the characteristics of the actors involved, which makes sense in terms of policy-making but not necessarily in terms of creating a better understanding of the educational phenomena. The conclusion seems clear for the World Bank and the OECD: A population with better skills means a country can experience better economic growth.

The Rise of Markets

The International Finance Corporation is the second largest World Bank organisation (with 184 members) among the World Bank Group. The IFC is ‘the largest global development institution focused exclusively on the private sector in developing countries’ (IFC, 2017b, para. 1). Most research on educational financing of international organisations focuses on projects financed by the IBRD and the IDA (what normally is known as ‘the World Bank’). Naturally, these two organisations have the largest investments in development worldwide and are important in supporting education at all the levels. However, this chapter analyses the role of a more recent educational actor among the World Bank Group, the IFC, whose role in private educational investment of the World Bank has been less researched. Although the IFC was created in 1956, it did not have a strong presence in education until more recently: ‘Among the most significant shifts in IFC work since 2000 has been the expansion of its work in health and education, which grew from less than 1% of its total investments, to 3% of the IFC’s portfolio in 2010’ (Mundy & Menashy, 2014, p. 17). The IFC was created when member governments became concerned that multilateral lending agencies were not effectively supporting private entrepreneurs. ‘The IFC also grew out of the belief that economic development, and thereby poverty alleviation, was dependent on a robust private sector’ (Robertson, 2012, p. 194). Based on the IFC Annual Reports, the total commitments signed (also reported as ‘IFC’s own account’ or in other cases ‘IFC or total long-term finance’) leave no doubt about the robust budget investments made lately by the IFC.

Unfortunately, it is not always possible to obtain the percentage or the amount invested in education, as this was possible only in certain periods (see Table 1); therefore, other data have to be inferred.

The percentage of the financing provided to education (and health) was available only in nine years, so it is difficult to picture the total proportions committed to these sectors. In these nine years (2001, 2002, 2003, 2004, 2005, 2007, 2008, 2009 and 2010), the total amount invested in education reported was 67,376 million dollars (a bit more than 67 billion). This represents only 2.09% of the total IFC commitments or IFC account (or total long-term finance) dedicated to education. Three problems of the IFC Annual Reports are: the amounts reported by the IFC are inconsistent year to year and the IFC keeps modifying the amounts in every report (in this case, the most updated amount was the one considered); the ways the information is presented changes in the reports (the concepts used to describe the type of financing); finally, the information about education and/or health is not always available.

The IFC can be described as the 'private sector investment arm', which is playing a more central role in education as 'an emerging market' (Robertson, 2012, p. 190). An important principle of the IFC is the estimation that the private education sector now has a market size of over \$400 billion dollars (IFC, 2010a). The World Bank actually recognises this:

Individual private income is not the only source of funding for private education providers, as multilateral agencies, bilateral agencies and government are also subsidizing and contracting with private sector schools and colleges to provide education on their behalf. In case of some governments this is done through Public Private Partnerships (PPPs). (IFC, 2010a, p. 6)

Why is it important to pay attention to what the IFC has done? Two quick answers: first it has to do with the fact that the IFC (which is part of the World Bank) has been promoting the development of higher education markets mostly in emerging economies that may have better chances of growth and success than investing in poorer countries. The World Bank (through the funding of the IBRD and the IDA) was

Table 1 IFC total commitments and percentage invested in education (when available). Period 2000–2017

Year	Budget identification	Amount (millions of dollars, latest year)	Area assigned	Percentage	Millions of dollars
2000	Total commitments signed	3909	Not available	Not available	Not available
2001	Total commitments signed	3934	Health care and education	3.5%	137.69
2002	Total commitments signed	3494	Health care and education	1.71%	60
2003	Total commitments signed	5037	Health care and education	0.73%	37
2004	Total commitments signed	5632	Education services	0.17%	10
2005	Total commitments signed	6449	Education services	0.60%	39
2006	IFC's own account	6703	Not education reported	Not available	Not available
2007	Total commitments signed	8220	Health and education	2.4%	197.28
2008	Total commitments signed	11,399	Health and education	3%	341.97
2009	Total commitments signed	10,547	Health and education	2%	210.94
2010	For IFC's own account	12,664	Health and education	3%	379.92
2011	For IFC's own account	7,491	No education sector	Not available	Not available
2012	For IFC's own account	9,241	No education sector	Not available	Not available
2013	For IFC's own account	11,008	No education reported	Not available	Not available

(continued)

Table 1 (continued)

Year	Budget identification	Amount (millions of dollars, latest year)	Area assigned	Percentage	Millions of dollars
2014	IFC commitments	9,967	No education sector	Not available	Not available
2015	IFC commitments	10,539	No education sector	Not available	Not available
2016	IFC commitments	11,117	No education report	Not available	Not available
2017	Total long-term finance	11,854	No education report	Not available	Not available
Total		149,205			

Source Annual reports of International Finance Corporation (2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010b, 2011, 2012, 2013, 2014, 2015, 2016, 2017a)

already supporting countries like India, Indonesia, Mexico, Colombia, Turkey and Tunisia (Maldonado-Maldonado & Cantwell, 2009), but now the IFC's work is more evident than ever. Second, these emerging economies eventually will expand potential micro-markets of higher education services when some of their students will look to continue studying a graduate degree in developed countries and/or decide to live in these countries (highly skilled migration). Today, developed countries increasingly require highly skilled personnel and also need the active participation of students from emerging economies to continue with their work in some areas of basic research and graduate education (Cantwell, 2011). The development of a potential market for international students who continue to look for opportunities to study in high-income countries has been profoundly studied in the past, including all its economic, social, political and cultural advantages (Gürüz, 2008).

From 2012 to 2016, the top five countries that received higher education financing from IDA which serves the world poorest countries were: India (receiving 27% of the total financing), Vietnam (14%), Bangladesh (14%), Pakistan (11%) and Mozambique (2.7%). Two regions obtained important funds from IDA: Western Africa (14%) and Eastern Africa (6%) (see Table 2).

Table 2 Projects financed by the IDA, World Bank (from 2010 to 2016)

Country	No. of projects	Money spent on higher education (millions of dollars)	%
Afghanistan	3	31.9	1.20
Bangladesh	5	359.75	13.57
Burkina Faso	2	20	0.75
Cambodia	1	11.04	0.41
Chad	1	1.35	0.05
Democratic Republic of Congo	1	50	1.88
Eastern Africa	1	145	5.47
Ethiopia	1	2.6	0.09
The Gambia	1	.825	0.03
Georgia	1	7.8	0.29
Ghana	1	2.8	0.10
Guinea	1	8.6	0.32
Guyana	3	12.04	0.45
India	3	720.18	27.17
Kosovo	1	.882	0.03
Liberia	1	2.1	0.07
Malawi	1	40.72	1.53
Maldives	1	1.5	0.05
Mali	1	19.8	0.74
Mozambique	2	71.95	2.71
Nepal	1	59.8	2.25
Nicaragua	1	7.25	0.27
Pakistan	1	300	11.32
Rwanda	1	17.5	0.66
Senegal	5	90.13	3.40
Solomon Islands	1	1	0.03
Sri Lanka	2	66.45	2.50
Tajikistan	1	15	0.56
Tanzania	2	51	1.92
Tuvalu	1	.6	0.02
Uganda	1	1.3	0.04
Uzbekistan	1	35	1.32
Vietnam	4	376.79	14.21
Western Africa	2	105	3.96
Republic of Yemen	2	12.62	0.47
Total		2650.27	

Source The World Bank (2016b)

The top five countries that received financing for higher education by the IBRD, which ‘provides loans and other assistance primarily to middle-income countries’ were Colombia (18%), Costa Rica (17%), Peru (13%), Tunisia (11%) and Chile (8%) (see Table 3).

There is another category classified as ‘others’, for which the top five countries were Afghanistan (40%), Democratic Republic of Congo (14%), Ghana (13.4%), Ethiopia (9.7%) and Kosovo (2.6%) (see Table 4).

Data from the IFC indicate that since 2000 there have been 63 approved projects for colleges, universities and professional schools distributed in 27 countries, two regions (East Asia and Pacific Region and Latin America) plus the West Bank and Gaza (see Table 2). The total investment approved by the Board dedicated to these projects was 1.3 trillion dollars and loans represented 934.5 million dollars (World Bank, 2016b) (see Table 1). Because the IFC was created to support private initiatives, the ‘higher end colleges’ are defined by the IFC (2010a) as:

Table 3 Projects financed by the IBRD, World Bank (from 2010 to 2016)

Country	No. of projects	Money spent only on higher education (millions of dollars)	%
Armenia	3	15.88	1.37
Brazil	1	50	4.34
Chile	2	88	7.64
China	1	1	0.08
Croatia	1	20.68	1.79
Colombia	2	202.5	17.59
Costa Rica	1	200	17.37
El Salvador	1	28.2	2.45
Indonesia	1	70.3	6.10
Kazakhstan	1	12.27	1.06
Macedonia	1	1.92	0.16
Mexico	1	56	4.86
Montenegro	1	7.99	0.69
Morocco	3	64	5.56
Peru	2	146.75	12.68
Romania	1	60.77	5.27
Tunisia	2	125	10.86
Total		1151.26	

Source The World Bank (2016b)

Table 4 Projects financed by the World Bank (others) (from 2010 to 2016)

Country	No. of projects	Money spent only on higher education (millions of dollars)	%
Afghanistan	1	50	40.3
Africa	1	2.64	2.1
Democratic Republic of Congo	1	17	13.7
Ethiopia	2	12.04	9.71
Ghana	1	16.61	13.40
Kosovo	1	3.22	2.59
Mauritania	1	1.98	1.59
Mali	1	2.5	2.01
Serbia	2	7.59	6.12
Somalia	1	2.8	2.25
Vietnam	1	.846	0.68
West Bank and Gaza	2	3.18	2.56
Western Africa	2	3.38	2.72
Republic of Yemen	1	.106	0.08
Total		123.9	

Source The World Bank (2016b)

those private universities and colleges which aim to fill the unmet demand for places in higher education that the State cannot afford to finance. They are often not-for-profit and many are faith-based. Very often the universities are reliant on foreign academic support and accreditation of their programmes by a foreign university. (p. 12)

This definition assumes the incapacity of the State to fulfil the demand of higher education, which is important to take into consideration. According to Olssen and Peters (2007):

While some economists and policy analysts have argued that there are new grounds for reappraising the role for the state in the knowledge economy (Stiglitz, 1999; Thurow, 1999), most governments have pursued policies that have followed a process of incremental and parallel privatization designed to blur the boundaries between the public and the private, learning and work. (p. 339)

Table 5 shows that Brazil is the country with the most IFC funding, receiving 403.63 million dollars (30% of the worldwide projects).

Table 5 Available details on projects financed by the IFC (2000–2016)

Country	No. of projects	For guarantee (in millions of dollars)	For loan (in millions of dollars)	For equity (in millions of dollars)	Total IFC investment approved (in millions of dollars)	%
Argentina	2		50		20	1.4
Antigua y Barbuda	1	30			30	2.2
Brazil	12	12.7	369.26	21.68	403.63	30.1
Chile	3	29.29	30		59.29	4.4
China	3		87.72	1.6	89.32	6.6
Colombia	12		38		38	2.8
Dominican Republic	1			20	20	1.4
East Asia and Pacific Region	1		61.89		61.89	4.6
Egypt	1	15.78			15.78	1.1
Ghana	1		2.5		2.5	0.1
India	2			.25	.25	0.01
Indonesia	2	19.03			19.03	1.4
Jordan	2	9.99		11.08	21.07	1.5
Kenya	1	7.4			7.4	0.5
Latin America	1		65		65	4.8
Mexico	2		72.84		72.84	5.4
Morocco	1			7	7	0.5
Namibia	1		10.8		10.8	0.8
Nigeria	2		6.5		6.5	0.4
Pakistan	1	3.38			3.38	0.2
Peru	3	10	7	25	42	3.1
Philippines	1		3.99	16.22	20.22	1.5
Saudi Arabia	1	30			30	2.2
South Africa	2			20.93	20.93	1.5
Trinidad and Tobago	1		5		5	0.3
Turkey	7		111.5		111.5	8.3
Uruguay	1		5		5	0.3

(continued)

Table 5 (continued)

Country	No. of projects	For guarantee (in millions of dollars)	For loan (in millions of dollars)	For equity (in millions of dollars)	Total IFC investment approved (in millions of dollars)	%
Vietnam	1		7.5		7.5	0.5
West Bank and Gaza	1	16			16	1.1
World Region	3			125	125	9.3
					1336.83	
Total		183.57	934.5	248.76		

Source World Bank (2016b)

Turkey is the second (8.3%), followed by China (6.6%), Mexico (5.4%) and Chile (4.4%). The regions supported were in the following order: World Region (9%), Latin America (4.8%) and the East Asia and Pacific Region (4.6%) (see Table 2). More importantly, the top five countries (Brazil, Turkey, China, Mexico and Chile) received 55% of the total financing provided by the IFC dedicated to colleges, universities and professional schools with 736.58 million dollars.

Mundy and Menashy (2014) reported that the IFC investments in education were still small, at about \$500 million dollars over 11 years, 'as contrasted to total lending of \$5 billion for education from IBRD/IDA in the single 2010 fiscal year' (p. 22). However, more updated research shows that in 9 years, the IFC's commitments increased a bit more than 1.4 billion (see Table 5). Still it seems interesting to compare the World Bank educational lending (IBRD and IDA) in the following fiscal years where there have been some considerable reductions such as IDA lending from 2014 to 2016 or IBRD lending from 2012 to 2014 although it has been recovered in 2016. In general, the total lending from the World Bank was 500 million dollars more than 2015 with respect to the following year (2016) (see Table 6).

Table 6 Total World Bank (WB) educational lending in millions of dollars divided between the IBRD and IDA (when available)

	2010	2011	2012	2013	2014	2015	2016	Total
IDA lending			1663	1666	2334	2057	1309	9029
IBRD lending			1296	1065	1123	1477	1754	6715
WB total lending	4945	1733	2959	2731	3457	3543	3063	22,431

Source The World Bank (2014a, 2015, 2016a)

Table 7 illustrates another estimation based on the analysis of IDA and IRBD funding exclusively dedicated to tertiary education compared to the IFC.

The amounts presented in Table 7 are put into perspective when compared to the total amount spent by the IFC since 2000, which was 1.3 billion dollars. This amount would represent only .89% dedicated to higher education of the total IFC commitments (149.20 billion). While there are difficulties in obtaining information for the same period (2012–2016), the 2000 data provide some sense that this amount is not minimal. Clearly the countries supported by the IFC are middle-income economies with potential higher education markets. The situation with India is interesting since the country receives the most funding from the World Bank. Although India is part of the so-called group of BRICS (Brazil, Russia, India, China and South Africa) its limited level of development has allowed it to receive funds from IDA until very recently (see Table 2); also India does not receive financing from the IFC given its legal framework and its restrictions to let the establishment of for-profit higher education institutions. Actually, the World Bank recently decided to move its Lead Global Solutions Group on Tertiary Education from Washington, DC to India where the person in charge also will become the Lead Education Specialist for India which is a noteworthy message of reorganisation within the international organisation with respect to higher education.

The IFC's higher education financing clearly supports the idea of privatising higher education or at least a recognition from the World Bank that the private sector may be more promising in responding to the higher education demand than the public sector. According to Shugurensky and Davidson-Harden (2013):

Table 7 Funding exclusively to higher education by IDA, IRBD from 2012 to 2016 and by the IFC from 2000 to 2016

International organisation	Millions of dollars	Percentage of total investment for all education levels
IDA (2012–2016)	1543.91	17%
IRBD (2012–2016)	1050.91	15.6%
Other (2012–2016)	123.9	Not available
IFC (2000–2016)	1336.83	Not available from that period

Source The World Bank (2014a, 2015, 2016a)

The Bank's involvement with the International Finance Corporation (IFC) and its "Edivest" initiative (IFC, 2002) supporting private sector involvement in education in developing countries acts as a leveraging mechanism for supporting a marketising and privatising agenda in education systems globally. (p. 334)

Besides the recognition of how uncomfortable the concept of profit can be in the context of globalised higher education (Fazackerley & Worthington, 2007), the promotion of private higher education has important implications in countries with large populations and emerging economies (see Table 5). Low-income countries or lower middle-income countries do not represent a particular interest to the IFC in terms of supporting their higher education development (Mundy & Menashy, 2014), especially if the creation of higher education markets requires more resources in both time and money than only supporting some key private higher education institutions. Indeed, the interest of the IFC to help these countries increase the private higher education markets could be related to the following four aspects: (1) it is a profitable business; and (2) it is a way to ensure the production of necessary graduates in these economies that respond to the skills' demands; (3) it is recognition of some kind of failure of the public higher education system; and/or (4) it is eventually a contribution to a larger market of graduates from emerging countries where some of them may become part of the highly skilled migrants that some developed countries continue to need.

These aspects might be part of the explanation (or at least they are part of the context) to understand why the IFC announced in 2013

a huge investment of '\$150 million in Laureate Education Inc., giving the international development organisation a small stake in the Baltimore-based global higher education company' (5%) (Kilar, 2013, para. 1). This amount represented the largest single IFC investment ever and caused some surprises for that reason. Laureate reports a revenue of 4 billion, still it 'is eager to have the backing of an investor led by members of international governments' (Kilar, 2013, para. 3). Perhaps the loan was less about money (although 150 million is a considerable amount) and more about legitimacy. Laureate operates more than 70 institutions in 25 countries around the world and is the largest global network of degree-granting higher education institutions and the largest company to become a public benefit corporation, which is the way they are defined legally. Their mission is to 'deliver professional-oriented programmes in a wide range of disciplines that generate strong interest from students and provide attractive employment outcomes' (Laureate, 2016, para. 2). According to Laureate, they have presence in all the regions of the world: five institutions in North America, 30 in Latin America, 15 in Europe (although it is only possible to identify 13; three in the UK, two in Germany, three in Spain, one in Portugal, two in Italy, one in Turkey and one in Cyprus), 10 in Middle East, 13 in the Asia Pacific and two in Africa.

As Runde (2016) mentioned, the IFC ultimately made investments that 'helped expand higher education in developing countries while also providing IFC a financial return' (para. 9). Since the IFC operates in a for-profit market they would not invest resources 'into a poorly run or a money losing company' and as a consequence they also would not invest in less profitable initiatives (Runde, 2016, para. 9). According to Kilar (2013, para. 8): 'Laureate is focused on expanding affordable, career-creating higher education in emerging countries and often deals with governments in its work', and they 'only invest in companies that will help expand emerging economies'. A justification on why they invest in such institutions has to do with the fact that they 'offer accounting, computer training, hotel management and general business degrees. These schools skip the football stadium, don't offer art history or sociology, and stay away from campus politics' (Runde, 2016, para. 6). The students acquire skills to improve their lives and the lives of

their families. Indeed, the IFC explains its work financing private higher education using examples such as India where this sector ‘provides the country with almost all its engineers and is also producing a growing percentage of medical students. Even in the United Kingdom, private providers dominate the market in postgraduate education in law’ (IFC, 2010a, p. 4).

Although the information of all the projects sponsored by the IFC from 2012 to 2016 is not always available, there are some examples of higher education institutions that received support from the IFC, and naturally in most cases, they are for-profit institutions, companies or enterprises (Table 8). Although the purpose of the IFC is to invest in private entities that are able to have financial capacity to pay, it is interesting to note the diversity of the institutions supported; some are old private universities (some Jesuit) others are for-profit companies and others are simply enterprises that invest in higher education. Unfortunately, the lack of information about all the sponsored projects hinders a complete analysis of the impact of the IFC in higher education.

What message does the IFC send by sponsoring these institutions? In many ways, it suggests that they are betting very hard on the private education sector with important implications, some of which are summarised by Mundy and Menashy (2014, p. 6): ‘Private education provision is argued to expand a country’s capacity for service delivery when government is low, especially when combined with demand-side financing that allows publicly funded students to go to private schools’. Under this logic, it is believed that if there is competition between public and private providers there will be more quality, efficiency, innovation and diversity. Also, private education is presented as improving the size and the conditions of middle class, and eventually as a way to blur the distinction between rich and non-rich (Mundy & Menashy, 2014).

Again, the debate on the IFC and its work requires more research and analysis. The relationship between the financing of the IBRD, IDA and the IFC needs to be studied in depth, including the ways these organisations relate. Another important aspect about markets and higher education concerns the work developed by the World Trade Organisation (WTO) since they are participating in the regulation of higher education services. Even when the trade in commercial services is less than

Table 8 Details available on the IFC projects

Country	Institution	Characteristics	Year	Project	IFC investment (in millions of dollars ^a)
Argentina	Universidad del Salvador	Jesuit private university	2016	Campus construction and infrastructure	10
Brazil	Estácio Participações S.A.	Largest private university	2015	Investment	50
	GaeeEducação	An education company that operates private universities	2014–2016	Loan to expand	70
Colombia	Ser Educativa S.A.	A for-profit education company	2012–2013	To fund strategic acquisitions	60
	Pontificia Universidad Javeriana	A Jesuit private university	2016	To span a construction period of 7 years	30
China	Xi'an Eurasia University	A private university	2016	To create a long-term senior loan	34.72
Indonesia	Atma Jaya University	A private university	2016	To fund an expansion	64
Jordan	Luminus Group	A private company	2014	Investment	10.5
Morocco	Institut des Hautes Etudes de Management	A private for-profit university	2013	Investment	7.5
Peru	Proyectos Educativos Integrales de Peru, S.A.C.	An education sector company	2014	Investment	25

(continued)

Table 8 (continued)

Country	Institution	Characteristics	Year	Project	IFC investment (in millions of dollars ^a)
Philippines	TCG Holdings, Inc.	A company with interests in food service and manufacturing, hotel operations and education	2015	Investment	17
South Africa	ADVTech Group	A leading private education group	2016	Investment	20.93
Turkey	Ozyegin University	A private foundation university	2013	To fund a new campus	60
	Plato	A private education provider	2012	Investment	6
World Region	Education Innovation Fund	A venture capital fund to invest in education in emerging markets	2014	To create a fund	20
	Coursera	An educational technology company	2013	Investment	5
	Laureate Education Inc.	A public benefit corporation	2012	Investment	150

^aThis number has to be taken cautiously because it is difficult to calculate

Source: World Bank (2016b)

four trillion dollars (versus the trade of merchandises which is more than 16 trillion) (WTO, 2016), we still need to learn more about the details of the market and in particular the higher education services. Researchers have studied how many countries and the European Union have declared their commitments to opening their higher education services; however, there is less knowledge about the actual commercial transactions. This is definitely another pending aspect to continue studying, especially in some of these middle-income countries that are fiercely looking to expand their higher education markets. Some governments feel pressure to develop higher education systems that are able to produce learners who are 'enterprising, agile and risk takers, on the one hand, and engage the private sector in a wider range of education activities (such as on-the-job training, publishing, technology initiatives and education provision), on the other' (Robertson, 2012, p. 193). Perhaps this is another explanation about why recent support to some institutions has been through the IFC and not their traditional backers (such as IDA and the IRDB). Perhaps the World Bank is moving from a supportive attitude towards development through higher education to a more neglecting attitude that will only support for-profit initiatives that guarantee certain types of higher education services.

Final Remarks

Because international organisations like the OECD or the World Bank cannot establish international regimes such as those related to sea limits, nuclear weapons or commerce regulations (Kratochwil & Ruggie, 2001), the main activities they can do to influence policy is to produce effective messages, coherent and well-grounded suggestions to their members and shape the distribution and priorities of international aid. The OECD looks to influence at a much more selective level and the World Bank at a more extensive scale. However, Henry, Lingard, Rizvi and Taylor (2001) considered that in some occasions the OECD develops policy recommendations that later the World Bank looks to apply in developing countries. In any case, the success of the World Bank and the OECD has to do with the way they construct and disseminate

their knowledge, by publishing documents, reports, recommendations, policies, conferences, networks and sponsored projects. This chapter presented the case of two important issues: the relevance of skills (and competences) and the development of the higher education markets (mostly private) while highlighting the complexity of understanding the internal changes that occur in these international organisations as well as in their positions on the way higher education should be expanded. These institutions have never been static.

Nevertheless, these are not only messages sent by international organisations. These are two devices that outline the global governance of education at two different scales: the financing and the comprehension of education. As it has been mentioned before (Maldonado-Maldonado & Cantwell, 2009), the multilateral and bilateral aid are influenced to each other and they seem to follow similar tendencies so there is nothing naïve about the World Bank promoting private markets of higher education in emerging economies. The World Bank could deny the way they contribute to increase the development of higher education markets, especially when there are policy documents where they do not necessarily embrace the relevance of for-profit higher education but emphasise the importance of its regulation (Marmolejo, 2016; World Bank, 2014b). Nevertheless, this chapter presents an analysis on financing data because it is also recognised that, one hand, there is a debate on what the World Bank suggests to do and, on the other hand, there is a discussion on how does the World Bank and similar organisations decide to spend their money. The discourses can point at somewhere but the financing indicates other directions. In this sense, there is a smooth shift when the World Bank is leaving low-income countries to look for funding to their higher education systems/institutions somewhere else (to other regional banks or international foundations). In the case of the emphasis on skills to understand the educational processes (particularly from the OECD), there are key implications on: what policy makers pay attention when they design policies; what forms of education and indicators are used to do worldwide comparisons and ultimately how education is studied.

In sum, through its private arm (the IFC), the World Bank supports the private demand-absorbing higher education sector and contributes

to building a network of stakeholders that maintain it (Ball, 2012). By focusing on the skills and competences over other ideas and possibilities (such as educating citizens), these organisations give a particular meaning and purpose to higher education and point out the type of knowledge that can be measured and compared. It means that higher education is relevant to train future professionals that actively participate in the labour market in certain countries. This short-term view on higher education has been a consistent criticism to international organisations. It could be considered a simplistic view but the World Bank and the OECD are contributing to reaffirm this idea. Two different indications of other ways to do things could be: (1) imagining the World Bank seriously committing financial resources to promote higher education beyond building markets in emerging economies and in other poorer nations; (2) envisioning the OECD suggesting other forms of valuing education in shaping public policy to promote alternatives of what currently exists.

In addition to the criticisms of the role of international organisations from left wing parties and civil society's organisations, there are new critical positions about their role in the context of the criticisms against globalisation. Therefore, one would think that international organisations would be more open to diverse voices but perhaps it is only a naïve request. Two organisations such as the World Bank and the OECD have to respond to their members, investors and clients, which may explain why, at the end, the financing provided to education is not very impressive. But another key consideration is to what extent these organisations are willing to discuss their agenda. Are these institutions ready to debate the real budget provided to their educational activities and/or loans and credits (to each level of education) and the policy implications given the type of knowledge they value? Or is there an obstacle to do that given their own organisational constraints and bureaucratic structure? Or do their interests and agendas simply lay elsewhere?

