# Chapter 2
# The Position of Higher Education Institutions in EU Policy and Law

**Abstract** The aim of this chapter is to provide an overview of the position of HEIs in European policy (the EU and beyond) and to discuss potential spill-over from directly applicable EU law. It will be shown that the EU hard law framework contains limited competences in devising policies regarding HEIs. Instead, policy is often made through soft law at the EU and European (beyond EU) level. Nevertheless, other provisions of EU law, such as Union citizenship, the free movement provisions and competition law, can, and already have, spilled over into the HEI sector influencing national policy concepts. Ongoing commodification could increase this effect, thereby endangering the traditional non-economic mission of European HEIs.

**Keywords** EU higher education policy · EU research policy · Diploma recognition · Bologna Process · Lisbon Strategy/Europe 2020 Strategy · Union citizenship · EU free movement law and higher education institutions · Public procurement law and higher education institutions · Spill-over

## Contents





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## 2.1 Introduction

The aim of this chapter is to provide an overview of the position of higher education institutions (HEIs) in European policy (EU and beyond) and to discuss potential spill-over from directly applicable EU law.[1] It will be shown that the EU hard law framework contains limited competences in devising policies regarding HEIs. Instead, policy is often made through soft law at the EU and European (beyond EU) level. Nevertheless, other provisions of EU law have already spilled over into the area of HEIs influencing national policy concepts. Ongoing commodification could increase this effect, thereby endangering the traditional non-economic mission of European HEIs as explored in Chap. 1 (Sect. 1.3.1).

The chapter is divided into two parts. The first part (Sect. 2.2) explores how HEIs are positioned within EU policy and law and what reasons might be behind this. The second part (Sect. 2.3) is dedicated to the examination of potential 'accidental' effects EU law might have on HEIs in overview. The chapter ends in a conclusion (Sect. 2.4) bringing together the results and leading to the next chapter which provides a more in-depth appreciation of such effects of competition law on HEIs.

## 2.2 Locating HEIs in European Policy

As has been discussed in Chap. 1 (Sect. 1.3.1), the two main activities of HEIs are providing higher education and research. An exploration of the position of HEIs in EU law and policy thus requires an examination of the policy areas of education and research and development (R&D). It will be shown that 'hard' EU competences are limited in both areas. The need for a certain degree of coordination beyond the Member States, as already touched upon in Chap. 1 (Sects. 1.3.3 and 1.3.4), has instead led to policies outside of the supranational EU framework. In the following, EU competences in education (Sect. 2.2.1.1), as well as the special area of diploma recognition (Sect. 2.2.1.2), and R&D (Sect. 2.2.1.3) will first be discussed. This will be followed by an analysis of EU and beyond-EU soft law mechanisms.

[1] A condensed version of this chapter is contained in Gideon 2015.

### 2.2.1 Supranational EU Policy on Education and Research and Development

When the European Communities (European Coal and Steel Community, European Atomic Energy Community and European Economic Community (EEC)) were founded, the founding Treaties contained only a few isolated provisions on education and R&D.[2] This might have been the case because European integration started as an economic integration endeavour and the economic value of HEIs was not apparent at the time.[3] Applying a neo-functionalism analysis as conceived by Sandholtz and Stone Sweet, this might also be due to the fact that initially there were not sufficient 'transactors' desiring cross-border interaction.[4] With further development of the European Community, however, these areas became part of EU policy, potentially because the commodification of HEIs made their economic value more apparent, whilst simultaneously the EU expanded its mission and activities. This latter phenomenon can be equally explained both by neo-functionalism and social constructivism. Schmitter's version of (neo-)neo-functionalism[5] accounts for political spill-over through the shifting of expectations to the EU level and for cultivated spill-over through EU Institutions working towards integration in new areas. According to Sandholtz' and Stone Sweet's neo-functionalism, transactors, or 'agents' in social constructivist language, influence integration, if this seems desirable to them.[6] Nevertheless, Member States have been reluctant to give up their power in the area of HEIs. This is perhaps unsurprising considering the fact that HEIs are regarded, partly, as belonging to the welfare state (directly affecting national finances) and also as part of national culture and identity and as such educating future leaders and civil servants and stimulating national industry and development.[7] The competences of the EU thus remain limited.

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[2] For more on the limited EU dimension of these policy areas in the beginning of the European integration project see Chou and Gornitzka 2014.

[3] Similar Walkenhorst 2008, p. 571 seq.

[4] Sandholtz and Stone Sweet 2012.

[5] Schmitter 2004; Niemann and Schmitter 2009.

[6] On active entrepreneurship towards policy integration with regards to the HEI sector see Corbett 2003.

[7] See Teichler 2007, p. 105; Walkenhorst 2008, p. 567 with further references, Chou and Gornitzka 2014; Chou and Ulnicane 2015; Hadfield and Summerby-Murray 2015. On the purpose of HEIs see also Sect. 1.3.1 above.

#### 2.2.1.1 EU Education Policy

Article 128 EEC was most significant amongst the few provisions on education in the founding Treaties; it gave the Council the power to 'lay down general principles for implementing a common vocational training policy'.[8] The Treaty of Maastricht 1992[9] specified the provision on vocational training and renumbered the Article to Article 127 EC. Furthermore, general education, including higher education, became a policy area to be found in Article 126 EC. Yet, these provisions only provided supplementary competences and did not enable the Community to harmonise national education systems. The Treaty of Amsterdam 1997 merely renumbered the provisions to Articles 149–150 EC and neither the Treaty of Nice 2001 nor the draft European Constitution 2004 included any content changes. Since the Treaty of Lisbon 2007, education is to be found in Articles 165–166 TFEU and sport has been added to the title, but the competences remained unchanged. When it comes to the division of competence, the Union, therefore, still has very limited competences basically amounting to the possibility of adopting EU programmes in addition to national education policies such as the Erasmus programme.[10]

