CHAPTER 7

# The New Old Debate. Free Movement of Services and the Freedom of Establishment Within the Internal European Market: Does the Directive 2006/123 EC Move Past Education? Concerning the Border of National Sovereignty Within the EU

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## The Setting of the Directive

Does education fall under European Directive 2006/123/EC (European Union 2006a) of the European Parliament and of the Council on services in the internal market? Does this count as an umpteenth expression of the dominating economic interpretation of the European Union, at least in the minds of the competent authority? Is the Directive in line with the OECD/UNESCO Directive concerning cross-border higher education (CBHE)?

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M.J. Rosa et al. (eds.), *Cross-Border Higher Education and Quality Assurance*, DOI 10.1057/978-1-137-59472-3_7

The first considerations of the Directive sound promising in all respects, both for the European and national education policies: the European Community is seeking to 'forge ever closer links between the States and peoples of Europe and to ensure economic and social progress' (European Union 2006a, consideration 1). The internal market (as stated in Article 14, al 2. of the Treaty (TFEU 2012)) comprises an area without internal borders in which the free movement of services is the rule. Article 43 of the Treaty (ibid.) guarantees the freedom of establishment. Article 49 (ibid.) secures the right to provide services within the Community. A free market requires Member States to eliminate limitations on freedom of services when there is a cross-border element, and it requires them to contribute to having better transparency and better information, which would benefit consumers (of education). The report from the Commission, *The State of the Internal Market for Services,* shows the huge gap that still exists between the vision of an integrated European Union and the daily reality of the European citizens and service providers (European Union 2006a, Consideration 3).

The last sentence from the third consideration (European Union 2006a, consideration 3) sounds familiar in terms of education control, management and policy: … '[These] impediments are often the consequence of administrative charges, legal insecurity with border-crossing activities and a lack of mutual trust between the Member States'.

There can be no possible hesitation: education fulfils a crucial role in the realisation of the Lisbon strategy to improve social cohesion and employment and to make Europe the most competitive and dynamic economy in the world. The Directive hopes to find the equilibrium between the opening of the market and the preservation of 'public services and social and consumer rights'.

Hereafter, you will read the conclusion: 'it is therefore necessary to eliminate the obstacles for the freedom of establishment for workers in the Member Stat*es* and the free movement of services between Member States' (European Union 2006a, consideration 3), a statement which is indispensable for any legal certainty about the ability to effectively exercise these two fundamental freedoms (freedom of establishment and free movement of service). Perhaps not as exciting as a well-written novel, but who would reason that the considerations of a European Directive are not interesting to read?

### *The Directive Appears to Contain Some Paradoxes Regarding the Extent of 'Trans-Nationality'*

The free movement of educational services and the freedom of establishment of educational offers in higher education have everything in common with 'academic mobility'. This includes the free movement of people. They sustain the European dimension of education and create a common education area. That's how the proposition may sound.

The eventual implementation of European Directive 2006/123/EC on CBHE shows an intriguing theme focused on all modern contradictions in the educational landscape: (1) the national versus the international character of education; (2) education *appears* to be public and private, a service and a good (as is apparent in the ministerial discussion of the Bologna group in Prague 2001); (3) education is applied as a responsibility of the state, but it also belongs to the market and *interpolates* the 'Third Sector'—in particular civil society (neither the state nor the market); (4) education indisputably remains a cultural good but it also possess some economic significance.

Furthermore, education *raises* itself as a cross-border field 'by excellence'. The European Commission often uses the term 'cross-border education'. This notion hardly veils what it is all about, namely the envisaged transnational nature of education (European Union 2006a). The idea of 'transnational' extends—irrespective of its scale—beyond the internal. In a sense, it abandons the concept of the nation and of relationships amongst nations (De Groof 2013). It gives up the assumption that a public good can only be defined on a national basis. Transnational education assumes, for example, that higher education in one Member State has the potential to answer the needs or opportunities of another Member State (Righter et al. 2006). National education systems can benefit from the facilitation of *cross-border* mobility and recognition.

## The International and European Dimension of Education

The international dimension of education and the European context of (European) education rights, both legal and juridical, have been explicitly discussed by Flemish and European education lawyers, especially in the scientific yearbooks and magazines cherished by the European Association

for Education Law and Policy (see website http://www.lawandeducation.com/and annual reports) and the *International Journal for Education and Policy* (editor Wolf Legal Publishers).