More than ever it is clear that the scaffolding of globalisation seems weak; perhaps it is time for some of their 'architects' to also pay more attention. Higher education is far too important to solely allow

international governmental organisations to constrain it to its economic impact in countries. This may be a good time to start magnifying its social benefits to all nations despite how much potential they have or how rich or poor they are.

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Part II

**Tools for European Integration in Higher
Education**



The Bologna Process and the Unachieved Potential for the Creation of a Common Higher Education Market

Cristina Sin and Orlanda Tavares

Introduction

The Bologna Process was launched in 1999 when the higher education ministers of 29 European countries signed the Bologna Declaration (currently with 49 signatory countries). Its ultimate objective was to create the European Higher Education Area (EHEA) by 2010, through a series of measures that would bring more synergy and convergence among national qualifications and higher education systems in order to improve student mobility and employability in this shared area, as well

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as the attractiveness and competitiveness of European higher education in the world. Although voluntary, the Bologna reforms have generated deep transformations of the higher education sectors of signatory countries, including reorganisation of degree structures, a new architecture of qualifications and quality assurance reforms.

This chapter suggests some arguments why the Bologna Process, by pursuing its convergence ambitions, could have the potential to act as an instrument for the creation of a common higher education market. This would help the integration efforts of the European Union (EU) in a policy area explicitly excluded from its legal prerogatives. However, the political ambitions of convergence have been counterbalanced by the prevalence of member states' sovereignty in the implementation of the reforms proposed by the Bologna Process. The steering through soft law, national traditions of higher education (HE) and national political agendas have led to a diversity of outcomes which raises questions about the feasibility of a common market. The Bologna Process is conceptually understood here as a Europeanisation process (see Olsen, 2002) towards the creation of a unified Europe (yet leaving aside the political union dimension implied in the definition, since the Bologna Process reaches beyond the borders of the EU). According to the definition proposed by Musselin (2009), extending Radaelli's definition of Europeanisation (2002), we view Bolognas 'a process of construction, diffusion and institutionalisation of formal and informal rules, procedures, policy paradigms, styles, ways of doing things and shared beliefs and norms, *first defined and consolidated in the making of intergovernmental public policy and politics* and then incorporated in the logic of domestic discourses, identities, political structures and public policies of EU countries and other European countries' (Musselin, 2009, p. 184, original italics).

The chapter starts by looking into the potential of the Bologna Process to contribute to the establishment of a HE market, in line with the marketization pressures exerted by European institutions, which are discussed next. Then this chapter discusses barriers which might hinder the creation of a common market, deriving from the peculiarities in the governance of the Bologna Process and the limited convergence following the uneven implementation observed in its signatory countries.

The Potential of the EHEA as a Higher Education Market

The Bologna Declaration (1999) and its predecessor, the Sorbonne Declaration (1998), both envisaged the creation of a European space of HE. The subtitle of the Sorbonne Declaration 'Joint declaration on harmonisation of the architecture of the European higher education system' is suggestive of the ambitions of creating a unified system of HE across Europe, to be constructed around two main cycles, undergraduate and postgraduate, expressed in credits meant to enable study flexibility. According to the Sorbonne Declaration, 'an open European area for higher learning carries a wealth of positive perspectives, of course respecting our diversities, but requires on the other hand continuous efforts to remove barriers and to develop a framework for teaching and learning, which would enhance mobility and an ever closer cooperation' (Sorbonne Declaration, 1998, p. 1). A year later, the countries which signed the Bologna Declaration, while committing themselves to the creation of a European area of higher education, avoided using the term 'harmonisation', which would have implied too high a risk of nation states ceding power over the organisation of their systems of HE, therefore too intrusive for national sovereignty (Croché, 2009).

In this early stage of the Bologna Process, the creation of the EHEA was expected to improve Europe's competitiveness worldwide and, at the same time, strengthen cooperation among signatory countries. This was to be achieved through the creation of common structures and frameworks guiding the reorganisation of national HE systems: a common degree architecture based on tiered study cycles; the Diploma Supplement as a tool to ensure readability of the degrees; common degree descriptors in the form of credits and learning outcomes; and cooperation in quality assurance with a view to developing comparable criteria and methodologies. These common structures and references, beyond facilitating the creation of the EHEA, also had the potential of configuring this area into a common market whose commodities were the degrees. Musselin (2009) already argued that one notable

feature of the Bologna Process was that it did not intend to transform national HE settings (e.g. status of universities, relationships with governments, funding, university governance, etc.), but ‘to change the “products” of HE (i.e. the degrees) and to normalise them by recognising three main degrees: the bachelor, the master and the doctorate’ and ‘to transform the HE “production processes” through the introduction of the European Credit Transfer System (ECTS), modularisation, etc., and also through the promotion of coherent quality assurance processes among countries’ (Musselin, 2009, pp. 181–182). Dill, Teixeira, Jongbloed, and Amaral (2004), too, considered that the adoption of a common degree framework by the Bologna signatory countries redefined the nature and contents of academic programmes, thus transforming what were state monopolies over academic degrees into competitive international markets.

Several aspects were present to facilitate the constitution of a HE market. First, the common degree architecture, expressed in the Framework for Qualifications in the European Higher Education Area (FQ-EHEA) and then reflected in the national qualifications frameworks, ensured not only the compatibility, but also the comparability of HE degrees. Since comparability between products is an essential condition in any market in order to allow consumers to make informed rational choices (Dill & Soo, 2004), the Bologna Process, through the promotion of degree comparability, represented, in theory, a step towards the creation of a HE market. According to Karseth and Solbrekke (2010), the document *A Framework for Qualifications of the European Higher Education Area* (Bologna Working Group on Qualifications Frameworks, 2005) left ‘little space for alternative interpretations other than that the “new style” qualifications described in terms of workload, cycle or level, learning outcomes, competence and profile are deemed necessary’ (Karseth & Solbrekke, 2010, p. 565) and that this approach was the only viable one for HE institutions to assume public responsibility for the employability of students and their preparation for the world of work.

Second, comparability of degrees as ‘products’ was facilitated by the introduction of common degree descriptors, capable of acting as a common currency: ECTS and learning outcomes. Beyond enabling

student mobility and international curriculum development (Berlin Communiqué, 2003), ECTS had the potential to fulfil an additional role: that of a ‘currency’ which allowed students to assess the degrees’ ‘value’ at the moment of making educational choices. Adopting this new currency appeared imperative for universities to ensure the transparency and comparability of their degrees, as otherwise they would ‘be unable to attract students from both home and overseas markets, who will not enter programmes if the resultant qualifications have limited recognition elsewhere’ (Karran, 2004, p. 412). ECTS and learning outcomes have already been associated with the neoliberal agenda (Gleeson, 2013), which introduced market-oriented changes in public services and reconceptualised public service users as consumers. Learning outcomes testify an increased concern with the end result of education rather than with processes (Sin, 2014). In the Bologna discourse, learning outcomes have been promoted to improve mobility and employability by providing an easy-to-grasp overview of student knowledge, abilities and skills. Thus, outcomes-based education emerges as fundamental for the alignment of education to the marketplace, with associated accountability criteria. According to Gleeson (2013), ECTS—to which we would add learning outcomes as well—may be the ‘Trojan horse’ that legitimates the neoliberal performativity agenda in education. Additionally, the Diploma Supplement, proposed by the Bologna Declaration in order ‘to promote European citizens’ employability and the international competitiveness of the European higher education system’, could be seen as equivalent to the visiting card of a degree, making evident its exchange value on the labour market or, potentially, for further studies. Again, similar to the reasoning above, it makes explicit graduates’ learning outcomes.

Finally, the cooperation in quality assurance (QA) in order to develop comparable criteria and methodologies—ultimately aiming at convergence in QA practices—could, from a market perspective, ensure that HE degrees (as products) underwent similar procedures for validation and certification across the EHEA. To this end, the European Standards and Guidelines for QA (ENQA, 2009) were adopted in the early phases of the Bologna Process, offering ample guidance to the institutions and QA agencies on the aims and processes which should guide internal and

external QA. Such homogenisation would result in trust in the quality of degrees and their recognition across the Bologna signatory countries, as indispensable conditions in a common market which permitted students and graduates' free circulation for study and work purposes.

Young (2003, p. 236) saw these developments as reflections of 'powerful political and economic forces' which 'go to the heart of debates about the nature and purposes of education and training', aiming 'to extend the market principle to a wider range of activities and services'. Thus, the adoption of common structures, frameworks or references to enable comparison between degrees and homogeneity in validation procedures have implied not only graduate employability and student mobility across borders (for a specific example of how this was achieved, Collins and Hewer (2014) and Davies (2008) provide a good account for nursing education), but also a great potential for the EHEA to evolve into a common education market. Yet, such a goal was not necessarily among the intentions of signatory ministers. Rather, the EHEA was intended to be an attractive education space worldwide, a means of raising the status of European higher education. Competitiveness on the global market, not necessarily a competitive common market, was the initial ambition of the Bologna Process. In fact, the emergence of models inspired by the Bologna Process on other continents and the growing interest in the EHEA (Brunner, 2009; Ferrer, 2010; Zeng, Adams, & Gibbs, 2013) over the course of the reforms subsequently created additional opportunities for European higher education as an export commodity (Dunkel, 2009).

Global competitiveness was indeed the main rationale for the national reforms driven by the Bologna Process in many countries (Lažetić, 2010). As an unintended consequence of such ambitions, scholars have noted that Bologna, in addition to cooperation, also favoured the emergence of competition between its signatory countries and between HE institutions. As stated by Charlier (2006, p. 28), the Bologna Process 'has placed the states and the universities in a complex game of cooperation–competition: they cooperate to make more attractive the system in which they are embedded, but they are ready to work each for oneself to seduce as many students as possible who were attracted by the new European higher education architecture'.

This mirrors European institutions' ambitions: competitiveness has been one of the most powerful messages of official European policies, which have promoted the vocationalisation and the marketization of European higher education, for a long time fiercely opposed by member states.

Marketization Pressures in European Higher Education

Unsurprisingly, when the Bologna Declaration was signed, education ministers adopted a defensive attitude in relation to the European Commission (EC), wary of this latter's previous attempts to subordinate HE to the economy (European Commission, 1991). The Bologna Declaration portrayed a Europe of knowledge as 'an irreplaceable factor for social and human growth and as an indispensable component to consolidate and enrich the European citizenship' (Bologna Declaration, 1999, p. 1) and acknowledged that HE served a higher purpose than economic utilitarianism. Thus, the Declaration 'signalled a very real departure' from Brussels' 'single-minded subordination of HE to the vocational imperative' (Neave, 2005, p. 13). Action reflected discourse, and the Commission was excluded from the Bologna Process. Although allowed to participate in the elaboration of the Declaration, the UK and French ministers insisted that this was to be an intergovernmental process (Corbett, 2011).

This was an expression of European member states' long-standing opposition to the extension of European institutions' legal remit to education (Croché, 2009), a policy area which was explicitly placed under the member states' competence in the European treaties. Since member states decide on the structural set-up of their education systems, finance education for their citizens and are accountable for both successes and failures, Garben (2010, p. 210) finds 'natural for the state to defend its position as the decider, internally as well as externally'. According to the principle of subsidiarity guaranteed by the founding treaties of the EU, member states have responsibility 'for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. Article 165 of the Lisbon Treaty limits

the Union's contribution to encouraging cooperation between member states and to supporting and supplementing their action, if necessary, in order to address common challenges. The article also explicitly excludes any harmonisation of the member states' laws and regulations in this domain. Garben (2010, p. 210) stressed that the prohibition of harmonisation constituted 'the first explicit negative limitation of competence in the history of European law, which the Maastricht Treaty introduced together with similar prohibitions in the fields of culture and health', in an attempt 'to draw clear lines in the sand, or to "clip the wings" of the EC'.

The European Commission and the Bologna Process

In 2003, the Commission was eventually integrated in the Bologna Follow-Up Group (BFUG) because of its financial and logistic capacity to sustain the continuation of the Process which was short of resources (Corbett, 2011; Croché, 2009; Martens & Wolf, 2009). This opened the door to the Commission's intervention in HE, an area formally outside the EU's legal competence. According to Corbett (2011), the Commission's inclusion in the Bologna Follow-Up Group set off a 'ping-pong' competition between itself and the Bologna Process over the leadership of the reform of European higher education. Through its participation in decision-making, the Commission largely influenced the direction of the Bologna reforms and acquired great purchase over HE, which turned into a valuable vehicle for European integration and competitiveness. The Lisbon strategy of 2000 set the goal of transforming Europe into the most competitive and dynamic knowledge-based economy in the world, which was capable of sustainable economic growth with more and better jobs and greater social cohesion, by 2010. Higher education, a key sector for the achievement of the strategy, was in urgent need of modernisation to be able to fulfil the purpose assigned to it. As a result, the European Commission's vision for HE has been economically driven, failing to contemplate equally its economic, political, social and cultural role in Europe (Keeling, 2006; Maassen & Musselin, 2009). As a consequence, the Bologna Process,

too, became subordinated to the Commission's agenda of economic growth and international competitiveness (Sin, Veiga, & Amaral, 2016), as a means towards the modernisation of HE, made very explicit in the European Commission's contribution to the London ministerial meeting (European Commission, 2007). One vehicle through which Bologna and Lisbon increasingly converged was the Open Method of Coordination (OMC) (Garben, 2010; Sin et al., 2016; Veiga & Amaral, 2006).

The 'Lisbonisation of European higher education' and the 'Lisbonisation of Bologna' (Capano & Piattoni, 2011) added a new dimension to the European-wide higher education reforms which so far had pursued convergence to facilitate student and scholar circulation. In the name of modernisation, Lisbon sought to promote convergence towards a culture of QA and competitiveness, for which institutional autonomy and accountability became fundamental pillars (Capano & Piattoni, 2011). This aimed at changing the steering and governance patterns of HE systems in Europe, with governments assuming a more indirect role, while universities assumed a role as corporate institutions, responsive to socio-economic demands (Capano & Piattoni, 2011). The European Commission displayed 'an articulated preference for market-based instruments' (Dobbins & Knill, 2009, p. 402), an orientation which also spilled over into the Bologna Process. As a result, in some central and eastern European countries, Bologna became 'increasingly perceived as means of legitimization of such market-based strategies and has hence accelerated their spread at the national level' (Dobbins & Knill, 2009, p. 425).

An example of the reinforced economic dimension and the integration of the market logic in the Bologna Process is the discourse on teaching and learning. This topic came to the forefront of the political agenda in 2007, at a time when employability became a priority of the Bologna Process (Sin, 2015). The London Communiqué of 2007 underlined the importance of curricular reform leading to qualifications better suited to the needs of the labour market. Chronologically, this roughly coincided with the more explicit urges of the European Commission which recommended that study programmes should foster entrepreneurship and employability and that curricula and teaching

methods should be directed at the development of employment-related skills (European Commission, 2006, pp. 3, 5–6). Garben (2010) criticised the tone of the reforms jointly driven by Bologna and Lisbon because they seemed to ‘regard education almost exclusively as an economic commodity, therefore arguing that ‘both policy projects contribute to a commercialisation of higher education’ (Garben, 2010, p. 209).

Legal Leverage in Favour of Marketization

Besides the intervention of the European Commission in the Bologna Process, the European Court of Justice (ECJ) also played a part in the commodification of European higher education. In 1964, the ECJ stipulated that the Community’s common laws and regulations took precedence over the law of member states (Sin et al., 2016). Generally, European laws are vague and ambiguous to accommodate the difficulty of reaching consensus among a large number of actors, but the ECJ has the final word in case of conflicting understandings. However, the ECJ rulings are passed in the logic of an internal market (Garben, 2010) and uphold the free movement of persons, goods, services and capital (Fagforbundet, 2008, p. 20). The ECJ has already created a body of jurisprudence on issues related to HE access, quality or labour market needs (Kwikkers & van Wageningen, 2012), frequently invoking the free circulation of students and the European citizenship. Kwikkers and van Wageningen (2012) argue that ECJ case law, in its efforts to defend the internal market, has contributed to the creation of a European area of higher education just as much as the Bologna Process, although in an indirect manner. For example, it has qualified ‘privately funded’ education as a ‘service’ within the meaning of the Treaty, it has demanded equal treatment of foreign EU students, including with regard to maintenance grants, and has condemned legislation which aimed at preventing the entrance of large numbers of foreign students who were trying to escape national *numerus clausus* regimes (Garben, 2010). Such case law often infringes the competence of national governments, even though education is an area of national sovereignty. Garben (2010) explains that the achievement of the objectives of the EU, i.e. the

creation of a common market, is likely to affect policy areas not initially intended as ‘EU business’, even in the absence of explicit legal competence. In this sense, ‘the Court has made it abundantly clear that education is not an area outside the scope of the Treaty, and that it can be deeply affected by the application of internal market freedoms as well as EU legislation’ (pp. 211–212).

The directives issued by the European Commission, such as the Services Directive or the Directive on the recognition of professional qualifications (discussed more detail in Chapters “[Higher Education as a Service: Denying the Obvious](#)”, “[Overburdening Higher Education? The Europeanisation of the Professional Complex](#)” and “[The Recognition of Professional Qualifications: The Part Played by the European University Association in the Alignment of EU Legislation with the Bologna Process](#)”), are a clear example of how the application of internal market freedoms and EU legislation can affect education. These directives, obeying a common market logic, have been another means towards the commodification of HE. For instance, the Services Directive urged countries to remove barriers to the free movement of services across borders and allowed the possibility of treating education as a service. The Directive applies only to *services of general economic interest* and not to *services of general interest*. Although in theory the distinction between the two is based on the presence or absence of remuneration, the ambiguity of the language allows education to fall in either of the two categories. In the case of HE, private educational services can be classified as services of general economic interest because of the size of the student contribution towards education, thus falling within the scope of the Directive. In fact, in previous rulings by the ECJ, private university courses have been considered as services of general economic interest (Sin et al., 2016). This implies the unrestricted movement and offer of such courses abroad, which can pose problems for safeguarding the quality of provision in cross-border higher education (Rosa, Sarrico, Tavares, & Amaral, 2016). The directive thus fosters the liberalisation of education in which a tension is created between free trade in an education market and the member states’ right to have full control over their HE system and its quality (Sin et al., 2016).

In brief, we can argue that the functional powers of European institutions to pursue the ambition of establishing a EU and a common market have also affected HE, although this policy area is protected from European legal intervention by the principle of subsidiarity. The Bologna Process was also infused by these European-wide developments, adopting an economic rhetoric and economic objectives. This change of focus, coupled with Bologna's potential to create a EHEA, as shown above, represented a favourable ground for the establishment of a common market in HE.

Why Has the Creation of a Common Education Market Failed?

Formal Versus Substantial Convergence

The convergence of degrees through the implementation and the embedding of the common structures proposed by the Bologna Process was an essential condition not only for the establishment of the EHEA, but also for the creation of a common market. However, extensive literature has highlighted that convergence has been achieved superficially, rather than in substance (CHEPS and INCHER-Kassel and ECOTEC consortium, 2010; Dunkel, 2009; Lažetić, 2010; Rauhvargers, 2011; Soltys, 2015; Vögtle, 2014). According to Dobbins and Knill (2009, p. 426), 'isomorphism induced at the transnational level comes in different shapes and can generate different results, even in a highly integrative transnational normative environment'.

Key Bologna promoters themselves have acknowledged the limited success regarding convergence. At the last Bologna conference in May 2015, ministers recognised that 'implementation of the structural reforms is uneven and the tools are sometimes used incorrectly or in bureaucratic and superficial ways' and that 'non-implementation in some countries undermines the functioning and credibility of the whole EHEA' (Yerevan Communiqué, 2015, p. 1). The 2015 *Trends* report of the European Universities Association (Sursock, 2015), prepared for the

same conference, and a European Commission/Eurydice study revealed the gaps between the EHEA policy objectives and institutional realities in the area of national qualifications frameworks (NQFs): only 19 countries had self-certified their NQFs' compliance with the FQ-EHEA and in several countries institutions were not aware of their national qualifications framework. Even in countries which were pioneers in the implementation of NQFs (Scotland, Denmark or Germany), the implemented frameworks represent 'different mindsets and signify translation processes that reflect continuation of established institutional practices', despite the establishment of new structures and an apparent acceptance of the Bologna script (Karseth & Solbrenke, 2010, p. 572).

Similarly, studies have exposed problems concerning credit recognition, an issue which 'remains an enduring obstacle to mobility' (Sursock, 2015, p. 12). Others have drawn attention to the diversity in degree structures (Dunkel, 2009; European Commission/EACEA/Eurydice, 2015; Sin, 2012, 2013, 2016) which prejudices recognition. Learning outcomes have proven to be a particularly problematic tool to implement and embed in institutions (Karseth & Solbrenke, 2010; Reichert, 2010; Sin, 2014). Such findings about the mismatch between political ambitions and effective achievements on the ground floor mirror previous studies which have highlighted the gap between legislative implementation and institutional action:

Most 'architectural' elements of the EHEA, i.e. those involving legislation and national regulation, have been implemented in most countries. The impact of the established architecture on substantive goal achievement at the level of higher education institutions and study programmes is still wanting; however, institution-level impacts are not easily shown in our assessment of goal achievement at the level of the EHEA and countries. (CHEPS and INCHER-Kassel and ECOTEC consortium, 2010, p. 5)

Vögtle (2014) similarly observed that there was a remarkable degree of policy convergence for the adoption of policies, but convergence in instrumental design and degree of implementation was much lower, thus accentuating the difference between policy levels. According to her:

Although we are confident to state that the Bologna Process, even though it rests on voluntariness, has aroused factual HE policy convergence in countries with different institutional and structural preconditions, convergence is less obvious once we dig deeper by investigating policy convergence beyond adoption patterns. (Vögtle, 2014, p. 179)

Quality assurance seems to be one action line with some success (Reichert, 2010; Stensaker, 2014), as countries have developed their QA systems around the European Standards and Guidelines for Quality Assurance as an ideal type. However, convergence in form is not always replicated by convergence in substance (Hsieh & Huisman, 2013; Smidt, 2015). According to Smidt, 'an image emerges that points to both convergence and divergence in approach and to remaining challenges—and this is perhaps not surprising given the diversity of the EHEA and the global challenges' (Smidt, 2015, p. 635).

Implementation Challenges

Rather than the effective convergence of structural elements, which would have created the conditions for a potential HE market, the consequence of the Bologna Process seems to have been the creation of a common language which has eased communication between participating countries and higher education stakeholders (Lažetić, 2010). Such outcomes derived greatly from the peculiarities which have characterised the implementation of the Bologna Process, principally the Open Method of Coordination as its governance model. On the one hand, the OMC functions through reliance on 'transnational communication', as 'a structured platform driven by norm- and rule-oriented problem-specific coordination' which results in the elaboration of norms and common solutions (Dobbins & Knill, 2009, p. 401). The benchmarks and indicators of the OMC had the capacity to set off-national reforms, especially as the scorecards, by monitoring progress, allowed comparison and created 'effects of socialisation, imitation and shame' acting as 'powerful means of coercion' (Ravinet, 2008, p. 365) for countries to commit to the Bologna objectives. But despite the OMC's capacity to

induce policy emulation and policy formation, it offers little guarantee that convergence in the outcomes of the reforms will be achieved (Veiga & Amaral, 2009). In this sense, Capano and Piattoni (2011, p. 588) distinguish between change in policy outputs and change in policy outcomes, stating that ‘the former may result from a formal adoption of common curricular formats and procedures, while the latter necessarily implies a deeper transformation of the day-to-day working of the entire national higher education system’.

Therefore, policymakers’ naïve belief in linear implementation and their assumption that intentions formulated at top level will be smoothly translated into practice are counterbalanced by the complexity of policy reception and enactment at national and institutional levels. While ‘the storyline in main policy documents indicates that reforms in HE can be institutionalised as a rational process with the help of guidelines defined at a European level’ (Karseth & Solbrekke, 2010, p. 563), policymakers underestimate the degree of institutional and cultural change necessary to embed educational reforms. This is a direct consequence of the multilevel nature of the Bologna Process, another feature with a profound impact on the implementation of reforms. Reinforced by the non-binding, voluntary nature of Bologna, this led to uneven participation and implementation across Bologna signatories, as testified by accounts of varying degrees of implementation in countries such as Switzerland (Bieber, 2010), Spain (Ariza, Quevedo-Blasco, Ramiro, & Bermúdez, 2013) or the former socialist countries (Soltys, 2015).

A variety in implementation can be partially explained by internal problems of the national higher education system, such as lack of efficiency, quality or participation (Lažetić, 2010) and by different political and historical traditions, such as in eastern European countries (Kwiek, 2004). However, another explanation commonly put forward in the scholarly literature is that governments have used Bologna as a pretext to advance their own priorities. National political agendas and preferences turned engagement with the Bologna Process into a dissimulated game, driven not necessarily by a genuine desire to achieve the stated objectives of the Process, but by subjective reasons and domestic interests (Garben, 2010; Lažetić, 2010; Musselin, 2009; Ravinet, 2008).

National reforms were promoted under the umbrella of the Bologna model, irrespective of whether or not this was true. Thus, the Bologna Process was politically attractive for countries because it allowed them 'to pursue their own agendas, labelling them as European and Bologna-inspired in national contexts', even though Bologna's legally non-binding character gave countries flexibility to implement only those policies which were deemed feasible (Lažetić, 2010, p. 588). Garben (2010) pushed the argument even further, suggesting that, in order to pursue unpopular domestic measures, governments took advantage by the confusion in national circles about the origins of Bologna: 'perhaps the Member States even created, or conveniently did not resolve, the mistake that the Bologna Process was imposed by "Europe", taken to mean the EU' (Garben, 2010, p. 222). Scholarly literature is testimony to the country-specific particularities in the implementation of Bologna reforms which reflect nationally oriented interpretations of the common European agenda (see for example, Dunkel, 2009; Karseth & Solbrenke, 2010; Musselin, 2009; Sin, 2013; Witte, 2006). As Kupfer (2008) argued, nation states retain power while operating in international settings, despite the fact that off-national decision locations create the impression of a power superior to the national government's power.

The discretion in implementation is replicated at an institutional level, where the actors ultimately responsible for enacting the Bologna reforms are situated. This bottom-heavy nature of Bologna has diluted even further the policy ambitions formulated in high-level forums. Universities are historical institutions marked by continuity, whose 'institutional memory' and underlying norms may constitute barriers to the adoption of external policies. According to Dobbins and Knill (2009, p. 402), 'even external models viewed as successful might face resistance and inertia if they challenge dominant beliefs and institutional identities'. Academics, in turn, thanks to the autonomy enjoyed by the profession, have considerable leeway in the effective enactment and embedding of externally driven policies (Duran, Moon, & Giraldo, 2009; Sin, 2014; Sin & Amaral, 2016; Sin & Manatos, 2014). A deficient understanding of Bologna's action lines has often been put forward as an explanation for the gaps in implementation (Bucharest Communiqué, 2012; Sursock, 2015; Yerevan Communiqué, 2015). The evolution of Bologna reforms over time 'did not always facilitate an understanding

of the important links between its various elements, or motivate academics to engage meaningfully in curricular renewal', according to the latest *Trends* report (Sursock, 2015, p. 70). But other authors attribute the modest progress to the 'embedded contradiction in the rhetoric of the policy documents: diversity on the one hand and a "common face" and compatibility on the other', which 'creates conflicting arguments and thereby resistance' during implementation (Karseth & Solbrekke, 2010, p. 571). Thus, Karseth and Solbrekke (2010, p. 571) suggest that the slow progress is due not to 'the lack of understanding in an instrumental sense, but the lack of shared understanding in a cultural and epistemic sense'. This is compounded by the fact that policies are formulated as vague and abstract statements of intent, remote from practice, and by ambiguous concepts (Lažetić, 2010; Sin & Neave, 2016), which favours even further the phenomenon of interpretive dispersion (Neave & Veiga, 2013).