However, from the 1970s onwards the EU did begin to recognise the importance of education for the Council of Education Ministers started meeting in formal sessions, the European Parliament and Commission created education divisions, education received a budget and education policy could be reviewed by the Court of Justice of the European Union (CJEU). There have been successful EU programmes,[11] most significantly the Erasmus programme established in the late 1980s which aims to encourage the mobility of students and in the course of which the European Credit Transfer System (ECTS) was invented.[12] Therefore, despite its being limited to supporting and complementing national policies, there is an EU education policy at the supranational level which is driven by economic factors (to facilitate the internal market) and politically (to achieve European integration and identity).[13] It has been argued that, in line with the general trends discussed in Chap. 1 (Sect. 1.3.3), the former has recently been more pronounced than the latter.[14]

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[8] For more on Article 128 EEC and problems resulting from this limited competence in the field of vocational education, see Hummer 2005, p. 56 seq.

[9] Dates used here are those of the publication in the Official Journal.

[10] On EU competences for education see further Hummer 2005, p. 33 seq, 57 seq, 71; Teichler 2007, p. 105 seq; Van der Ploeg and Veugelers 2007, p. 19; Walkenhorst 2008, p. 568; Garben 2010, p. 189 seq.

[11] See further Teichler 2007, p. 111 seq.

[12] On EU education policy see Teichler 2007, p. 105 seq, 109 seq; Van der Ploeg and Veugelers 2007, p. 22, 24 seq; Walkenhorst 2008, p. 568 seq; Garben 2010, p. 187 seq; Chou and Gornitzka 2014, p. 9 seq; Hadfield and Summerby-Murray 2015.

[13] On motives and developments see Walkenhorst 2008, p. 571 seq; Chou and Gornitzka 2014; Hadfield and Summerby-Murray 2015.

[14] Chou and Gornitzka 2014; Hadfield and Summerby-Murray 2015.

#### 2.2.1.2 Diploma Recognition

Despite the limited competences for education at the EU level, functional spill-over from the free movement provisions occurred early on. To achieve free movement of persons in the internal market it was necessary to harmonise certain aspects of access to individual professions and therefore, inter alia, to harmonise professional recognition[15] of diplomas to guarantee access to regulated professions.[16] A regime of directives based on what is now Article 53 TFEU has been passed in this respect, which have later been consolidated into Directive 2005/36/EC.[17] Additionally, the Court has made it clear[18] that Member States should check the substantive comparability of qualifications received in another Member State in cases not covered by secondary law.[19]

It is generally assumed that academic diploma recognition cannot be harmonised on the basis of Article 53 TFEU since the internal market competences are regarded as having strict functionality and, therefore, not allowing abstract content or structural harmonisation, especially if the strict subsidiarity of Articles 165 and 166 TFEU is taken into account.[20] Academic recognition thus still takes place according to national law, potentially influenced by the Bologna Process, which will be discussed below (Sect. 2.2.3). The only other requirements arising from primary EU law concern cases where both academic and professional recognition are possible. Here, the migrant may not be forced to choose and if one form of recognition has been obtained, the other can still be sought at a later stage under certain circumstances. In particular, when academic recognition is requested for professional reasons in addition to professional recognition, it cannot be denied. Also, if academic recognition has been obtained, but does not in itself give access to the profession, professional recognition can be additionally demanded.[21]

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[15] Professional recognition allows the migrant the right to carry the title of the profession, but not the host state's academic title, Hummer 2005, p. 67.

[16] Regulated professions can, according to national law, only be executed after the fulfilment of certain qualifications, Hummer 2005, p. 61.

[17] Directive 2005/36/EC on the recognition of professional qualifications OJ [2005] L 255/22. There have been additional amendments since. A consolidated version of Directive 2005/36/EC can be found on http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:02005L0036-20140117.

[18] See C-340/89 *Vlassopoulou* (Judgment of 7 May 1991, EU:C:1991:193). This has recently been reaffirmed in C-298/14 *Brouillard* (Judgment of 6 October 2015, EU:C:2015:652) and C-342/14 *X-Steuerberatungsgesellschaft* (Judgment of 17 December 2015, EU:C:2015:827). Further on the latter two cases and the inconsistency with the Court's own procurement and employment decisions see Gideon 2016.

[19] On diploma recognition see further Hummer 2005, p. 60 seq; Van der Ploeg and Veugelers 2007, p. 22 seq; Garben 2010, p. 191. For a more extensive discussion see Schneider 1995.

[20] Hummer 2005, p. 58 seq. See also Garben 2010, p. 191 seq; Garben 2011, p. 186 seq who thinks that a different interpretation would be possible and a CJEU judgement would be needed for clarification.

[21] Hummer 2005, p. 67 seq.

#### 2.2.1.3 EU Research and Development Policy

Whilst the Founding Treaties contained no competences for R&D, a common R&D policy was starting to be adopted from the 1970s onwards. This was based on Article 235 EEC (now Article 352 TFEU) which gave the EEC the competence to 'take the appropriate measures' where action was deemed necessary to achieve the Community's objectives. This led to the adoption of the First Framework Programme[22] in 1983, which defined a budget and activities for a period of three years and focussed mainly on energy research. Efforts amplified from the late 1980s onwards, as R&D was considered increasingly important for the development and competitiveness of Europe.[23] With the Single European Act 1987 the policy area 'research and technological development' was incorporated into primary law as Articles 130f–130q EEC. These provisions officially foresaw the multi-annual Framework Programmes as a basis for more detailed initiatives. The competences given to the EEC were complementary in nature, intending to support actions of the Member States. However, unlike in education policy they did not stand under strict subsidiarity and an absolute prohibition of harmonisation. The policy aims were to increase collaborative research with businesses, support cooperation beyond the EU, the dissemination and transfer of knowledge, increase of competition and support of mobility in the Community. The Maastricht Treaty 1992 made 'research and technology' a Community objective (Article 3m EC), while the Treaty of Amsterdam 1997 only renumbered the provisions. Yet, the content was neither changed with that Treaty nor with Treaty of Nice 2001.[24]