The embedding of the international norm of education is a given; however, the articulation thereof often remains a challenge (De Groof 2012).

The European Community is rapidly evolving. The European Court of Justice (ECJ) repeatedly has to shift the boundaries of where national governments collide with each other in order to preserve the national character of their education systems, their 'traditional values' and 'national identity'. Or they may invoke arguments of a 'specific demographic situation' or a 'specific linguistic context' in order to take protectionist measures which hardly promote the mobility of 'teaching' and the scientific corps, or of students throughout Europe. The jurisprudence of the ECJ in education comprises the principles of non-discrimination and equality, and recognises them as the cornerstones of the Union.

Par excellence in the field of education, the general legal principles of Community law established the following concepts as relevant: non-discrimination, mobility, free movement and freedom of establishment, convergence, community loyalty, subsidiarity, transnational cooperation, recognition, equality and trust (De Groof 2009). There is a lack especially of the last one: 'trust', not blind trust but trust based on clear, European established ideals[1] (De Groof 2013). Related to that, in essence, is the extent of the application of the aforementioned Directive 2006/123/EC.

### *Practice and Experience with Transnational Education Links*

National education law/policy has repeatedly been inspired by and inspired others when transnational cooperation really was appropriate for the situation. The cooperation between Flanders (Belgium) and the Netherlands, for example, allows for original constructions, in particular the transnational University Limburg (tUL) in accordance with the treaty of 18 January 2001 and the founding of the common accreditation system.

These initiatives have already shown their complexity. The national legislation of both the Netherlands and Flanders caused tensions concerning the relevant norms of finance, admission and diplomas and—how could we miss it—language regulation. The evaluation of the first period of the tUL resulted in a new, more realistic one school, two-campus approach. The research regarding the execution of regulation 1082/2006 regarding the European Grouping of Territorial Cooperation (EGTC) did not offer much solace.

The troublesome differences regarding Dutch and Flemish quality assurance and accreditation have been explicitly mentioned (De Groof and Hendriks 2006; De Groof 2003). It may be hoped that when they make a new draft of the newly made system they will aim to achieve *harmonisation*, which is a well-known term in European education law.

Could such initiatives possibly lead to a common space for higher education and scientific research (De Groof 2004)? In an earlier position (De Groof 2005) I already refined the idea of a far-reaching Flemish-Dutch space.

I later called a fourth perspective the creation of a 'common research space': cooperation possibilities are currently being underused and the scarcity of resources calls for a more rational organisation of impulse programs, research funds (the merger of FWO and NWO, the national public research agencies in Belgium and the Netherlands) and the strengthening of geographic networks (Algemeen Nederlands Verbond 2011).

Such transnational models could inspire other European 'regions', like the Baltic or Nordic states, or the Balkan countries.

## The Guidelines According to a Market for Services

Directive 2006/123/EG d.d. 12 December 2006 has been called an important step towards the realisation of a common market for services (European Commission 2012). As mentioned above, this Directive aims to abolish the existing restraints on the freedom of establishment for workers in Member States and the freedom of services between the Member States, 'with the guarantee of a higher quality of services' (Article 1.1. of the Directive). This Directive provides for a general legal framework for a large array of services and aims to keep in mind the different features of all the different activities and jobs and their regulations. A juridical integration with a high protection for the objectives of the common good becomes possible through the coordination of national regulations.

The research concerning the *Travaux Preparatoires* shows the continuing nuancing and weakening of the so-called radical application of the Directive. Other objectives of the 'common good' need to be kept in mind, such as the protection of the environment, public security, public health and the necessary legality regarding labour law. The eventual compromise consists of a long list of subjects which fall outside the scope of this Directive (Cfr. Article 1 'subject matter' and Article 2 'scope' of the Directive). The Member States are especially encouraged not to liberalise

certain 'services for the common good' or to privatise public 'institutions' that offer such services (European Union 2006a, consideration 8). Certain fields are avoided in this Directive, especially because of the care for cultural and linguistic diversity.