Persistence of National Differences Invalidating the Establishment of the Common Market

The specificities which have characterised the Bologna Process have therefore failed to lead to the expected convergence, engendering instead a diverse array of national and institutional interpretations and adaptations of the reforms. The freedom of manoeuvre granted to countries in the process of implementation led to an 'implementation *à la carte*' (Lažetić, 2010) and to unclear results, since policy outcomes have been influenced by national policy legacies and prevailing national interests (Capano & Piattoni, 2011). Additionally, countries have been implementing the reform at different speeds, 'depending on their basic position, political creativity and resonance in the higher education systems' of the goals of the Bologna Process (Dunkel, 2009, p. 189). Consequently, despite 'the ritual signature of a new communiqué every two years' by the participating countries re-affirming their commitment to the implementation of the Bologna objectives, 'the local adaptations, national translations and side effects attached to each domestic implementation weaken the convergence potential of Bologna' (Musselin, 2009, p. 198).

Diversity in the outcomes of implementation, also visible in the diversity of degrees, does not constitute, in itself, an obstacle to the creation of a common market. However, diversity without the possibility of comparison does represent an obstacle. When potential consumers are not able to compare between ‘products’ (the degrees), because of an uneven adoption of the ‘currency’ (the degree descriptors—ECTS, learning outcomes or the Diploma Supplement), the market fails to realise its potential.

Conclusion

This chapter has argued that the Bologna Process, aiming at the convergence of higher education systems in a common EHEA, had the potential to act as an instrument for the creation of a higher education market through the adoption of common structures, frameworks or references, although a common market did not appear among the ambitions of the Bologna Process. This was an ambition nurtured by European institutions.

A common market, as an unintended consequence of Bologna, would have assisted the integration efforts of the EU in a policy area explicitly excluded from its legal prerogatives. In fact, despite the principle of subsidiarity, the functional powers of European institutions to pursue the creation of the EU and a common market have also affected HE. On the one hand, the European Commission contributed to the formation of an economically driven vision for HE, especially after the launching of the Lisbon Strategy which turned to HE as a key sector for a competitive knowledge economy. On the other hand, in the name of the free movement of people and services upheld by the European treaties, the jurisprudence of the ECJ and the EC Directives have contributed to shaping a market-like space for education. At the same time, they have impinged on member states’ capacity of organising their HE systems. Apart from posing a legal problem by ignoring the subsidiarity principle, this fails to ‘respect the fact that, in education, considerations that are not economic—and that might very well be at odds with economic efficiency—play an important role’ (Garben, 2010, p. 228).

The Bologna Process has not escaped unaffected by the discourse promoted by European institutions. It, too, has become infused by an economic rhetoric and economic objectives, thus changing its rationale from a social/cultural one to an economic one (Sin & Neave, 2016). This change of focus, coupled with Bologna's ambition to create a EHEA with comparable degrees, common degree descriptors and an overarching framework of qualifications guiding the organisation of national HE systems, created optimal conditions for the creation of a common market in HE. Nevertheless, the political ambitions of convergence have failed to materialise to an extent which would make a common market feasible. The prevalence of member states' sovereignty in the implementation of the Bologna reforms, the steering through soft law, the force of national traditions of HE and the prioritisation of national political agendas have led to a diversity of outcomes. For better or for worse, such diversity, when it is not accompanied by the possibility of comparing the degrees as the products, because of the absence of a shared and established use of currency, becomes a barrier to the successful creation of a common market.

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Higher Education as a Service: Denying the Obvious

Anne van Wageningen

Introduction

Hidden just beneath the surface of the European Union's treaty law lies a European Union (EU) area of higher education, emerging from the mist. As such, this emergence is seen as a partial miracle. Education has always been considered an area of national sensitivity (Gornitzka, 2009) and the Member States have been clear about blocking any transfer of powers in this area to the EU. As has been asserted in Article 165 of the Treaty on the Functioning of the European Union (TFEU), the EU shall only adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. Furthermore, Article 165 TFEU should prevent liberalisation of cross-border higher education and keep each Member State in control of its higher education system and the access to that system. So why dive into the connection

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between services and cross-border higher education? And why discuss liberalisation of education?

Article 165 TFEU is not the only provision of the European Treaties regulating (higher) education. Several articles of the TFEU regulating the internal market and European citizenship, and subsequent secondary law that has been established in regulations and directives to specify Treaty provisions, also determine the EU law of higher education. The Court of Justice of the European Union (CJEU), through provisions invoking the right to free movement of persons and services, has added elements to the construction of this area of higher education. Furthermore, association treaties with Ukraine, Moldova and Georgia have given a firm legal base for EU higher education law (van Wageningen, 2017). This has opened new avenues for the development of the EU area of higher education. Moreover, it has put higher education policy under the legal scrutiny of an independent judge.

However, the CJEU needs other actors to be able to render judgements. European citizens, students, pupils and the European Commission are these actors who were and are actively lodging cases to the CJEU (van Wageningen, 2015), thus using the only option to involve the Court. However, European citizens have not lodged cases in a logical order, but rather in a random way, giving the CJEU's contribution a case-to-case impression, reinforced by the Court's only mode of operation—deciding individual cases.

In addition, (higher) education is a service (Hancher & Sauter, 2017, p. 543; O'Leary, 2011, p. 531). As has been judged by the CJEU in the Humbel and Edel case (Case C-263/86), education provided under the national education service is a Service of General Interest (SGI), but not a service for remuneration falling under the scope of Article 57 TFEU. Therefore, the analysis may have stopped here as if the question was irrelevant. However, Gideon has signalled the importance of the EU law on services for European higher education (Gideon, 2015, 2017). Certainly, in the earlier days of European cooperation the freedom to use or provide services was used as an argument to discuss and decide cases. The CJEU has still been shown to respect Member State autonomy in (higher) education, probably because the legal framework for

action of the EU in this field is particularly conducive to a restrictive approach in issuing new rules by the common institutions (Comandè and de Groof, this book). Nevertheless, Member States have offered much opportunity to the Court to interfere, not necessarily because the latter wished to do so, but because the Member States' legislation left no other options (De Groof, 2016, p. 124).

This interference has not always been well perceived by Member States (Garben, 2010b, p. 1496), but strangely enough these have started a tremendous harmonisation endeavour with the Bologna Process and the creation of the European Higher Education Area (EHEA) (Garben, 2011). Harmonisation is a forbidden word in European higher education, so the process is framed under the term 'convergence', although it will still smell the same. The reason to mention this process here is its deep potential connection with services and thus with European Union law about services.

This chapter discusses some issues resulting from the connection of services and (higher) education. Therefore, the meaning of both higher education and services needs to be clarified. Although it seems like stating the obvious, it is important to be clear about what kind of higher education is at stake. It is not only about three years of bachelor, two years of master and then three to four years of doctorate, but it is also about six months of in-company training, or one year of postdoctoral professional training, or three years of barrister training followed by a permanent education programme. The kind of higher education offered has consequences for the outcome of the analysis of educational services.

Thus, the typology of the different higher education activities has its necessary corollary in the typology of services. Why? 'Services' are a label to which a wide spectrum of activities can be connected. Are we dealing with commercial activities such as transport, creating a publicity campaign, using a swimming pool, or are we dealing with services like the issuing of passports or social security grants? This listing suggests clarity to determine which kind of services are at stake. Yet, services are difficult to define and 'cover a vast range of situations' (Barnard, 2016, pp. 291–292). The CJEU even stated in *Fidium Finanz* (Case C-452/04, para. 32):

The notion of ‘services’ covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.

Furthermore, the freedom of services is regulated as part of the internal market (article 26 TFEU). Therefore, to get the CJEU involved means to find legal ground within an internal market logic. Even though the CJEU has been protective of public services, still the entry code to the CJEU bench is always ‘internal market’, followed by a claim stating a breach of the freedom of services or freedom of establishment. Thus, the simple fact of invoking the internal market provisions suffices to qualify the Court to judge the matter at stake.

Nonetheless, services are not only economic in nature but can also be non-economic, as has been expressly stated in the Lisbon Treaty Protocol 26 on services of general interest. The Services Directive also establishes a distinction between Services of General Interest (SGI) and Services of General Economic Interest (SGEI), of which only SGEI fall under its scope. Lacking Occam’s razor to determine if a service is economic or non-economic, the character of services is determined by political choice. This is also valid for higher education, in which case governments and legislators define this service as economic or non-economic depending on the national traditions of higher education systems or political affiliation of the majority.

However, it is not only the legislator and governments that are categorising services; the CJEU has to do the same. Due to the way powers have been conferred to the European institutions, the CJEU is authoritatively deciding as a last resort on issues of interpreting the European Union’s Treaties (Article 19 Treaty on the European Union). It follows that conflicts on the interpretation of services or on education or on combining those are *in fine* decided by the CJEU. Case law is thus crucial to understanding the European Union’s area of higher education, the role of services within the internal market and the possibilities to liberalise cross-border higher education. Moreover, it is important to understand what the CJEU understands to be a service, what kind of a service and how that service is connected with higher education.

Thus, an analysis and an answer are needed because of two different issues, which connect education to services. The first issue is fundamental to how a Member State perceives its higher education and how much room it leaves to private (higher) education institutions. The second issue is the extent to which higher education systems are funded by tuition fees. Although many Member States finance higher education not by asking for a real financial contribution from students, who in terms of services are the users of the service, there are Member States in which student fees are covering the costs of their studies. This policy choice is fundamental to qualify (higher) education as a SGI or a SGEI (Chalmers, Davies, & Monti, 2014). Furthermore, private institutions may ask for a higher fee than public institutions, especially if private institutions aim to make a profit from higher education (HE) activities. Moreover, some public and private institutions may ask for full cost fees after a certain enrolment time has passed; e.g., the Netherlands permits higher education institutions to raise their fees to cost price after six years of enrolment at an institution.

In HE it is most likely that natural persons are users of services, although it can be argued that public authorities, such as states, are users as well. It is unlikely that providers of higher education services are natural persons; however, there is a case of a German teacher who as a secondary activity taught in France, an activity which was considered a service (Jundt Case C-281/06). Moreover, in addition to services, a discussion on establishments is needed, since establishments could be seen as services in a fixed form. These are the actual enterprises, or companies, or firms to go to, to actually be able to follow education. These are the physical environments in which the activity (service) is provided.

States and higher education institutions (HEI) represent the supply side of HE. Therefore, some elements of the Bologna Process and the resulting EHEA need to be mentioned. The Bologna Process has gained prominence and even constitutional status within the EU, due to treaty ratifications of Association Agreements between the EU and, respectively, Ukraine, Moldova and Georgia (van Wageningen, 2017). It thus has become a guiding principle for collaboration in higher education between EU Member States and at least those countries.

In analysing the liberalisation of cross-border higher education and its connection to services and the internal market, the argument continues with describing services according to EU law. Part of this development is the internal market-oriented approach chosen by the CJEU.

Services, an Introduction to Certain Types of Services

The Treaties regulate services. According to Article 56 TFEU:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

However, Article 56 TFEU only provides for an anti-discrimination clause against nationals of other Member States. Article 57 gives more indications on the content of services. It states:

Services shall be considered to be “services” within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

“Services” shall in particular include:

- a. activities of an industrial character;
- b. activities of a commercial character;
- c. activities of craftsmen;
- d. activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

In the *Luisi and Carbone* case, the CJEU added elements to determine the meaning of services. Services can be provided or can be used. Moreover, in this case, the freedom to use services has been firstly and matter-of-factly assessed in the joined cases *Luisi and Carbone* (*Luisi and Carbone/Ministero dello Tesoro* joined cases C-286/82 and C-26/83). The CJEU stated in para. 10:

By virtue of Article 59 of the Treaty [now Article 56 TFEU]¹, restrictions on freedom to provide such services are to be abolished in respect of nationals of member states who are established in a member state other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the member state where the person for whom it is provided is established or else the latter may go to the state in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60 [now Article 57 TFEU], which permits the person providing the service to pursue his activity temporarily in the member state where the service is provided, the latter case is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital.

And in para. 16:

It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another member state in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services.

Thus, services are a service. This is to be distinguished from the establishment of natural persons (residing in the host Member State) or legal persons (having their seat there), both being there on a permanent or semi-permanent basis. Secondly, services are normally provided for remuneration. This excludes voluntary services from the scope of the Treaties. Lastly, services are temporary, even if it takes a long period to provide the service (Barnard & Snell, 2017, pp. 414–415), which is relevant for higher education, too.

Yet, Member States have not only regulated the freedom to provide services as opposed to the freedom of workers and the freedom of establishment, but they have also distinguished the services falling under the scope of Articles 56 and 57 TFEU (SGEI) from services of general interest (SGI), not necessarily for remuneration. For instance, the remuneration aspect is absent in cases of social security grants.

Member States have also included Article 14 TFEU:

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

This article must provide for the possibility to give state aid to services, which would not exist without this aid. Considering the *Altmark* case (Case C-280/00) in which partial subvention of ‘for-loss’ activities could be realised with profits from other activities, this opens a debate on funding higher education programmes with insufficient student enrolments with money taken from study programmes with enough students. It could even be argued that a Member State should be able to start to offer higher education in disadvantaged regions to promote social and territorial cohesion, according to the aforementioned article 14 TFEU.

Another debate is found in protocol no 26 on Services of General Interest. It is cited in its entirety due to its potential importance for education.

PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

THE HIGH CONTRACTING PARTIES,
WISHING to emphasise the importance of services of general interest,
HAVE AGREED UPON the following interpretative provisions, which
shall be annexed to the Treaty on European Union and to the Treaty on
the Functioning of the European Union:

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

Two elements need to be mentioned. The first element is that in the first article a further explanation of Article 14 TFEU is given. It guarantees the possibility for public authorities to provide, to commission and to organise services of general economic interest. The second element is the acknowledgement of non-economic services of general interest.

Thus, a distinction between services for remuneration and services of general interest can be made, although the last category cannot be indisputably connected to a social, a cultural, or an educational service (Neergaard, 2009, p. 20). These three types of services can be provided for remuneration as well. Social services of general interest (SSIG) in the European Union are a subcategory of services of general interest (SGI). However, education and training are not explicitly covered by the Commission Communication on 'Implementing the Community Lisbon programme: Social services of general interest in the European Union' (European Commission, 2006, p. 5, note 7). Nevertheless, it is informative to read what the Commission actually understands by social services. It states that:

... although under Community law, social services do not constitute a legally distinct category of service within services of general interest, the list above demonstrates their special role as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion. Their value is also a function of the vital nature of the needs they are intended to cover, thus guaranteeing the application of fundamental rights such as the dignity and integrity of the person. (European Commission, 2006)

As a result, the following categories of services can be tabled (see Table 1).

In December 2006, the European Parliament and the Council passed Directive 2006/123/EC on services in the internal market. This Directive aims to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services between Member States. It only covers Services of General Economic Interest (SGEI), naming a few which are explicitly excluded. However, the exclusion clauses do not refer to education. It could thus imply that education only falls under this directive if Member States allowed for education to be considered a SGEI or a service of private interest.

Table 1 Services in general

Services	
Categories	Services of general interest
Services of private interest (Articles 56 & 57 TFEU)	Services of general economic interest (Article 14 TFEU & Protocol No 26 on services of general interest & Articles 56 & 57 TFEU)
Examples	Social services of general interest (Article 14 TFEU & Protocol No 26 on services of general interest) Police Sanitation services Public security Issuing passports Social assistance
	Public transports Providing electricity networks
	Private security providers Plumbers Delivery services Computer repair Music concerts

Higher Education Services

Due to preliminary procedures and even infringement procedures initiated by the Commission, the CJEU has been bound to rule on education and services. It has thus been clarifying numerous problems of connecting education and services. An obvious problem has been to decide if higher education is a SGI or a SGEI.

As has been judged by the CJEU in the Humbel and Edel case (Case C-263/86), education provided under the national education service is a service (SGI), but not a service for remuneration (SGEI) falling under the scope of Article 57 TFEU. If article 57 TFEU does not apply, then article 56 TFEU does not apply either and thus discrimination on grounds of nationality is allowed. Davies is very critical about the artificial distinction between student fees or remuneration applied to education to keep it out of the ambit of article 57 TFEU. He even states that the court suggests implicitly that ‘the special nature of education actually does take it outside Article 56 by making money received in order to supply that education something nobler and different than mere payment’ (Davies, 2015, p. 565).

Crucially, the CJEU argued that education is something a state provides as one of its duties towards its own population in the social, cultural and educational fields. Furthermore, education is funded from the public purse and not by pupils or their parents. The State has no objective to engage in a gainful activity (Humbel case, para. 18). And, in general, there is no room to discuss the amount of the remuneration of this activity (Humbel case, para. 17).

The CJEU however makes a very important distinction between pupils living in a Member State, or not, regarding secondary schooling. In the *Casagrande* case it was ruled that no extra enrolment fee could be asked from students not living in the Member State. Furthermore, the CJEU made a distinction between secondary education and higher education. The latter is also exempt from extra enrolment fees according to the *Gravier* ruling (Humbel case, paras. 22–25).

The *Wirth* case concerned state payments for citizens that followed a higher education study in another Member State (Case C-109/92). It directly engaged in the question of funding other state HE systems. *Wirth* was a German student who studied in the Netherlands. He wanted to receive a grant from the German authorities to study in a Dutch HEI. This grant was refused because *Wirth* did not fall under the new German legislation. He went to a German court asking to annul the decision. That court referred the case to the CJEU for a preliminary procedure, asking if courses given in an establishment of higher education must be described as services within the meaning of the Treaties. The CJEU repeated its argument given in the *Humbel* case. Then it stated in para. 16:

Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds.

An interesting point was raised by the United Kingdom (*Wirth* Case, para. 17).

However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their

parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty [i.e., EEC Treaty, now article 57 of the TFEU]. Their aim is to offer a service for remuneration.

The Court then quickly changed the subject, but it had been said. Furthermore, the Court concluded that the Dutch establishment of higher education did not provide services falling within the scope of article 57 of the TFEU, but did not, however, at the same time exclude the possibility that this article might apply to (some) higher education institutions. This confirms the point made by Davies in relation to the Humbel case.

Another aspect of the Wirth case was the change of the law. Wirth would have gotten a claim under the old law to receive a grant to study in the Netherlands. However, this changed, thus causing this legal conflict. Wirth claimed he was hindered in his liberty to choose his service provider. Therefore, the CJEU had to determine if the higher education provided by the Dutch HEI was a service falling under article 57 TFEU. The CJEU reasoned that the Dutch establishment of higher education did not provide a service within the scope of the actual article 57 TFEU (Case C-109/92, para. 21), since its aim was not to make a profit. It then reasoned that the Member State (i.e., Germany) was not regulating against the free movement of services, since the Dutch HEI did not provide a service falling under the freedom of services provisions, and thus was allowed to restrict the 'export' of study grants (Case C-109/92, para. 21). The Wirth case confirmed the Humbel & Edel ruling, and enlarged its application to higher education, but its outcomes have been altered by the Schwarz and Gootjes-Schwarz case (Case C-76/05) and by the Zanotti case (Case C-56/09), to be discussed hereafter. What has to be retained from the Wirth case for the purpose of this contribution is the acknowledgement of higher education as a service.

Article 14 TFEU also applies to higher education, meaning public authorities can start an HEI, ask an existing HEI to provide certain programmes or regulate or give general rules of conduct for HEIs to provide higher education. The second Article of Protocol 26 makes crucial to know if Member States see (higher) education as an economic service

or a non-economic service; and if Member States allow other parties to provide an education service on their territory or not.

Services Hiding Another Service

It then has to be clarified if a service in higher education is private or public, or if the service is effectively a service in higher education or another service hidden under higher education services. The last question was raised in the Bressol case (C-73/08), which was commented mainly in relation to proportionality, freedom of European citizens, and budgetary constraints in higher education (Garben, 2010b; Kwikkers & van Wageningen, 2012).

The possibility of a Member State to regulate SGI via other services has been less debated on. The Bressol case, however, also has the wider implication that Member States may use other services to guarantee a service, i.e., in this case, regulating services of higher education to guarantee services in health care. The Bressol case was about limiting the number of non-Belgian students in medical and para-medical higher education programmes. The Walloon government had imposed a limit on the enrolment of non-Belgian students to favour Belgian students, by claiming that French students enrolled in Medicine would return to their country once they completed their studies, which deprived the Belgian health sector of the necessary human resources. In both the Austrian and Belgian cases (Commission versus Austria, Case C-147/03; Commission versus Belgium, Case C-65/03), these Member States tried to push this argument in court. However, the CJEU dismissed the argument of Austria and Belgium that special rules needed to apply for medical education. The argument was made in the Bressol case, again. As follows from para. 55 of the Bressol Case, the Belgian and Austrian Governments joined forces:

The Belgian Government, supported by the Austrian Government, confirms that the legislation at issue in the main proceedings is necessary to attain the objective of ensuring the quality and continuing provision of medical and paramedical care within the French Community.

The CJEU acknowledged that restrictions could be imposed ‘to be able to ensure adequate public health services’ (para. 72). However, these restrictions should meet the following prescription of the CJEU (para. 82):

Consequently, the answer to the first and second questions is that Articles 18 and 21 TFEU preclude national legislation, such as that at issue in the main proceedings, which limits the number of non-resident students who may enrol for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.

The CJEU thus further developed the severe and strict proportionality test introduced in the Austrian case, which should be applied to decide whether or not to limit the number of students of other Member States enrolling in higher education programmes (Kwikkers & van Wageningen, 2012, pp. 47 et seq). Turning the argument of guaranteeing other services upside-down, considerations to regulate other SGI could be used as an explicit argument to implicitly regulate access to higher education. This possible *détournement de pouvoir* could be used by Member States to limit access of non-national European citizens to higher education. Therefore, the CJEU has imposed a severe proportionality test, which still opens the possibility to safeguard the execution of other public services.

Another conclusion which can be drawn from the Bressol case is that public authorities (state or regional) can demand that an HEI offer a public service. This should also allow public authorities, in conformity with the Altmark ruling, to keep less popular education programmes for the sole purpose of safeguarding and furthering knowledge, or to apply article 14 TFEU in combination with protocol 26 to promote social and territorial cohesion.

This conclusion seems to be confirmed in a litigation of Sabine Simma Federspiel against the Provincia autonoma di Bolzano and Equitalia Nord SpA (Case C-419/16). Ms Simma Federspiel was an Italian resident from the autonomous region of Bolzano who was

requested to pay back a special grant she had received to take a full-time training as a specialist doctor in neurology and psychiatry not in Italy, but in Innsbruck, Austria. In the Province of Bolzano, people speak German, the public health services are understaffed, and thus the Autonomous Province of Bolzano paid her grant. However, a condition was that within ten years after graduation she should work for a period of at least five years in the public health service of the province. This was meant to ensure that this province had a well-functioning health service capable of communicating with the German-speaking inhabitants. She failed to meet that condition, after which the Province claimed back a sum of just a little less than €120,000. Ms Federspiel went to court seeking annulment of the measures to repay the grant. Since the total sum to repay was substantially higher than the awarded grant and the study was in another Member State, the Italian court requested a preliminary ruling to decide if article 45 TFEU (Freedom of workers) conditions to work at least five out of ten years or to pay back the grant with statutory interests. However, this case is also influencing the freedom of public authorities to demand services.

The CJEU held that such legislation amounts to a restriction of the free movement of workers prohibited, in principle, by Articles 45 and 49 TFEU (para. 37). However, the legislation was applied without discrimination. Furthermore, the CJEU accepted the arguments of the Autonomous Province and the European Commission that these measures (para. 42):

are intended to guarantee for the population of that province specialised medical assistance of high quality, balanced and accessible to all, while maintaining the financial equilibrium of the social security system.

The CJEU further assessed if the measure as such was proportional (5 out of the first 10 years after graduation), if the measure fit the local situation (doctors trained to be capable of practising in two languages) and if Ms. Federspiel was aware of the conditions to receive the grant (a signed declaration to repay the grant in the event of total failure to honour that undertaking). It then concluded that a Member State may impose such severe conditions (para. 51):

unless the measures laid down by that legislation do not actually contribute to the pursuit of the objectives of protection of public health and of the financial equilibrium of the social security system and go beyond what is necessary in that regard, which is a matter for the referring court to assess.

This case is explicitly about the freedom of workers and about the freedom to establish an undertaking (medical practice). It is also implicitly about public and private services. In this case the service has been demanded by the State. These measures are acceptable as long as they make it possible to sustain a SGI. In short, the State pays for the higher education of an individual to ensure services other than higher education.

Taking Services Abroad

Bridging the Public, the Private and the Non-national

The case of Schwarz and Gootjes-Schwarz is a showcase illustration of a Member State rule which is not EU-law proof. The Schwarz children went to a private school in Scotland. However, they were German nationals and their parents stayed in Germany. This private school was not cheap. The German authorities refused to grant tax reductions, although tax reduction was given to parents choosing a private German school. The case was taken to the CJEU. The Court needed to examine if such schooling represented a service normally provided for remuneration. The CJEU, after having repeated the considerations it made in its Humbel and Wirth cases, evaluated the German tax rules. Its conclusion in para. 66 was:

Legislation such as that under Paragraph 10(1)(9) of the EStG has the effect of deterring taxpayers resident in Germany from sending their children to schools established in another Member State. Furthermore, it also hinders the offering of education by private educational establishments established in other Member States, to the children of taxpayers resident in Germany.

It thus concluded that German rules hindered the freedom to use or provide services. The German authorities argued that granting tax deductions would constitute an unreasonable burden on the State. The CJEU did not go along. Reducing tax relief and applying it to every taxpayer would constitute a less stringent method than refusing tax relief on a geographical basis (Schwarz, Case C-76/05, paras. 67, 79–81). This case was not about higher education, but this educational level would follow in the *Zanotti* case.

