

**EU Higher Education Law**  
**The Bologna Process and Harmonization**  
**by Stealth**

*By*  
**Sacha Garben**

**76**

**EUROPEAN MONOGRAPHS**



**Wolters Kluwer**  
Law & Business

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Process and Harmonization by Stealth

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*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-3365-6

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Printed in Great Britain.

# **EU Higher Education Law**

## EUROPEAN MONOGRAPHS

*Editor-in-chief Professor David O'Keeffe*

In this series *European Monographs* this book. *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* is the seventy-sixth title. The titles published in this series are listed at the end of this volume.

## About the Author

Sacha Garben (Ede, 1982) studied Dutch and European law at the University of Maastricht from 2001 to 2005 and obtained an LLM degree from the College of Europe in Bruges in 2006. She carried out her PhD research, on which this book is based, at the European University Institute in Florence. She successfully defended her thesis in June, 2010. In 2008, she spent a semester as a visiting researcher at the European Law Research Centre of Harvard Law School. She has published several articles on EU law and higher education and continues her research in this field, as well as in other areas of European law. Sacha Garben currently works at the European Court of Justice in Luxembourg.

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## List of Abbreviations

|         |   |
|---------|---|
| BFUG    | Bologna Follow Up Group   |
| CRE     | Confederation of EU Rectors' Conferences and the Association of European Universities |
| ECJ     | European Court of Justice   |
| ECTS    | European Course Credit Transfer System  |
| EHEA    | European Higher Education Area  |
| ENIC    | European National Information Centre  |
| ENQA    | European Network for Quality Assurance  |
| EQAR    | European Register for Quality Assurance Agencies                                      |
| EQF     | European Qualifications Framework   |
| ERASMUS | European Community Action Scheme for the Mobility of University Students              |
| EU      | European Union  |
| FETAC   | Further Education and Training Awards Council   |
| HE      | Higher Education  |
| KIC     | Knowledge and Innovation Community  |
| LRU     | Loi relative aux libertés et reponsabilités des universités                           |
| NARIC   | National Academic Recognition Information Centre                                      |
| OMC     | Open Method of Coordination   |
| PISA    | Programme for International Student Assessment  |
| TEU     | Treaty on the European Union  |
| TFEU    | Treaty on the Functioning of the European Union                                       |
| WTO     | World Trade Organization  |

## Preface

It is hard to imagine a more enjoyable place to write a PhD thesis than the European University Institute in Florence. The spectacular beauty of the place, the richness of its intellectual resources and the multicultural and interdisciplinary academic community all have contributed to a true once-in-a-lifetime experience, for which I am very grateful.

It is also hard to imagine a more appropriate place to conduct this research, as the European University Institute is a typical example of European cooperation in higher education. In the early days of what is now the EU, the Member States discussed creating a European University, for which a legal basis was explicitly provided by the Treaties. Due to the resistance of some of the Member States, the project was somewhat watered down. The European University Institute was created as a post-graduate institute on the basis of a separate Convention, denying it Community status. Nevertheless, it was and remains closely related to the EU institutional framework. The European University Institute operates in the intriguing twilight zone between EU and international cooperation, much like the Bologna Process. As a 1972 press release said: 'Like the Institute, European education can be either the product of intergovernmental cooperation or a function of the Community, the decision has yet to be made.' It seems that today, almost four decades later, the same still holds true.



## Acknowledgements

It is because of the support of several people both within and outside the European University Institute that this research has come about.

First and foremost, I would like to thank my supervisor Professor Bruno de Witte for his invaluable support and guidance. Also Professor Marise Cremona deserves a special mention in this regard.

Furthermore, I am particularly indebted to Professor Hildegard Schneider, who has been there for me ever since the beginning of my academic life.

I would also like to mention Professor Michael Dougan and Professor Grainne de Burca, whose inspiring ideas have helped shape my own. Special thanks go out to the editorial team of Kluwer Law International, for helping me turn the PhD thesis into this book.

Last but not least, I would like to thank my family and my friends for their unconditional support and confidence.