The provisions on R&D have been located in Article 179–190 TFEU since the Treaty of Lisbon 2007 and they have been slightly strengthened. Under Article 4 TFEU research policy has become a shared competence and the Union can pass legislation in addition to Framework Programmes to attain the European Research Area following the ordinary legislative procedure (Article 182(5) TFEU). Paragraph 1 of Article 179 TFEU makes R&D a Union objective and explicitly mentions the establishment of the European Research Area in which 'researchers, scientific knowledge and technology circulate freely'. The latter is stressed again in para 2 which foresees that the Union shall aim at 'permitting researchers to cooperate freely across borders and at enabling undertakings to exploit the internal market potential to the full'. Furthermore, the title 'research and technological development' is complemented by the words 'and space' and a new Article 189 TEFU on a common space policy has been inserted.[25]

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[22] Framework Programme for Research 1984–87 COM(83) 260 final.

[23] Jones 2001, p. 325 seq. This corresponds with the changing nature of HEIs as described in Chap. 1.

[24] On the development of supranational R&D policy and its objectives see Jones 2001, p. 325 seq; Hummer 2005, p. 33 seq, 70 seq; Lenaerts and Van Nuffel 2005 p. 318 seq, Chou and Ulnicane 2015; Ulnicane 2015.

[25] This would have been similar under the Constitution. See Lenaerts and Van Nuffel 2005, p. 319.

The broadening of the competences has not led to significant regulatory initiatives or harmonisation of R&D policy. Indeed, Article 4(3) TFEU contains the caveat that the exercise of the shared competence 'shall not result in Member States being prevented from exercising theirs'. The Member States thus remain the main actors responsible for designing research policy which is not to say that EU policy has had no influence. Indeed many have researched the effects of EU research policy, despite it being still mainly distributive in nature.[26]

Since 2014 the Framework Programmes have been replaced by Horizon 2020[27] aligning EU research funding with the Innovation Union Flagship of the Europe 2020 Strategy (which will be discussed further below in Sect. 2.2.2), the European Institute of Innovation and Technology, the Competitiveness and Innovation Framework Programme and the building of the European Research Area.[28] Overall, as research has shown, European R&D policy has become increasingly influenced by economic thinking over the last decades,[29] more recently supplemented by ideals of excellence and societal impact.[30]

#### 2.2.1.4 Interim Conclusion on Supranational EU Policy

The value of education and research became more apparent towards the end of the 20th century with the shift from an industrial production-based society to a knowledge-based one.[31] Additionally, as discussed in Chap. 1, the nature of HEIs changed towards commodification and internationalisation. These developments made European coordination desirable. EU education and R&D policy began to develop, but the Member States seemed reluctant to provide the Union with extensive competences or indeed to utilise potential possibilities of existing competences. Garben, for example, argues conclusively that there might already be a basis in primary law for legislation on academic recognition of diplomas.[32] This might be explained with ongoing controversies in the public realm about

[26] For an in-depth analysis of the governance and functioning of EU research policy see Pilniok 2011; Chou and Gornitzka 2014; Chou and Ulnicane 2015; Ulnicane 2015; Young 2015.

[27] For more information see the European Commission's 'Horizon 2020—The EU Framework Programme for Research and Innovation' website on http://ec.europa.eu/research/horizon2020/index_en.cfm?pg=h2020.

[28] Young 2014, 2015; Chou and Ulnicane 2015.

[29] Young 2014, 2015; Chou and Ulnicane 2015.

[30] Young 2014, 2015; Ulnicane 2015. Young raises the question if the focus on excellence can lead to a two-speed Europe in R&D policy and whether increasingly competitive EU funding is truly efficient considering the significant investments into the preparation of applications with only small chances of success.

[31] Walkenhorst 2008, p. 574 seq.

[32] See Garben 2010, p. 189 seq; Garben 2011, p. 184 seq.

'competence creep', the legitimacy of the European Union project and the desire to keep these policy areas national and retain power. Nevertheless, further coordination appears to have been deemed necessary. Therefore, a significant part of European policies affecting HEIs started using soft law mechanisms to avoid the supranational policy mode.[33]

### *2.2.2 EU Soft Law: The Lisbon/Europe 2020 Strategy*

As it was deemed that Europe was in need of reform to keep up with its competitors, the European Council in Lisbon in 2000 announced that its strategic goal for the next ten years would be for the EU 'to become the most competitive and dynamic knowledge-based economy in the world'.[34] As regards HEIs it was considered necessary that these face internationalisation. The European Research Area was announced, the concept of which encourages many of the commodification trends discussed in Chap. 1,[35] and the aims of the Bologna Process (discussed below in Sect. 2.2.3) were endorsed as part of the Lisbon Strategy.[36]

The Lisbon Strategy itself is only a declaration and not legally binding. Instead the OMC has been chosen as the appropriate instrument for achieving the aims of the Lisbon Strategy which have been further specified in numerical targets. The aim of the OMC is to allow for the formation of a 'common will' and enhance social learning by providing a network for EU organs, national authorities and social partners as well as the private and the third sector.[37] The EU Institutions (mainly the Commission and European Council/Council) evaluate and steer the process.[38] This allowed the EU organs to get involved in policy areas which are/were the primary responsibility of the Member States. Inter alia the 'Commission now has an entry to Bologna coordination'[39] and it gave a new impetus to research

[33] See also Teichler 2007, p. 114; Walkenhorst 2008, p. 573 seq; Maassen and Musselin 2009; Garben 2010, p. 187 seq; Chou and Ulnicane 2015; Young 2015.

[34] Lisbon European Council 23 and 24 March 2000 Presidency Conclusion para 5.

