CHAPTER 8

Delivering Education Across Borders in the European Union National Responses to the Services Directive

Lukas Bischof

The European Higher Education Area (EHEA) aims at ensuring more comparable, compatible and coherent systems of higher education in Europe, to facilitate mobility and to improve recognition of degrees. It is, however, not only students, staff and research projects that cross borders. In recent years, higher education providers themselves are mobile—for example, by opening branch campuses in other countries or granting other institutions the right to award their qualifications by way of franchising or validation agreements. Such agreements are concluded between higher education institutions (HEI) and (educational) institutions and entail the right of the latter (the 'receiving') institution to conduct a study program that leads to the awarding of the qualification of the first, the 'exporting' institution. These forms of *program* and *provider mobility* (Knight 2006) have been proliferating at a quick pace, facilitated by a peculiar consequence of the Single Market of the European Union (EU).

L. Bischof (✉)
CHE Consult, Berlin, Germany

M.J. Rosa et al. (eds.), *Cross-Border Higher Education and Quality Assurance*, DOI 10.1057/978-1-137-59472-3_8

The Services Directive: A Loophole for the Commodification of Higher Education?

The European common market guarantees that European citizens can have their qualifications recognised in any EU Member State in the same way that they would be recognised in their home country (European Union 2006, Art. 53, Art. 165). At the same time, it allows any European business to establish a business and offer their services in any other EU Member State (European Union 2006, Art. 49, Art. 54, Art. 56, Art. 62). Holders of Spanish diplomas are therefore allowed to work in their profession in Germany or any other EU country, and a company from Poland is allowed to offer its services in Ireland. No EU Member State is allowed to infringe on these rights. Education itself on the other hand has always been the exclusive domain of each EU Member State.

In 2008, however, in a series of landmark rulings on the Services Directive (European Union 2006) the Court of Justice of the European Union established that franchised or validated study programs conducted as a primarily revenue-generating activity cannot be considered as '*services of general economic interest*' (SGEI), which are exempt from certain provisions of the Services Directive, even though they concern education, which is usually considered an SGEI. As a consequence of these rulings, the governments of receiving countries may not put restrictions on franchised or validated degrees offered in their country, and instead, their regulation falls within the exclusive responsibility of the Member State in which the qualification-granting, 'exporting' institution is established (European Court of Justice, of 13.11.2003; European Court of Justice, of 24.10.2008; European Court of Justice, of 04.12.2008). The case law of the European Court of Justice thus effectively permits, for example, a British university to allow a non-accredited institution (or company) based in, say, Greece, the right to issue British degrees, in spite of Greece's formal exclusive responsibility for education. Quality assurance of such degrees is the sole responsibility of the exporting country, although it is not clear how or whether franchised or validated degrees are quality-assured by their degree-granting institutions. It has been pointed out that this ruling is in stark contradiction to the UNESCO/OECD Guidelines for Quality Provision in Cross-Border Higher Education (UNESCO und OECD 2005).

Mapping the Real Picture: The Study on CBHE in EU Member States

There is very little empirical data on the actual scope of cross-border provision of higher education services (henceforth: CBHE), however. The data that does exist is incomplete and scattered across various stakeholder organisations such as national ministries, quality assurance agencies and other umbrella organisations. In addition, while EU case law and legislation apply to the establishment of franchising and validation agreements and the opening of branch campuses in the EU, it is unclear which types of national legislation are in place in individual EU Member States to regulate them at the national level. Nor is it clear to which degree national authorities are even aware of the existence or the extent of cross-border provision of higher education actually taking place in their countries. It was in this context that in 2012 the European Commission decided to fund a research project aiming to:

I. Provide a mapping of the cross-border delivery of higher education services within the then-27 EU Member States (being offered by both EU and non-EU based institutions);
II. Provide a mapping, an analysis and an assessment of the regulatory frameworks regarding cross-border higher education activities at the Member State level.

The results of this project and the resulting report (Brandenburg et al. 2013) are summarised in this article.

