

# THE IMPACT OF EC LAW ON HIGHER EDUCATION. SUBSIDIARITY OR SUPRANATIONALITY?

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## I. Unity and diversity in higher education

### *1. The tradition of universities*

Education and higher education are inseparably related to culture and to the transmission of knowledge and cultural values.<sup>1</sup> We may rightly claim that universities were the pillars of cultural unity of Europe from early medieval times, supporting Christianity and expressing spiritual and intellectual communion. Instruction was based on the same curriculum all over Europe. The studies of the seven crafts (*septem artes liberales*) or the teaching of Roman law or canonical law can serve as examples. This common European heritage is embodied by the splendid university libraries, the well-protected autonomy of universities and the century old traditions and symbols of these institutions.

### *2. Locality and national influence*

Nevertheless, it is certain that the above mentioned cultural harmony behind the network of medieval universities has never led to a rigid unity. The richness and variety of cultures were present as well. Taking the example of legal studies, it is worth to emphasize that the legal culture of medieval Europe was

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<sup>1</sup> It is worth to cite the first sentences of the Lisbon Convention of the Council of Europe on the relationship of higher education and culture. „Conscious of the fact that the right to education is a human right, and that higher education, which is instrumental in the pursuit and advancement of knowledge, constitutes an exceptionally rich cultural and scientific asset for both individuals and society” Convention on the Recognition of Qualifications concerning Higher Education in the European Region. Lisbon, 11. IV. 1997. ETS no. 165. Source: <http://conventions.coe.int>. 25. 05. 2006.

comprehensive and multi-layered. Besides Roman law local and municipal laws or the rules of customary law were widely applied as well.<sup>2</sup>

The local or national traits left their marks on the institutional structure of universities as well, since the students, coming from different countries, formed national groups, so-called „nations” in order to organize their life, to protect their interests and to nurture their traditions.

From the sixteenth century A.D. universities had a pivotal role in shaping modern states and in forming national identity and culture. This contribution was especially important in Flanders, in Finland, in the Baltic States or in Central Europe.<sup>3</sup> Parallel to this development the states have developed their own policy on higher education, determining the strategic goals and institutional structures and the available financial resources. However, the basic function of universities has remained the same: transmission of knowledge to the future generations on the highest level, while instruction has been inseparable from scientific research.<sup>4</sup>

From the mid twentieth century a new player has emerged influencing higher education on our continent – the European Community with its mushrooming competences. So it is reasonable to scrutinize the impact of European integration on universities. Whether subsidiarity or supranationality is the determining factor in this relationship? How does European law approaches the problem of unity and diversity in this field?

## II. Treaty of Rome

### 1. Modest competences

The chapter of the Treaty of Rome<sup>5</sup> on education, and especially its Art. 149, offer modest competences for the European Community. 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

<sup>2</sup> *Brauneder, W.*: Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte? *Saggi, Conferenze e Seminari* 23, Centro di studi e ricerche di diritto comparato e straniero, Roma, 1997, p. 22.

<sup>3</sup> *de Ridder-Symoens, H.*: The intellectual heritage of ancient universities in Europe. In: *Sanz, N. – Bergan, S.* (eds.): *The heritage of European universities*. Council of Europe Publishing, Strasbourg, 2002, pp. 77-91, especially p. 80.

<sup>4</sup> *Lonbay, J.*: Reflections on Education and Culture on EC Law. In *Craufurd Smith, R.*: *Culture and European Union Law*. Oxford University Press, Oxford, 2004, p. 247.

<sup>5</sup> Treaty establishing the European Community (signed in Rome 25 March 1957) as amended by subsequent treaties.

the content of teaching and the organisation of education systems and their cultural and linguistic diversity. Community action shall be aimed at:

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,
- encouraging mobility of students and teachers, by enabling inter alia, the academic recognition of diplomas and periods of study,
- promoting cooperation between educational establishments,
- developing exchanges of information and experience on issues common to the education systems of the Member States,
- supporting the development of youth exchanges and of exchanges of socioeducational instructors,
- supporting the development of distance education.