[35] Presidency Conclusion (n 34) para 12 seq. The European Research Area is based on Commission Communication 'Towards a European Research Area' COM (2000) 6 final, 18.01.2000. See further on the European Research Area Ulnicane 2015.

[36] Presidency Conclusion (n 34) para 25 seq.

[37] On the OMC see Hummer 2005, p. 72 seq; Begg 2008; Cohen-Tanugi 2008, p. 23 seq, 47 seq. An in-depth account of the OMC can be found in, for example, Kröger 2009.

[38] European Commission (2014) European institutions and bodies. Europe2020, http://ec.europa.eu/europe2020/who-does-what/eu-institutions/index_en.htm. Accessed 4 March 2016.

[39] Chou and Ulnicane 2015, p. 8.

policy for which it is next to Horizon 2020 still an important governance mechanism.[40]

However, the progress towards the ambitious numerical targets has been slow[41] and the Lisbon Strategy was re-launched in 2005[42] and re-introduced after the financial crisis as the new Europe 2020 Strategy in 2010.[43] The most important numerical targets in higher education and research to be achieved by 2020 are: an increase in research spending to 3 % GDP, a decrease of school drop-out rates to less than 10 % and an increase to 40 % of all 30–34 year olds with tertiary education. None of these differ significantly from the original aims.[44] Young has described this as the Member States opting in as regards the targets, 'but opting out in practice by not meeting those'.[45]

### *2.2.3 The Bologna Process*

Following the initiative of the education ministers of Italy, France, Germany and the UK to reform European higher education systems expressed in the 'Sorbonne-Declaration',[46] the education ministers of 29 European countries[47] officially launched the Bologna Process with the 'Bologna Declaration' in 1999.[48] The Bologna Declaration is not legally binding and, with 48 countries involved at present, the Bologna Process goes far beyond the EU.[49] The overall aim of the

[40] Chou and Gornitzka 2014; Chou and Ulnicane 2015; Young 2015.

[41] See further with regards to the latest mid-term review Vanhercke 2014 who describes a 'continuous and sharp deterioration' as regards meeting the targets and attributes the limited successes in education and energy at least partly to the financial crisis since high unemployment incentivises people to return to education and the worsened economic situation required savings which could lead to the reduction in emissions.

[42] Brussels European Council 22 and 23 March 2005 Presidency Conclusions.

[43] Brussels European Council 17 June 2010 Conclusions (EUCO13/10 CO EUR 9 CONCL 2).

[44] For an overview of targets and current achievements see Eurostat (2016) Europe 2020 Indicators. http://ec.europa.eu/eurostat/web/europe-2020-indicators. Accessed 4 March 2016.

[45] Young 2015, p. 24.

[46] Sorbonne 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, 25 May 1998.

[47] The 15 EU Member States of the time, the countries which became Member States in 2004 and 2007 except Cyprus as well as Iceland, Norway and Switzerland. On the beginnings of the Bologna Process see Eurydice 2010, p. 9 seq.

[48] Joint declaration of the European Ministers of Education of 19 June 1999.

[49] For the latest up-dates of the Bologna Process see French Bologna Secretariat (2016) Bologna Process—European Higher Education Area http://www.ehea.info/article-details.aspx?ArticleId=5. Accessed 4 March 2016. For more detailed information and evaluations see European Commission/EACEA/Eurydice 2015.

Bologna Process was to establish an internationally competitive 'European Higher Education Area' (EHEA) by 2010 which was specified through long-term and intermediate targets in regular ministerial meetings. Additionally, a follow-up group tasked with facilitating the development of the process was set up. It contains, alongside representatives of the Bologna countries and the Commission (which joined as a member in 2001), representatives of the Council of Europe, the European University Association (EUA), the European Students Union and other organisations.[50] The main features include the achievement of a common three-cycle study structure (undergraduate, master and doctoral level), the standard issuing of diploma supplements, the implementation of a module system, the usage of the ECTS, the establishment of national qualification frameworks describing the qualifications available and the introduction of quality assurance.[51] At the 2009 Leuven conference it was agreed to proceed with the Bologna process until 2020, as it was generally regarded as successful by the participating countries.[52] Consequently, in 2010 the EHEA was officially launched at the meeting in Budapest-Vienna.[53] The last Bologna ministerial meeting was held in 2015 in Yerevan (Armenia) the commitments of which included a strong focus on mobility (including the promotion of portability of grants, professional recognition and staff mobility) and the next meeting is planned to take place in France in 2018.[54]

### *2.2.4 Interim Conclusion: The Location of HEIs in EU Policy*

While originally not featuring in primary law, policies on education and research have developed at the supranational level. The main (regulatory) competences, however, still lie with the Member States. Yet, it has already been shown that functional spill-over from the free movement provisions can interfere with this division of competences as it has led to the need for secondary legislation on the professional recognition of diplomas. Furthermore, coordination beyond what has been achieved within these policy areas seemed necessary, but the Member States opted for the OMC and the beyond-EU Bologna Process rather than extending primary law competences or using existing competences to their full potential. Only with

[50] On the history and set up of the Bologna process see Hummer 2005, p. 49 seq; Eurydice 2010, p. 9 seq.

[51] See Hummer 2005, p. 47 seq; Van der Ploeg and Veugelers 2007, p. 21 seq; Eurydice 2012, p. 7 seq.

[52] Communiqué of the Conference of European Ministers Responsible for Higher Education, Leuven and Louvain-la-Neuve, 28–29 April 2009 para 1, 24.

[53] Budapest-Vienna Declaration on the European Higher Education Area 12 March 2010 para 1.

[54] Yerevan Communiqué of the EHEA Ministerial Conference of 14–15 May 2015.

the Treaty of Lisbon has the competence base for R&D been slightly strengthened. However, that does not appear to have led to extensive legislation realising significant regulatory changes so far.