Methodology, Scope and Focus of the Study

Due to the above-mentioned difficulties related to data availability, the study set out with extensive desk research, reviewing data collected by the Observatory on Borderless Higher Education, scholarly articles, newspaper mentions and Google search results. In addition, the extended network of CHE contacts in higher education and the study's high level expert advisory board (its members were Stamenka Uvalič-Trumbič, Peter Scott and Hans de Witt) contributed with their knowledge and contacts. Following the desk-research phase, a web-based survey of stakeholder organisations was conducted. The surveyed stakeholders included ministries of higher

education, rectors' conferences, quality assurance agencies, ENIC/NARIC bodies, providers of CBHE, and other relevant organisations who were asked to supply information on institutions exporting as well as receiving CBHE activities in their respective countries. Those stakeholder organisations that expressed a deeper interest were invited to participate in a CHE Experts Delphi to jointly develop a web-based survey questionnaire on the regulation of such CBHE activities, which was subsequently sent to be filled in by stakeholder organisations in all EU Member States. The collected data was verified by CHE Consult and, together with the description of the regulation in effect, sent back to the respective Ministries of Education for confirmation of accuracy. Finally, in-depth interviews in Austria, Cyprus, France, and the UK rounded out the study. The data collection took place from March to September 2012.

Patterns of Provision: CBHE Activities in the European Union

Some Words on the Units of Measurement

This chapter presents the results of the mapping of the CBHE activities which were carried out in the 27 EU Member States as of 2012. The basic unit of measurement is '*instances of CBHE activity between two unique institutions*'. Thus, for the purposes of the mapping exercise, a franchising agreement affecting one bachelor's program is, for example, treated the same way as a branch campus offering bachelor's, Master's and doctoral degrees across five academic disciplines, both being counted as one instance of CBHE activity. Conversely, there are branch campuses that offer only a few programs, as well as franchising or validation agreements between two unique higher education institutions that affect several degree programs. The following data do not account for these differences in scale, unless indicated otherwise.

Anglophone Countries Dominate the Export of CBHE Arrangements

Which countries' HEIs are most prominent in offering their degree programs in the European Union? As referred by Brandenburg et al. (2013, p. 37), the major 'exporters' on a world-wide scale are by far the United Kingdom (142 instances of CBHE activities) and the United States of America (44 instances

of CBHE activities). HEIs from both countries export CBHE to countries all over Europe, with the UK being most active in Spain and Greece, and the USA in Spain and the UK. The two countries following the UK and the USA in terms of number of CBHE activities are France (17) and Poland (9). As the focus of this study is on CBHE activities offered in EU Member States, the following visualisations are limited to the EU.

Looking at European exporters from a regional perspective, it becomes clear that exporters are not only found in the capital cities. In particular, Europe's major exporting country, the UK, has institutions from all its regions involved in CBHE. This possibly reflects the specific circumstances encouraging UK institutions to take part in CBHE as exporters, and which include a tradition of international activity and government encouragement to be entrepreneurial in their search for new sources of income. The primary exporter is the University of Wales, which validates 43 programmes in 14 countries, but other UK institutions also export several programmes to different receiving institutions abroad (although it should be noted that the University of Wales has recently scaled back its activities following problems with its quality assurance arrangements in some cases, which has led to the termination of many of its validation agreements).

The distribution of exported CBHE activity by type (franchising/validation vs. branch campuses) shows that franchising/validation agreements constitute the vast majority of UK exports, whereas branch campuses are comparatively less common. Of the major European exporters, only Poland's CBHE activity is dominated by branch campuses. Overall, the United States is the major exporter of branch campuses (28) to the EU. However, smaller countries such as Serbia (3), Japan (2), Malaysia and Iran also operate branch campuses in the EU.

Strong Presence of Received CBHE Activities in Southern and Central European Countries

The study by Brandenburg et al. (2013, p. 32) identified a total of 253 CHBE activities in 24 EU Member States. The highest absolute number of CBHE-activities were found in Spain (49) and Greece (29); followed by Germany (14), Austria (13) and Hungary (14). Low levels of CBHE activity could be observed in Lithuania (1), Bulgaria (2) and Poland (2). No providers have been found to be operating in Estonia, Portugal or Slovenia.