Zanotti Goes Abroad

Zanotti was an Italian student who pursued a Master degree course in International Tax Law at the International Tax Centre (ITC) in the Dutch city of Leiden. He deducted part of the course fees as costs from his gross tax for the tax year 2003. The Italian tax authorities refused to accept the deduction, even without any appropriate justification. However, if a course was taken in Italy, tax deduction of the costs of the course was not a problem, regardless of the HEI being a private or a public HEI. As a result of the Italian system, a difference was made between State universities and other universities. Furthermore, if the course was offered in a public university, the deduction of costs of a private university course had to align to the costs of the same course offered at the state university nearest to the residence of the taxpayer. And if no equal course was available, the costs of the most comparable public HEI course offered closest by had to be chosen for fiscal purposes.

Zanotti did not pursue a Master degree course in Italy but in the Netherlands and, moreover, according to Zanotti and the Commission, at a private institute working together with the public University of Leiden, but nevertheless aimed at making a profit from its master degree courses. The latter argument was contradicted by the Italian Government, which claimed ITC was a public university. At stake here was the freedom of establishment and the right of citizens to be treated equally.

The CJEU firstly answered the question on the freedom of establishment, because it considered that the freedom of establishment was a specific expression of the more general freedom of every citizen to move and reside freely (para. 24). It considered that ITC courses constituted services normally provided for remuneration. Then it considered Zanotti's claim that no other equal or comparable course was available in Italian private or public HEIs. In contrast, the Italian Government stated that Zanotti was allowed to deduct a sum, but the amount was corrected because the authorities applied quantitative and territorial limits. The CJEU recalled its ruling in Schwarz and Gootjes-Schwarz (para. 54):

that, in order to avoid an excessive financial burden, it is legitimate for a Member State to limit the amount deductible in respect of tuition fees to a given level, corresponding to the tax relief granted by that Member State, taking account of certain values of its own, for attendance at educational establishments situated in its territory. (see Schwarz and Gootjes-Schwarz, para. 80)

However, the Italian case is complex because regions may impose other taxes and State universities have the possibility to set course fees independently. The CJEU judged that these course fee variations were no restriction on the freedom of providing services. It furthermore ruled (para. 64):

In the absence of harmonisation measures, it is for the Member States, in exercising their powers, to lay down the criteria for calculating deductible university tuition fees, provided that the relevant rules comply with the provisions of the EC Treaty and, in particular, in a case such as that in the main proceedings, do not dissuade taxpayers resident in Italy from attending university courses offered by establishments situated in other Member States.

The Zanotti case thus offers leeway for Member States to differentiate the level of course fees as long as no difference is made between Member State citizens. The corollary of it is that Italians should not be

deterred from their freedom of using services abroad, if a corresponding Italian course cannot be found. Furthermore, the Zanotti case adds to the Schwarz ruling by including higher education. Moreover, recalling the Italian Government's argument that ITC was a public university, this could play out as a criterion determining if the course provider should be seen as the provider of a public service or a private service (article 56 & 57 TFEU), thus also implying the application of the Services Directive.

Yet, one question still is open. Can someone only use services abroad or also offer services abroad? This question is at the core of the Jundt case.

Jundt and His Tour en France

Secondary activities of persons are considered to be a service, but it is important to distinguish them from work on a permanent basis. To be considered to be providing a service, someone has to work for different persons throughout a certain period of time. The Jundt case (C-281/06) was about a German teacher whose normal activities were in his law firm in Germany. His teaching activities were at the University in Strasburg, France, which he considered to be a service. This meant a different tax regime in Germany. The dispute started with the refusal of the German fiscal authorities to allow Jundt to deduct his teaching earnings as if they were a service. The CJEU finally ruled in 2007, nearly 16 years later, on his 1991 income tax revenue.

Nevertheless, it was worth waiting, because three questions were answered. Firstly, the ruling established that a teaching activity of a taxpayer of one Member State for a legal person established under public law in another Member State comes within the scope of article 56 TFEU. Secondly, one cannot justify a more favourable tax exemption for nationals only if they carry out services for national public law legal persons instead of foreign public law legal persons by overriding reasons relating to the public interest. This means it is practically not allowed. Thirdly, Member States cannot confine the

Table 2 Services in higher education I

Higher education		
Public higher education	Private higher education	
	National private education	Foreign education

Table 3 Services in higher education II

Services in higher education							
Demand			Provision				
Students			States or other public authorities	HEI			
National students	EU students	Foreign students		Public HEI	Private HEI		
				National	National	EU member state	Foreign

favourable tax reduction scheme to persons who offer services only to national legal persons.

Thus, services in higher education can be tabled in two ways. First, a distinction between public or private higher education can be made (Table 2). The second table (Table 3) addresses the distinction between providing and demanding a service. Higher education can be provided as public higher education or private higher education. If higher education is provided by foreign services providers, by definition it is private higher education.

Services and Establishments

The freedom of services and the freedom of establishment are closely connected (Barnard & Snell, 2017). Whether activities are the result of a service or the result of a company or firm performing an activity can sometimes be difficult to discern.

The following treaty provisions regulate the freedom of establishment.
Article 49 TFEU:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 51 TFEU:

The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 54 TFEU:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

“Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

For example, the Dutch legislator has adopted a change in the Higher Education Law to acknowledge HEIs from other EU Member States. They need to prove to have the competence to issue degrees according to their own national rules. If so, they may operate in the Netherlands and, more importantly, students may receive Dutch study grants if they reside in the Netherlands. This legal change was voted in 2017. The Dutch rule has thus not been used to apply Article 51 TFEU, but on the contrary accepts other Member States' official authority. It even accepts that non-profit-making legal persons can operate in Dutch higher education. This change of the Dutch law is a recognition of the CJEU judgement in the *Valentina Neri* case, which is discussed hereafter.

Valentina Neri and the Freedom to Provide Higher Education from Branches in Different Member States

This case states the principle of freedom of establishment. *Valentina Neri* pursued education in Italy, but in a secondary establishment of a British company, the European School of Economics (ESE), which provided higher education (*Neri Case*, C-153/02). At her request, the Italian Government informed her that her degree obtained via ESE would not be acknowledged in Italy. Then, she demanded ESE to undo her enrolment and she claimed the reimbursement of tuition fees paid to the establishment, because ESE could not deliver degrees recognised by the Italian authorities. ESE refused, after which *Neri* went to an Italian court to claim her tuition fees back. This company challenged the administrative practice of refusing the recognition of those degrees issued by other Member States' companies. Since there was a clear EU legal dimension to the case, the Italian court referred the case to the CJEU to obtain a preliminary ruling. This case was ruled on the basis of the freedom of establishment. The CJEU concluded in para. 39:

... that the organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried out by a national of

one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State.

As noted in para. 45, the Italian government, however:

... appears to wish to justify that restriction by the need to ensure high standards of university education. It maintains that the Italian legal order does not accept agreements such as the one at issue in the main proceedings on university education since it remains attached to a view of such education as a matter of public interest, expressing as it does the cultural and historical values of the State. According to the Italian Government, such an agreement on university education prevents direct quality control of these private bodies by the competent authorities both in the Member State of origin and the host Member State.

Then, the CJEU introduced a proportionality test to justify restrictions on fundamental freedoms (para. 46). The Italian authorities failed that test, because Italian establishments of higher education can award degrees to Italian nationals. The CJEU did not mention discrimination, but only stated that the administrative practice at stake here:

... does not appear suitable for attaining the objective of ensuring high standards of university education pleaded by the Italian Government. (para. 47)

Nevertheless, this case is relevant for services because the flow of arguments of this case is applicable to services as well. The primary difference is that the freedom of establishment under article 49 TFEU requires that the company or person should have a permanent link with the Member State, while for services under article 57 this permanent link is not necessary (Barnard & Snell, 2017, pp. 411–415). Therefore, if the British company had not opened an establishment in Genova, but had operated from the UK having agreements with Italian universities, it should have had to be considered a service (Table 4).

Table 4 Establishments in higher education

Establishments in HE			
Private			Public
National	Other EU	Foreign	National
Privatised accreditation offices	Accreditation offices	HEI out of the span of control of any EU Member State	Public accreditation office
Private HEI	HEI (no difference in guest Member State) falling under other member state public law		Public HEI State diploma registration system

The Association Agreements Between the EU, the EU Member States and Georgia, Moldova and Ukraine

European higher education law has gained the status of primary EU law as a result of the ratification of three separate treaties with Georgia, Moldova and Ukraine (van Wageningen, 2017). Via these treaties, the Bologna Process has also become firmly rooted in EU law. This solves the problem Garben (2010a) pointed to, that European higher education missed a firm competence base in EU law. As an example, articles 358 and 359 of the Association Agreement with Georgia are quoted because they are concerned with education. These are also quoted because the Georgia agreement is the most comprehensive agreement on higher education of all three agreements.

Article 358

The Parties shall cooperate in the field of education and training to intensify cooperation and dialogue, including dialogue on policy issues, seeking approximation to relevant EU policies and practices. The Parties shall cooperate to promote lifelong learning, encourage cooperation and transparency at all levels of education and training, with a special focus on higher education.

Article 359

This cooperation in the field of education and training shall focus, *inter alia*, on the following areas:

- a. promoting lifelong learning, which is a key to growth and jobs, and can allow citizens to participate fully in society;
- b. modernising education and training systems, enhancing quality, relevance and access throughout the education ladder from early childhood education and care to tertiary education;
- c. promoting quality in higher education in a manner which is consistent with the EU Modernisation Agenda for Higher Education and the Bologna Process;
- d. reinforcing international academic cooperation, participation in EU cooperation programmes, increasing student and teacher mobility;
- e. encouraging the learning of foreign languages;
- f. promoting progress towards recognition of qualifications and competences and ensuring transparency in the area;
- g. promoting cooperation in vocational education and training, taking into consideration the relevant EU good practices, and
- h. reinforcing understanding and knowledge on the European integration process, the academic dialogue on EU-Eastern Partnership relations, and participation in relevant EU programmes.

Importantly, the Georgia Agreement, as any association agreement, is ratified by the EU and also by all Member States individually. This has consequences, since the status of EU primary law means that the CJEU has gained competence to judge over higher education as such and no longer needs to seek a connection with other domains of EU law. However, article 359 of the Association Agreement with Georgia is also about services. It mainly concerns the provision side of higher education, but as has been argued earlier in this contribution it nevertheless is about services.

The Bologna Process was never destined to become part of the European Union's law, but it has now become a part of EU law due to the ratification of the three Association Agreements. The Bologna Process will certainly influence services, considering its broad scope of

action and the broad definition of services in EU law. However, it is now too soon to tell how it will influence EU law, and how influential it will be exactly needs to be further debated. One example is the development of quality assurance exercised in a Member State by private organisations from other Member States.

Conclusion

This chapter has provided evidence for a clear connection between services and higher education. Although the European Commission has never explicitly engaged in discussing education as a service, it has challenged national higher education rules on the basis of freedom of services or other treaty provisions. Furthermore, European citizens have been actively challenging Member States' rules on the basis of the freedom of services or establishment. As such, this connection could still be a simple one. Nevertheless, this chapter has also revealed the existence of a complicated and variegated relationship between services and higher education, which is due to Member States' interpretation of services and of higher education services.

This approach is best illustrated by one question: is there an internal market for higher education or is there no internal market for higher education? That choice is entirely up to the Member States. The Zanotti case made clear that it depends on the way HE is financed. As Davies observed (2014), States determine if public services are to be considered a service falling under article 56 TFEU (mainly funded by students) or not (mainly funded by the State directly). It then does not matter if States are providing generous grants or are not paying at all. Escaping article 56 TFEU seems only possible with direct substantial state funding of HEIs. It furthermore means that there is no theoretical distinction between public and private HE services, but only a political one. And if article 56 applies, then article 57 determines the applicable legal regime for private services.

States are thus in the lead to define what kind of services are offered. Depending on a choice for SSGI, SGEI, or private services, different strands of reasoning, different modes of regulating and different ways of

treating different (institutional) actors will occur. States are in the lead, but need to comply with EU law, which means Member States cannot discriminate against other citizens or enterprises to provide and demand services. An important exception is made if Member States can convincingly argue that other services of national interest are endangered, as has been ruled in the Bressol and Chaverot case or the Federspiel v. Bolzano case.

Higher education services can vary. These services can include cross-border aspects, and these features can also concern users and providers. It is safe to say that services cover a broad array of facets connected to (higher) education. Services can be used or can be provided. In general, students or parents use services. Member States provide services, but Member States also demand services, most likely at the same time to satisfy their insatiable hunger for (higher) educated citizens or to sustain other services. Member States have leeway to organise public authority to issue degrees, to establish higher education institutes and to fund them, but here Member States are limited in their options if they want to prevent other Member State institutions of higher education from offering services or establishing agencies, branches or subsidiaries and, as a consequence of their establishment, also issuing degrees or grades.

The CJEU has developed a strand of cases on services connected to (higher) education. These cases probably cover nearly every possibility to engage in a service: as a user, a provider, in a host Member State or one's own. Thus the effect is that (higher) education, however cultural it may be, has come under the ambit of the EU internal market and service provisions and especially CJEU review. Member States seem to agree with this development, considering that they had a chance to block developments with every treaty change or even with the Association Agreements, such as with Georgia. However, they did not use that opportunity, but on the contrary made a quantum leap towards anchoring European higher education law on a rock solid fundament of legal competence. It cannot be seen in any other way, since the Association Agreements have been ratified by the 28 Member States and three other states, after having also been

approved by the European Parliament and the Council of the EU on a proposal of the European Commission. In the same association, approval of the Bologna Process has gained European constitutional value.

Nonetheless, funding social services has always been an important issue for governments and parliaments. The taxpayer money has to be well spent and accounted for, so the possibility for students to take study grants abroad to finance their studies and other Member States higher education systems has not been overtly enthusiastically supported. Still, Member States have not altered CJEU case law that allowed the option to export grants. Thus, as has been discussed in the Schwarz and Zanotti cases, the freedom to demand services is guaranteed, even if private service providers benefit. This, however, does not exclude the possibility of limiting the amount of money the state has to give to the user of the service.

Different online and offline study programmes, a constant flux of students and at this moment not foreseeable new developments having an effect on higher education, make it difficult to forecast how (national) systems of higher education will respond. New avenues have opened, considering the way services are rooted side by side in one European Union treaty frame. In this chapter, the connective elements between services and higher education were depicted. The variation of services linked to higher education was discussed, which allows a conclusion with two certainties. Firstly, higher education is a multifaceted service. Secondly, the Europeanisation of higher education and the transition towards one European higher education service area or an internal market for higher education are still in a state of flux.

Note

1. Whenever necessary, the numbering of the current articles of the Treaty on Functioning of the European Union (TFEU) or of the Treaty on the European Union (TEU), in force since 1 December 2009, is indicated in [...]. If not, the numbering is the actual original one.

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Overburdening Higher Education? The Europeanisation of the Professional Complex

Eva Hartmann

Introduction

European migration has become the centre of a heated debate over the future of Europe. The Swiss attempt to restrict immigration by re-introducing a quota system for European migrants, followed by BREXIT, is just the tip of a major attack on the European migration regime. However, we should not conclude too hastily that European migration will soon come to an end, at least not the migration of skilled labour. European economies depend too heavily on this type of migrant. Accordingly, experts have warned the British government

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of the negative impact a restriction of the freedom of labour would have for the country's economy.¹ Many proponents of skilled migration underline its importance in the light of demographic changes. The European Union (EU) estimates that 75 million jobs will need to be filled again in Europe as people retire or leave the workforce by 2020 (CEDEFOP, 2012; see also European Parliament, 2015). However, what these accounts fail to address are other, more political, reasons which make the freedom of movement of persons inseparable from the freedom of goods, capital and services.

In a first step in this chapter, I will develop a theoretical framework that helps us to better understand the political dimension of skilled migration. I will engage with a neo-Gramscian account of European integration which makes it possible to consider skilled migrants as intellectuals, to whom Antonio Gramsci assigns a vital role in establishing hegemony. I will further develop this perspective in order to get a better idea of the role of regulated professions in this context. A Durkheimian account of professions brings the mediation role of professions to the fore. The way I interrelate this more liberal account of the professions with a historical materialist account is inspired by Gramsci's reformulation of Croce's liberal philosophy. By integrating a Durkheimian account of professions into Gramsci's notion of hegemony, we get a better idea of the integrative role of hegemony. To bring power back into the picture, a dimension Durkheim systematically overlooks, I will further develop the perspective by also integrating a Weberian account of professions. This account sheds light on the major struggles over the regulation of professions and the implications for Europeanising the 'professional complex', to use a term coined by Talcott Parsons (Parsons, 1969, p. 331).

The paper then moves on and identifies different strategies the EU has deployed with a view to establishing a European market for services in the field of regulated professions. The theoretical framework I will develop makes it possible to understand this market-making not only as an economic project but equally as a political project. An *ordo-liberal* 'state-building-by-way-of-the-market' strategy has informed the integration project from the very beginning, as a famous quotation from Jean Monnet, dating from 1952, indicates:

Europe's nations should be guided towards a super state without their people understanding what is happening. This can be accomplished by successive steps each disguised as having an economic purpose, but which will eventually and irreversibly lead to federation. (quoted in Klaus, 2012, p. 21)²

The historical analysis of the Europeanisation of professions will illuminate how this state-building through the market was anything but a smooth process. The project had to deal with many setbacks, which forced the EU to modify its strategies time and again. It is due to these difficulties that the European Higher Education Area (EHEA) has gained in importance in recent years in advancing the European professional complex, as I will show. However, this has major consequences for professions and their societal role, and risks overburdening higher education with new tasks it does not have the means to carry out.

Hegemony and Mediation

Gramsci's theory of hegemony draws our attention to the role of intellectuals in underpinning power in capitalist societies. Following a Marxian tradition, he underlines the importance of economic power in terms of ownership of the means of production, but also highlights how the economy needs to be "mediated" by the whole fabric of society and by the complex of superstructures" (Gramsci, 1978, p. 144). The intellectual functions and categories of modern societies, and hence intellectuals, have gained in importance in this mediation due to the massification of higher education (Gramsci, 1999 [1971], p. 142). However, it would be wrong to consider intellectuals as a class of their own, as Alessandro Olsaretti does, for instance (Olsaretti, 2013). Rather, they are affiliated to different social groups. In empirical terms they may be professors, priests, doctors, lawyers, but also engineers, technicians or trade unionists. The broader the social compromise between capital and labour, the wider the range of groups providing intellectuals.

Gramsci's theory of hegemony identifies this group of intellectuals as the social realm where the core principles and values of the hegemonic order are developed, under the leadership of the intellectuals belonging to the dominant capital factions, i.e., the organic intellectuals (Bates, 2007; Gramsci, 1999 [1971], p. 217). The hegemonic social order, underpinned by these principles and values, supports the interests of the ruling classes. However, the mode and relations of production, the political system, and the lifestyle the order promotes cannot be reduced to these class interests. They need to include some of the concerns of the allies in order to gain their support and to be able to portray the order as universal and hence in the interest of all (see e.g. Bieler & Morton, 2003; Morton, 2006).

Stuart Hall's further development of Gramsci is particularly interesting for my attempt to make Gramsci's ideas fruitful for a study of the European integration process. Hall points out the homogenising effects of hegemony (Hall, 1985). His analysis underlines the heterogeneity of societies, where traditions, cultures and customs unrelated to the capitalist mode of production continue to exist despite the dominance of the capitalist mode of production. The different social realms have their own autonomy; some complement and reinforce each other, while others enter into a relationship of tension or even contradiction. The hegemony of the capitalist classes, or rather of capitalism as a social relation, does not eliminate these other relationships. It rather renders them invisible and creates the illusion of homogeneity. It imposes a normative order that everyone has to refer to in order to make their voice heard and their claim relevant, even though it may not account for the specificity of their own concerns. Hence the hegemonic order interrelates parts of society's diverse traditions, cultures and customs and practices, while at the same time it renders them invisible through an abstraction process. This integration by abstraction is an exclusion by inclusion that underpins the capacity of bourgeois society to absorb the entire society and to constitute a 'necessary unevenness of complex unity' (Hall, 1985, p. 92). Rendering invisible the plurality of social relations ensures that the subalterns remain fragmented and therefore incapable of developing an alternative to the 'powerful system of fortresses and earthworks' of hegemony

(Gramsci, 1999 [1971], p. 494; see also Green & Ives, 2009). Ignorance and invisibility are therefore key features of the passive revolution by which a social compromise *inter alia* between capital and labour is established. Only those who resist this type of absorption will encounter the 'iron fist' of hegemony.

Hall's notion of unity sheds light on an important challenge faced by the endeavour to establish a European hegemony. How can one create a sense of Europeanness in the light of the great diversity and without many disciplining devices? It is in this context that the Europeanisation of the regulated professions comes into play.

The Mediation Role of Professions

Professionals play a vital role in the process of abstraction and exclusion by inclusion, thanks to their contacts with clients or patients. Doctors, for instance, are likely to meet all members of a society sooner or later.³ Part of the doctors' role is to turn the very specific situations of their patients into cases that they can relate to their generic expertise. A similar mediation between the concrete and the abstract takes place when lawyers abstract from the specific case of a given client with a view to identifying the general legal rules involved. Through this mediation, very diverse concrete situations become associated with norms claiming universal validity and abstracting from the specificity of the concrete situation.

Going back to Emile Durkheim helps to provide further insights into this mediation role and into the way it ensures social cohesion, or organic solidarity to use Durkheim's term (Durkheim, 2003 [1957]; see also Lukes & Prabhat, 2012). Durkheim identifies two main areas where professions contribute to social cohesion. Firstly, members of professions mediate between the economy and the state. An insurance surveyor negotiating with a company would be an example. Secondly, professionals also mediate between the individual and the ever more remote state. A teacher would be a case in point here. In these different mediation processes professions are vital to interrelate the modern individuals with the state and thus as a mechanism for constituting the nation.

As Durkheim puts it: 'A nation cannot be maintained unless, between the state and the individuals, a whole range of secondary groups are interposed.' (Durkheim, 2014 [1893], p. 27). Professions are thus vital for the constitution of a nation, that we can understand, in the vein of Benedict Anderson, as an imagined community (Anderson, 1991).

In his study of professions, Eliot Freidson describes the quality of mediation in terms of a 'third logic', which he situates between the logic of the market and that of state bureaucracy (Freidson, 2001). This idea echoes Durkheim's concern that professional services informed by profit-making and competition might undermine their important mediation role, as might a top-down hierarchical order (Durkheim, 2003 [1957], pp. 10–12; see also Allsop, 2006). This perspective thus underlines the importance of a third logic for the mediation capacity of liberal professions, which in turn helps to establish an 'organic solidarity' that ensures social cohesion in highly differentiated societies where the collective consciousness is so abstract that it leaves more scope for individual variation and diversity (Durkheim, 2014 [1893], p. 228). Two main types of regulations are expected to underpin the third logic in the sphere of liberal professions: one regulates market access, the other market conduct. Typical market entry requirements are provisions regarding formal qualifications, level of practice, additional professional examinations, registration or membership in a professional body and rules of areas of reserved practices. They may also include economic needs tests. Conduct regulations often comprise regulation of prices or fees (minimum price, fixed price etc.), regulations relating to advertising and marketing, but also location and geographical diversification, restrictions on inter-professional cooperation and ethical codes of conduct (Paterson et al., 2003, p. 3).

The Durkheimian account, read against its liberal grain, thus provides further insights into how liberal professions help to advance the absorption capacity of capitalist societies and to establish a 'necessary unevenness of complex unity' (Hall, 1985, p. 92). What Durkheim ignores is how contested the regulations for liberal professions are. A Weberian approach to professions provides a better account of the struggles involved.

Interprofessional Rivalry and Professionalism

Integrating a Weberian account of professions into our Gramscian account brings into the picture power struggles in terms of rivalry between different kinds of expertise and professions. Andrew Abbott speaks of inter-professional rivalry in his study of the system of professions (Abbott, 1988). Social closure is a key concept in this context. The concept draws on Weber and his study of the market-restricting power of guilds, professions and other status groups (Weber, 1978, p. 45). However, the scholars using Weber's concept reject his assumption that social closure will fade away with the generalisation of the market economy. They don't share his expectation that the only remaining market restrictions will be the ones that can be justified in terms of a science-based modern rationality (Weber, 1978, pp. 384, 639). Such an account of market restrictions underestimates the emergence of new power-related social closures replacing the old ones (see, e.g. Murphy, 1984, p. 551; Saks, 2010). With this modification, Weber's notion of closure has become very influential in the study of the market regulations established in the name of ensuring the third logic. Magali Larson (2013 [1977], p. 68) studies the transformation of market regulations in terms of professional projects. Emerging projects aim to improve access to privileges and thus collective mobility by challenging existing closures (Larson, 2013 [1977], p. 74). However, the projects also establish new social closures to keep potential competitors at bay. Professional bodies play a vital role in this context. They help to limit the number of people active in a given profession and are therefore vital in translating:

one order of scarce resources – special knowledge and skills – into another – social and economic rewards. To maintain scarcity implies a tendency to monopoly: monopoly of expertise in the market, monopoly of status in a system of stratification. (Larson, 2013 [1977], p. xvii)

The constitution of professions is thus closely related to the question of what counts as the right expertise, which in turn has an impact on who becomes authorised to pursue a profession. It is part of a modern

technology of authorising expertise. Only those people who can pass the barriers will be authorised to provide the mediation mechanism that interrelates the different parts of society with a view to establishing a complex unity that is necessarily uneven, rendering major diversities invisible.

This theoretical outline provides us with a broader analytical framework for studying the cross-border mobility of regulated professions. The integration of the sociology of professions into a Gramscian theory of hegemony makes it possible to understand the Europeanisation of the professional complex as part of a broader attempt to establish a new hegemonic order. Against this backdrop, we can better understand why the EU prefers losing an important member like the UK to curtailing the freedom of movement of people. It would deprive itself of an important mechanism that mediates between the economies and the EU, as well as between the different individuals and the even more remote EU.

A sociological account of this mediation role also makes it possible to understand why the constitution of a European professional complex was anything but a smooth process. It required a dismantling of national mediation mechanisms with a view to replacing them with new, European ones.

A Difficult Start

The Member States already expressed in the Treaty of Rome (1957) their intention to gradually reduce restrictions on the freedom of establishment for regulated professions, as well as the freedom to provide professional services throughout the European Economic Community (Article 52, 59). The Treaty also entitled the Community to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications with a view to increasing cross-border mobility (Article 57). However, the Community made little use of these legal options until the beginning of the 1970s (Kortese, 2016). The European Court of Justice (ECJ) was vital to galvanising the process. In 1974 it produced two seminal decisions—Case 2/74 *Reyners v. Belgium* and Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*. We can understand

the role of these rulings as part of a judicialisation of politics (see De Witte, Muir, & Dawson, 2013; Shapiro & Stone Sweet, 2002; see also Comandè & de Groof in this volume). Or as the Norwegian Union of Municipal and General Employees (Fagforbundet) puts it:

From the start, the ECJ has regarded it as its supreme duty to realise the fundamental principles of the EU Treaty on the free movement of goods, services, capital and persons. Whatever the politicians cannot – or dare not – clarify, is clarified by the judges in the ECJ. (Fagforbundet, 2008, p. 4)

In the *Reyners* case the plaintiff was a Dutch national born in Brussels who was not allowed to practice as a lawyer in Belgium due to his nationality, despite having completed his education in law in Belgium (2/74/ECJ, 1974; Craig & de Búrca, 2011, p. 52). In the *Binsbergen* case a Dutch lawyer (M. Kortmann) had moved from the Netherlands to Belgium and was, as a result, barred from working as legal representative or adviser in the Netherlands as he was no longer a resident in that country (33/74/ECJ). The Court decided in both cases in favour of the plaintiffs and hence in favour of the freedom of movement and right to residence, and ruled that the restrictions imposed by the governments had breached EU law.