The Lisbon/Europe 2020 Strategy and the Bologna Process are soft law and thus not legally binding. Their alleged bottom-up nature and involvement of various stakeholders, their flexibility and the possibility of avoiding the supranational frame and thereby potentially losing control are considered as advantages.[55] However, there are also negative sides to the chosen modes of cooperation. The non-binding nature enables Member States to 'opt-out' when it comes to actually achieving the targets, as can be seen especially with regard to the Lisbon/Europe 2020 Strategy. On the other hand, research shows that soft law can nevertheless create perceived binding effects.[56] Indeed, many have described the Bologna Process and the Lisbon/Europe 2020 Strategy as developing a certain inevitability and, in addition, as intertwined and as reinforcing commodification.[57] In particular, the Bologna Process has led to significant changes in European higher education. It has done so despite being unpopular with stakeholders such as students and academics who, inter alia, criticise the, in their eyes, too inflexible three cycle structure and the focus on employability. It has also been felt that the process would lead to fierce competition among students, be too paternalistic and would not fit with every subject.[58] In the face of this, and considering the soft law nature as well as the fact that the Bologna Process only provides guidelines (e.g. the length of three years of undergraduate study is a minimum requirement not a fixed term), the question arises why the national reforms are implemented in this way. Garben has argued in this respect that the Bologna Process serves as 'an efficient smokescreen for governments to agree on unpopular reforms'[59] while advertising them as binding and thus putting implementation pressure on national parliaments. Furthermore, despite these approaches being advertised as bottom-up alternatives to hard law, only certain actors participate. In particular, since the European

[55] See Begg 2008, p. 430 seq (especially 433), Ştefan 2012 p. 8.

[56] Ştefan 2012 p. 15 seq. She also explores how under specific circumstances soft law can create legal effects, but this is of less concern to the areas explored here.

[57] E.g. Nóvoa 2002; Neave and Maassen 2007; Ravinet 2008; Croché 2009; Gornitzka 2010; Corbett 2012.

[58] See, for example, Banscherus et al. 2009, p. 11 seq with further references on criticism in Germany, Cardoso et al. 2008 on criticism regarding the degree structure, Hummer 2005, p. 78 seq on problems in Austria, Cippitani and Gatt 2009, p. 391 on legal and practical problems with a focus on Italy, Garben 2012, p. 20 seq with further references on student and teacher protests.

[59] Garben 2010, p. 206.

Parliament, the CJEU and the general public are not involved, this could be regarded as causing democratic concerns.[60]

These democratic concerns, the commodification trends apparent in the European policies which endanger the traditional non-economic mission of HEIs (as discussed in Chap. 1, Sect. 1.3.1) as well as the confusing jungle of EU law, EU soft law and international instruments which appear as mainly fragmented sectoral policies lacking a clear mission or horizontal approach (though somewhat less so for R&D)[61] make one wonder whether a coherent supranational policy would not be the better choice for HEIs in Europe.[62] However, the negative perceptions of the soft law measures and the EU in general might, as explained above in Chap. 1 (Sect. 1.3.4), make further integration into the EU hard law frame momentarily unlikely. At the same time, HEIs are not immune to the forces of other area of (directly applicable) EU law which can lead to spill-over.

## 2.3 Spill-over from Directly Applicable EU Law

Spill over from EU law on HEIs can arise from different provisions. Firstly, the Union Citizenship provisions (Sect. 2.3.1) in their broad application by the Court potentially open higher education systems to more students than was originally anticipated. This could have an increasing impact on the organization of national higher education systems.[63] Secondly, HEIs might, as a result of the commodification tendencies analysed in Chap. 1 (Sect. 1.3.3), more regularly fall under the free movement provisions (Sect. 2.3.2). Thirdly, HEIs could (in part) be regarded as undertakings and thus fall under the competition rules (Sect. 2.3.3). Finally, if research and education are to be regarded as economic services, the state might be required to commission these in public procurement procedures (Sect. 2.3.4).

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[60] See further Garben 2010, p. 205 seq; Garben 2011, p. 210 seq. See also Walkenhorst 2008, p. 579 seq, Maassen and Musselin 2009, p. 9 seq; Ştefan 2012 p. 8. Garben also explores the question of whether the Bologna Process could be seen as depriving the Union of its power and contradicting Article 4(3) TEU and Article 5 TEU and therefore it could be regarded as illegal for Member States to undertake action collectively instead of using the EU frame (Garben 2010, p. 198 seq; Garben 2011, p. 203). She concludes, though, that while the course taken was not exactly in the spirit of cooperation, it would probably not amount to a breach of EU law. Considering C-370/12 *Pringle* (Judgment of 27 November 2012, EU:C:2012:756) it also seems unlikely that the Court would follow such an argumentation, though the judgment was, of course, related to the specific circumstances of the case.

[61] Chou and Gornitzka 2014; Chou and Ulnicane 2015; Ulnicane 2015.

[62] As will be seen below in Chap. 6, such policy involving the European Parliament and consulting stakeholders and the general public could lead away from the tendency towards commodification and create exemptions from the more economic provisions of EU law.

[63] See Dougan 2009, p. 154 seq; Neergaard et al. 2009, p. 7. On the role of the Court in the sphere of citizenship see, Dougan 2012.

These provisions of EU economic law might then require further commodification creating additional constraints on the traditionally non-economic mission of European HEIs. In the following, a brief description of these areas of law will be undertaken.