According to Art. 149 the Community and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe. The Council of Ministers shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States or acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.

## *2. Unanimity in decision-making*

Art. 47 (2) of the Treaty contains a further limitation according to which the Council of Ministers acts unanimously when it decides on directives, the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons.

At first sight the list of limited competences and incentive measures as well as the exclusion of approximation of laws and guaranteeing a veto right for any Member State as a result of unanimity voting sound like a text-book example on subsidiarity.<sup>6</sup>

### **III. Actual impact of the European Community**

#### *1. Factors of influence*

The practical impact of the Community is significantly stronger than the previous analysis of the norms of the Treaty of Rome indicates. This is due to several factors: i) the grants and programmes of the European Community, ii) the obvious interference between the goals of the Council of Europe and the Euro-

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<sup>6</sup> Lonbay, J.: op. cit, p. 244.

pean Community, iii) the rules of Community law on the mutual recognition of diplomas awarded in higher education and iv) the case law of the European Court of Justice protecting the internal market and the fundamental economic freedoms, the so-called „*Grundfreiheitenkontrolle*”, as it is often described in German legal literature.

## 2. European grants and programmes

These incentive measures include the Erasmus programmes<sup>7</sup> supporting the mobility of students and inter-university networks, or the highly successful *Jean Monnet* initiative<sup>8</sup> – offering grants for European studies and research in the field of law, economics, political sciences and history. While the TEMPUS III programme – overreaching the borders of the EU –, offers assistance for the restructuring of higher education institutions in the Balkan and in Eastern Europe.<sup>9</sup>

We have to add to this the support of such *sui generis* European institutions in the field of higher education<sup>10</sup> like the College of Europe in *Brugge*,<sup>11</sup> the European University Institute in *Fiesole*,<sup>12</sup> the European Institute of Public Admini-

<sup>7</sup> At present the Erasmus Mundus programme is effective with the aim of supporting quality education and cooperation with third countries. See Decision No 2317/2003/EC of the European Parliament and of the Council of 5 December 2003 establishing a programme for the enhancement of quality in higher education and the promotion of intercultural understanding through cooperation with third countries (Erasmus Mundus) (2004 to 2008), furthermore 1999/311/EC: Council Decision of 29 April 1999 adopting the third phase of the trans-European cooperation scheme for higher education (Tempus III) (2000-2006) OJ L 120, 08. 05. 1999, pp. 30-36.

<sup>8</sup> The financing of the Jean Monnet Program was confirmed by the European Parliament in 2004: Decision 791/2004/EC of the European Parliament and of the Council of 21 April 2004 establishing a Community action programme to promote bodies active at European level and support specific activities in the field of education and training. OJ L 138, 30. 04. 2004. Since 2007 the call for proposals for the Jean Monnet Programme has been integrated in the general call under the Lifelong Learning Programme.

<sup>9</sup> 2002/601/EC: Council Decision of 27 June 2002 amending Decision 1999/311/EC adopting the third phase of the trans-European cooperation scheme for higher education (Tempus III) (2000 to 2006) OJ L 195, 24. 07. 2002, pp. 34-37.

<sup>10</sup> Decision 791/2004/EC of the European Parliament and of the Council of 21 April 2004 establishing a Community action programme to promote bodies active at European level and support specific activities in the field of education and training. OJ L 138, 30. 04. 2004.