The *Reyners* case is particularly interesting as it provides further insights into the complexity of establishing a European professional complex. What was also at stake in this case was the definition of exercise of official authority and hence the interpretation of Article 55, which allows for exemptions from non-discrimination provisions (now TFEU Article 51). This article provides that freedom of establishment and the right to provide services throughout the EU do not apply in cases where the services are connected to the exercise of official authority. This exemption is relevant for many professional activities carried out for instance by a tax adviser, a police officer or an *avocat* (barrister), as in the *Reyners* case. A Member State can make use of the exemption article to restrict the provision of some services to its own nationals without breaching the non-discrimination provisions of the EU. In the *Reyners* case the Court challenged the range of activities to which the nationality requirement applied. In other words, it raised questions about the type of activities that are closely connected to official authority.

Should professionals be allowed to carry out services in the name of a state they are not citizens of? In the light of the political sensitivity of this question, the controversy that the *Reyners* case triggered does not come as a surprise. The Government of Luxembourg, for instance, argued that Article 55 ‘covers all the professional activities of the advocate which form an indivisible and inseparable whole, since they all have the same objective, to assist the administration of justice’ (ECJ 2/74, p. 637). In contrast, the Dutch government put forward a reading according to which Article 55 ‘refers not to professions but only to activities’ (ECJ 2/74, p. 637). The Court decided in favour of the Dutch government’s argumentation. Its ruling continued to allow for exemption in the case of an exercise closely related to state authority. However, it also significantly reduced the scope of professional activities falling under this exemption. The exemption article should be limited to those activities ‘which in themselves involve a direct and specific connexion with the exercise of official authority’ (ECJ 2/74, p. 655). With this decision, the Court put forward a much narrower reading of what counts as official authority. It developed some guidance in this and subsequent cases for determining what type of activities would continue to fall under the exemption clause. For instance, police or army officers continue to fall under the scope of Article 55 but secondary school teachers no longer do, as the Court ruled in *Bleis v Ministère de l’Éducation Nationale* (C-4/91), although secondary education is a compulsory activity that the state is obliged to provide.

The Court’s decision that the direct effect also applies to regulated professions also turned the *Reyners* and *Binsberger* cases into landmark rulings. Direct effect means that the primary legal text, hence the treaty, can be used by the Court without further interpretation provided by secondary legal sources such as regulations or directives. In other words, the principle of direct effect allows the ECJ to play a much more proactive role in the definition of new standards, which then can be codified into EU law at a later stage (Shapiro & Stone Sweet, 2002). For our purpose, this meant that the freedom to provide professional services and the right of establishment could be imposed by the Court despite the absence of any specific directives at that time. However, the Court also explicitly acknowledged the special nature of regulated professions and the

services they provide. In the *Binsberger* case it underlined the need to regulate the delivery of these services as long as they can be ‘justified by the general good — in particular rules relating to organization, qualifications, professional ethics, supervision and liability’ (33/74/ECJ: para 12). In other words, the Court signalled that it was willed to respect the need for a ‘third logic’, as Freidson calls it.

The fact that *Reyners* and *Binsberger* had both obtained their formal qualifications in the country where they wanted to practice probably made the direct effect provision more acceptable at that time. Neither case had any consequences for the way the Member States recognised each other’s formal qualifications. However, the Member States knew that this was just a temporary respite. The ‘iron fist’ of the judicialisation threat was now visible. Although the fact that the ECJ made little use of the direct effect competence in the sphere of recognition of qualifications also indicates that the Court was aware of the limited legitimation it had to carry out the threat (for an overview of the cases, see European Commission, 2010b). Scholars emphasising the judicialisation of EU policy-making tend to underestimate the legitimation a law needs to have to become ‘living law’, to use a term coined by the sociologist Eugen Ehrlich (Ehrlich, 2001 [1913]; see also Habermas, 1996; Hartmann, 2011). Hence, the Court helped to galvanise a political process but did not replace it.

Back to Policy-Making

The threat of the ‘direct effect’ put policy-making back on the agenda. After 1974 a number of recognition directives saw the light of day, starting with the directives concerning doctors (75/362/EEC and 75/363/EEC) followed by 77/452/EEC and 77/453/EEC for nurses; 77/249/EEC and 77/250/EEC for lawyers; 78/686/EEC and 78/687 for dentists; 78/1026/EEC and 78/1027/EEC for veterinary medicine; 80/154/EEC and 80/155/EEC for midwifery; 85/832/EEC and 85/833/EEC for pharmacists; 85/384/EEC and 85/385/EEC for architects. In addition, advisory committees on training, including professionals and supervisory authorities, were established for other professions (Dalichow, 1987;

Evetts, 1998). However, for many other professions the effort to establish European qualification standards turned out to be a complex and cumbersome endeavour, often with little results (de Cockborne, 1995; Evetts, 2002, p. 13). The Community even failed to establish a directive in the field of engineering (Verbruggen, 1994, p. 64). These failures clearly show how solid the social structure of the old, nationally organised professional complex still was at that time. Many professions had enough power to resist the opening-up of their markets.

The absence of European standards set clear limits on how far the professional complex could be advanced by way of the market. How should the Court assess whether a national regulation was appropriate to protect the third logic or a disguised attempt to keep foreign competitors out, without European standards for the regulation of professions? How can one determine the equivalence, for example, between a degree in civil engineering obtained in Portugal and one obtained in Germany? In the *Bouchoucha* case (C-61/89), for instance, the Court ruled that Member States may, in the absence of European standards, restrict the right to practice according to their own standards, even if this implies constraining the access of professionals from other countries where the regulations are less restrictive.

However, the Court did not back down. In the *Vlassopoulou* ruling (C-340/89) it decided that a Member State had at least to assess the equivalence of the professional qualifications of an applicant interested in pursuing her profession in that country. The ruling further increased the pressure by providing that rejected applicants should have the right to appeal. In this case the body in question has to justify its negative answer in terms that are broadly accepted in Europe, in order not to be accused of disguised protectionism. In other words, the justification obligation increased the pressure on the Member States and their professions to establish mutually agreed standards.

Increasing Pressure

In the late 1980s the Council introduced a sea-change regarding the Europeanisation of standards for professional qualifications with the adoption of Directive 89/48/EEC. This directive constituted the first

pillar of a general recognition regime.⁴ It essentially transposes the new harmonisation strategy of the Community, drawing on the seminal *Cassis-de-Dijon* ruling in 1979 (120/78), to the field of professional qualifications. The new harmonisation strategy favours a ‘laissez-régler’ approach. It refrains from establishing far-reaching European standards and instead seeks to establish *ex-negativo* minimum standards. The EU member states have to accept all other national social closures as equivalent, provided they are ‘not substantially different’ (Directive 2005/36/EC Article 14.4). These minimal standards are no longer sector-specific but generic, hence applying to all professions.

The price the EU paid for this broader coverage of the recognition regime was a decoupling of the regulations regarding formal education and the right to practice. The new general recognition system of the EU is restricted to education. It does not prevent the Member States from having additional requirements in place that regulate the pursuit of a profession as long as they are justified by the general public interest. However, it significantly reduces the scope for additional, nation-specific social closures.

The second compromise was related to the regulated professions already covered by the sectoral directives. These well-organised professions were exempted from the first generation of general system regulations. They only became part of the 2nd general recognition system 15 years later, in 2005 (Directive 2005/36/EC). The EU had managed to employ this divide and rule strategy to keep the better organised professions out of play until it had established a general recognition regime. However, to turn this recognition regime into living law it relied heavily on the higher education institutions, as I will show in the next section.

Universities as the White Knight

While establishing the general system, the European governments also started to search for a way to facilitate the mutual recognition of academic qualifications in more general terms. At the same time, they were keen not to defer any major competences to the EU that the Court could then use in its rulings. Following Gramsci, we can read this

reservation of the Member States towards the EU as an indication of the importance education continued to play for domestic hegemony. The Member States decided in favour of the intergovernmental framework of a joint convention between the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Council of Europe. In 1992 the European states got the green light from the UNESCO general assembly to develop the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, which was eventually signed in 1997 in Lisbon (Lisbon Recognition Convention, 1997). Today the Convention has been signed by 54 countries, the majority of them having ratified it as well.

This Convention was to become the key legal framework of the Bologna Process, aiming to establish a European Higher Education Area (EHEA). The Bologna Process in turn has been instrumental in further developing standards that strengthened the far-reaching recognition provisions of the Lisbon Recognition Convention in terms of the information obligations for the sending countries (Lisbon Recognition Convention Article VIII.1). The participating countries agreed on a common degree structure and a strong focus on competences, as they adopted the European Credit Transfer and Accumulation System (ECTS) and the diploma supplement and later on the European Qualifications Framework (EQF). They also established principles of quality assurance through external agencies. The system of quality assurance and accreditation has become vital for further facilitating the recognition of qualifications since it makes the institutions issuing the qualifications comparable (Rosa & Teixeira, 2014). Quality has become an important generic equivalent making abstracting from the specificities of the national systems easier. Many of the quality assurance agencies provide their services across EU borders. They directly benefit from the European Single Market and have thus become part of the ordoliberal 'state-building-by-way-of-the-market' strategy (Hartmann, 2017).

With the parallel development of the Lisbon Recognition Convention and the Bologna Process, the Member States have strengthened the role of the universities in Europeanising the professional complex.⁵ The success of creating generic European standards for the

recognition of HE qualifications stands in stark contrast to the difficulties in developing European standards for the other dimensions of the third logic. The second generation of the general recognition regime sought to bring the professions back to the table. Directive 2005/36/EC called for the establishment of common platforms where professional associations and organisations or Member States should further specify the meaning of substantial differences for the specific professions (Article 16). Yet, despite several attempts, no common platform was established, and in 2010 the European Commission deemed this strategy to have been a failure (European Commission, 2010a, p. 16). A sociological account of the professions and their role for society helps to explain the difficulties in terms of the complex social issues at stake. The fact that the well-organised professions were now part of the European professional project might have been another reason for the lack of progress. They were no longer 'neutralised', as they had been in the first generation of the general recognition regime.

Towards Mediation

In the light of these major difficulties, the generic qualification standards developed in the context of EHEA acquired even greater importance. By that time, the Bologna standards had become living standards in most of the participating countries, providing the formal structure of study programmes. But universities were also encouraged by the European Commission to play a more active role in helping the well-organised professions to align their profession-specific education requirements with the generic European HE standards. The European University Association (EUA) was to become an important mediator (see Howard Davies in this volume). Most of this collaboration between the professions and EUA was funded by the EU Tuning project. In other words, the mediation role of the EUA was enabled by the EU. The fact that the Commission did not take the lead is remarkable and provides interesting insights into the enabling conditions of the emerging professional complex.

This collaboration paved the way for an amendment of the recognition directive, which now requires that the common training framework should be based on European academic standards such as the European Credit Transfer System (ECTS) and the European Qualifications Framework (EQF) (Directive 2005/36/EC-consolidated, 2013). The directive also provides that meeting the standards of this common training framework, and not membership of a professional organisation, should be decisive for someone's right to pursue a profession in another EU country. With this shift in emphasis the EU has made the universities even more the 'centre of the professional complex' (Parsons, 1969, p. 331) than they used to be at the/a national level. This has major implications for the sites where mediation takes place. Universities and other higher education institutions have been assigned new tasks, without getting any additional resources to carry them out. Even worse, their own traditional mediation role between individuals and the state has been weakened in two ways. Firstly, the employability doctrine has increased the pressure on universities to cater to the needs of the prospective employers of their students. As a result they have become the main mediator between the economy and the state, to the detriment of the first mode of mediation, i.e. the one between the individuals and the state. Secondly, universities see themselves increasingly compared with other universities in global rankings in a way that does not account for their context-specific mediation role.

Conclusion

This contribution has drawn on Gramsci's theory of hegemony in order to understand the crucial role of cross-border mobility of people in organising support for the European Union as a political project. Against this theoretical backdrop, we can better understand why the EU fiercely defends the freedom of movement of people. It is not for merely economic but also for political reasons that the EU refuses to abolish this freedom, despite the risk of losing important allies. The study has paid particular attention to the role of universities in this context.

I have further developed the analysis of the enabling conditions of European hegemony by integrating important insights from the sociology of professions. A Durkheimian account of professions, if read against its liberal grain, is particularly useful in illuminating the crucial role of regulated professions in mediating between individuals and the remote state. Hence, professions are not only allies with whom the ruling power has to share some privileges in order to gain their support, as a more Weberian reading of Gramsci's theory of hegemony suggests. Professions also play a vital role in enabling social integration, relating individuals to the state with a view to ensuring the individuals' loyalty towards the state. This mediation is instrumental for establishing the nation as an "imagined community", to use Anderson's term (Anderson, 1991).

Transposing these sociological accounts of hegemony and professions to a European level is, of course, not unproblematic in the light of the methodological nationalism informing them. We cannot assume that the mediation takes the same institutional form as Europe will take as an imagined community. We have to study empirically what structures are emerging that can mediate, as well as the quality of this mediation. I have therefore explored the extent to which professions have become part of the European integration process since the 1970s and the implications for their mediation capacity. The historical analysis reveals an incremental process with setbacks as well as progress, and provides important insights into the complexity of the endeavour to Europeanise the professional complex. It also brings to the fore an interesting interplay between the European Commission, the European Court of Justice, the Member States, the professions and universities. Any attempt to reduce the integration process to a judicialisation of policy-making, with the ECJ being the main driving force, would not do justice to the complexity of this.

The study has illustrated the importance of market-making in Europeanising the professional complex. But it has also pointed out the limits of the *ordo-liberal* 'state-building-by-way-of-the-market' strategy. Europeanisation is not only about creating a European Single

Market for professional services. It is equally about restricting this market. The EU, supported by the rulings of the Court, keeps underlining the need for restrictions, as long as they are justifiable in the name of the general good. Following Freidson, we can understand these restrictions in terms of a third logic that is a vital for the mediating role of professions and that differs from the market logic and the rigid logic of state bureaucracy. The EU relates this third logic explicitly to regulations delineating the organisation of the professions and requirements regarding qualifications, supervision, and liability as well as ethical standards for professional work. The historical reconstruction of the European professional complex highlights the major difficulties the professions and the Member States have encountered in their attempts to establish European standards for this third logic. It is in this context that higher education institutions and their Europeanisation by way of the Bologna Process have gained in importance. They helped to compensate for the absence of a strong European third logic and to avoid a situation in which one of the other two logics prevails. We could say that Parsons' assumption that universities are the 'centre of the professional complex' (Parsons, 1969, p. 331) applies even more to the European professional complex. However, this crucial role of HE institutions raises important concerns. HE institutions have been given new mediation tasks without additional means to carry them out, or even worse, while their own traditional role in mediating between individuals and the state has been weakened. The undermining of existing mediation mechanisms can be seen as an important reason why the EU has plunged into a profound legitimisation crisis. However, more sociological studies of mediation mechanisms and their transformation in the context of the European and international economic and political integration are needed to understand the complexity of the process and its implications for the social cements of societies. We need a European if not an international sociology that can better account for the transnationalisation of societies (Burawoy, 2016; Favell & Guiraudon, 2011). It might become compulsory reading for all the bureaucrats in Brussels and the political scientists supporting their world view with their studies.

Notes

1. <http://bruegel.org/2017/02/brexit-uk-eu-movement-of-people/> [last accessed 2/12/2017].
2. The exact source of this quote is disputed. Some claim that it was written by British Conservative Adrian Hilton, paraphrasing Monnet.
3. Although a number of studies point out that the frequency is not only related to the patient's health but also to her or his economic position, mediated by the specific national health system. See www.theguardian.com/society/2017/aug/12/health-inequality-gap-growing [27/11/2017].
4. Subsequent directives extended the general recognition regime to other forms of professional education and training of at least one year's duration (Directive 92/51/EEC), and to certain commercial, industrial or craft occupations that are not yet covered by the other two Directives 99/42/EC.
5. This role is also reflected in a study of the DG Internal Market and Services, in which a number of competent authorities underline the importance of the Bologna Process in facilitating the recognition of professional qualifications (see DG Internal Market and Services, 2011).

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The Recognition of Professional Qualifications: The Part Played by the European University Association in the Alignment of EU Legislation with the Bologna Process

Howard Davies

Introduction

In 2007 the European University Association (EUA) embarked on a series of discussions and meetings which would culminate, six years later, in the adoption of significant amendments to European Union (EU) legislation on the recognition of professional qualifications. They were enshrined in Directive 2013/55/EU, ‘amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (“the IMI Regulation”)’.

The amendments espoused the principles of student-centred learning, which sit at the heart of the ethos of the Bologna Process. They also harnessed the mobility instruments on which the Process had come to depend. This was the first instance of the importation of the Bologna apparatus into EU hard law.

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Like many terse statements of fact, these assertions raise a host of questions. Does EUA claim to be the prime mover of specific EU legislative acts? No, it does not. Many other factors and agents were involved—not least, all those activated by the global financial crisis of 2008. Did EUA have a mandate to lobby for the wholesale convergence of the Bologna Process and EU legislation? Was it intent on consolidating the role of the European Commission in the Bologna Follow-Up Group (BFUG)? Had it accepted the priority of the employability imperative, to the exclusion of all other strands of the higher education (HE) mission? Had it abandoned the humanist tradition of 850+ higher education institutions (HEIs) and 33 national rectors' conferences and sacrificed it on the altar of the needs of the qualified labour market?

The answer to all these questions is 'no'. EUA has consistently regarded the Bologna Process and the European Higher Education Area (EHEA) as a space co-regulated by the inter-governmental activity of the 48 constituent ministries and by the key sectoral stakeholder bodies, of which the EUA is one. It has responded to the European Commission's occasional policy initiatives (Communications and Consultations) with a blend of measured welcome and cautionary comment appropriate to the constituency which it represents.¹ It recognises that the geo-political expanse of the EHEA is broader than the scope of EU legislation and that, within the EU, higher education remains the legal competence of each Member State (MS). The EHEA offers diversity of HE practice, together with the opportunity of intensive cooperation; EUA energetically celebrates and promotes both of these.

Why, then, and to what extent, would EUA concern itself with the convergence of Bologna and EU law? The sequence of events that began in 2007 has to be set in context.

The Background

EU legislation on the recognition of professional qualifications (hereinafter RPQ) is by no means peripheral to the world of HE. It is relevant to the 'readability' of qualifications in the EHEA, to curriculum design and to quality assurance. Its application is limited to the 28 MSs,

to the 3 members of the European Economic Area (EEA—Iceland, Liechtenstein and Norway), and to third-country professionals wishing to practise in any of these 31 countries. However, it also features in pre-accession negotiations with would-be future MSs, as well as in trade talks with actual and potential partner countries.

RPQ is not a new policy strand. On the contrary, it was one of the founding principles of the European Economic Community (EEC). Article 57 of the Treaty of Rome (1957) contains the germ of everything that was to follow:

1. In order to facilitate the engagement in and exercise of non-wage-earning activities, the Council, on a proposal of the Commission and after the Assembly has been consulted, shall, in the course of the first stage by means of a unanimous vote and subsequently by means of a qualified majority vote, act by issuing directives regarding mutual recognition of diplomas, certificates and other qualifications.

[...]

3. In the case of the medical, para-medical and pharmaceutical professions, the progressive removal of restrictions shall be subject to the co-ordination of conditions for their exercise in the various Member States.

The ‘mutual recognition’ evoked in Article 57.1 was conceived as a powerful instrument of policy and administration. It was to give expression to the freedoms enshrined in the Treaties, expedite the integration of the European services market, eliminate protectionism, boost economic growth and work in the interests of the consumer. And so it is today. While its scope has gone beyond the ‘non-wage earning’ (i.e. fee- or salary-based) professions and come to encompass the totality of the qualified labour market, its underlying rationale has remained unchanged for 60 years.

In 1957, RPQ was regarded by the EEC as something distinct from the recognition of academic qualifications. The latter was the province of the Council of Europe, as evidenced in the *European convention on the equivalence of diplomas leading to admission to universities* (Council of Europe, 1953). This convention led ultimately to the Lisbon Recognition Convention of 1997, to which 53 states are currently party, and which is regarded as the legal foundation of the Bologna Process.

Yet the EEC's deference to the Council of Europe did not deter it from developing its own education policy in the cause of European integration (Corbett, 2005). This work gained momentum at precisely the moment—in the 1970s—when the Commission was drafting its first Directives on RPQ.

It might be supposed that the two currents of recognition policy, the academic and the professional, would have merged into a single set of good practices. After all, universities had long recognised the degrees awarded by peer institutions—when recruiting academic staff, researchers and postgraduate students. And throughout history, they had been the *alma mater* of all liberal professionals. Moreover, by the 1970s, social and economic pressures for access to higher education and for the supply of highly qualified labour had triggered 'massification' and the creation of cohorts of new institutions. As a result, most HEIs had absorbed into their missions the mandate of 'training provider'. While their graduates were still heirs to humanist values inculcated with great conviction, they were at the same time being ushered more insistently into stratified and regulated labour markets.

The HE sector, however, spurned the opportunity to align academic and professional recognition within a European framework. The Commission, cogitating on the mechanisms of recognition, 'appeared to favour basing equivalence on length of studies – anathema to rectors who believed that was simplistic in view of national variation in qualifications' (Corbett, 2005, p. 64). A prompt to action was subsequently provided by the Sorbonne Joint Declaration of 1998. Not only did the Declaration herald the Bologna Process and the creation of the EHEA, it also brought to the now familiar policy strands (employability, mobility, readability of qualifications) the endorsement of four hugely influential MSs—France, Germany, Italy and the UK. Crucially, it mentioned in the same breath recent initiatives in the fields of academic and professional recognition:

A convention, recognising higher education qualifications in the academic field within Europe, was agreed on last year in Lisbon. The convention set a number of basic requirements and acknowledged that individual countries could engage in an even more constructive scheme. Standing by these

conclusions, one can build on them and go further. There is already much common ground for the mutual recognition of higher education degrees for professional purposes through the respective directives of the European Union. (Sorbonne Joint Declaration, 1998, pp. 2–3)

It was to this prompting that EUA responded in 2007. Two other factors were influential. First, the realisation that the HE sector should, when considering the EU policy framework, pay close attention to the work of a range of Directorates-General (DG), rather than limiting their interest to DG Education and Culture and DG Research. Partly, this was due to the multiple sources of available funding; partly, it was due to the extent to which institutional strategies were beginning to take on board considerations of enterprise, lifelong learning and regional development.

The second factor was the controversial passage through the co-decision procedure of the so-called Bolkestein Directive (Directive 2006/123/EC on services in the internal market, now known as the Services Directive). This legislative initiative was intended to bond tightly with legislation on the recognition of professional qualifications, with the clear objective of facilitating the mobility of professional service providers in the internal market. The debate was sufficiently heated to draw the attention of the HE sector to the yawning gap between the educationally progressive features of the Bologna Process and the regressive content of RPQ.

It was at this point—in time and in policy development—that EUA's monitoring evolved into exploratory intervention. To better understand the issues and the outcomes, it is useful to separate into three periods the flow of events from the 1980s to 2013.

1985 to 2005: The Attempts to Consolidate and Extend RPQ

In 1985, at the request of the European Council, the European Commission presented a Proposal (European Commission, 1985, p. 3) embodying a draft *Directive on a general system for the recognition*

of higher education diplomas. Having laboriously set up a system of automatic recognition, on the basis of agreed minimum conditions of training, in what are known as the seven ‘sectoral’ professions (medical doctor, dentist, general care nurse, midwife, veterinary surgeon, pharmacist and architect), the Commission decided that to proceed in the same way with other professions would be far too costly in terms of time and legislative effort. It had, for example, taken 17 years to reach agreement on the architects, a profession which was and still is unregulated in some Member States.

Instead, the Commission proposed a ‘general system’, which embraced nearly all the remaining regulated professions.² With automatic recognition out of reach, it put in place mechanisms for applying compensatory measures to cases of qualifications which ‘substantially’ differed from one national system to another, be it in terms of required level of prior qualification, or level of attainment, or course content. These were the measures that would later be specified as adaptation periods and aptitude tests. The General System would include, as a prime example, engineers, who—in popular memory—would otherwise have been the object of legislation as the eighth sectoral profession.

One year later, in 1986, the Commission amended its Proposal (European Commission, 1986, p. 7). It added new elements, including consultation with the relevant professions, a requirement that any necessary additional professional practice be supervised and assessed, and an appeals procedure for professionals who considered themselves misrecognised. Out of the legislative process came Directive 89/48 EEC *on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration.* Three years later, the scope of RPQ legislation was extended by Directive 92/51/EEC on a *second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.* It encompassed non-HE post-secondary courses of shorter than three years’ duration.

Throughout, the motivation of the EU institutions had been constant: to build a Single Market in which cross-border service delivery thrived—regulated, but otherwise unimpeded. But what is enabled by legislation does not necessarily happen. The study group convened

in 1997 by Commissioner Edith Cresson lamented the ‘slow progress’ made in RPQ. The group’s recommendations (Study Group on Education and Training, 1997) helped bring into being some of the principal features of the twenty-first-century HE landscape: competence-based curricula, qualifications frameworks and lifelong learning.

If progress had been slow, it was at least in part due to the enlargement of the EU to 15 MSs in 1995 and to the constantly changing map of regulated professions. For the legislators, strictly legal updating took precedence over the incorporation of educational initiatives. They made a first attempt to update when they put into effect Directive 2001/19/EEC,³ the so-called SLIM Directive, amending the measures on the General System, as well as the cluster of sectoral Directives. This proved insufficient and is best swiftly passed over, since it brought ample illustration of how the speed in certain MSs tended to zero. In October 2003, the Commission launched infringement procedures for non-compliance against France, Ireland, Italy, Luxembourg and the UK.

The most generous interpretation of the dilatoriness of these MSs is that the passage of its successor Directive through the co-decision procedure had already begun. The Commission had already published a further Proposal (European Commission, 2002). What eventually became Directive 2005/36/EC *on the Recognition of Professional Qualifications* proved to be a major legislative advance, insofar as it consolidated and streamlined 15 separate Directives, the earliest of which dated from 1977.

2005 to 2013: The Enactment and Amendment of Directive 2005/36/EC

The top priority of the 2005 Directive was rationalisation. Legislators were aware of the Bologna Process, but chose not to import its outcomes. This, despite the fact that debates in the European Parliament in the course of the legislative process had highlighted incongruities which were becoming increasingly apparent. If the Directive legislated on course duration, why could it not use the metrics embodied in the

European Credit Accumulation and Transfer System (ECTS), which the Commission itself had devised for its ERASMUS programme?