Indeed this Directive applies to a wide diversity of services. A reading of the full Directive deserves recommendation, in particular the troublesome parts related to education:

> Certain activities, in particular those funded by public funds or that are executed by public institutions or that form a 'service', need to be judged in the light of all characteristics of those activities, especially in the way that they are being practiced, organised and funded in the relevant member state. The Court of Justice has judged that the actual characteristic of the compensation consists of an economic return for the offered services and has thus acknowledged the fact that there is no compensation with activities that are being executed by the government or in its name, without an economic return in the framework of its social, cultural, parental and juridical responsibilities, such as training that is being given in the frame of a national education system or the management of a social security system that does not incorporate economic activity. The payment of a contribution by the customer, such as tuition fees or registration fees contribute, to a certain extent, to the costs of the system, but they do not constitute a compensation because the service is primarily financed by public resources. These activities thus do not fall under the definition of service in article 50 of the Treaty and do not fall within the scope of this Directive. (European Union 2006a, consideration 34)

### *Plea for the Exclusion of Education Under the Scope of This Directive*

There is without doubt extensive legislation concerning the free movement of services and freedom of establishment. This Directive is located at their extension: 'build forth and add'. One shall remember the commotion that went with the preparation of the Bolkestein Directive. It has been called 'the most controversial piece of EU legislation in recent years' (Rentrop 2007).

Even during its deliberations, the European Trade Union Committee for Education, or ETUCE, was explicitly in favour of the full exclusion of education from the scope of the Directive and concluded with the following negative commentary:

> EU Member States evidently have great interests in a highly educated population, particularly raising the educational attainment levels of the less educated groups of the population. But genuine equal access and high quality in education are not brought about by increased commercialisation of the education sector and increased trade in education services. The draft Services Directive and its implication for the education sector give rise to a crucial political question: What should be granted higher value, the right to free trade in an open education market or member states' right to fully regulate their education sector with a view to securing high quality and equal access throughout life to its population? (ETUCE 2006)

Preceding this was the combined declaration of the 'National Unions of Students in Europe' (ESIB), the 'Organising Bureau of European School Students' (OSEBU) and the ETUCE, all of whom pleaded for the following review:

> The ETUCE, ESIB and OBESSU therefore welcome the commission's recent commitment to revise the proposed Directive. In re-drafting the Directive, the Commission must secure that the Directive:
>
> --Does not interfere with Member States' responsibility to provide education as part of their duty to provide services of general interest;
> --Is in line with the educational objectives of the Lisbon Strategy, notably ensuring equal access and high quality public schools and universities in the EU;
> --Will not impede Member States' efforts to work towards high quality public education accessible to all at all levels of education system;
> --Will not lead to a larger share of the education system being subjected to market forces;
> --Will not disturb the division of competences between the EU and Member States on politics as set out in the EC Treaty. According to article 149-150 in the Treaty, education is a national matter and member States have full responsibility for the content of teaching and the organisation of its education systems. (OSEBU and ETUCE 2005)

Is this convulsive behaviour really necessary? Does free movement hinder the high quality of education, or can it improve it? Does the Directive hinder the fulfilment of the responsibility of the Member States regarding education? Does 'the market' control the sector of higher education?

On multiple occasions the unilateral economical lecture of strategic documents regarding higher education was castigated by the EU commission. But does protectionism count as a warranty for the solid social security

and for the academic mobility inside the EU? Does national responsibility hinder the realisation of a common market regarding (education) services?

I would eagerly cite the work of Hilde Simoens (1992, 1996): from historical research it appears how conservative universities are, but does the same diagnosis count for the beneficiaries and the stakeholders of the universities and scientific businesses? Recent jurisprudence regarding the violation of Community law makes this apparent.

## The Infringement Case 2011/4027: 'Commission v Slovenia'

In 2011, the Directorate General Internal Market (DG MARKT) requested that Slovenian authorities bring their *Higher Education Act* in line with the Directive to ensure that the barriers for the free movement of services in the higher education sector would disappear. The fact that all the documents were only available in the Slovenian language led to little to no attention being given to the procedure[2]… (Miklavik and Bucik 2014).