<sup>11</sup> College of Europe (The second campus of this institution has been established in Natolin, Poland)

<sup>12</sup> European University Institute. See: Convention setting up a European University Institute OJ C 29, 9. 2. 1976, pp. 1-10. One of the basic goals of the establishment of the Institute was to offer alternative to the PhD programmes of the leading American universities. See *de Witte, B.*: Cultural Linkages. In: *Wallace, W.*: The Dynamics of European Integration. The Royal Institute of International Affairs, London, Pinter Publishers, London, New York, 1990, pp.192-210, especially p. 197.

stration in *Maastricht* or the European Law Academy in *Trier*. Moreover, a comprehensive information system – the so-called *Eurydice* system – was set up on education and higher education within the framework of the *Socrates* programme.<sup>13</sup>

The above mentioned programmes remain within the framework of Art. 149 of the Treaty of Rome. However, they have a significant influence thanks to the financial resources mobilised by them which are tempting in an area of social activity where shortage of capital is characteristic.<sup>14</sup>

### 3. *Communications of the European Commission*

Seemingly the European Union does not have an all-embracing policy on higher education, which is certainly true if we only take into account the rules of the Treaty of Rome and the obligatory sources of European law. But if we extend our analysis to the soft law documents, it becomes obvious that the European Commission has comprehensive and well-elaborated ideas on the future role of universities in Europe. The communication of the European Commission published in 2003 on „The role of universities in the Europe of knowledge” can serve as a good example for the formation of this strategy.<sup>15</sup> Another communication which was published in 2005 under the expressive title: „Mobilising the brainpower of Europe: enabling universities to make their full contribution to the Lisbon Strategy”<sup>16</sup> is an other good precedent for this strategic thinking. The authors of these papers – having in their mind the gradual establishment of a European higher education area -, deal with such issues like under-funding of European universities or ensuring autonomy and management efficiency in academic affairs. The Commission supports the involvement of private capital as an additional financial resource for universities, the establishment of young technological („spin off”) companies by universities and consolidating the excellence of European universities.

Although the above mentioned Communications are not binding formally, nevertheless they make clear the preferences of the Commission which will inevitably influence the allocation of grants in this field. Moreover, according to the experience of the past decades, the soft law documents of Community law sooner or later become binding legal norms.

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<sup>13</sup> See [www.eurydice.org](http://www.eurydice.org)

<sup>14</sup> In 2004 the Commission published a Communication on its planned programmes: Communication from the Commission – The new generation of community education and training programmes after 2006. COM/2004/0156 final.

<sup>15</sup> Brussels, 05. 02. 2003, COM(2003) 58 final.

<sup>16</sup> Brussels, 20. 04. 2005, COM (2005) 152 final.

Actually, there are even more soft law sources with persuasive effect, for example the Commission recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers.<sup>17</sup> This recommendation which has the aim to contribute to the establishment of a European Research Area, deals with such essential issues like research freedom and professional responsibility and attitude, career development and the value of mobility.

#### *4. Interference between the goals of the Council of Europe and the European Community*

Under the aegis of the Council of Europe seminal documents were elaborated, like the Magna Charta of University<sup>18</sup> or the Bologna Declaration on the European Higher Education Area.<sup>19</sup> The Bologna Declaration and the following documents set up essentially four basic goals.<sup>20</sup> Namely ensuring that degrees are easily readable and comparable, restructuring European higher education to guarantee that it is in two phases: an undergraduate phase is followed by a postgraduate phase. Plus the documents encourage the credit accumulation and transfer system (ECTS) and support quality assurance processes.<sup>21</sup> As it is often emphasized by experts, the changes were very fast, the reforms were introduced in a top-down method, often without opportunity for debate amongst those affected.<sup>22</sup>

The reciprocity between the activities of the European Union and the Council of Europe in the field of higher education is obvious. At this point it is worth returning to the already mentioned Communications of the European Commission which incorporate into Community law the goals of the Bologna process declaring amongst others that “diversity demands organisation at European level” and emphasizing the need for sufficient compatibility between the different national regulations in order to avoid breeding confusion.<sup>23</sup>

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<sup>17</sup> 2005/251/EC, OJ L 75, 22.3. 2005, pp. 67-77.