The analysis of the distribution of the different types of received CBHE activity shows an apparent predominance of branch campuses in

the United Kingdom, France, Poland, the Netherlands and the Slovak Republic. Everywhere else, franchising/validation is more common, especially so in the major receiving countries of Greece and Spain.

An alternative for measuring the intensity of received CBHE activity consists in counting the number of students enrolled in CBHE relative to the total number of students enrolled in higher education institutions in the respective country. This type of analysis brings to light that the smallest states in the EU—Malta, Cyprus and Luxembourg, which also have smaller student populations—have the highest incidence of CBHE activity. Apart from the smallest states, Greece, Hungary, Denmark and Austria also appear as major recipients of CBHE activities relative to the overall number of all students enrolled in higher education. High levels of CBHE activity can also be identified in some Southern states (Spain, Greece, Cyprus and Malta), as well as in Latvia, Hungary and the Czech Republic in Eastern Europe. Other Eastern European states (Estonia and Slovenia), however, do not receive any CBHE or exhibit low level activity (Lithuania, Poland and Romania) (Brandenburg et al. 2013, pp. 35–36).

Received CBHE Activities Are Located in Metropolitan Hubs

CBHE activity is found to occur primarily—or in some countries even exclusively—in the capital cities, which indicates that the political, economic and cultural hubs are especially attractive locations for foreign providers, presumably because demand is higher due to higher population density and the reputational bonus of being established in a metropolitan centre. This pattern matches the geographic distribution of domestic higher education institutions, which are more likely to be found in capital cities and other urban centres than in rural areas. The concentration of CBHE activity in heavily industrialised areas with great demand for an academic workforce further suggests that favourable economic and structural conditions may act as significant motivating factors for CBHE providers.

Public HEIs Favour Validation, Private HEIs Favour Branch Campuses

Another noticeable pattern is that the majority of exporting institutions—especially from the UK—are large, public HEIs, while the vast majority of received CBHE activity occurs at small, privately funded institutions. A closer look at the type of CBHE activity pursued by public and pri-

vate institutions shows that private institutions (at least those based in EU Member States) are more likely to operate branch campuses whereas validation agreements tend to be the preserve of public institutions.

Relationship Between Provider Mobility and Student Mobility May Explain Patterns of CBHE Activity

Individual survey respondents claimed that in countries like Greece the need for modernisation in higher education coupled with its extensive regulation produces considerable excess demand for higher education that foreign providers are trying to meet—despite the strict regulatory framework in place. To test this hypothesis, student mobility data taken from Eurostat (2009 for incoming students, 2010 for outgoing students) relative to the total number of each country's students was correlated with the incidence of received/exported instances of CBHE per 10,000 students for each country.

The data suggests that countries with higher incoming student mobility tend to have fewer instances of received CBHE. Although this pattern does not equally apply to all countries (Cyprus, Austria and Denmark exhibit high levels of both CBHE activity and incoming students), most conform to this inverse relationship, most notably the United Kingdom (the major exporter) and Greece and Spain (the major recipients). Overall, there is a strong statistically significant correlation ($r=0.41$, $p<0.05$) between (i) the proportion of students of a certain nationality studying in other EU countries compared to the total number of students of that nationality, on the one hand, and (ii) the number of received CBHE activities in a country per total number of students in that country on the other. This suggests that countries whose nationals emigrate in large numbers for purposes of degree mobility tend to be the same countries that attract the highest relative number of CBHE activities. One of the factors accounting for the pattern of CBHE activities may therefore indeed be the students' perception of the quality and/or quantity of the supply of domestic higher education.

Regulation of CBHE Activities in the European Union

After mapping the actual incidence of CBHE arrangements in the European Union, the second objective of the study was to develop an overview of regulatory approaches in place. In principle, Member States can directly regulate CBHE by formulating limits and conditions for a

foreign institution's right to operate within their territory. In addition, by facilitating or obstructing the process of degree recognition they may make such arrangements indirectly more or less appealing to potential students.