In the *Formal Notice* of the competent DG, dated 20 May 2011 (European Commission 2011), the Commission stated that the higher education law was not in accordance with Articles 49 and 56, in conjunction with Article 54 of the Treaty on the Functioning of the European Union (TFEU), and with Articles 10, 13 and 16 of the Directive, and that it ignored the *acquis communautaire* since it required higher education facilities of another Member State to acquire the permission of the Slovenian government, preceding any founding of the education (of the other Member State) in Slovenia. The Commission added that those procedures were not very transparent; in particular, it lacked a statement of its reasons and criteria, there was no 'common good' requirement, nor any proportionality, clear description or objective, and it was not made known and available in advance.

Subsequently Slovenian law required an accreditation of branch campuses (of higher education institutions of other Member States) in accordance with Slovenian standards and finally registration in the national registry of higher education institutions.

As a consequence of the notifications made by the EU Commission, amendments were made to the law, which consisted of fewer restrictions for higher education institutions of other Member States, but these changes were considered inadequate by the Commission to prevent a further infringement procedure.

The 'Reasoned Opinion' of the same DG was introduced on 20 June 2013 and again requested that the Slovenian government make its law in accordance with the Community laws regarding the freedom of establishment and the freedom of services (European Commission 2013). The Commission was offended by the special administrative procedure that the Member State had wanted to develop towards the EU—allowing providers to offer education—a procedure that was not even issued, through which the organisation of the branch campuses or the franchising was made legally possible. Such hindering and the juridical vacuum are not in accordance with the Community law.

The Commission assumed the position that Slovenian institutions had to limit themselves to ensure that the provider (out of a different EU Member State) was legally recognised in its original country, had acquired the admission to grant valid diplomas, and had received an accreditation.

The Slovenian response rested on the exclusive competence of the Member States regarding (higher) education and denounced the interference of the Commission in such matters; such initiatives are not in accordance with Slovenian 'norms and values', as described in the national quality standards. Finally, the relevant international guidelines (in particular the *Standards and Guidelines for Quality Assurance in the European Higher Education Area* (ENQA 2015a) and the OECD/UNESCO Guidelines for quality provision in CBHE (OECD 2005)) have no enforceable legal power.

Slovenian student movements had made critical remarks before concerning the 'too indulgent position of their government' towards the European claims:

> We see the infringement procedure as continued pressure from European and international institutions on Slovenia to commercialize and deregulate higher education. These changes are being introduced around the world in the name of competitiveness and free trade principles. (…) We wholeheartedly oppose the changes demanded by the commission, he added, not only because they can create dangerous possibilities for the existence of educational institutions of questionable quality, but also because of the ideological basis for such changes. (…) Our (former) government doesn't see itself in a position to decline anything from the EU institutions and […] they are not capable of understanding neither the implication of such deregulation, nor the legal tricks the commission is using to apply pressure. (EurActiv 2014)

### *Aptitude of Reasoning: Can We Consolidate the Directive, and in Extension the Relevant Community Law, with the National Education Policy?*

It is to be assumed that in the future, boosting litigation will, particularly in the field of health care and education, more frequently appeal to Community law to question the boundaries of national legislation. Both fields mirror the complexity of modern society in which hardly one particular national law can be executed in isolation from other laws. Even though the fields of both health care and education are 'safeguarded' from the Directive, the claim of the common market does acknowledge an obligation toward results to safeguard the free movement of services and the freedom of establishment from the limitations in national law.

What arguments can be developed to establish the balance between national responsibility and European principles from the one 'market'?

(a) Article 16.3 of the Directive describes the conditions under which Member States can limit the 'provision of a service' should they interfere with grounds of (public) interest. These restrictions are, however, subject to the principles of 'necessity' and 'proportionality'—as stated in the article, in addition to the overall principle of non-discrimination.

The perilous mission, on account of the national authorities, is to prove that the limitations made are 'necessary' and 'proportional'. An abundance of case law is available that suggests that the restrictive measures are mere protectionism. Despite the relevant national competence, the Member State remains responsible for proving that the restrictions will not violate the necessity of the national legislation to accomplish the specific goals (such as quality) in comparison with the legislation of the country of origin's concerned educational establishment (European Court of Justice 2003a).