<sup>18</sup> The Magna Charta of University, Bologna, 18 September 1988. source: <http://www.coe.int> 21. 03. 2005.

<sup>19</sup> Joint Declaration of the European Ministers of Education Convened in Bologna on 19th of June 1999. Source: <http://www.coe.int> 21. 03. 2005. Its predecessor was the Sorbonne Joint Declaration: Joint Declaration on harmonisation of the architecture of the European higher education system by the four Ministers in charge for France, Germany, Italy and the United Kingdom. Paris the Sorbonne, May 25, 1998. The requirement for two phases in higher education and for the mutual recognition of diplomas based on such a system has been already drawn up in this document. „A system, in which two main cycles, undergraduate and graduate, should be recognized for international comparison and equivalence, seems to emerge” source: <http://www.coe.int> 21. 03. 2005.

<sup>20</sup> *Lonbay, J.*: op. cit. p. 252.

<sup>21</sup> European Network for Quality Assurance (ENQA).

<sup>22</sup> *Lonbay, J.*: op.cit. p. 253.

<sup>23</sup> Brussels, 20. 4. 2005, COM (2005) 152 final, p. 7.

Moreover, the Bologna process itself seems to be still on the fast track. In 2005 the ministers responsible for education met in Bergen, and discussed the Report on Standards and Guidelines for Quality Assurance in the European Higher Education Area.<sup>24</sup> The preparation of this document was supported by the European Commission which all goes to show that there is a close co-operation between the European organisations. A Report on a Framework for Qualifications of the European Higher Education Area was carefully studied in Bergen as well.<sup>25</sup> These sweeping changes are driven by several goals: completing the internal market in the field of education, contributing to a knowledge-based economy in Europe and coping with the increasing global pressure.<sup>26</sup> As a recent article in Newsweek magazine bluntly explained: "Europe's schools must abandon old traditions to unify the system... without which its eccentric schools can not compete."<sup>27</sup>

### 5. *The impact of the jurisprudence of the European Court of Justice*

The first major judgements of the European Court of Justice which had an influence on higher education were passed some twenty years ago, applying the prohibition of discrimination based on nationality, and banning the collection of additional or extra tuition-fees from nationals of other Member States of the European Union.<sup>28</sup> These judgements were based on a broad interpretation of the Treaty of Rome since at that time only vocational training was clearly within the scope of Community law.<sup>29</sup> Since this early case law of the European Court of Justice is well-known in legal literature, it is sufficient to concentrate on the latest development.

In the case *Commission v. Belgium*<sup>30</sup> the ECJ established that holders of secondary education diplomas awarded in other Member States should gain access to higher education organised by the French Community of Belgium under the

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<sup>24</sup> Standards and Guidelines for Quality Assurance in the European Higher Education Area. European Association for Quality Assurance in Higher Education, 2005. Source: <http://www.bologna-bergen2005, 04. 05. 2005>.

<sup>25</sup> A Framework for Qualifications of the European Higher Education Area. Bologna Working Group on Qualifications Frameworks 2005. Source: <http://www.bologna-bergen2005, 04. 05. 2005>.

<sup>26</sup> At present the United States is a clear world leader in higher education. Furthermore, one must not neglect the fact that China and India invest huge sums into building and improving their universities. See *Vencat, E. F.*: The race is on. Newsweek, August 20-27, 2007, pp. 40-44.

<sup>27</sup> *Spring, S.*: U of Europe? Newsweek, August 20-27, 2007, p. 51.

<sup>28</sup> For example case 293/83, *Francoise Gravier v. City of Liege*, ECR (1985) pp. 593-615.

<sup>29</sup> *Steyger, E.*: National Traditions and European Community Law. Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1997, p. 86.