Such questions were also being posed by commentators, lobby groups, academic and professional bodies. From 2007, which marked the end of the period in which the Directive had to be transposed into national legislations, a space was opened up in which stakeholders sought to maximise the ‘readability’ promoted by the Bologna Process and to give it effect by drawing the Directive into its ambit. This window of opportunity would formally end in 2012, the date of the Directive’s quinquennial review and the date by which any amendments would have to be finalised.

Moreover, there was a wider context. It now included two further EU enlargements, from 15 to 25 and from 25 to 27, which meant that two-thirds of Bologna signatory countries were members either of the EU or the EEA. It also meant a proliferation of differentially regulated professions.

The EUA Workshop, 2007

As indicated earlier, the EUA had a wide membership which embraced HEIs in all of the Bologna signatory countries as well as the majority of the national rectors’ conferences. It stood for a belief in HE as a public good, with a triple obligation to personal fulfilment, social cohesion and the economic needs of society. Its Lisbon Declaration (EUA, 2007) proclaimed its headline commitments to the EHEA (which included employability alongside student-centred and lifelong learning), as well as to internationalisation, research, quality and institutional autonomy. As a member of BFUG it had a proactive role. At the same time, it was in close contact with the EU institutions on matters relating to the interests of its constituency. It was thus well placed to identify—in the interests of both diversity and coherence—elements of EU legislation which appeared out of step with, and even to hold back, the construction of the EHEA. The Directive of 2005 fell into this category.

In October 2007, the EUA therefore convened a meeting of interested bodies to explore the implications. In addition to associations and

agencies in the HE sector,⁴ it brought together six of the seven sectoral professional bodies.⁵ These represented, at EU level, professionals who had graduated from EUA member institutions which were now participating in the Bologna Process. As such, they were aware that the bodies of professional knowledge, on which automatic recognition was based, had been enshrined in legislation 30 years before and in some cases had dated significantly. They recognised that, if curricula were to be updated, this could not be done without reference to the Bologna parameters within which the training providers were working: the three-tier qualification framework of Bachelor, Master and Doctorate; ECTS; student-centred and lifelong learning; external and internal quality assurance. It was from this environment that future professionals, their future members, would graduate. They would therefore need to monitor and intervene in the alignment of academic practice and the requirements of the regulatory bodies.

Student organisations⁶ also participated in the workshop, as did the European Parliament's committee on the internal market and consumer affairs (IMCO) and unit D3 of the Commission's DG Internal Market, responsible for RPQ.

The IMCO representative stressed that the priority of the committee was the completion of the Single Market and considerations of consumer protection, in both of which RPQ had an important role to play. The Parliament had, in his opinion, relatively little interest in the Bologna Process; in terms of legal competence and budget, it was far less significant than research, and MSs in any case were resolutely in favour of an inter-governmental approach where HE was concerned.

The spokesperson from DG Internal Market stressed the difficulty of amending RPQ legislation, both because of the need for unanimity in Council and because of the myriad of regulatory and professional bodies that would be involved in any effort to build consensus. In a useful marker of its stance, DG Internal Market set out its view of the various interfaces of the Directive and the Bologna Process. These concerned qualification frameworks, ECTS, and the question of competence-based curricula. To summarise its 2007 position:

Qualifications frameworks

The Bologna qualifications framework (FQ-EHEA) consists of three cycles – Bachelor, Master and Doctorate. The sectoral professions, on the other hand, have single-cycle curricula which are prescribed in the Directive: for example, at least six full-time years for a medical doctor; at least four full-time years for an architect. These integrated course durations cannot be split into sequences of Bachelor and Master; nor can they give access to the qualified labour market at the point of graduation from Bachelor, as Bologna intends. The incompatibility of Directive and Bologna is irreducible. As for Recommendation 2008 on the establishment of the European Qualifications Framework for lifelong learning (EQF), it is non-binding and irrelevant; it is useful only for non-regulated professions.

ECTS

HEIs are free to use ECTS, but ECTS points must not be used to reduce the number of specified full-time years set down in the agreed and legally binding minimum training conditions. In the cases of medical doctors and general care nurses, the Directive specifies a number of annual contact hours. It is not possible to accommodate them within the Bologna band of 25–30 hours (of contact and self-managed study) per ECTS credit point. In any case, the ECTS Users' Guide [the 2005 version] clearly states that 'there is no direct link between contact hours and credits' (European Commission, 2005, p. 5). ECTS has been designed for student mobility, not for the mobility of professionals. To import ECTS into the Directive would be both disruptive and irrelevant.

Competence-based curricula

The basic agreed minimum training conditions, on which automatic recognition is based, stipulate that certain bodies of knowledge be covered in the curricula. Neither the Commission nor the MSs will accept the addition of lists of competences, for that would be to abandon objective input-based criteria.

These threads will be followed later in this chapter. For the time being, let it be simply recorded that in 2007, DG Internal Market was adamant in its resistance to any change to legislation on RPQ which might be prompted by the Bologna Process. The very task of streamlining

older measures had proved laborious; to put everything back into question was, for the DG, inconceivable.

The Decision to 'Re-Engineer' the Directive

And yet, by 2008, in conversation with EUA, DG Internal Market had conceded the need to 're-engineer' the Directive by 2012, date of its quinquennial review. Why the apparently sudden change of tack? A number of factors suggest themselves:

- the gradual consolidation of the Bologna Process and the growing day-to-day reality of transparency and 'readability' of HE qualifications;
- the growth of programme mobility alongside the credit mobility promoted by the various iterations of the ERASMUS programme;
- the consequent emergence of cohorts of mobile students who might be assumed to constitute future cohorts of mobile professionals;
- the development of the EQF which, like ECTS, was predicated on educational attainment measured in terms of learning outcomes;
- the inclusion of medicine and nursing in the Tuning project and the identification of generic and specific competences to be acquired in the course of basic training;
- the growth of cross-border patient mobility and telemedicine, the extension of performance-related funding in public health systems, and the concomitant premium set on patient safety and professional competence in the healthcare professions;
- the enduring need to galvanise cross-border service provision in the context of the Single Market, the Lisbon Agenda and the global financial crisis of 2008.

Besides, the political and institutional landscape was changing fast. In the Barroso II Commission, Michel Barnier became Internal Market Commissioner and threw himself energetically into the 're-launch' of the market. Meanwhile, the Treaty of Lisbon of 2009 removed the requirement for unanimity in the Council, replacing it with qualified majority voting which in practice required measures to be approved by 18 of the

27 MSs. The Treaty also increased the powers of the European Parliament. There was the prospect of a new Commission and Parliament in 2010.

The Contribution of Academic and Professional Bodies

Finally, there was pressure from the academic and professional bodies. Of course, they were energised by the factors listed above, not least by the widespread calls to prioritise patient safety. After all, it was partly in view of public anxiety that the healthcare professions had been excluded from the Services Directive of 2006. At the same time, there persisted the impression that the professions' successful lobby had been motivated by protectionism. Did they really wish to promote cross-border professional mobility? There is evidence that they did: it is worth looking briefly at the efforts to develop the competence-based curricula (see Table 1) which, agreed at European level, would optimise patient safety and facilitate mobility.

It is important to note the role of the Commission in driving forward these collaborations. Five of the seven have been supported by funding awarded, not by DG Internal Market, but by DG Education and Culture. Six, if one allows for the extent to which the midwives have benefitted from the substantial work undertaken by the nurses. Again making allowance for the midwives, it is apparent that the least successful outcome has been in medicine—largely because for many years the leading academic bodies took up rival positions, which no doubt made it difficult for the professional body to reach an unambiguous view.

On balance, one can see that the academic-professional consensus was strong: competence- and outcome-based curricula were regarded as a matter of some urgency. The healthcare professions in particular had multiple perspectives: they were feeling the build-up of public concerns about patient safety; they were dependent for basic training provision on HEIs committed to the Bologna Process; and they were intent on putting down markers for the re-engineering of the Directive.

Re-Engineering—Needed but Still to Be Defined

To return to the notion of 're-engineering'. What did it mean? For the academic and professional bodies, it meant the prioritisation of

Table 1 Examples of collaboration between academic (A) and professional (P) bodies to identify core competences in the sectoral professions

Sectoral profession	Collaboration between academic (A) and professional (P) bodies in work on identifying core competences, assembling competence clusters, and developing competence-based curricula at the level of basic training
Medical doctor	<p>In 2007 the EU-funded thematic network MEDINE (A) published a set of core competences identified in conjunction with the Tuning Project [Tuning Project (Medicine), undated]. The European Medical Students' Association (A) was a MEDINE partner, while the Association for Medical Education in Europe (A) and the ECTS Medicine Association (A) also participated in the development work</p> <p>The Standing Committee of European Doctors (P) has historically displayed ambivalence, preferring to stand by the position that curricular design is an MS competence, in which the regulatory bodies must also play a part</p> <p>On the other hand, in 2007 the Committee endorsed the European Core Curriculum which had been produced by student bodies prior to the MEDINE document (International Federation of Medical Students' Associations; European Medical Students' Association, Hilgers, & De Roos, 2006)</p>
Dentist	<p>In 2013 the Council of European Dentists (CED) (P) and the Association for Dental Education in Europe (ADEE) (A) published a joint position on the competences of dental practitioners (CED and ADEE, 2013). It combined efforts undertaken separately in preceding years. In the case of ADEE, the position derived from the EU-funded thematic network DentEd, in which the European Dental Students Association (A) also participated. ADEE has also produced a detailed policy paper on a competence-based curriculum (ADEE, 2010)</p>
General care nurse	<p>Discussion of competences at European level is long-standing. Two EU-funded initiatives are worthy of note: the second phase of the Tuning Project (A), which agreed specific competences in 2005 [Tuning Project (Nursing), 2005]; and a Leonardo da Vinci project (A), which produced a 'European Reference Guide for competences in nursing' (Haute École de Namur, 2008)</p> <p>Tuning, in particular, triggered substantial debate among all the relevant stakeholder bodies—academic, professional and regulatory. The European Federation of Nurses Associations (EFN) (P), initially preferring the competences tabulated by the International Council of Nursing, went on to produce its own Competency Framework (EFN, 2015)</p>

(continued)

Table 1 (continued)

Sectoral profession	Collaboration between academic (A) and professional (P) bodies in work on identifying core competences, assembling competence clusters, and developing competence-based curricula at the level of basic training
Midwife	The International Confederation of Midwives (ICM) (P) has drawn up the list of essential competences in midwifery (ICM, 2013). There is no public record of debate within the European Midwives Association (P), which until very recently was unable to maintain its website
Veterinary surgeon	In June 2013 the Federation of Veterinarians of Europe (FVE) (P), together with the European Association of Establishments for Veterinary Education (EAEVE) (A) and a consortium funded by the EU's seventh framework research programme, designed an undergraduate core curriculum in animal welfare (FVE and EAEVE, 2013)
Pharmacist	The Pharmine project, an EU-funded thematic network, has undertaken extensive work on competences (Pharmine, 2011) in a consortial framework which includes the Pharmaceutical Group of the European Union (P), the European Pharmaceutical Students Association (A), and universities in four MSs
Architect	The European Network of Heads of Schools of Architecture (ENHSA) (A) participated in the Tuning Project and identified the architect's generic and specific competences (ENHSA, 2007). These provided input into the recommendations subsequently adopted by the general assembly of the Architects Council of Europe (P) (ACE, 2008)

competences. But in 2009, among the legislators, there was little sense of its possible content or methodology. The prime concern of DG Internal Market was the defence of the principle of automatic recognition. This was the red line that determined its perception of the Bologna Process. In its view, ECTS threatened to undermine the quantitative prescriptions on course duration. It believed that learning outcomes could not be assigned to a fixed timeframe and, in any case, were not amenable to assessment. Quality assurance in the Bologna mode⁷ was held to introduce the possibility of an individual's professional qualification being compromised by inadequate institutional performance. Professional competence, it insisted, was the concern of national regulators, not of

the EU legislators. DG Internal Market could not contemplate anything that might put automaticity and legal certainty at risk.

In one area in particular, DG Internal Market foresaw great inconvenience. In architecture, not all basic training courses were obliged to conform to the Directive's prescriptions. But if they did not, their graduates had no right to automatic recognition and were obliged to try their luck in the General System. Compliant courses had to be notified, by MSs, to the Commission; they were then inscribed in Annex V of the Directive. The DG attributed to Bologna the sudden appearance of hundreds of new courses, in such profusion that it felt sceptical about whether they would be accurately assessed and notified by MSs.

The feeling that Bologna was making EU legislation more difficult to implement was reinforced by the Monti Report in 2010. Mario Monti commented that 'there is a greater awareness that despite the Bologna process training contents across Member States are not converging to a degree that makes further action superfluous'. He went on: 'To make recognition of professional qualifications easier, the *acquis* in this area should be modernised. The scope for automatic recognition of qualifications to new professions should be expanded to new sectors in addition to the seven professions today, targeting in particular new professions required for green and digital industries to facilitate the mobility of highly skilled workers' (Monti, 2010).

The EUA View

While EUA could sympathise with the desire to protect the principle of automatic recognition—after all, it had no brief to impede the completion of the single market—it had serious reservations about the EU approach to RPQ. In EUA's view, automaticity had long been based on opacity, but the days of opacity were gone; RPQ had relied on trust, but now—thanks to 'readability'—the reliability of that trust could be confirmed or disconfirmed. Qualifications that previously had been recognised unquestioningly were now open to critical scrutiny by academics, professionals and competent authorities in other MSs.

Moreover, it made no sense for EU legislators to turn their backs on, for example, learning outcomes—which academics knew how to assess and which were not at all incompatible with courses of predetermined length. How could EU institutions sensitive to public opinion refuse to countenance output- and competence-based curricula? And how could the effective quality assurance of HE programmes not be regarded as a positive contribution to subsequent professional practice? And—*pace* Mario Monti—the EHEA was interested in the diversity of course content rather than in its mechanical replication across culturally distinct higher education systems. It wanted recognition based on the comparability of qualifications, not on a notion of equivalence that masked an insistence on the replication of content.

In 2009, the impression therefore persisted that DG Internal Market remained unaware of how much the HE landscape had changed:

- in 2010, the EHEA would come into existence;
- the Bologna signatory countries, in general, had enshrined Bologna much more extensively in national or regional legislation;
- they had consolidated Bologna's three-cycle qualifications architecture, backing it up with national qualifications frameworks;
- they had adopted the European Standards and Guidelines on Quality Assurance (ESG), prioritising student-centred learning defined in terms of learning outcomes;
- they had endorsed the principle of lifelong learning, with a strong commitment to the recognition of prior learning and to continuing professional development.

The 2010 Meeting in the European Parliament

It was to air anxieties and differences of opinion that EUA invited DG Internal Market and the European Parliament's IMCO committee once again to meet formally. This time it would be in a much larger meeting held in the European Parliament (reported in EUA, 2010). It was convened in October 2010 and was attended by 90 delegates of regulatory, professional and academic bodies and the EU institutions. It was the

first time that, at European level, the HE, professional and regulatory sectors had sat down to discuss RPQ with the legislators.

The meeting brought into the open a number of issues that had been looming larger in informal discussions. A good example is vertical programme mobility. If, in certain contexts, the basic training programme of a sectoral profession were to be split into a sequence of Bachelor and Master, what in theory could prevent a student from crossing an internal EU border between the two parts and completing in one MS what he or she had begun in another? Which body would assure the programme's compliance with the Directive? What opportunities for employment would present themselves at the conclusion of the Bachelor stage, as the Bologna Process intended?

Such questions triggered heated debates—regarding Germany, for example, where some maintained that 50% of medical students never registered as medical doctors and that a Bachelor stopping-off point would give entry to the labour market as, say, medical journalists or act as a transitional qualification to a different ancillary healthcare profession. The discussions also raised questions about the legitimacy and efficacy of cross-border quality assurance, the degree of cross-border cooperation between regulatory bodies, and the capacity and willingness of HEIs to construct cross-border vertically structured joint degrees.

The meeting reached no definitive conclusions. But it did help to impel DG Internal Market into a period of hyper-activity during which, between 2010 and 2012, it delivered an evaluation of the Directive (European Commission, 2011c), a set of 'experience reports' produced by MS and by profession,⁸ a public consultation, a commissioned study of the Directive's relation to the Bologna reforms (European Commission, 2013b), a Green Paper and a proposal for an amended Directive.

2013 to Date: Signs of Convergence

The Directive 2005/36/EC was eventually amended in 2013, as Directive 2013/55/EU, in order, as always, to boost cross-border activity in the Single Market. What were the HE-related outcomes of this crash programme of re-engineering?

The European Credit and Accumulation System (ECTS)

In the framework of the amended Directive, ECTS makes its appearance in EU hard law for the first time. Not as the object of a prescription, but as a supplementary (as opposed to an alternative) way of expressing course duration in the agreed minimum training conditions of the sectoral professions. For example, would-be pharmacists must undertake their basic training in a minimum of four years. These years may now additionally be specified as ECTS 240. Gone, apparently, is the suspicion that HEIs or their funding bodies might manipulate credit points to reduce course duration below the agreed level. ECTS is similarly available as a supplementary tool in those levels of the General System which apply to HE courses. (The next section discusses the characteristics of the General System.)

Effectively, the importation of ECTS is acknowledgement of the fact that the majority of MSs enshrined ECTS in their own HE legislations when adopting the Bologna norms—and that it made no sense not to recognise this in the Directive. At the same time, it is a reminder that the EU could not enforce the use of ECTS—despite having invented it at the dawn of the ERASMUS programme—because in doing so it would trespass on the competence of MSs to design and control their own HE provision. After all, even in the Bologna Process, there is no commitment or obligation to use ECTS as such, merely ECTS or an equivalent system.

The European Qualifications Framework for Lifelong Learning (EQF) and the Common Training Frameworks

To trace the emergence of the EQF in RPQ, it is necessary to look back at the common platforms which were enabled by Article 15 of DIR 2005/36/EC. These were an attempt by the legislators to convert at least part of the General System to automatic recognition. They provided for the individually applicable compensation measures to be waived, if at least two thirds of MSs could identify a common

compensation mechanism capable of covering substantial differences in the content and duration of training courses. In the event, no common platform was ever established; practice was too divergent and the task too complicated.

That this was a dead end soon became apparent. The Commission then proposed, by analogy with company law and intellectual property law, a 28th regime (European Commission, 2011a). The 28th regime was so-called because it would co-exist with the 27 national provisions, not replacing or over-riding them, but available for MSs to opt into if they wished. The hope was that many would. The 28th regime was not, however, a common platform by another name. It revealed a crucial shift of emphasis, from input considerations (such as course content and duration) to output considerations, expressed primarily in terms of the competences to be acquired in the course of training. Here, indeed, was evidence of a major re-think.

In the amended Directive of 2013, the 28th regime (which by then would have been the 29th, due to the accession of Croatia) was renamed the common training framework (CTF).⁹ It was no doubt wise to abandon the ordinal designation, given the possibility of future accessions and secessions. Henceforth, one-third of MSs (i.e. 10 out of 28 currently—or, in the event of Brexit, 9 out of 27) may agree on ‘common sets of knowledge, skills and competences’, proposed by representative professional bodies operating at EU or national level, or by competent authorities. Other MSs may then opt in. CTFs are conceived as an attractive option for non-sectoral professions which wish to develop a competence-based curriculum at European level. Currently setting the pace are the hospital pharmacists.¹⁰

Article 49a.2d specifies that CTFs will be designed in line with the EQF, an instrument which Recital 11 describes as ‘designed to promote the transparency and comparability of professional qualifications’. This is a strikingly, and perhaps symptomatically, narrow definition. Of course, the scope of the EQF is much broader, embracing all qualifications in post-secondary education sectors, whether in vocational education and training (VET) or in HE, whether professional or academic.

EQF and the General System

The introduction of the EQF into EU hard law was hesitant and tentative. It could easily have gone much further. Specifically, it could have replaced the five-level grid used in the General System to calibrate substantial difference in qualification level and to trigger the compensation mechanisms. The grid compacts all post-secondary training into five levels (a) to (e), the top two of which are at HE level.

What, then, is the situation of the General System in the amended Directive? Sadly, it is unreconstructed. Notably, a striking lack of clarity characterising the definition of the two HE levels (d) and (e) remains unresolved. In the 2005 Directive, Article 11 defined (d) as consisting of training courses of ‘at least three and not more than four years’ duration’ and (e) as of ‘at least four years’ duration’, thus allowing four-year training programmes to be assigned either to (d) or to (e). This ambiguity worked primarily in favour of MSs in which the combined duration of a Bachelor and Master sequence was four years. In fact, it worked in favour of the UK. Indeed, it was the UK that secured the fudge, under the Luxembourg presidency.

The Commission had proposed to the legislators that (e) cover courses of ‘more than four years’, thus clearly separating two durations. Traces of this intention are evident in Recital 11 of the amended Directive, which indicates that level (d) should be interpreted as the Bologna Bachelor and level (e) as the Bologna Master, but this wording is not carried into the text of amended Article 11. Recital 11 presses the point that the EQF could indeed have been used to replace the five-level grid; undoubtedly it would have offered greater transparency and user-friendliness.

The Commission’s Green Paper made the point crisply:

Article 11 of the Directive stipulates five levels of qualification which are based on the type and duration of training. When a professional applies for the recognition of his or her qualifications for a profession under the general system, the competent authority must use these levels in order to determine if the applicant can benefit from the Directive. If there is a difference of two or more levels between the qualification of the professional and the qualification required in the host Member State, the Directive does not currently apply.

The levels defined in Article 11 might overlap with the eight levels of the EQF, which is based on “learning outcomes”, once the latter is implemented in 2012. The coexistence of two classification systems creates a risk of confusion for competent authorities and other stakeholders. (European Commission, 2011b, paragraph 3.3.1)

However, as if resigned to frustration, the Commission also footnoted the observation that competent authorities and the responses to the public consultation indicated that ‘the application of the system on the basis of these predefined levels is seen as overly complex’ (European Commission, 2011b, p. 11). And indeed, its proposal did not survive the legislative process. The prospect of greater simplicity and transparency was rejected. This was perhaps because, in 2011, the EQF was not sufficiently embedded and because competent authorities were reluctant to use an instrument not wholly in their control.

Nevertheless, some progress had been made and there is no reason to think that the Commission will not return to the attack. Indeed, in its review of the EQF, dated late 2013 and preceding the coming into force of the amended Directive in January 2014, it noted that:

[t]here is less coherence [of the EQF] with the Directive on the recognition of professional qualifications. The directive works with five levels and input criteria such as course duration to recognise qualifications on the labour market, while the EQF has eight levels based on learning outcomes. This has caused uncertainty among stakeholders. Therefore, the new directive envisages synergies with the EQF. It keeps the five-level inputs system, but makes it possible to set up ‘common training frameworks’ that enable countries to agree on minimum levels of knowledge, skills and competences linked to EQF levels. Based on this, countries will be able to automatically recognise professional qualifications’. (European Commission, 2013a)

Conclusion

The amended Directive is unlikely to constitute the end of the story. The convergence of professional and academic recognition systems is likely to be driven ever more rapidly by economic imperatives.

Recovery from the financial crisis, after all, is incomplete. Europe's horizons are not clear of geo-strategic, economic and political clouds.

DG Internal Market was not consulted on the introduction of the EQF. Will it, now that it has mutated into DG GROW in the Juncker Commission, be sucked into the orbit of the European Skills, Competencies and Occupations Taxonomy (ESCO)¹¹? How will it respond to initiatives within the Bologna Process to accelerate the automatic recognition of academic qualifications? How will it handle the delegated acts which, in the new comitology, allow it to amend 'non-essential' features of the Directive—aspects which, while they may be non-essential in a restricted legal and technical sense, may be of crucial importance to curriculum designers and training providers?

The next report on the operation of the Directive is due in January 2019. Whether this will lead to further amendments is impossible to say. In any case, the questions go beyond the scope of the present chapter, which covers EUA's activities between 2007 and 2013. In respect of the period described, it is legitimate to conclude that EUA helped raised awareness among academic and professional bodies of the discontinuities between the Bologna Process and EU legislation. At the same time, it drew the attention of DG Internal Market and the European Parliament's Committee on IMCO to developments which impinged on their remit, but of which they were too little aware. On balance, its intervention served to steer EU legislation towards the Bologna Process, rather than the reverse.

There was no obligation on the Commission to consult the higher education sector. Article 59 of the 2005 Directive merely committed it to consult 'experts from the professional bodies concerned'. DG Internal Market nevertheless proved very willing to listen to the EUA point of view, both before and after the decision to 're-engineer'. It is possible that the severity of the economic crisis opened up communication channels more readily than otherwise would have been the case. This chapter contends that the bilateral DG-EUA dialogue was of interest and importance. Not, however, solely of itself, but set in the richer context of the intense multi-stakeholder conversations taking place throughout the period.

The tensions are still far from resolved. At the most recent count, there are nearly 6000 regulated professions in 28 MSs. They represent about 22% of the EU labour force and are populated by around 50 million citizens, the majority of whom have a higher education background. Anomalies abound. According to the Commission, ‘using civil engineers as an example, a key profession in a priority sector, regulatory variations [...] have resulted in a highly fragmented professional landscape of 99 separate categories of civil engineer and which figures on low mobility suggest may be acting as a barrier’ (European Commission, 2016, p. 2).

The Commission’s lament is eloquent. It points to fundamental dilemmas. How can the EU derive an integrated high-skilled labour force from the rich academic diversity of the EHEA? How can the HE sector contribute to this endeavour while ensuring that it does much more than satisfy immediate labour market needs? The questions persist as the landscape changes. Witness the current push to create the digital single market and the new skills base that it requires.

Now that EU28 have celebrated the anniversary of the Treaty of Rome in 2017, MSs will doubtless be pressed to bring the discourses of academic and professional recognition even further into alignment. Yet precisely because they jealously guard their national competences in higher education, they are likely to rely more and more on the initiatives of the inter-governmental, co-regulated, EHEA.

Notes

1. See the article by Alberto Amaral and Andrée Surssock in this book.
2. More were subsequently brought in by Directive 1999/42/EC.
3. See the useful summary by Rauhvargers (undated).
4. Association of Medical Schools in Europe (AMSE), European Association of Establishments of Veterinary Education (EAEVE), European Network of Heads of Schools of Architecture (ENHSA), the Florence Network for Nursing and Midwifery, Medical Education in Europe (the MEDINE the thematic network), the UK Quality Assurance Agency (QAA), the nursing group of the Tuning Project (*Tuning Educational Structures in Europe*, coordinated by the Universities of Deusto and Groningen).