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## Chapter 1

# Introduction: A Surprising Evolution in European Higher Education

### 1. INTRODUCTION

A curious trend has emerged recently in the European educational landscape. European governments have embarked on an ambitious project to reform their higher-education systems so as to bring them in line with each other, in other words, to harmonize them with a view to creating a European Area of Higher Education. This revolutionary development is taking place under the name of the 'Bologna Process'. This process has been set in motion quite suddenly. It was initiated in 1998, when at an international Forum organized in connection with the celebration of the 800th anniversary of the Sorbonne University, the Ministers of education of France, Germany, Italy and the United Kingdom decided on a 'Joint Declaration on Harmonization of the Architecture of the European Higher Education System.' It was open for the other Member States of the European Union (EU) as well as for third countries to join. Belgium, Switzerland, Romania, Bulgaria and Denmark accepted and signed immediately. The Italian Minister for Education extended an invitation to fellow Ministers in other European countries to a follow-up conference, which was to take place in Bologna the following year.<sup>1</sup> This conference did indeed take place on June 1999, and it was on this occasion that no less than twenty-nine European countries agreed on a Declaration that would fundamentally influence the future of their higher-education systems.<sup>2</sup>

---

1. Hackl 2001, 21.

2. This is known as the 'Bologna Declaration'. Currently forty-six European countries take part in the process: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium (Flemish Community and French Community), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the

This expeditious course of proceedings might give the impression that there was a great motivation and determination to Europeanize higher education. But was higher education not a highly controversial area in which the European countries were reluctant to yield national sovereignty? Had the same countries that now so willingly engaged in this far-reaching process not 'for decades praised the blessings of diversity, that is of system differences, across Europe'?<sup>3</sup> Reading the actual text of the Bologna Declaration, one cannot but be struck by the ambitious language it employs. The Declaration commences with the statement that 'the European process, thanks to the extraordinary achievements of the last few years, has become an increasingly concrete and relevant reality for the Union and its citizens'. Even more importantly, the Declaration continues to say: 'we are witnessing a growing awareness in large parts of the political and academic world and in public opinion of the need to establish a more complete and far-reaching Europe, in particular building upon and strengthening its intellectual, cultural social and scientific and technological dimensions'.

It seems difficult to imagine that these phrases stem from the same countries that have been keen on keeping higher education safely in the hands of the nation-state and forcefully resisting any kind of harmonization. Furthermore, the meaning of these phrases becomes quite ambiguous upon realizing that the Bologna enterprise is taking place outside the framework of the EU. While in words praising the achievements of the EU in the process of European integration and explicitly referring to the 'Union and its citizens' and the aim of 'consolidating European citizenship', the Declaration is in fact nothing more than a soft law instrument which envisaged practically no involvement of the EU. Its intergovernmental character, in addition to its extended membership that currently enables twenty non-Member States to take part, places the Bologna Process outside the EU's formal policy-making process.<sup>4</sup> Hackl points out that the developments concerning the Bologna Process seem to contradict the 'traditional resistance of the EU Member States to any harmonization policy in education and to increased Community competences'.<sup>5</sup> It is true that the pro-European integration wording and tone of the Bologna Declaration are in that respect remarkable. However, the fact that the Member States decided to tackle higher education issues in an intergovernmental manner actually illustrates their resistance against EU involvement and their desire to remain fully sovereign.

The zealous way in which the Member States guard their national educational autonomy is, in a way, understandable.<sup>6</sup> Education is closely connected to cultural identity, and seen as a traditional function of the nation-state. This is probably the reason why it was excluded from the original Treaty of Rome. Yet (higher)

---

Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Serbia and Montenegro, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, 'the former Yugoslav Republic of Macedonia', Turkey, Ukraine and the United Kingdom. The European Commission is a voting member of the Follow-up Group.

3. Wächter 2004, 268.

4. Keeling 2006, 207.

5. Hackl 2004, 2.

6. Expression borrowed from Ryba 1992, 11.

education is an area where, in spite of the initial absence of explicit law-making competence, the EU has somehow managed to create law and policy. Both the European Commission and the European Court of Justice (ECJ) have played an important role in this development. It was in the landmark *Casagrande* case that the ECJ established that the Community could legitimately act in areas where it has not been expressly attributed with competence, if such is necessary for the achievement of Community aims.<sup>7</sup> Typically, *Casagrande* was an education case. Over the years, with its legislation on the mutual recognition of diplomas, the case law of the ECJ, and with its mobility programmes, in particular ERASMUS, the EU has established itself as an important player on the European educational field.<sup>8</sup> These developments have been criticized. According to Murphy, 'the fuzzy, blurred, and covert history of education policy in Europe does not contribute much to a sense of optimism regarding the strengthening of European democratic legitimacy, a key and indispensable component of any effective post-national form of citizenship'.<sup>9</sup> Leaving aside whether this criticism is entirely in place, the forgoing does create some understanding of the Member States' somewhat mistrustful attitude towards the EU when it comes to higher education.