<sup>30</sup> Case C-65/03, ECR (2004) p. I-6427.

same conditions as holders of diplomas awarded in Belgium. The judgement emphasized that it was clear from the Court's case-law that the principle of equal treatment, and the prohibition on any discrimination on grounds of nationality prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. So, the Kingdom of Belgium has failed to fulfil its obligations under Art. 12, read in conjunction with Art. 149 and 150 of the Treaty of Rome. A special feature of the decision is that it was partly based on the above described chapter on education of the Treaty of Rome which created only weak competences for the Community.

The judgement delivered in *Commission v. Austria*<sup>31</sup> was a logical sequence of the former jurisprudence of the Court and undoubtedly raised the greatest attention up till now. The case was brought to the Court because the Austrian legislation provided that students who had obtained their secondary education diploma in a Member State other than the Republic of Austria and who wished to pursue their higher or university studies in a given area of Austrian education, must not only produce that diploma, but also must prove that they fulfilled the conditions of access to higher or university studies in the State where they had obtained their diploma, such as, in particular, success in an entrance examination or obtaining a sufficient grade to be included in the *numerus clausus*.

The Court declared that a legislation according to which a Member State admitted citizens of other Member States to its universities only if they fulfilled prior the admission criteria in their own country was not compatible with Community law. Such a rule amounted to discrimination based on nationality. The judges rejected the Austrian argument according to which the aim of the national rule was to safeguard the unity and financial equilibrium of Austrian higher education limiting the tide of foreign, mostly German applicants. The Court observed that the possibility for a student from the European Union, who obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constituted the very essence of the principle of freedom of movement for students guaranteed by the Treaty of Rome.

The position of students was affected by the judgement rendered in the *Bidar* case<sup>32</sup>, although from a different angle. In this judgment the ECJ considered the law of the United Kingdom, according to which the eligibility for preferential student loans provided at reduced interest rates, was conditional upon the „set-

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<sup>31</sup> Case C-147/03, ECR (2005) p. I-5969.

<sup>32</sup> Case C-209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing and Secretary of State for Education and Skills*, ECR (2005) p. I-2119.



bled” status of a student, supposing three year long establishment in the UK before starting the university. The imposition of such rigid conditions was declared incompatible with EC law. The fundamentals of this approach had been elaborated in the *Grzelczyk*<sup>33</sup> case, where the Court formulated the principle according to which Member States of the EU should undertake a certain level of financial solidarity in order to contribute to the subsistence of students coming from other Member States.

Moreover, in an Italian case called *Valentina Neri and European School of Economics*<sup>34</sup> which was judged in 2003, the Court established that an administrative practice was incompatible with Community law if it prohibited the recognition of diplomas which were given to Italian citizens by universities in other Member States, although the diplomas were based on courses attended in Italy. In order to understand the decision an overview of the facts of the case is necessary. Ms. Neri was admitted to the University of Nottingham Trent in England. However, another institution, the European School of Economics, acting as an agent of Nottingham University, organised courses in Italy. So, Ms. Neri applied for these courses paying the fee as well. Later she was informed by Italian authorities, that in this case they would not recognise her diploma. Ms. Neri wanted to get back her money, sued the European School of Economics which claim raised the need of the interpretation of Community law.

The Italian Government wished to justify that restriction referring to the policy of ensuring high standards of university education. It maintained that the Italian legal order did not accept agreements such as the one at issue in the main proceedings on university education. It emphasized that education was a matter of public interest, expressing the cultural and historical values of the State. However, this argument was rejected. The decision of the European Court of Justice contributed significantly to the free movement of universities within the European Union. It has paved the way towards an increased competition amongst universities. The universities obviously have different chances in this competition. These chances are obviously determined by their traditions and heritage, the language of the education or by the qualities of their teaching staff. But there are very substantial differences in the budgetary support and financial resources of European universities as well. So, the competition amongst universities in the European higher education space can be easily distorted.

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<sup>33</sup> Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d' Ottignies-Louvain-la-Neuve*, ECR (2001) p. I-6193.

<sup>34</sup> Case C-153/02, ECR (2003) p. I-13555.