## *2.3.1 Union Citizenship*

Traditionally, national public services were based on nationality and territoriality. These traditional settings changed through European integration. According to the free movement provisions, economically active citizens of other Member States have to be treated as nationals, which, inter alia, allows them to take part in their host state's education system and makes them eligible for benefits (further below in Sect. 2.3.2). With the introduction of Union Citizenship, free movement and the prohibition of discrimination were then extended to all Union Citizens.[64]

### 2.3.1.1 Union Citizenship and HEIs

According to Article 21 TFEU every Union Citizen has the right to reside wherever he or she wishes within the EU and Article 18 TFEU provides that a Union Citizen legally residing in the territory of another Member State has the right to equal treatment. However, this is subject to Directive 2004/38/EC,[65] which gives Member States the right to deny residency if the Union Citizen does not have sufficient resources and health insurance (Article 7(b) and (c)) and would thus become 'an unreasonable burden' on the host state. A line of CJEU case law broadened the latter somewhat in that the financial independence of the economically inactive EU migrant does not have to cover absolutely every circumstance, as a certain amount of solidarity from the host state can be expected and such limited reliance on the host state's finances does not give the host state the right to deny residency.[66] When it comes to equal treatment, the lawfully residing EU migrant

[64] See Dougan and Spaventar 2003, p. 699 seq; Dougan 2008, p. 723; Kohler and Görlitz 2008, p. 93 seq; Dougan 2009, p. 154 seq; Schrauwen 2009, p. 4 seq.

[65] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC OJ [2004] L 158/77.

[66] C-184/99 *Grzelczyk* (Judgment of 20 September 2001, EU:C:2001:458), C-413/99 *Baumbast* (Judgment of 17 September 2002, EU:C:2002:493).

(and his or her family members) can generally expect equal treatment, but this can be limited through secondary law (in particular Article 24 of Directive 2004/38).[67] Outside such limitations, unless there is a 'real link' to the host state's society,[68] Union Citizenship provides the right to equal treatment regarding access to social benefits without the security of residency rights.[69] Indeed, in *Dano* and *Alimanovic*[70] the Court allowed for Member States to combine the criteria for residency and access to social benefits (and to rely on general rules rather than individual assessment) to deny access to social benefits.[71]

In *Gravier*[72] the Court applied this general line that residency and equal treatment for EU migrants should be ensured without creating 'an unreasonable burden' on the host state in field of higher education. Here it developed the approach (now to be found in Article 24(2) Directive 2004/38) that no discrimination is allowed in any area connected to access to higher education (e.g. entry grades, fees), but the eligibility to additional support (e.g. maintenance grants) can be limited to permanent residents.[73]

A similar approach is taken towards the home state and the exportation of grants; generally no territoriality requirement can be imposed unless either the increased number of potential benefit recipients would provide an unreasonable

[67] In previous case law, it appeared that equal treatment can also be expected if the circumstances of the case warrant this (e.g. the reliance is only temporary) even if secondary measures normally exclude the reliance on benefits (C-184/99 *Grzelczyk,* C-140/12 *Brey* (Judgment of 19 September 2013, EU:C:2013:565)). However, more recent case law seems to move away from requiring to make individual assessments and instead allows Member States to set more general rules (in line with secondary EU law) on when such reliance is excluded (C-333/13 *Dano* (Judgment of 11 November 2014, EU:C:2014:2358), C-67/14 *Alimanovic* (Judgment of 15 September 2015, EU:C:2015:597)).

[68] C-85/96 *Martínez Sala* (Judgment of 12 May 1998, EU:C:1998:217), C-209/03 *Bidar* (Judgment of 15 March 2005, EU:C:2005:169). In C-158/07 *Förster* (Judgment of 18 November 2008, EU:C:2008:630) the Court up-held this line of reasoning. It did, however, allow a rather long residency requirement (five years) for the 'real link' to be established.

[69] C-456/02 *Trojani* (Judgment of 7 September 2004, EU:C:2004:488).

[70] C-333/13 *Dano*, C-67/14 *Alimanovic*.

[71] C-333/13 *Dano*, C-67/14 *Alimanovic*.

[72] 293/83 *Gravier* (Judgment of 13 February 1985, EU:C:1985:69), C-39/86 *Lair* (Judgment of 21 June 1988, EU:C:1988:322) para 16. These cases were decided before Union Citizenship had been established with the Treaty of Maastricht and the Court thus needed to go into some length to explain why students would fall under the Treaty provisions in the first place. They were, however, decided on the basis of what is now Article 18 TFEU. The latter has, with the Treaty of Lisbon, been incorporated into the citizenship provisions after it has been read together with what is now Article 21 TFEU for some time. Recently, this differentiation between access and maintenance has been discussed and reaffirmed in C-233/14 *Commission v Netherlands* (Judgment of 2 June 2016, EU:C:2016:396).

[73] See further Van der Mei 2005, p. 225 seq; Dougan 2005; Kohler and Görlitz 2008, p. 95 seq; De Groof 2009, p. 80, 92 seq.

burden or no 'real link' to the home state exists anymore.[74] The two approaches are regarded as cumulative and interactive in that the migrant's home state is supposed to support him or her until his or her ties to the host state are close enough to allow benefits to be granted there. The latter argument was posited as the way forward in the field of educational mobility.[75]

Overall, Member States have eagerly tried to retain control over more social policy areas. In health (Article 168 TFEU), education (Article 165 seq TFEU) and social security (Article 151 seq TFEU) the EU has only limited competences. In the field of education, the Member States avoided the supranational mode of harmonisation and during the negotiations for the Treaty of Lisbon[76] much emphasis was placed on the principle of conferral of competences and the principle of subsidiarity. The Court's (earlier) judgements on EU citizenship have thus been criticised for interfering with national welfare systems which are particularly sensitive areas closely related to national finances.[77] Additionally, the Court's case to case approach makes this area of law somewhat unpredictable. Even if one disagrees with this criticism and instead finds the Court's overall approach to be reasonable, appearing as it does, to strike a balance between upholding the free movement of citizens and the concerns of the Member States, the cases discussed in the following demonstrate that the citizenship provisions, under certain circumstances, can in fact lead to significant spill-over into national HEI policies.