5. Architects Council of Europe (ACE), Council of European Dentists (CDE), European Federation of Nurses Associations (EFN), European Midwives Association (EMA), Federation of Veterinarians of Europe (FVE), Pharmaceutical Group of the EU (PGEU).
6. European Union of Students (ESU) and the European Pharmaceutical Students Association (EPSA).
7. The third edition of the 'Standards and Guidelines for Quality Assurance in the European Higher Education Area' was published in 2009.
8. These are downloadable from http://ec.europa.eu/growth/single-market/services/free-movement-professionals/policy/legislation_en.
9. Recital 25 and new Article 49a.
10. See its project website at <http://www.hospitalpharmacy.eu/>.
11. ESCO is based in DG Employment and Social Affairs and is the basis for the Commission's thinking on labour market needs.

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European Policy Implementation: Challenges for Higher Education Quality Assurance

Sónia Cardoso and Maria J. Rosa

Introduction

The Bologna process brought additional relevance to quality assurance (QA), considered to be one of the most important drivers for building the European Higher Education Area (EHEA). This has paved the way for important developments in QA, such as the establishment of a significant number of national QA agencies, European-level organisations (namely the ENQA—European Association for Quality Assurance in Higher

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Education, and the EQAR—European Quality Assurance Register for Higher Education) and, ultimately the drafting of the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG), meant to be a framework to guide the implementation of internal and external QA systems in the European higher education landscape.

Despite all these developments, a number of challenges remain for QA at the European level, namely regarding the assurance of the quality of higher education provided across Europe and beyond (ENQA, 2016). In fact, although cross-border higher education (CBHE) has significantly increased in the last decades, sufficient and adequate mechanisms to assure its quality can be thought of as still relatively incipient. Furthermore, the increasing role of the European Commission (EC) in higher education policies (Sin, Veiga, & Amaral, 2016) has led to the emergence of the idea that liberalising education services and affirming higher education as a tradable commodity within a market is the right way—perhaps the only way—to transform the European Union into the ‘most competitive and dynamic knowledge-based economy in the world’ (Lisbon European Council, 2000). This raises obvious challenges for the quality of the services delivered and consequently to the assurance of this quality, especially because there have also been attempts to restrict the possibilities of assuring CBHE quality under the argument that higher education, as other goods, should be freely traded in an international market (Rosa, Sarrico, & Tavares, 2016).

The present chapter intends to look at how the European dimension of QA has developed over the last two decades and the extent to which it has reached its stated objectives. Emphasis is given to the challenges currently faced by European QA, under the framework of a series of initiatives designed to establish a EHEA and market. Against this goal, a set of documents translating the positions of European and international agents are discussed. Acting as ‘intermediate bodies’ in relation to the implementation of European QA, these agents can be thought of as holding different hierarchical positions regarding their power and competence in this field (see Fig. 1).

At the top level are, in parallel, the Bologna member states and the EC (backed up by the European Court of Justice—ECJ) as the precursors of the EHEA and of the QA within it. Then, with different functions regarding the operationalisation of these two features, European organisations emerge, such as the European University Association (EUA), the

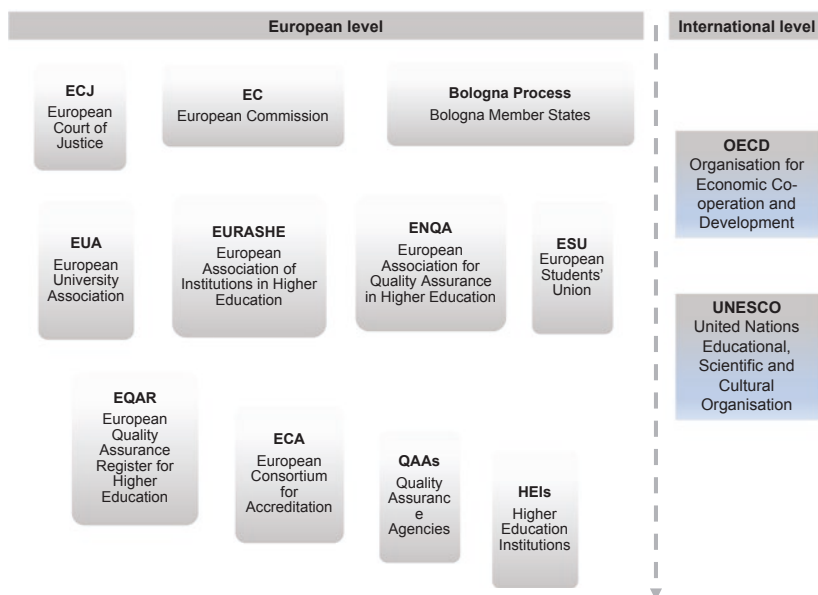


Fig. 1 Intermediate bodies (agents) involved in quality promotion and assurance at European level

ENQA, the EURASHE (European Association of Institutions in Higher Education) and the European Students' Union (ESU), which individually or as a group (the E4 group) have significantly contributed to QA's European dimension. Subsequently, with a lower degree of power and competence, appears the EQAR, as well as the ECA (European Consortium for Accreditation) an association of accreditation and QA agencies. Finally, the higher education institutions emerge, at the same time, as the main recipients of QA measures, and as one of the main promoters of their 'practical' implementation. In parallel, organisations such as the OECD (Organisation for Economic Co-operation and Development) and UNESCO (United Nations Educational, Scientific and Cultural Organisation) also play a relevant role in influencing European QA.

The documents analysed were mainly constituted by guidelines and reports issued by the EC and the European Parliament and Council; the Communiqués from the Bologna ministerial conferences (from 2001 to 2015); and some other reports and statements from the EUA, ENQA,

EURASHE, ESU and EQAR. These documents were thought to represent the views or proposals of the different European agents on how quality can or should be assured in the context of the recent European policy implementation regarding higher education, namely that which directly addresses the establishment of a common education area and market, while identifying the main challenges emerging at this level.

The remainder of this chapter starts by putting forward the initiatives taken to build a European higher education market. Then emphasis is given to the contributions of different European agents aiming to promote and assure quality of higher education within that context. In a third part, trust and cooperation are discussed as 'prerequisites' for the establishment of QA as an effective tool towards European integration in higher education. Finally, an attempt is made to systematise some of the challenges currently faced by European QA, while some avenues for future debate on the topic are proposed.

The Attempt to Build a European Higher Education Market

Especially with the approval of the Lisbon strategy, in 2000, and following the EC's inclusion in the Bologna Follow-up group, in 2003, the Commission introduced an economic neo-liberal rationale into the higher education policy agenda which the Bologna Process has been harnessed to serve (Sin et al., 2016). This rationale is based on the direct link between the Bologna Process and economic advantages deriving from the establishment of a common education area and market within which higher education institutions emerge as crucial agents in the response to the demands of the knowledge society and economy (Martens & Wolf, 2009).

A good example of the EC's neo-liberal rationale is the passing of the European Directive 2006/123/EC by the European Parliament and the Council, also known as the Services Directive (Amaral, 2016; Sin et al., 2016). As recognised by its legal text (Directive 2006/123/EC), the goal of the Directive is to establish an internal market in

services by removing legal and administrative barriers and introducing simplification and transparency measures. This is expected to foster competition in cross-border service provision and economic growth (Sin et al., 2016).

The Directive excludes the services of general interest (SGI), while including the services of general economic interest (SGEI). Contrary to the areas of health, environment, public health or security, education is not explicitly excluded from SGEI, even though the national education systems are (Amaral, 2016; Sin et al., 2016). Education, and specifically higher education, which are not publicly funded (and hence, are mostly paid by students and families) fall within the scope of the Directive (Sin et al., 2016), and are not included in the list of the exceptions to the free delivery of services (Directive 2006/123/EC). Indeed, up until now the EC has considered private provision of higher education as falling under SGEI. This means that a provider from a given country may offer its education services in another country as long as these services, i.e., study programmes, are accredited in the provider's country of origin (Amaral, 2016; Sin et al., 2016). The host country can neither oppose this provision nor determine the accreditation of the study programmes by its national agency. However, there were cases where this opposition was attempted although without success (see De Groof, 2016).

Backed up by the ECJ, the EC assumes that the accreditation and the recognition of CBHE programmes' quality depend on the authorities of the 'exporting' country (Amaral, 2016). Interestingly, the directive devotes a sole chapter to the QA of the SGEI, stating that the member-states, in collaboration with the EC, must take the appropriate follow-up measures to encourage providers to assure the quality of services delivery, and even the methods for this assurance (Directive 2006/123/EC). However, it is unclear in what way the exporting countries should deal with the responsibility of assuring this quality (Bischof, 2016).

In view of the above, it is possible to say that the Services Directive constitutes an attempt to consider education a tradable service that is clearly even more robust than the efforts taken in this respect at a global level. That is the case of the proposal to the World Trade Organisation (WTO) to consider education as such a service to be included in the

General Agreement on Trade and Services (GATS). To some extent, the aim was similar to that of the Directive, i.e., to eliminate barriers to the provision of education services by foreign providers while granting them conditions equitable to those of domestic providers (Amaral, 2016).

Although the reaction to the inclusion of education in GATS was 'far from enthusiastic', with many countries not making commitments (Amaral, 2016, p. 11), it also constituted an important step towards the institutionalization of the neoliberal economic paradigm on higher education, under the argument that free trade subsidises intellectual progress (Rosa et al., 2016). Nonetheless, under the GATS, 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives' (WTO, 1995, p. 285) is recognised. This means that a receiving country would be allowed to have a role in the assurance of the quality of the education received as long as it makes use of the same criteria for both national and foreign providers. This is not permitted under the Services Directive as the main concern is to facilitate the provision of services even if this means preventing the receiving country from acting on behalf of consumers' protection. This is rather strange especially in the case of an education market.

All of these developments raise obvious questions and challenges to the promotion and assurance of higher education provision's quality. The next section discusses European initiatives in this context, reflected in a series of reports targeting QA and member-states collaboration at this level.

Promoting and Assuring European Higher Education Quality

The attempts to create a European higher education market, as described above, entail consequences not only in terms of the provision of education but also of the quality of this provision (Amaral, 2016; Berlinguer, 2016). Especially over the last decade, several important initiatives have been endorsed by European agents to promote and assure this quality while protecting students and stakeholders from low quality provision and rogue providers (Amaral, 2016).

From the National QA Systems to an European Dimension in QA

In a first moment, concerns about higher education quality and its assurance were mainly linked to the development of QA systems, both at national (QA agencies) and institutional levels. As suggested by the *Report on the Implementation of the Council Recommendation 98/561/EC* (EC, 2004), the EC's attention was by then focused on the development (and its status) of such systems, as well as the cooperation in this field between member-states. The overall success in regard to both issues was acknowledged and seen as due not only to the contribution of the Bologna Process and the Lisbon strategy (within which the quality agenda assumed a central role), but also of the mandate of ENQA, established in 2000. Despite these developments, the need to take further steps towards the mutual recognition of QA systems was recognised.

The same focus can be identified in regard to the early Communiqués issued from the Bologna ministerial conferences. These clearly emphasise the need for national QA systems to establish a common framework of reference and to disseminate best practices (Prague Communiqué, 2001), as well as to develop mutually shared criteria and methodologies on QA (Berlin Communiqué, 2003). The need for cooperation between nationally recognised agencies was also stressed, with a view to enhancing the mutual recognition of accreditation or QA decisions (Bergen Communiqué, 2005). In this context, the idea of creating a European register of QA agencies, based on national review, was put forward (Bergen Communiqué, 2005).

In response to previous demands and, specifically to the Berlin Communiqué (2003), the European Standards and Guidelines for Quality Assurance were drafted, in 2005, through the joint work of ENQA, the EUA, EURASHE and the former National Unions of Students in Europe (ESIB, currently ESU)—the E4 Group. Thought of as an instrument to contribute to the consolidation of the European dimension in QA, the ESG were defined as a set of generic and non-prescriptive principles in QA, identifying the areas ideally to be covered by national QA arrangements both externally (QA agencies) and internally (higher education institutions) (ENQA, 2009).

Therefore, the consolidation of the European dimension of QA and the importance of cooperation at this level were on the QA agenda by the time the Services Directive was issued. In 2006, the European Parliament and Council (EPC) Recommendation (EU, 2006) highlighted the need to improve transparency and trustworthiness in terms of quality and its assurance, namely through the effective implementation of the ESG by QA agencies and higher education institutions. Furthermore, aimed specifically at improving cooperation in QA, the collaboration between QA agencies in terms of qualification recognition, as well as the creation of the EQAR, were encouraged (EU, 2006).

In 2007, the London Communiqué acknowledged the progress made in terms of cooperation while encouraging it in future QA developments (London Communiqué, 2007). To this end, the EQAR was endorsed as an instrument aiming to ‘enhance confidence in higher education in the EHEA and beyond, and facilitate the mutual recognition of QA and accreditation decisions’ (London Communiqué, 2007). The Register was officially established in 2008 as a ‘voluntary, self-financing, independent and transparent’ body. QA agencies’ application to it is to be ‘evaluated on the basis of substantial compliance with the ESG, evidenced through an independent review process endorsed by national authorities’ (London Communiqué, 2007).

The Need for Cross-Border QA

Framed, to some extent, by the establishment of the Services Directive and the resulting developments, transnational education in all its forms and, specifically, CBHE, also emerged as an issue shaping European QA. Concerns with the QA of CBHE are stressed by both the Leuven/Louvain-la-Neuve Communiqué (2009), where the need for this form of education to be ‘governed’ by ESG is emphasised, and the *EC Report on the progress in QA* (EC, 2009). As underlined by this Report, transnational education and CBHE in particular ‘remained largely outside the scope of QA’ (EC, 2009, p. 5). Moreover, ‘it is still unclear what being accredited in one country, even by a registered agency, means in another’ or ‘how the misuse of such an accreditation could be prevented, e.g. in the case of a higher education institution which operates in several

countries without offering in all locations the guarantees that led to the initial accreditation' (EC, 2009, p. 7). It was further recognised that due to the opening of QA to foreign registered agencies by only some few member-states, cross-border QA remained limited with only few institutions requesting foreign agencies' evaluations/accreditations.

Reaffirming QA as an essential feature to 'reinforce the attractiveness of the EHEA's offerings, including in the provision of cross-border education', in 2012 the Bologna ministers reiterated their encouragement for national QA agencies to apply to EQAR (Bucharest Communiqué, 2012). Furthermore, they put forward the permission for registered agencies to perform their activity across the EHEA, while complying with national requirements, the main aim being the recognition of EQAR-registered agencies' decisions on degree programmes (Bucharest Communiqué, 2012). Aligned with the concern to foster cross-border QA and cooperation at this level, the 2014 *EC Report on progress in QA* (EC, 2014) stressed the important steps already taken, namely through the action of specific agents such as ENQA, EQAR and ECA. Founded as a project organisation in 2003 and incorporated as an association of recognised accreditation and QA agencies in Europe in 2014, ECA was perceived as a way to overcome obstacles represented by member-states' tendency to work with their own agencies (EC, 2014).

Cross-border cooperation in QA was also emphasised as a response to the challenges raised by CBHE. In fact, and apparently easing the position assumed in the Services Directive regarding the responsibility for QA, the EC recommended that QA agencies monitor 'the quality of their institutions' CBHE exports' (EC, 2014, p. 9). This monitoring may allow QA agencies to warrant high quality education and thus safeguard the reputation of their higher education systems (EC, 2014). Furthermore, as a way to increase the credibility, transparency and consistency of their assessments, QA agencies were encouraged to focus on the quality of cross-border cooperation and to strengthen their international links. To facilitate the process, QA agencies:

in the hosting country could be informed about quality assessments of CBHE institutions located in their country, or could carry out joint assessments. Bilateral agreements mandating the QA agency in the receiving country to act on behalf of the sending QA agency, or to allow an

EQAR-registered agency to evaluate the CBHE institution, would help meet quality concerns and have the added advantage of encouraging cross-border cooperation and mutual learning. (EC, 2014, p. 9)

As suggested by Amaral (2016), one question emerging at this level is to know whether the recognition of the need for such bilateral agreements also means the recognition that, so far, the EC has acted with 'too much intrusion in an area protected by subsidiarity, stripping the nation state of some of its prerogatives in an area of high political sensitivity' (p. 16).

Another question arising is linked to the development of cross-border cooperation in QA. The way put forward to address this issue is allowing EQAR registered agencies to operate outside their own countries. How far governments are indeed willing to let national higher education institutions to be evaluated by foreign QA agencies (even if aware that these work in compliance with the ESG and are registered in the EQAR) is another story, however, one still needing to be written. At this level, the issue of trust between countries and QA agencies in relation to their ability to assure the quality within the EHEA and market, as proposed by the EC, clearly emerges as a critical one.

Trust and Cooperation

Taken broadly, trust can be defined as a highly variable, relational and social process that may emerge in very different ways depending on circumstances (Simmel, 1950). When considered under a more specific perspective, trust emerges as an 'ex ante' guess, a bet on the actions of the other which is based on a rational interpretation, an evaluation sustained on available (previous) knowledge and experience regarding that same other (Offe, 1999; Sztompka, 1999).

The Issue of Trust in Higher Education Quality Assurance

This notion of trust seems to adequately reflect what is happening with QA at the European level. Trust in the quality of HE delivered in the European area and market as well as in the actors and instruments

designed for its assurance seems to be (still) dependent on a rational evidence or an irrefutable proof, which seems to have not been given yet. In this context, and with regard to the European dimension of QA, it does not seem enough to have independent QA agencies operating according to the ESG, with membership in ENQA and registered in EQAR.

This phenomenon is not new in the context of higher education. In fact, and although under a different rationale and context, issues of trust concerning higher education quality were at the origin of the Evaluative State (Neave, 1998) and the emergence of QA systems during the 1980s. Nearly three decades have passed since these first developments, and despite all the 'paraphernalia' of QA policies, practices and instruments implemented at different levels (European, national and institutional) and with different purposes, trust has not yet been restored. Indeed, many signs point to the decreasing 'trust of governments and society in higher education systems, their institutions and their professionals regarding their capacity to ensure adequate standards of quality' (Amaral, 2014, p. 15).

In the European context, and despite all the efforts put forward by the EC and the Bologna ministers regarding QA, as previously seen, trust among countries, agencies and institutions regarding higher education quality is still far from being a reality. In particular, the ESG's drafting and implementation and the EQAR's establishment, two of the most important initiatives in this context (Sursock, 2015), have not yet been capable of truly creating trust among all the agents involved. In relation to the ESG, the level of their implementation differs throughout the EHEA, with some countries still reluctant to promote such implementation (ESU, 2015). Furthermore, and despite the tendency for convergence (Hopbach, 2016), QA procedures still present variations among countries (ESU, 2015). For instance, assessment and accreditation criteria tend to refer to specific national aspects and the consequences of assessment and accreditation decisions are framed by national legal frameworks (Hopbach, 2016). Combined, these two factors do not seem to provide the best of contexts for the mutual trust and recognition of what constitutes higher education quality and its assurance across the EHEA.

One piece of evidence that a low level of trust (or even mistrust) exists in the European QA arena is the fact that countries still hesitate to recognise a review from non-national agencies, namely when such a review leads to decisions on the permission of institutions or programmes to operate (EC/EACEA/Eurydice, 2015). In fact, no major developments in opening up national systems have been acknowledged so far and a relevant proportion of systems (around 75%) do not follow the commitment to allow their institutions to be evaluated by EQAR registered agencies (EC/EACEA/Eurydice, 2015). This collides with the vision and expectations of students, one of the most important HE stakeholders. As noted in the *Bologna with Students Eyes Report* (ESU, 2015), most of the ESU's member student unions tend to agree with EQAR's existence and with QA agencies operating in foreign countries. This is perceived as opening the possibility of increasing the transparency of higher education quality for students.

Furthermore, a duality seems to exist between the expansion of cross-border QA activities by the agencies and the position assumed by countries through their legal national frameworks (EQAR, 2014; Sursock, 2015). Indeed, while QA agencies seem to have rapidly expanded such activities, offering their work across national borders, and higher education institutions seem to recognise this as an advantage (as they see cross-border external review as a way to develop their international profile or to enhance the recognition of their degrees), the national frameworks are 'lagging behind' (EQAR, 2014; Sursock, 2015). No progress has been registered in these legal frameworks 'allowing institutions to choose any QA agency that is listed in EQAR' (Sursock, 2015, p. 12). As a consequence, cross-border external evaluations and accreditations often happen in addition and parallel to the national mandatory external QA, which leads 'to an unproductive duplication of efforts' not contributing to promote 'a genuine European dimension to QA' (EQAR, 2014, p. 6).

With the aim of removing such duplication and, as such, contributing to consolidating trust in the EHEA, the EQAR called upon European ministers (Yerevan Ministerial Conference, 2015) to improve the recognition of QA outcomes across borders as part of their national systems (EQAR, 2015). Furthermore, the revised version of the

ESG (published in 2015) is intended to establish a greater common denominator for external QA in Europe and to provide a favourable framework for the consolidation of trust and recognition (EQAR, 2015). In this context, the ministers were recommended to review and adapt national regulations to help QA agencies comply with the revised ESG; to allow higher education institutions to take responsibility for their QA and to choose a suitable EQAR-registered QA agency for the external QA process; and to allow EQAR-registered agencies to operate in their country without additional prerequisites, while recognising their outcomes in line with the national requirements (EQAR, 2015).

Cooperation: The Way Forward to Build Trust?

One of the main problems with the issue of trust—or lack of trust—resides in how to assure the quality of cross-border activities under the ‘new’ European higher education framework which, as previously discussed, is marked by the attempt to create a market, where the responsibility for assuring the quality of education lies with the supplier country. As stressed by Rosa et al. (2016), although it is certain that higher education institutions have adhered to international activities, including CBHE, it is however less certain whether they are in fact prepared to assure the quality of such activities. Furthermore, CBHE raises problems linked with non-official and unregulated providers who remain outside official national QA regimes and, thus, are not subject to internal or external audit/monitoring. It also raises problems associated with consumer protection deriving from the eventual existence of bogus institutions or lack of information, allowing one to distinguish the good and poor quality CBHE institutions.

How then can a receiving country protect itself and its nationals from low quality provision and rogue providers? This is certainly a significant challenge for which, so far, there is no ‘magical’ solution. And this despite the fact that all agents seem to accept that the ‘responsibility for CBHE QA should probably lie in coordinated and shared responsibilities of national authorities and national QA agencies of both the importing and the exporting countries’ (Rosa et al., 2016, p. 279), the role of some networks of agencies, such as ENQA, being also relevant.

Therefore, cooperation seems to be one of the key-features in building trust across the EHEA (Sursock, 2015). Strengthening cooperation between QA agencies seems to be the way forward to ‘facilitate and enhance information exchange, policy dialogue, and the regulation of CBHE’ (ENQA, 2016, p. 1). And, in fact, although incipient, examples of cooperation between national QA agencies in evaluating higher education institutions and/or particular programmes already exist (EC/EACEA/Eurydice, 2015). An important driver of trust which allows perhaps increased cooperation resides in the agencies’ ability to convince their European peers that they offer a sufficient level of comparability. For this purpose, it is very important that agencies rely on infrastructures capable of providing reliable data and proof of comparable practices as ‘a precondition for cross-recognition of degrees and the promotion of student mobility’ (EC, 2009, p. 10).

Recently, as a result of the QACHE (Quality Assurance of Cross-border Higher Education) project, coordinated by ENQA (ENQA, 2016), a set of principles were established with the aim of fostering cooperation. These range from making information on CBHE easily available to encouraging regional networks of agencies, such as ENQA, to play a focal role in the facilitation of information sharing and cooperation in the QA of CBHE (see ENQA, 2016, p. 40). These principles were included in the QACHE Toolkit (ENQA, 2016), with the purpose of offering practical guidance to QA agencies on how they can improve the sharing of such information and enhance cooperation.

Furthermore, the *QACHE Report* (ENQA, 2016) emphasises the need for efforts around QA of CBHE to be built on a number of existing international guidelines—the UNESCO/OECD Guidelines for Quality Provision in CBHE; the UNESCO/APQN (Asia-Pacific Quality Network) Toolkit Regulating the Quality of Cross-border Education; the INQAAHE (International Network for Quality Agencies in Higher Education) Guidelines of Good Practice in Quality Assurance; the ESG; and the CHIBA principles¹—as well as existing national reference points.

According to Hopbach (2016), the UNESCO/OECD guidelines may indeed be a useful roadmap in promoting cooperation at the level of the QA of CBHE. These guidelines were defined with the aim of

providing an international framework for quality provision in CBHE and, to this extent, to support international cooperation while contributing to 'enhance the understanding of the importance of quality provision' in regard to this form of transnational education (Hopbach, 2016, p. 185). Moreover, the guidelines 'have proven to be the most influential international recommendation on policies, regulations and QA in the area of CBHE' (Hopbach, 2016, p. 185). Although not detailing the specific actions to be taken, the guidelines explicitly include recommendations for governments (in terms of national responsibility and international cooperation); higher education institutions (in terms of making quality 'abroad' comparable with quality 'at home' and respecting the receiving country's QA system); and QA agencies (in terms of the inclusion, in their mission, of the CBHE and the collaboration between sending and receiving bodies). Additionally, while emphasising the need for national responsibility and international collaboration, the OECD/UNESCO guidelines reinforce the importance of mutual trust between governments, institutions and agencies for the mutual recognition of diplomas. In this context, regional and inter-regional collaboration emerges as of paramount importance as it enables achieving a common understanding of the specific nature of CBHE among all parties involved (Hopbach, 2016).

Challenges for Higher Education Quality Assurance

QA is an unavoidable topic when discussing the developments of European higher education in the last decades, namely the ones resulting from European policy implementation. On the one hand, QA is seen as the way to build trust among national higher education systems in the framework of a European higher education market; on the other hand, it is seen as one of the most significant tools to build a true EHEA, in line with the Bologna Declaration (1999) objectives.

Nevertheless, the building of a EHEA and market seems to be struggling with difficulties which may, in part, be explained by the fact that up until now, the role of QA has not yet been totally successful.

In fact, and contrary to the expectations, QA seems to be acting as one of the impediments to the full establishment of the EHEA, essentially due to a lack of trust between Bologna countries regarding QA mechanisms (Bischof, Gajowniczek, & Maikämper, 2014). Improvements at this level, especially in order to enhance trust, seem, therefore, imperative.

Focusing on the main developments characterising European QA since 2009, Bischof et al. (2014) identify areas still needing further attention and improvement. Two of these match those also identified in this chapter: cooperation in QA and the QA of CBHE. One possible way for consolidating this cooperation and thus, for promoting the European dimension of QA through the enhancement of trust, could consist in the establishment of more and perhaps more effective mutual recognition agreements. As argued by Hopbach (2016, p. 196) the ECA had interesting experiences concerning these agreements, ‘which turn out to help building trust through common grounds in terms of methodology’ although ‘not being completely able to overcome legal barriers in many cases’. Through the establishment of agreements, QA agencies could have a more proactive role in the promotion of collaboration and, hence, of trust.