We witness the birth of a new form of higher education which is called “transnational” in literature, because the students are living in a different country than that of the seat of the university awarding their diplomas. “Sit locally, study globally”<sup>35</sup> as the new proverb indicates. This new way of higher education may appear in different forms from branch universities till distance learning. The rapid development of transnational forms is demonstrated by the fact, that according to some statistics 74 % of courses in higher education are offered by foreign, mainly English, universities in Greece. This situation can be partly explained by the fact, that only 15 % of the applicants were admitted to Greek universities. This “bottleneck” was widened by the cross-border educational services.<sup>36</sup> Actually the decision rendered in the *Neri* case was not without precedents since the European Court of Justice almost two decades ago declared in an other Greek case that by prohibiting nationals of other Member States from setting up “*frontistiria*” (coaching establishments) and private music and dancing schools, and from giving private lessons at home, the Hellenic Republic has failed to fulfil its obligations under the articles on the right of establishment and free movement of services of the Treaty of Rome.<sup>37</sup>

The obvious consequences of the cited judgements of the Court are the free movement of students within the European Union, the vigorous competition and rivalry amongst universities and probably even a certain harmonisation of the curricula of the universities in the different countries. Continental European universities might follow the international trend in offering entire degrees in English.<sup>38</sup> Parallel to these changes such organisations were set up like the *European University Association (EUA)* and several professional bodies established themselves on a European level as well. For instance in the case of lawyers the *Council of Bars and Law Societies of the European Union (CCBE)* and the *European Bars Federation (FBE)* were set up. The European framework of legal education is evaluated by a separate periodical.<sup>39</sup> The professional bodies active at European level are expressly supported by the European Community provided that their members are recruited from at least 12 Member States.<sup>40</sup>

<sup>35</sup> *Vencat, E. F.*: The race is on. Newsweek, August 20-27, 2007, p. 43.

<sup>36</sup> *Lonbay, J.*: op. cit, pp. 258-259.

<sup>37</sup> Case C-147/86, *Commission v. Hellenic Republic*, ECR (1988) p.1637.

<sup>38</sup> The English only undergraduate programmes are more and more popular at Asia’s universities. See *Vencat, E. F.*: op. cit, p. 43.

<sup>39</sup> *European Journal of Legal Education*.

<sup>40</sup> Decision 791/2004/EC of the European Parliament and of the Council of 21 April 2004 establishing a Community action programme to promote bodies active at European level and support specific activities in the field of education and training. OJ L 138, 30. 04. 2004.

### 6. Directives on mutual recognition of diplomas

Besides the jurisprudence of the European Court of Justice, we have to take into account the impact of the directives on mutual recognition of diplomas. In addition to the sectoral directives applicable in respect of nurses, doctors, mid-wives, dentists, pharmacists and architects which were passed several decades ago, the Council Directive 89/48/EC is especially important.<sup>41</sup> This horizontal directive applies to any Member State national wishing to pursue a regulated profession as an employed or self-employed person in a host Member State, unless the profession is covered by the above mentioned specific sectoral directives. The scope of the directive covers every diploma awarded in higher education which requires a post-secondary training of at least three years' duration. The basic principle of the directive is automatic recognition. Exceptionally the host state may require an adaptation period or aptitude test as a precondition of the recognition of the diploma if its competent authority can prove that there are essential differences in the substance of the curricula in the Member State of origin and in the host state. Where the applicant's education and training are at least one year shorter than those required by the host state, then it may demand the applicant to produce evidence of professional experience.<sup>42</sup>

Directive 2001/19/EC amends the former directives on the recognition of professional qualifications.<sup>43</sup> According to this amendment the applicant must have a right of appeal under national law if his application is rejected or if a decision is not reached within a stipulated period. Member States are to state their reasons for such decisions taken regarding the recognition of diplomas, certificates and other evidence of formal qualifications. Moreover, the Directive not only deals with the recognition of diplomas, since it contains rules on the recognition of the proofs of financial standing or on insurance against the financial risks arising from professional liability.