#### 2.3.1.2 The Infringement Procedures Against Austria and Belgium

The infringement procedures against Austria and Belgium[78] concerned the 'open-access to education' policies which both countries had implemented to increase

[74] C-499/06 *Nerkowska* (Judgment of 22 May 2008, EU:C:2008:300) and, in the field of education, C-11-12/06 *Morgan and Bucher* (Judgment of 23 October 2007, EU:C:2007:626), C-523-585/11 *Prinz and Seeberger* (Judgment of 18 July 2013, EU:C:2013:524), C-220/12 *Thiele* (Judgment of 24 October 2013, EU:C:2013:683) and C-275/12 *Elrick* (Judgment of 24 October 2013, EU:C:2013:684) (all on restrictions to the exportation of maintenance grants in Germany) and, recently, C-359/13 *Martens* (Judgment of 26 February 2015, EU:C:2015:118). On the exportation of grants and the earlier case law see further Dougan 2005, p. 980 seq; Shuibhne 2008; Dougan 2008, p. 727 seq; Schrauwen 2009, p. 4 seq, 9 seq.

[75] For an in-depth discussion see van der Mei 2005. See also Dougan 2008, p. 737.

[76] In this regard it is even been suggested that the problems during the constitutional reform process might partly have been caused by a negative opinion towards Union Citizenship and what it brings with it (Dougan 2009, p. 164 seq).

[77] On this point see Dougan 2008, p. 729, 738; Dougan 2009, especially p. 161 seq, 181 seq; Schrauwen 2009, p. 10 seq.

[78] Cases C-147/03 *Commission v Austria* (Judgment of 7 July 2005, EU:C:2005:427) and C-65/03 *Commission v Belgium* (Judgment of 1 July 2004, EU:C:2004:402) respectively. There had already been an infringement procedure against Belgium for quota legislation in the 1980s (case 42/87, Judgment of 27 September 1988, EU:C:1988:454) which had been found to infringe the Treaty. See further Kohler and Görlitz 2008, p. 97.

the percentage of their population in tertiary education.[79] Residents only had to have a secondary school certificate to be admitted to an HEI. For students from other Member States, however, additional requirements were imposed; they had to qualify for the same course of study in their home state. Austria and Belgium deemed this necessary to avoid an influx of German and French students respectively who, given the much stricter requirements for university access in their home states, would come to the neighbouring states where they could gain access more easily and also study in their native language. It was feared that a large influx of students would create a burden on state finances and could ultimately threaten the open access policy. The Court, however, decided that these rules constituted indirect discrimination and therefore infringed Article 18 TFEU. It did not accept the justification due to a lack of evidence and as it deemed the discriminatory system disproportionate.[80] The judgments received fierce academic criticism because the Court was regarded as having overstepped its competences in an area of primary responsibility of the Member States. While the Court, in fact, just followed its long established case law that access to higher education requires equal treatment, whilst additional benefits do not, these cases, indeed, had a significant impact on the policy choice of the open education system which either had to be surrendered or opened up to a large influx of non-residents. It was generally considered that the Court should at least have been more lenient at the justification stage rather than demanding hard proof and applying a strict proportionality test.[81]

After the judgments, Austria and Belgium abolished the discriminatory measures which led to disproportionately high numbers of German and French students respectively in certain subjects, especially in the field of medicine.[82] As these were considered to be mostly 'free-riders', it was feared that this would also result in a threat to the health care system. Both countries thus introduced quota systems reserving 75 % (Austria) and 70 % (Belgium) of the places for residents.[83] The Commission then, again, initiated infringement procedures against Austria and Belgium, but suspended them in order for the countries to gather evidence that the quota system might be necessary.[84]

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[79] The fact that this is after all a goal of the Lisbon Strategy has, however, not been brought as a justification in the proceedings.

[80] For more on the cases see Damjanovic 2012, p. 157 seq; Reich 2009, p. 637; Kohler and Görlitz 2008, p. 95 seq; Garben 2008, para 6 seq, Rieder 2006.

[81] See Damjanovic 2012, p. 158 seq; Reich 2009, p. 637 seq.

[82] Up to 80 % of French students were, for example, enrolled in medical subjects in Belgium (Damjanovic 2012, p. 162 with further references).

[83] Damjanovic 2012, p. 163 with further references.

[84] It has been suggested that Austria's strong demand during the Lisbon Treaty negotiations to expressly declare public education as a non-economic service of general interest for which Article 2 Protocol 9 reassures the competence of the Member States might also have played a role in that respect (Damjanovic 2012, p. 163).

However, in line with both neo-functionalism and social constructivism, integration cannot necessarily be halted by such arrangements and in the meantime a preliminary reference from a Belgian court came before the CJEU.[85] Upon a claim for access by French students, the national court asked about the compatibility of the quota system with Article 18 TFEU and any potential justifications due to the threats to the national education and, potentially, health care system. In its questions, the national court also pointed to the fact that open access to education was equally an aim of Article 165 TFEU, which the Union shall support, as well as of Article 13(2) of the International Covenant on Economic, Social and Cultural Rights which contains a standstill obligation towards measures achieving that aim. The CJEU, confirming its earlier case law, decided that Articles 18 and 21 TFEU do prohibit such a quota system, but that 'the objective of protection of public health' could constitute a justification. It was left to the national court to determine the latter. A similar outcome had been suggested in the pre-ruling literature, since by doing this the Court could reach a political compromise by upholding its former case law and avoiding the more general questions of who pays for cross-border education and how an open access system can be upheld in net receiver states.[86] The issue, on a more general level, is thus unresolved and seems to remain a sore point, as can be seen by the Austrian attempt to reduce fares on public transport for permanent resident students only, something that has equally been found to infringe the citizenship provisions.[87]

#### 2.3.1.3 Interim Conclusion on Union Citizenship and HEIs

Union Citizenship generally only provides students with the right to reside in the territory of another Member State and to access higher education in that Member State. Additional benefits are generally excluded for EU migrant students unless a 'real link' to the host state can be established. Instead these benefits can be exported from the home state. Whilst this system does not seem to cause too many concerns generally, the cases of Belgium and Austria have shown that the citizenship provisions can have significant spill-over effects threatening the whole concept of an open access to education policy in certain circumstances. Here, further regulation seems required.[88]

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[85] Case C-73/08 *Bressol* (Judgment of 13 April 2010, EU:C:2010:181).