Regulation on Receiving CBHE Activities

Countries receiving CBHE can exercise varying degrees of control over HEIs seeking to establish branch campuses or validation/franchising agreements. This ranges from a simple registration to keep track of incoming provision or institutions to completely banning certain forms of provision. In between these two extremes, countries use a number of mechanisms: Some countries require proof that institutions are accredited in their exporting country. Others require institutions to be authorised or to receive the consent of domestic authorities. Yet others require foreign providers to receive institutional accreditation, that is, in effect, to become part of the national higher education system of the receiving country. Based on this variety, countries were classified according to the following system, inspired by the typology proposed by Verbik and Jokivirta (2005), in Table 8.1

There are also differences in the recognition of CBHE degrees. In a few countries (Luxemburg, Romania, Lithuania and Latvia) there is automatic recognition; in some other countries only European degrees are automatically recognised (Greece, Bulgaria and Cyprus). In the other countries recognition is not automatic.

Table 8.1 Classification of receiving countries using Verbik and Jokivirta's terminology

Type	*Classifiers*	*Countries in this category*
Countries with no regulation		CZ, BE, IE, FI, FR, NL, SE, UK, some German länder
Countries with little regulation	Need to register, Need to prove recognition/ accreditation in exporting country	AT, DK, EE, HU, SI, BG, CY, EL
Countries with some regulation	Need for authorization by receiving country	IT, MT, ES
Countries with considerable regulation	Need for accreditation of receiving country Prohibit franchising and validation	LU, PL, RO, LV, LT

Regulation regarding receiving CBHE is quite diverse. What is notable is that Southern and Eastern European countries—the same ones receiving more CBHE activities—tend to be more restrictive in their regulative framework.

Regulation on Exporting BHE Activities Is Less Developed than Regulation of Received CBHE

In contrast to the regulation of received CBHE activity, it is surprising that countries rarely seem to impose heavy restrictions on the exporting activities of their higher education institutions. The vast majority of countries either impose no regulation at all on their institutions or rather minimal constraints. Countries with no regulation on exporting include: Finland, Estonia, Slovenia, Cyprus, Luxembourg and Lithuania. However, CBHE export from these countries is nevertheless low or non-existent. At the time of writing, explicit regulation for exporting programmes existed only in Romania, France, Germany, Denmark, Netherlands, Latvia and Poland and in some cases only regarding certain types of HEIs (in Austria, Cyprus and, Ireland).

Whilst two thirds of Member States have some form of regulation in respect to receiving CBHE, most of them rely substantially upon the accreditation processes of exporting countries. This expresses a significant level of trust of the receiving countries. A certain 'regulation gap' or 'accountability gap' may be said to exist, however, where no regulation or minimum registration requirements on the receiving side coincide with no regulation of CBHE export in the exporting country. The exception to this is the UK and its peer-review based approach led by the QAA (Quality Assurance Agency) which stems from UK universities' independent status, and Austria, which requests additional accreditation of each branch or programme delivered through CBHE arrangements.

Even where countries regulate the receipt of CBHE, there can be a lack of regulation of exports. This is notable in itself, but especially interesting in light of the case law of the European Court of Justice, which has ruled that the exporting Member States are responsible for the organisation and evaluation of the courses and degrees granted by their higher education institutions, including those delivered in another Member State. With current low levels of CBHE there is clearly an opportunity to take steps on the exporting as well as the receiving sides to deal with issues of quality etc. before levels of CBHE increase. Efforts by receiving and exporting

local governments as well as EU-wide coordinating bodies or networks (such as possibly EQAR or the ENIC-NARIC bodies) to monitor the export and establishment of CBHE activities could have positive impacts on quality.

Equal Treatment for EU and Non-EU Providers

Outside of Bulgaria, Cyprus, and Greece, which ban programmes from outside the EU, very few countries differentiate between CBHE from EU-based and non-EU-based institutions. Where such differences do exist, they tend to be quite minor.

What Do the Patterns of CBHE Provision Tell Us?

The Decisive Factor for Scope of CBHE Activities Seems to Be Demand, Not Regulation

Member States cover a broad spectrum in terms of the controls they place on the ability of foreign providers to operate on their territory. Perhaps around one third of Member States have in place quite strict requirements, while one quarter does not have any regulation in place whatsoever. It is unclear why such variety in regulation procedures exists. The relationship between the level of regulation and the amount of CBHE activity in receiving countries appears to be rather weak. This suggests that regulation has little effect and that even strict regulatory frameworks cannot deter CBHE providers from operating where there is a good "market" for their educational product. Unfortunately, it is not possible to answer the counterfactual question as to whether levels of CBHE would be (even) higher if stricter regulation did not exist.