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<sup>41</sup> Council Directive 89/48/EEC of 21 December 1988 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. OJ L 019, 24. 01.1989. The Commission submitted a draft on the re-regulation of mutual recognition in 2002: Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications. COM (2002) 119 final, 7 March 2002.

<sup>42</sup> *Barnard, C.* : The Substantive Law of the EU. The Four Freedoms. Oxford University Press, 2004, pp. 300-305. On the implementation of Directive 89/48/EC see *Schneider, H.*: The Free Movement of Lawyers in Europe. In: Faure, M. – Smits, J. – Schneider, H. (eds.): Towards a European *Ius Commune* in Legal Education and Research., Intersentia, Antwerpen, Groningen, 2002, pp. 15-38, especially pp. 29-30.

<sup>43</sup> Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001. OJ L 206, 31.7.2001.

Even if the directives on the recognition of diplomas can not be applied, the European Court of Justice requires the authorities of the host Member State to consider, in the case of diplomas awarded in another Member State, the extent to which the knowledge and qualifications certified by the diploma awarded to the person concerned correspond to the knowledge and qualifications required under the legislation of the host Member State. Where they correspond only in part, it is also for the competent national authorities to assess whether the knowledge acquired by the person concerned during a course of study or by way of practical experience is sufficient to show possession of knowledge to which the foreign diploma does not attest.<sup>44</sup>

Besides the norms of the European Community we have to refer to the Lisbon Convention on the Recognition of Qualifications concerning Higher Education in the European Region which was elaborated under the aegis of the Council of Europe.<sup>45</sup> Up till now 44 states have ratified the Convention or joined it. The all-embracing convention covers not only the recognition of diplomas awarded in higher education, but the recognition of qualifications giving access to higher education,<sup>46</sup> and the recognition of the periods of study.<sup>47</sup>

### *7. Broad scale of European influence*

In sum we may claim that the European Community in cooperation with the Council of Europe can influence several elements of the process leading to diplomas in higher education, from the conditions of admission till the mutual recognition of diplomas. Moreover, during the time span of education it may have an impact on the structure of training and on the mobility of teachers and students. Community law fosters the free movement of universities amongst Member States and supports the different forms of cross-border educational services and transnational education. This impact is the aggregate result of a variety of instruments: directives, different soft law rules and programmes, and the case law of the European Court of Justice. All in all we may perceive the traits of subsidiarity and the signs of creeping supranationality in the development of European law. It is vital to strike the right balance between these competing principles.

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<sup>44</sup> Case C-234/97, *Bobadilla v. Museo Nacional del Prado and Ministerio Fiscal*, ECR (1999) p. I-4773.

<sup>45</sup> Convention on the Recognition of Qualifications concerning Higher Education in the European Region. Lisbon, 11. IV. 1997. ETS No. 165. <http://conventions.coe.int> 25.05.2006.

<sup>46</sup> The first convention on this subject was passed in 1953 by the Council of Europe: European Convention on the Equivalence of Diplomas leading to Admission to Universities (1953, CETS No. 15.) and its Protocol (1964, CETS No. 49.).

<sup>47</sup> The predecessor of this part was a separate convention passed by the Council of Europe in 1956: European Convention on the Equivalence of Periods of University Study (1956, CETS No. 21.).

## SUMMARY

**The Impact of EC Law on Higher Education.  
Subsidiarity or supranationality?**

MIKLÓS KIRÁLY

The essay discusses unity and diversity in higher education, describes the common European origins of universities and speaks about the interplay of local and national traditions. It contrasts the modest competences of the Treaty of Rome with the actual impact of the European Community. Among the components of that influence the essay enumerates the Community grants and programmes (as for instance Erasmus, Jean Monnet and TEMPUS), the Community directives on the mutual recognition of higher education diplomas, communications that the European Commission has issued in recent years – which offer comprehensive and detailed ideas about the future of European universities -, and the evident interplay between the objectives of the Council of Europe and the European Community. That synergy is clearly seen from the joint implementation of the recommendations enshrined in the Bologna Declaration.