On the other hand, more legislation seems to be needed to strengthen cooperation in external QA and, consequently, to allow for the possibility of European QA agencies to develop activities in member-states other than their own. A low proportion of agencies operating cross-border is recognised, which might be explained, on the one hand, by EQAR’s still limited impact on creating a common market for QA and, on the other hand, by the lack of a common legal framework allowing registered agencies to work internationally. Another possible explanation lies in the fact that at the moment it is rather difficult for a higher education institution to call for the services of an agency outside its country of origin, since the agency must operate not in compliance with its own rules, but with those of the institution’s national QA system. This obviously causes additional burdens on the agencies’ work. Additionally, many European countries remain reluctant to devolve responsibility for external QA beyond national boundaries (Bischof et al., 2014). As emphasised in the 2015 *Bologna Process Implementation Report*,

although 'there is evidence that higher education institutions are increasingly taking advantage of opportunities to work with agencies from other countries, national reforms in this area are slow-moving' (EC/EACEA/Eurydice, 2015, p. 104). Although these might be the most relevant reasons framing the still low international action of QA agencies, one cannot disregard the fact that the possibility of this action, namely by EQAR-listed agencies, may raise issues related to the creation of a QA market. Intrinsically, agencies' international action can be interpreted as a form of 'privatisation' of QA. While in some countries (e.g., Austria) this idea does not seem to be resisted, other countries are still discussing the entrance of foreign agencies into their national borders (Stensaker, 2014).

At the level of CBHE, regulation mechanisms seem to be highly diverse, ranging 'from minimal or no restrictions on foreign providers' freedom to operate to foreign providers being required to obtain an additional accreditation in the receiving countries' (Bischof et al., 2014, p. 84; Bischof, 2016). Furthermore, robust QA mechanisms for the activities of higher education institutions beyond national borders seem to be rarely imposed by the exporting countries. This constitutes a curious fact especially in light of the ECJ ruling determining that the exporting member-state is responsible for the evaluation of the study programmes delivered in another member-state. Additionally, when there are QA mechanisms in place, these tend to be mainly focused on 'traditional' approaches, which are not suited to CBHE (Bischof et al., 2014).

The approaches underlying the aforementioned QA mechanisms are also not suited for joint programmes since they do not include provisions for situations where partners have different QA criteria (Bischof et al., 2014; EC/EACEA/Eurydice, 2015). A specific European accreditation for joint programmes is therefore needed (Bischof et al., 2014). Nevertheless, attention should also be given to institutions, in the sense of providing them with more support concerning the delivery of such programmes. As stressed by the *EUA Trends Report* (2015), institutions are still 'more concerned about anchoring these programmes institutionally and making them sustainable, than about the external QA requirements' (p. 12).

A way to overcome the contingencies related to both cooperation in QA and CBHE QA, and thus enhancing the role of QA in building the EHEA, could lie in a more coordinated work by national authorities and national QA agencies, based on shared responsibilities and further concertation between national and supranational actions (Rosa et al., 2016). The adoption of global guidelines already in existence, the most relevant being those from the UNESCO/OECD, should be more strongly promoted (Knight, 2011; Rosa et al., 2016).

European-level organisations, such as ENQA and EQAR, could also be more active in this respect. As stressed in the *QACHE Report* (ENQA, 2016), these organisations are key players in addressing the information and cooperation needs of agencies. Therefore, they are

ideally placed to function as central repositories of information on national higher education systems, quality assurance approaches, and higher education providers. In addition, they could support international policy dialogue and cooperation between agencies. (ENQA, 2016, p. 39)

Besides ENQA and EQAR, other QA organisations exist nowadays at the European level, all of them working to foster the ‘European dimension of QA in higher education, by bringing different angles of vision and foci’ (ENQA, 2010). This is the case of ECA, which, following its aim of mutually recognising accreditation and QA decisions (ECA, 2016), can eventually play a significant role in improving CBHE QA within Europe and/or in setting up a European accreditation for joint programmes. Therefore, one of the paths to be followed seems to be closer articulation and cooperation between the national and international/regional levels (Hopbach, 2016).

Specifically at the level of CBHE QA, and having in mind the higher education market promoted by the Services Directive, it is important that the EC defines more clearly ‘who should be responsible for evaluating the quality of CBHE institutions, the higher education structure of the exporting Member State or the structure of the host Member’ (Berlinguer, 2016, p. 108). Berlinguer (2016) finds it appropriate, for instance, that in order to assure the quality of CBHE, the EC establishes the conditions for quality and uses quality checks; or that both

the exporting and the receiving member-states (or the two respective agencies) reach an agreement regarding the evaluation of quality. This may lead to convergence in terms of quality evaluation and assurance between the exporting and receiving member-states. According to Hopbach (2016) the QA of CBHE would benefit if this specific form of education was addressed by all the regulations targeting both higher education and QA and accreditation. It would also be beneficial if both higher education institutions and QA agencies assumed as their particular purpose to engage explicitly in the QA of this type of provision. For instance, institutions could include the provision of CBHE in their internal QA systems while QA agencies could address CBHE specificities in their assessment/accreditation standards and criteria.

Finally, from a different perspective, one of the challenges QA may face in the near future may be its relation with consumer protection.² The example of the UK is enlightening. In October 2015, the Competition and Markets Authority (CMA) promoted a review of higher education institutions' compliance with consumer law. The aim was to see whether institutions revealed problems with institutional information, terms and conditions to applicants (CMA, 2015). Apparently this did not cause any concern for the UK QA agency (QAA). CMA and the agency's spheres of influence were even thought to be complementary and mutually reinforcing: while the former oversees the consumer law application, the latter ensures that institutions meet quality criteria in their education provision. However, one considers that attention should be given to this development. A question arising is which of the logics will prevail particularly among institutions: the 'consumer' logic, under which higher education delivery is to be regulated by consumer protection agencies with far-reaching powers, or a QA logic, based on principles and procedures sustained by pan-European consensus, implemented by peers and framed by a self-regulation ethos? Another important question is whether these two perspectives are mutually exclusive, or is there space for a QA framework supported by consumer protection laws, to which 'ill-served' students can resort to?

So far challenges for QA at the European level are a reality, namely in the context of the higher education developments resulting from European policy implementation. The way they are actually going to be

addressed and their outcomes are, nevertheless, still to be fully revealed. But, as Mark Twain stated, 'the art of prophecy is very difficult, especially with respect to the future!'

Notes

1. Principles defined following the workshop under the Brisbane Communiqué in Chiba, Japan on 18 February 2008. Asia-Pacific Quality Network.
2. We would like to thank Howard Davies, EUA Adviser, for giving us access to his unpublished notes of January 2016 on this topic.

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Part III

Conclusion



The Visible Hand of the Market in European Higher Education Policies

Orlanda Tavares and Cristina Sin

This book has analysed the multiple forces, drivers and actors which have been shaping European higher education policies. It has brought together a variety of perspectives—political, sociological, legal, economic and educational—which look at different aspects which, in one way or another, are determining higher education policies in Europe. The objective of the book has been to offer a comprehensive account of these various aspects in order to investigate whether and how higher education has been caught in the European integration efforts and in the ambition to consolidate the internal market of the European Union.

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This concluding chapter brings to the fore the main topics that have been recurrent throughout the book—backed by the arguments presented by the various contributors—which have allowed us to draw the main conclusions. It starts by highlighting the neoliberal tendencies coming from international organisations such as the OECD and the World Bank, which have affected higher education worldwide and which are also reflected in European higher education. Then, it presents the proactive intervention of European institutions to drive forward the creation of an internal market, to which higher education has not been immune, despite its exclusion from the legislative remit of these institutions. Next, the chapter reflects on the Bologna Process as a development which holds a broader vision of the purpose of higher education (beyond its economic utility) and which, despite the pursued convergence, is unlikely to contribute to and maybe even put a brake on the free advancement of a higher education market in Europe. Finally, the tensions in the relationship between the authority of European institutions and the competence of Member States in the definition of higher education policies are outlined.

Global Neoliberal Tendencies in Higher Education

The higher education landscape has undergone a process of deep transformations since the last decades of the twentieth century. To this transformation have contributed many aspects, such as massification, competition and the growing diversity of higher education institutions (Barnett, 2003; Karseth, 2006; Karseth & Solbrekke, 2016), alongside the move towards the knowledge economy and a newfound relevance for higher education. The traditional purposes of higher education, such as the promotion of students' individual growth and democratic citizenship, typical of an Humboldtian idea of university, are being challenged by a progressive instrumentalisation of higher education to new economic imperatives (Sin, Tavares, & Amaral, 2017), as made clear in the chapters by Ravinet, Maldonado and Streckaisen.

The new economic imperatives have emerged in a context where the rhetoric in favour of the liberalisation of markets, fed by neoliberal thinking, has gained increased prominence and has affected

different levels of higher education. European policies coming from the European Commission (EC) and the Bologna process are having impact on the creation of an internal market in higher education. Moreover, the European Union's (EU) vision of the higher education sector is gradually becoming one of a market. The links between higher education and the market began to take shape when higher education started to be understood as a form of vocational training, early in the 1980s.¹ Later, in the 1990s and beginning of the 2000s, the 'Europe of knowledge' discourse gained ground, reinforcing the economic relevance of higher education. However, higher education became an actual landscape for neoliberal restructuring principles with the revision of the Lisbon strategy and Europe 2020, essentially from the mid-2000s on. These developments brought consequences for higher education, its principles and purposes. As Ravinet explains, institutional autonomy, inseparability of teaching and research and academic freedom—traditional university principles—are losing terrain to function-oriented principles, indicative of a narrow understanding of what the purposes of the University can be. Therefore, social and political functions of the university do not appear as principles and universities are not conceived of as places which seek knowledge 'for its own sake' but rather knowledge for a specific purpose: to fuel EU economic competitiveness.

The hand of the market is becoming more and more visible in the European context at various levels of higher education, as analysed by Streckeisen. European universities are being encouraged by the EC to contribute to the competitiveness of the economy, to produce more human capital, to better match labour market needs with skills and to engage in business partnerships, diversifying their sources of funding. Universities are also being challenged to develop closer ties with the economy, to increase the relevance of education and training programmes, to become entrepreneurial, to build up stronger private business-like management and leadership—New Public Management—and to be accountable for their performance in return for autonomy. Also, a rising number of academics are becoming more entrepreneurial, engaging in market-like behaviours, competing for grants, producing marketable products, research and technology transfer. Student training is more and more considered as human capital production and they are

increasingly exposed to economic valuation. Simultaneously, students are also conceived of as entrepreneurial selves investing in their human capital. Employability, mobility and the match between the supply of qualifications and the demand for qualified people are the major concerns for the creation of an international market. However, neoliberalism tends to reinforce inequalities between countries, institutions and students. To add to the complexity of the political landscape, organisations such as the European Universities Association or the European Students' Union have emerged over the past two decades, whose voices as opponents of a pure utilitarian dimension of higher education counterbalance to some extent the neoliberal and market discourse.

The instrumentalisation of higher education as a tool for economic growth is also being pushed forward by the agenda of at least two relevant international organisations: the Organisation for Economic Cooperation and Development (OECD) and the World Bank (see Maldonado's chapter). As these organisations have an important role in shaping educational policies worldwide, and particularly the higher education policy agenda, their current emphasis on the 'expansion of higher education markets' and on 'skills' is affecting higher education settings. International organisations are promoting the free market through a specific model of development, economic growth and worldwide integration. On the one hand, the World Bank's shift from the idea of 'education for all' towards 'learning for all' brings to the fore educational effectiveness, since learning (as opposed to education) is something that can be measured. On the other hand, the OECD stresses 'skills', more than 'learning', and has developed several mechanisms to assess the most important skills at various education levels and with variable success (PISA, AHELO, PIACC), thus assuming a role as 'missionary for the values of liberalization' (Smyth & Shacklock, 1988, p. 243). Therefore, these two international organisations are attributing a different meaning and purpose to higher education, much more instrumental than it was in the past: the World Bank by supporting the private higher education sector (a lucrative business which is also more receptive regarding the production of graduates whose skills are attuned to the labour market needs) and by contributing to building a network of stakeholders that support it; and the OECD, by emphasising skills and

competences over educating citizens. These worldwide trends serve to legitimate the orientation of European higher education policies.

The Visible Hand of the European Union Institutions

The institutions of the EU have also facilitated the liberalisation of higher education, motivated by two drivers. On the one hand, the ambition to push forward the federalisation project and the ever closer integration of the Union, not least through the creation of an internal market, have caught higher education in the web of EU intervention as a secondary effect. On the other hand, higher education has come to the attention of the EC for its potential for economic development and, therefore, has been intentionally targeted as a catalyst and powerhouse of economic growth (see Janez Potočnik, European Commission, 2006), mirroring similar neoliberal phenomena occurring globally and which have given the economy pride-of-place among other spheres of activity. Since economic integration has so far been the primary method of integration, these two drivers are often intertwined in practice. Although not easy to disentangle, various chapters in this book have shown that these two ambitions have been pursued by different means.

The ambition of harnessing higher education to the economic agenda of the EU is clearly expressed in the EC's communications, promoters of an instrumental vision of higher education, charged with boosting the continent's economic growth. The capacity to shape discourses on higher education has been greatly facilitated by the integration of the Commission in the Bologna Follow-Up Group, as well as by the adoption of the Lisbon Strategy and the pursuit of the 'Europe of Knowledge' (Corbett, 2011; Keeling, 2006; Sin, Veiga, & Amaral, 2016). The Commission has resorted to information, persuasion and reprimands—in brief to 'sermons' (Vedung, 1998)—to steer the direction of European higher education. The Commission's acting could therefore be described as 'governance by opinion' (Martens, Balzer, Sackmann, & Weyman, 2004). While acknowledging this more

utilitarian view of higher education to avoid charges of irrelevance and ivory-tower behaviour, the European University Association, as the voice of European universities, has nonetheless striven to counterbalance such a one-sided image of higher education and has continuously emphasised its social and humanist dimension, as Amaral and Sursock demonstrate in their chapter. They plea for preserving the university as a social institution which continues to act as the critical conscience of society rather than be subordinated to economic imperatives.

To fulfil the former ambition, federalisation, the EU institutions—and particularly the Court of Justice of the European Union (CJEU) and the EC—have resorted to hard law. A lot has been written about the EU's lack of competence to harmonise national systems and legislate in (higher) education (Garben, 2010; Martens & Wolf, 2009; Neave, 2005), considered too sensitive an area because of the heavily national and cultural weight it carries. However, this does not automatically mean that higher education has been immune to the intervention of the European institutions. In fact, rather the contrary has been the case, although the influence on higher education could be considered as a collateral effect of legislation not directly aimed at regulating higher education. Willingly or unwillingly, higher education has come under the remit of Union action via the regulation of other areas which, not in a plain manner at first sight, affect it. The mechanisms of intervention in higher education have, therefore, not necessarily been intended to change the functioning of this specific area. However, through attempts to solve issues that stand in the way of further integration, higher education has undoubtedly been affected. Two of the chapters, by Wageningen and by Comandè and de Groof, have illustrated how the jurisprudence of the CJEU has brought higher education—or at least some aspects it—under the authority of hard law.

Wageningen's contribution has revealed the implications of considering higher education as a service, which has been conducive to its liberalisation across the borders of EU Member States. Once considered a service, higher education enters the ambit of EU treaties and of directives which regulate the free movement of services, as well as that of persons in order to use or offer services, within the borders of the Union. Thus, despite the fact that such legislation is about the freedoms and the

non-discrimination guaranteed by the treaties (which lay the foundation of the EU), it indirectly interferes with higher education. The role of the CJEU, through its interpretation of the treaties, is crucial in this sense. To give a few examples, the Court has prohibited nationally imposed restrictions to the enrolment of foreign students in areas which a country could deem crucial to restrict in order to guarantee other public services to nationals (e.g. the Bressol case in relation to medical education in Belgium and the need invoked by this country to ensure the training of sufficient national doctors, thus limiting the enrolment of foreign students). Another example is the Court's favourable decision regarding tax deduction of the cost of studies in another European country, claiming that doing otherwise the country refusing the deduction would restrict students' freedom to use services abroad (e.g. the Zanotti case). Finally, in the Valentina Neri case, the Court found the Italian government guilty of discrimination when this latter refused to recognise the degrees awarded by a private-based British institution on the grounds that it could not guarantee the quality of education offered in this institution, thereby creating obstacles to the freedom of establishment.

These rulings, therefore, question the viability of national legislation which regulates access to higher education, conditions for deducting the costs with education or the establishment and quality assurance of foreign higher education providers. Although countries have competence to legislate in matters of higher education, such rulings create precedents which are very likely to influence future political decision-making, not least because Union law precedes over Member States' laws in cases of conflict (cases *Van Gend & Loos*—case 26/62 and *Costa/ENEL*—case 6/64). As Comandè and de Groof state in their chapter, 'the fact that principles of paramount constitutional nature such as the supremacy of EU law, vertical responsibility of the State and direct effect have been implemented at national level is a sign of ultimate agreement with the merit of the solutions'.

The Court's leeway in the interpretation of treaty law—guided by a vision of federalism and invariably deciding in favour of the four freedoms of the internal market—is, therefore, a reason why higher education has been brought under the domain of EU law. This room for manoeuvre, leading to 'judicial activism' by the Court (see the chapter

by Comandè and de Groof), has been enabled by the vague provisions formulated in the treaties, necessary in order to make sure that Member States can reach consensus. Therefore, whether or not the Court willingly assumes this position, it nevertheless ends up having to provide legal solutions to problems left open-ended by political deadlocks and by the inability to reach agreement and to take action. The Court turns into a 'judicial legislator' and we thus assist to the 'judicialisation of politics', that is, 'the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts' (Vallinder, 1994). The core of the question is that the Court's sentences, as briefly shown above, can have the effect of invalidating national legal acts concerning higher education and, therefore, have the potential to re-orient Member States' higher education policies. As argued by Comandè and de Groof, given the complexity of the normative material, an increase in the Court's jurisprudence on higher education issues is expected, through the lens of education-tailored primary norms (e.g. related to the right to education or academic freedom) or through those regarding the internal market.

Therefore, a key point to retain is that higher education, although an area protected by the subsidiarity principle, cannot be neatly circumvented or separated from other areas in which the Union's institutions have competence to legislate. The recognition of professional qualifications (discussed by Hartmann and Davies) to facilitate the freedom of movement of highly-skilled workers across the borders of Union's countries is another case in point. Hartmann argues that the Europeanisation of the professions is crucial not only for the consolidation of the internal market, but also for the success of the political EU project of building a federation. This is because the Europeanisation of professions establishes a European hegemony, while dependence on national authorities for establishing the conditions for access to professions weakens. After decades of attempts to ensure recognition through the setting of European standards, the key role of higher education in the Europeanisation of professions, capitalising on the progress of the European Higher Education Area, has come to the fore. As Davies' chapter made clear, professional recognition has gradually been converging with the academic recognition system developed through

the Bologna Process reforms. This is evidenced by the fact that the European Directive for the Recognition of Professional Qualifications (2005 and amended in 2013) acknowledged and imported Bologna elements such as the ECTS and a focus on competences through the establishment of common training frameworks. Consequently, the importance of higher education as a playing field for enabling professional recognition must be acknowledged. According to Davies, it remains to be seen how the EU can derive an integrated high-skilled labour force from the rich academic diversity of the EHEA.

The Endurance of National Sovereignty

The European Higher Education Area and the reforms of the Bologna Process have, intentionally or not, slowed down the integration efforts of the European institutions. Veiga and Magalhães (see chapter in this volume) applied the theoretical perspective of differentiated integration, as a strategy which aims to reconcile heterogeneity of Member States, to analyse the Bologna Process. Having looked at integration in three dimensions—time, space and matter—these authors concluded that the EHEA has effectively unfolded as a process of non-integration, explained by the flexibility of the Open Method of Coordination as the method chosen to drive forward the process.

This lack of integration could be seen as a barrier to the federal project of the EU, which, as mentioned earlier, has relied heavily on the creation of an internal market. In fact, the establishment of the European Higher Education Area presented a great potential for the convergence of national systems of higher education through the comparability of degrees and the common descriptors of qualifications meant to ease of legibility and recognition. As the chapter by Sin and Tavares argues, the conditions were there for the creation of a common higher education market in which academic degrees functioned as commodities. However, the political ambitions of integration and convergence have been counterbalanced by the prevalence of Member States' discretion in the implementation of the reforms proposed by the Bologna Process, facilitated by the steering through soft law.

The implementation of comparable degrees, of common degree descriptors and of an overarching framework of qualifications—all of which were elements supposed to guide the organisation of national HE systems—has occurred with a high degree of variation.

While diversity is a sign of the social and cultural richness of the European continent, when it is not accompanied by thoroughly implemented transparency tools and the possibility of comparing degrees as tradable commodities, because of the heterogeneity and variation in the use of the established currency, the consequent lack of legibility becomes a barrier to the successful creation of a common market. Additionally, while Sin and Tavares reported quality assurance to be one of the most successful areas because of the widespread adoption of the European Standards and Guidelines for Quality Assurance in the majority of participating countries, problems with mutual recognition of degrees and the lack of trust between countries, institutions and national quality assurance agencies persist, as signalled in the chapter by Cardoso and Rosa. Therefore, issues with quality assurance also constitute an impediment to the successful establishment of the European Higher Education Area and an internal market of qualifications, despite the apparently successful implementation of quality assurance policies.

The persistence of national traditions of higher education and of national political agendas, despite a common reference framework for the implementation of the Bologna reforms, are indicative of the preservation of a high degree of national sovereignty in matters of higher education. In her chapter, Ravinet depicts the uneasy relationship between the Bologna signatory countries and the EC by referring to a ‘vigilant cooperation strategy’ adopted by the former, who remain alert to the Commission’s ambitions of power while enjoying the resources it provides. Another aspect in which the Bologna Process diverges from the European mainstream discourses is the vision of higher education it puts forward. Although bearing the influence of economic thinking (e.g. the employability discourse), at the same time it appears to represent a counter force which slows down the neoliberal march of official European institutions. Ravinet’s chapter reveals how other higher education principles besides the economic ones are evident in the Sorbonne and the Bologna Declarations, as well as in the ministerial

communiqués. These contain a plurality of references, including what Ravinet refers to as the ‘University normative kit’ which has always defined the traditional university and which inspired the Magna Charta, namely academic freedom, inseparability of teaching and research, institutional autonomy and the social dimension of higher education. In the words of Rüttgers ‘higher education has to be connected to values (...) with the foundations of our western culture’ (Rüttgers, 2013, p. 2). Unfortunately, the appropriation of Bologna by the Lisbon strategy has strengthened the utilitarian view of higher education as a key element in a strategy of economic growth and competitiveness (Sin & Neave, 2016).

Competing Forces in European Higher Education—An Unresolved Matter

The EU can be seen as a confederation, as ‘the central institutions are ultimately subordinate politically to the constituent units and derive their authority from the approval and consent of the constituent units’ (Watts, 1991, p. 7). The authority of the institutions of the Union is delegated (not always on a permanent basis) by the member units, which may have veto power in a number of matters. The European treaties regulate which powers are delegated in the Union and which powers remain under the exclusive remit of the Member States. The EU has also some characteristics of a federation, such as the partial use of a common currency and the existence of a Court of Justice. The CJEU is responsible for interpreting and enforcing the European law or for annulling EU legal acts believed to violate EU treaties or fundamental rights. The EU has neither a fiscal nor an electoral basis, which might contribute to the sense of a lack of democracy experienced by European citizens.

Implementing policies in the EU is a rather difficult business, as the Union is made of a large number of Member States with very different priorities and preferences. One problem is what Scharpf (2007) called the joint decision trap (JDT), resulting from decisions at the level of the

Union being made by qualified majority vote and, in some cases, by unanimous vote, which may result in political inefficiencies or even paralysis because of the difficulty of reaching agreement. Another problem is the equilibrium of power between the Union and the Member States, which can be analysed using delegation theories such as the principal-agent theory (Kassim & Menon, 2002). The principal (Member State) may face difficulties to ensure that the agent (Commission) performs so as to fulfil the principal's preferences. In the case of the EU this is particularly evident because there are multiple principals (the Member States) with different levels of power and large preference heterogeneity (Hawkins, Lake, Nielson, & Tierney, 2006). As different Member States may have different preferences in relation to some policy or problem, the Commission can easily operate in ways that will not satisfy all the principals. Schäffer (2004, p. 3) considers that the governance structure of the EU 'offers [the agent, Commission] ample opportunity to act independently of their principals'.

The difficulty in ensuring compliance by the agent (Commission) together with their reiterated tendency for competence creep promotes that the governments of Member States, on the one hand, and European institutions, on the other, thus emerge as the two forces which compete for the authority to decide higher education policies. Officially, this prerogative belongs to the former, supporting the idea that governments effectively have sovereignty in this matter (Article 165 of TFEU). The Bologna Process is an example in this sense, as national governments voluntarily came together to work towards the convergence of their higher education systems, but in their own terms and bottom-up, and not under the top-down coordination of a powerful supra-national entity. Countries thus explicitly rejected a supra-ordinate authority, like the EC, to steer their higher education policies. However, it did not take much time before the EC had a participation in this process, thus increasing its intervention power in higher education matters.

In parallel, the pursuit of European integration and the ambition of creating an internal market have implied legal initiatives, such as the regulation of fundamental freedoms, the regulation of services or the regulation of professions, which have indirectly drawn higher education under the remit of these legal texts. This has consequently contributed to diminish Member States' sovereignty in higher education.

However, this does not occur in a deliberate and systematic way. Rather, the loss of sovereignty tends to be felt when specific situations arise which reveal conflicts or contradictions between national legislation and the conditions necessary to consolidate the internal market. This usually occurs through the intervention of the CJEU, either when the Commission becomes aware of national legal provisions which hinder in one way or another the progress of the internal market or when individuals or organisations bring cases before the Court.

The CJEU is responsible for ensuring the correct interpretation and application of the Treaties of the EU and, as a European institution, must defend European interests and the project of integration. In its decisions the CJEU always upholds the four freedoms (capital, goods, services and people), which are enshrined in the European Treaties and are the founding bases of the European internal market. In the *Casagrande* case, the CJEU ruled that the exercise of powers transferred to the Community may result in interference with policies of Member States in areas such as education and training (Kwikkers & Wageningen, 2012). Having the final word and creating a body of jurisprudence, the Court of Justice becomes a very important actor in the steering of higher education policies. Above all, it can invalidate national regulations, as several cases in this book have shown.

The completion of the internal market is therefore not feasible without the intervention and the regulation through the 'visible hand' of European institutions. This hand has eventually come to touch areas that were assumed to be beyond its reach, such as higher education, despite the principle of subsidiarity applicable to the latter. The European federal project is therefore an unresolved matter, at least as far as higher education is concerned, as this policy area appears to be caught in between ambivalent ambitions of Europeanness and national identity.

Note

1. In the *Gravier* case (case 293/83) the European Court of Justice considered that higher education could be considered as a form of vocational training when it prepares for a qualification or which provides the necessary training and skills for a particular profession, trade or employment.

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