(b) The general principles of law, as developed by the ECJ, remain fully applicable. These principles refer to the necessity to justify the restrictive effects of the limitations made by national law, '*so far as that (public) interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.*' (European Court of Justice 1996a, b, 1999, 2003b)[3]

European case law casts up a critical threshold for Member States before they can consider creating national restrictions towards education providers of another Member State; in particular: '*that (public) interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established.*'

(c) In the case of '*Commission* vs. *Slovenia*' the European Commission specifically states that every restriction on the transnational organisation of educational service must be based on a explicitly formulated (public) interest, which is transparently described, in proportion with the intended goal, clear and unambiguously articulated, objective and published in advance, admissible for all parties, … In the Flemish context these conditions sound familiar, given the current interpretations of legislative techniques and good administration.

(d) Lastly, European case law stipulates that Member States should not be obsessed by the burden of proof imposed by the national norms but rather appeal on the information provided by authorities within other European Member States. National governments are obliged to take recognition, proxies, qualification into consideration, and '… *must take into consideration all the diplomas, certificates and other evidence of formal qualifications (…) by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by national rule*'.[4]

The Slovenian authorities will find themselves facing a thorough job proving that the quality assurance and/or the accreditation process of the country of origin of any concerned university or college is not adequate to meet Slovenian standards. There is, however, a certain trust in Slovenia, for Slovenia is a governmental member of EQAR and SQAA. The Slovenian Quality Assurance Agency for Higher Education, not a member of ENQA, is registered in EQAR.

## The Ambiguity of the 'Entrepreneurial University': Public Versus Private?

The arguments used do not end the debate about the scope of Community law on service providers—including the debate between the DGs responsible for the internal market and those responsible for education.

On the one hand, one cannot ignore the ambiguity present within higher education institutions, one created by the commercialisation of certain services within the university and the economic context in which it operates. Once tuition fees with 'remunerative' value, contract research with the private sector, business-inspired management, spin-offs with R&D, the exploitation of copyright and other issues come up, the image of a 'hybrid-university' arises (Van Bijsterveld and Mouwen 2000). Research funds of public origin are competitively distributed as well. The search for alternative finance is not one with a recent date. The economically relevant competition in the context of education became a constant of the greatest importance (De Groof et al. 2003).

Education jurists have for an extensive period already pointed to the fact that the classic demarcation lines between public and private law are fading, especially in matters relating to education. The question is not limited to practicing trade activities for education institutions (Ballon 2002–2003), as it extends to the characterisation of its mandate and its mission. The more universities open themselves as entrepreneurial entities, the more they have to deal with mostly European constraints. The *Europe 2020 Strategy* hopes for an intertwining of education, business, research and innovation and wants to contribute to entrepreneurship within and of the university (European Commission 2010).

There was already a plea that competition law be applied also to universities and colleges (TFEU 2012, Articles 101–109). Competition does not limit itself to companies but also entails 'businesses', entities that pursue an economic activity. The wide description of 'economic activities' does not leave universities indifferent (Gideon 2012; Steyger 2003; Swennen 2008–2009). The potential consequences of the application of European competition law appear drastic for price agreements, misuse of power and over-subsidising (Gideon 2014).

## The Principle of the Free Movement of Services and Establishment Requires Uniformity in Quality Care and Accreditation Procedure

The free movement principle requires that a Member State may rely on the credibility of applicable procedures of quality assurance and accreditation in another Member State. The *Guidelines* mentioned above apply a different concept.

Ideally, a common and shared responsibility—a cooperative approach among universities and colleges of higher education, in particular through joint degrees—is assumed. Each service provider from another Member State should take into consideration the cultural setting, for academic reasons also. It is however questionable whether the rules of both states are—at the same time—in order, and whether a joint framework proves to be effective. Besides, experience shows that such an arrangement is appropriate and has little preventive or prohibitive effects.

The recommendation of the *Guidelines for Quality Provision in CBHE* states that co-operation "between the bodies of the sending country and the receiving country" should be extended, as well as the emphasis on the "mutual understanding of different systems of quality assurance and accreditation" (UNESCO 2005, p. 19).[5]

Additionally, the *UNESCO-APQN Toolkit* rightly and unequivocally stipulates that the primary onus for ensuring quality lies with the providers of the services, but it directly adds that governments and quality assurance agencies in both the providing and receiving countries can play a role in ensuring quality programmes and qualifications (UNESCO/APQN 2007, p. 12).