The study devotes special attention to the impact of the jurisprudence of the European Court of Justice as reflected by its recent judgements. As a consequence of precedents created by that Court, it is now possible to use the secondary school certificate of one country to gain admission to a higher education institution of another (host) country, and it is inadmissible for a host country to define unusual admission requirements. In a similar manner, it is forbidden to define requirements that are excessively burdensome or bureaucratic when students of another country apply for preferential student credit. A separate chapter of case law is the recognition of diplomas obtained in transnational education, which in other words means supporting the free movement and competition in several other fields of universities for the purpose of creating the European Higher Education Area.

To sum up, the European Community – its modest competences notwithstanding – has the capability of influencing every component of the higher education process, ranging from entrance examinations to the recognition of diplomas. Although the Treaty of Rome defined subsidiarity as a norm, signs of creeping supranationality can be witnessed in higher education.

## RESÜMEE

**Die Auswirkungen des EG-Rechts auf das Hochschulwesen.  
Subsidiarität oder Supranationalität?**

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Die Studie untersucht das Zur-Geltung-Kommen der Einheit und der Vielfalt im Hochschulwesen, indem sie die europäischen Wurzeln der Universitäten, sowie das Zur-Geltung-Kommen der örtlichen und nationalen Traditionen vorstellt. Sie stellt die tatsächliche Auswirkung der Europäischen Gemeinschaft den bescheidenen Zuständigkeiten gemäß dem Römischen Vertrag gegenüber. Die Studie zählt Folgendes zu diesen Einflussfaktoren: die europäischen Subventionen und Programme (zum Beispiel *Erasmus*, *Jean Monnet*, *TEMPUS*), die Richtlinien, die die gegenseitige Anerkennung von Hochschuldiplomen gewährleisten, die in den vergangenen Jahren herausgegebenen Mitteilungen der Europäischen Kommission, die bezüglich der Zukunft der europäischen Universitäten umfassende und detaillierte Vorstellungen formulieren, sowie das offensichtliche Aufeinanderwirken der Ziele des Europarates und der Europäischen Gemeinschaft. Diese Synergie kommt überaus deutlich in der gemeinsamen Realisierung der Zielsetzungen der Erklärung von Bologna zum Vorschein.

Die Analyse schenkt der Rechtsprechung des Europäischen Gerichtshofs im Spiegel der jüngsten Urteile besondere Aufmerksamkeit. Als Folge dieser Rechtsprechung kann man auch mit dem in den anderen EU-Mitgliedstaaten erworbenen Mittelschulzeugnis in die Institution des betreffenden Mitgliedstaates aufgenommen werden, bzw. es können keine spezifischen Aufnahmekriterien gestellt werden. In ähnlicher Weise dürfen auch im Falle von Studenten aus anderen Mitgliedstaaten bezüglich des Gewährens von günstigen Studentenkrediten nicht allzu schwierige, starre Forderungen gestellt werden. Ein eigenes Kapitel im Fallrecht stellt die Anerkennung der grenzübergreifenden transnationalen Ausbildung dar, also im Grunde die Unterstützung der Freizügigkeit und gleichzeitig des Wettbewerbs der Universitäten im Interesse der Schaffung des Europäischen Hochschulraumes.

Zusammenfassend kann festgestellt werden, dass die Europäische Gemeinschaft – trotz ihrer bescheidenen Zuständigkeiten – in Wahrheit sämtliche Elemente des Hochschulprozesses beeinflussen kann, von der Aufnahmeprüfung bis zur Anerkennung der Diplome. Neben der im Römischen Vertrag festgesetzten normativen Subsidiarität kommt also auch eine verstecktere Supranationalität zur Geltung.