It appears that with the Bologna Process the Member States have tried to avoid the growing influence on higher education by the EU. In this sense, the Bologna Process constitutes as much a *de-nationalization* (or Europeanization) of higher education, subjecting the national higher-education systems to European-level coordination, as a *re-nationalization*, by taking these matters of EU policy away from the European Organizations. It has been said that by deciding to proceed in this inter-governmental mode of European cooperation, the Bologna Declaration disowns the EU institutions of 'their role as drivers of European integration in higher education'.<sup>10</sup> This is certainly the case, although it is doubtful whether a driving role for the EU in this area was ever truly supported by the Member States. Traditionally, educational policy was perceived as 'an excellent subject for intergovernmental cooperation among the Member States in close connection with Community action, but could not be the subject of genuine Community action itself'.<sup>11</sup> Although the Maastricht Treaty included a legal basis for EU action in the educational field, it did so only reluctantly. The text of what is now Article 165 Treaty on the Functioning of the European Union (TFEU) – previously Article 149(1) EC – shows how limited the competence attributed:

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

7. Case 9/74, *Donato Casagrande v. Landeshauptstadt München* [1974] ECR 773.

8. See Corbett 2003.

9. Murphy 2003, 560.

10. Wächter 2004, 270.

11. De Witte 1989.



Apart from this principle of national educational autonomy, Article 165 holds another restriction of EU competence, in that it prescribes that in the incentive measures that can be taken, harmonization of the laws of the Member States is prohibited. Nevertheless, the second paragraph of Article 165 TFEU does acknowledge a role for the EU in educational matters. It specifically mentions the promotion of mobility and in that context the (academic) recognition of diplomas and periods of study. Furthermore, the internal market competences can include a very real education dimension, such as in the case of the mutual recognition of diplomas for professional purposes. As we shall come to see in the following chapters, the EU has in fact been very active in these fields, to the extent that we can now speak of European higher education law. That means that the Bologna Process deals with matters that have become EU business over the years. This potential overlap between the Process and EU policies might be problematic.

One can theorize several possible explanations why the Member States decided to avoid the EU in adopting and operating the Bologna Process. It can be thought of as a kind of retribution, to punish the EU institutions for their intrusive efforts to force upon the Member States the Europeanization of higher education, to the detriment of their national educational autonomy. This would, however, neglect the fact that also the Member States themselves have supported and legitimized this action of the European Institutions, and that they in principle seem to support the aims of student and teacher mobility and the role of education in the European knowledge economy. A less polarized explanation would be that the Member States just wanted to be on the safe side with the Bologna Process, not as a punishment but rather as a precaution, knowing that involving the EU and its institutional framework could lead to unwanted spill-over and could run out of their control. A third explanation, which builds on the findings of political scientists that Bologna was inspired mainly by the national interests of national political actors, is that the Member States wanted to outmanoeuvre domestic constraints while at the same time avoiding the more democratically legitimate procedures of the EU's institutional framework. It might go far to qualify the Sorbonne and Bologna Declarations as deals done in smoke-filled rooms, but the truth might not be far from there. It could very well be that all these explanations, and perhaps even others, play their part. But as we shall come to see in the following chapters, it can be said that regardless the reasons for adopting the Bologna Process in an inter-governmental non-EU fashion, the Member States have in avoiding the EU framework opted for harmonization by less transparent, accountable, legitimate and democratic means. The Bologna Process amounts to harmonization by stealth.

## 2. CORE ISSUES

In order to determine how EU higher education law interrelates with the Bologna Process, and vice versa, it is firstly important to map the particular areas of overlap, and to assess its consequences. It could be that the course of proceedings in the Bologna Process actually worsens the picture as painted by Murphy, cited above.