It does, however, seem clear that opportunities for CBHE are created where the kind or quantity of supply of domestic higher education does not meet demand. A strong statistical relationship was found between received CBHE levels and outgoing student mobility. This gives some support to this hypothesis. In some countries the driving factors may be a general lack of modernisation, which provides a receptive market for CBHE. In others, it might be more a question of insufficient quantity or quality of provision relative to demand in specific areas (or niches). Whether such opportunities are exploited by entrepreneurial exporting HEIs will depend on their own assessment of the risks and benefits, and (regulatory) obstacles that are associated with such a venture.

Lack of Systematic Data Collection Makes Evidence-Based Regulation and Recognition of CBHE Problematic

Perhaps the most striking finding is the lack of good quality, reliable data collected by Member States. While some States do maintain registers of incoming CBHE providers, as of 2012, the only example of systematic data gathering of overseas provision were the country reviews conducted by the UK's QAA. This leads to two potential problems. Firstly, in the absence of evidence, perceptions and misperceptions of the CBHE phenomenon dominate, which may lead to 'just-in-case' regulation which may stifle needed provision.

On the other hand, the lack of systematic data collection leaves loopholes for rogue providers. When trying to confirm identified CBHE activities, we noticed a near complete lack of information about providers' formal recognition accreditation on their websites. Without a visible indication of the recognition of the study programme, however, it is very difficult for students, employers or other HEIs to correctly assess the legitimacy and value of their qualifications. During our research we identified, among others, an institution which is legally registered as a company with the name 'university' based in one EU Member State, which has offered to 'validate' programmes in other Member States. Such a degree holds no legal value whatsoever. In the absence of a 'whitelist' of recognized higher education, however, it is difficult for universities to ascertain the value of such degrees—and for students or employers this is virtually impossible.

CBHE Is an Area for Meaningful Cooperation Within the EU

Member States so far seem to have relied upon their own resources to ensure protection for students and their own institutions. However, there appears to be scope to develop cooperative arrangements. Although most countries already rely upon the accreditation procedures of others, it is a moot point as to what extent this is a sign of trust as much as a convenience. Without transparency tools for registration of incoming providers of CBHE and a European register of legitimate HE, loopholes will remain for rogue providers to exploit. On the other hand, the existing European infrastructure—the ENIC/NARICs, The European Register for Quality Assurance (EQAR) or initiatives such as Qrossroads (http://ecahe.eu/home/qrossroads/)—hold promising potential upon which further cooperation can be built.

References

Brandenburg, U., McCoshan, A., Bischof, L., Kreft, A., Storost, U., Leichsenring, H., et al. (2013). *Delivering education across borders in the European Union*. Brussels: European Union.

European Union. (2006). Directive 2006/123/EC of the European Parliament and of the council of 12 December 2006 on services in the internal market, vom OJ L 376, S. 36–68. Online verfügbar unter. http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0123

European Court of Justice. vom 13.11.2003. Aktenzeichen C-153/02.

European Court of Justice. vom 24.10.2008. Aktenzeichen C-274/05.

European Court of Justice. vom 04.12.2008. Aktenzeichen C-151/07.

Knight, J. (2006). Crossborder Education: An Analytical Framework for Program and Provider Mobility. In J. Smart, & B.Tierney (Eds.), *Higher Education Handbook of Theory and Practice*, (pp. 345-395). Dordecht: Springer.

UNESCO, OECD. (2005). *Guidelines for quality provision in cross-border higher education*. Paris. Online verfügbar unter http://www.unesco.org/education/guidelines_E.indd.pdf zuletzt geprüft am 18.11.2014.

Verbik, L., & Jokivirta, L. (2005). National regulatory frameworks for transnational higher education. Models and trends, Part 1. Observatory on Borderless Higher Education (OBHE) (Briefing Note, 22).