The document echoes the G*uidelines for Quality provision in CBHE*, a text adopted by the OECD Council on 2 December 2005 and designed in collaboration with UNESCO (UNESCO/Council of Europe 2002; Council of Europe/UNESCO 2010): the sovereignty of each country regarding higher education needs are recognised (ibid, p. 5). The settings are—indeed—responsible for quality (and care) (ibid., p. 14), but the mutual 'co-ordination' and 'cooperative' predominates (ibid., pp. 16–17).

The 2012 OECD report *Guidelines for quality provision in CBHE: where do we stand?* (Vincent-Lancrin and Pfotenhauer 2012) suggests again that the countries '… make it clear under which conditions, if any, foreign educational providers and programmes can operate in the country' (ibid., p. 21).[6]

However, it repeatedly appears that the 'joint approach' constitutes the problem rather than the solution. The application of parallel standardisation offers too many gaps, contradictions, administrations and other inconsistencies. The compliance with 'legitimate expectations' on the other hand puts the burden of proof on the service provider of the sending country. The 'marginal button' on the part of the receiving country is limited to monitoring the existence of the capacity of the national legislation of the country of origin of the service provider.

May an international regulatory remedy be brought?

As I have already indicated, it has been a significant amount time since the educational system of the kind in *Post-Article 165 TEC* has arrived (TFEU 2012, Article 165). This may refer to the explicit dimension of quality already contained in the first part of Article 165. The recommendation of the European Parliament and the Council of 15 February 2006 (European Union 2006b) further refined recommendation 98/561/EC (European Union 1998) and suggests the creation of the European Register of Quality Assurance Agencies.[7]

Fully in line with the principles of subsidiarity which are unfortunately often misunderstood, particularly in the area of education (De Groof 1994b; Lenaerts 1994), the concept is based on existing national agencies but imposes substantive quality standards before registration qualifies.

There is thus already a fine instrumentation: *The European Standards and Guidelines for Quality Assurance* (ENQA 2015a), in which the independence and accuracy of the external and internal quality assurance are seen as core provisions, the *European Quality Framework for Higher Education* (European Commission 2015), of which any proper implementation would have to be screened by international rather than national experts, the aforementioned *Register*, and finally the *European Association for Quality Assurance in Higher Education* (ENQA 2015b). The latter uses a set of clear and consistent criteria for 'full' and 'associate members' based on the same standards and guidelines (ENQA 2014).

This opportunity should be used in order to test the relationships between these—and other—tools and procedures on their mutual coherence; however that is not possible in this short contribution. The relationship, with the technique of professional academic recognition, would immediately be established, including the EU quality label (EQANIE 2015).

Meanwhile, several new initiatives have developed, including the 'European Consortium for Accreditation in Higher Education' (ECA), whose mutual convergence of quality assurance systems is praised (Dittrich 2010) and the 'European Quality Assurance Forum' (EQAF), where the agenda for quality assurance is actualised (Bollaert 2014a, b).

Meanwhile, there exists no consensus, on an EU scale, amongst national governments, and the opinions of DG MARKT remain the same. From the last report of the EC on the progress in quality assurance of higher education, it was already shown that the underlying consensus within the commission is indicated: should the preference be given to

bilateral agreement? (European Commission 2014). The preference can go to the reconciliation of two essential principles: (1) the single market is not a supranational affair, far removed from Member States, but it is rather an integral part of states and an integral part of the national regulations (domestic law); (2) international quality standards and common concepts, which will underpin the credibility of national procedures, should be clearly defined. The agenda outline of such an international framework has already been defined (Van Damme 2003).

The policy and legal implications of the complementarity of both principles would certainly have to be further investigated. The weakness of the infringement procedure EC vs Slovenia lies on the one hand in specifically defined levels of national systems, so that one can automatically fall back on the national quality and accrediting systems—in too many countries the accreditation system is still 'ministry driven'—and on the other hand in the lack of supervision by the competent authorities from the sending member states on 'cross-border higher education', such as it actually develops in the receiving country.

With regards to the last point: national legislation does not immediately (facilitate/promote) such control—the Dutch standard, for example, is prohibitive and requires the intervention of the government.

The Flemish regulations applying to 'joint training organised by a Flemish higher education institution together with one or more foreign institutions of higher education that will lead them to successful completion to a joint diploma within the meaning of Article II.172, §3,' seem to be interpreted like the EC.

The external assessment mentioned in § 2 may, for the entire course or a part of the training programme that is taken by the partner institution(s), be replaced by one of the following assessments: (1) an evaluation carried out by an external rating agency which meets the European Standards for the External Quality Assurance of Higher Education; (2) an accreditation given by another accreditation organization, which applies to the complete program or the part that is exercised by a partner institution and is in accordance with article II.149, first paragraph; (3) other relevant pieces in which the institution's council provides the insight that the part of the curriculum that is provided by the partner institution offers the generic quality assurances in the meaning of article II.140 and II.141, so that the students have achieved the results indicated in article II.141 by the completion of their education.

## Concluding Observations

When investigating legislation of higher education throughout the European Member states, and *a fortiori* throughout the countries of the European Higher Education Area, we see that a 'protectionist' reflex remains, as if such an attitude offers some security to the maintenance of (national) culture. In itself the procedure of 'attestation, accreditation, assessment, evaluation, registration, recognition, license…' may become justified; apparently this is not the case for their cumulative effect (De Groof 1993, 1994a; De Groof et al. 1997, 2001; De Groof and Lauwers 2000).

The second consideration refers to the order to move away from the longing for 'standardisation': as repeatedly argued, higher education needs diversification and profiling rather than neutralization of differences. They not only enhance the generation of cost; they also prevent the formation of autonomous space, which each provider of education must have so as to enable them to fulfil their mission. But the good principles of legislation dealing with education have already been previously elaborated.

An interesting research question would consist of comparing the underlying interdependence of space (or the limitation of space) for the commitment and initiative of civic society in the national education system (Glenn and De Groof 2012), on the one hand, with the degree of protectionism in very highly regulated higher education systems on the other.

Another conflict in the liberalisation of the education market is the negotiation for 'transatlantic trade and investment partnership' in the wake of the failure of the WTO to free world trade on a multilateral basis. The newly appointed European Commission finds itself in charge of the debate dealing with such agreements with regards to healthcare, social policy, cultural diversity and education.

In a reference document of the *European University Association*, it was assumed that no services are in principle excluded from the TTIP: 'While for-profit education services are necessarily eligible for inclusion, the fact that public services are exempted in GATS offers no comfort to the European higher education sector, much of which is hybrid in terms of its funding and governance' (EUA 2014, p. 7). The new forms of transnational higher education reveal interesting questions on their impact on the emergent debate.

Numerous concepts need to be clarified, but the fact that universities with a complex portfolio of research, teaching and consulting can perform entrepreneurial activities makes their impact intriguing.

The hybrid character of higher education institutions also leads to self-reflection: how entrepreneurial can a university be without becoming a purely economic entity?

## Notes

1. Maastricht University/Transnational University of Limburg, Crossing Borders—Frontier Knowledge, Rapport Project: Wetgevingsonderzoek grensoverschrijdende samenwerking, offered by: Ministry of Education, Culture and Science, Higher Education and Study Finance.
2. The Slovenian members of the European Education Law and Policy Association (ELA) strengthen their cooperation.
3. Commission vs. Luxemburg, Case C-445/03, §21, citing Joined Cases C-369/96 and C-376/96 Arblade and Others (1999) ECR I-8453, paragraphs 34 and 35, and Portugaia Construçöes, paragraph 19.
4. Hugo Fernando Hocsman vs. Ministre de l'Emploi et de la solidarité, Case C-238/98, European Court Reports 2000,p. I-6652, §23 (and 40), citing, Case C234/97 Fernandez de Bobadilla vs Museo Nacional del Prado (1999) ECR I-4773, paragraphs 29–31: The authorities of a Member State to whom an application has been made by a Community national for authorization to practice a profession, the access to which depends, under national law, on the possession of a diploma or professional qualification, or on periods of practical experience, must take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialized knowledge and abilities so certified, as well as the experience with the knowledge and qualifications required by national rules.
5. Footnote 1 of the document warns that the Guidelines are not legally binding: 'Member States are expected to implement the Guidelines as appropriate in their national context'.
6. Afterwards the document states that the 'compliance index for regulatory framework measures' does have to take into account the quality and accreditation procedures, but it does not confirm whether this concerns the receiving or the sending state.
7. Afterwards, (*European Quality Assurance Register* EQAR).

## References

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