[86] See, Garben 2008, para 20 seq. Rieder 2006, p. 1725, by contrast, suggested that the quota system would infringe EU law.

[87] C-75/11 *Commission v Austria* (Judgment of 4 October 2012, EU:C:2012:605).

[88] Van der Mei 2005, p. 232 seq had suggested a justified quota system which, however, seems difficult as the Court only let the concerns about the health system count as a justification and not the threats to the education system itself. On the attempts to establish a reimbursement scheme between certain Member States see Damjanovic 2012, p. 162 seq with further references.

### 2.3.2 The Free Movement Provisions

The free movement provisions are the core of internal market law. They require that goods (Articles 34 TFEU seq), workers (Article 45 TFEU seq), self-employed persons and business (Article 49 TFEU seq), services (Article 56 TFEU seq) and capital (Article 63 TFEU seq) can move freely within the EU. They are therefore provisions of economic law, which on the surface do not have anything to do with HEIs.

Early on, however, the free movement of persons spilled over into the sphere of HEIs with regards to the professional recognition of diplomas as discussed above (Sect. 2.2.1.2). Furthermore, the free movement of economically active persons also requires that these are treated equally without the limitations applicable to mere citizens. Any limitations to receiving maintenance grants and other non-access-related support can thus not be applied to free moving economically active persons.[89] Economically active EU migrants can also extend rights to their family members including third country nationals. These can access education (Article 10 Regulation 492/2011/EU)[90] and, once in education, obtain an independent residency right which can be further extended to their family members.[91]

As regards the free movement of services or, if on a more permanent basis, establishment, the Court has initially not considered education (including higher education) to be a service in the meaning of Article 56 TFEU, since it is not 'normally provided for remuneration'.[92] Yet, if education is provided by institutions which are 'financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit', it would, according to

[89] C-39/86 *Lair*. This has been reaffirmed in C-46/12 *N* (Judgment of 21 February 2013, EU:C:2013:97). In C-542/09 *Commission v the Netherlands* (Judgment of 14 June 2012, EU:C:2012:346) and C-20/12 *Giersch* (Judgment of 20 June 2013, EU:C:2013:411) the Court also declared the denial of the portability of a grant to the child of a migrant and frontier worker respectively, if they did not fulfil a certain length of residence, as incompatible with Article 45 TFEU. However, the aim of increasing the percentage of residents with tertiary education has been considered as a valid justification ground in *Giersch*, though the Court did not find the residency requirement to be proportionate in this case. The latter is interesting, since increasing the percentage of residents with tertiary education is after all an aim of the Lisbon/Europe 2020 Strategy, but this had not been brought as a justification in the citizenship cases of Austria and Belgium mentioned above (Sect. 2.3.1.2). It now seems that it can potentially be a valid justification for a limitation of the free movement of economically active persons.

[90] Regulation 492/2011/EU on freedom of movement for workers within the Union OJ [2011] L 141/1.

[91] C-529/11 *Alarape* (Judgment of 8 May 2013, EU:C:2013:290), C-115/15 *NA* (Judgment of 30 June 2016, EU:C:2016:487).

[92] Cases 263/86 *Humbel* (Judgment of 27 September 1988, EU:C:1988:451) and, for higher education, C-109/92 *Wirth* (Judgment of 7 December 1993, EU:C:1993:916).

the Court, amount to a service in the meaning of Article 56 TFEU.[93] One would assume that a similar distinction would need to be made for research with basic, curiosity driven research in public institutions without a recipient paying remuneration not constituting a service, while essentially privately financed research does.[94] For education as well as for research, the distinction would probably have to be made on a case to case basis. During the last decades of on-going commodification at the national level, there have already been a number of cases where the Court declared educational activities by (higher) education institutions to be services in the meaning of the Treaty and applied Article 56 and 49 TFEU respectively. In the cases *Schwarz,*[95] *Jundt,*[96] and *Zanotti*[97] the freedom to provide services required tax changes in national policy,[98] in *Neri*[99] the freedom of establishment required a change in diploma recognition policy and in *Direxta*[100] the Court found an infringement of the free movement of services in requiring ten years of experience of private HEIs in order for its postgraduate students to be able to receive certain funding. While the infringement in *Direxta* was found to be justified,[101] these cases illustrate that, especially with increasing commodification, the free movement of services and establishment respectively can have unforeseen consequences for HEIs. Exclusion of or stricter regulation with regards to private providers, as often requested to safeguard quality and equality in higher education,[102] could, for example, constitute a restriction of these provisions. Furthermore, as the cases mentioned above illustrate, tax advantages could no longer be granted exclusively to national (public) providers.

Finally, a case in the area of the free movement of capital touched upon HEI policy. In an infringement procedure against Austria,[103] the Court declared the

[93] Case C-109/92 *Wirth* para 13 seq.

[94] A similar differentiation is made by the Commission in its 'Framework for State aid for research and development and innovation' OJ [2014] C 198/01 Sect. 2.1 (Research Framework) for the field of state aid law (see further Chap. 3 Sect. 3.2.4.2 below).

[95] C-76/05 *Schwarz* (Judgment of 11 September 2007, EU:C:2007:492).

[96] C-281/06 *Jundt* (Judgment of 18 December 2007, EU:C:2007:816).

[97] C-56/09 *Zanotti* (Judgment of 20 May 2010, EU:C:2010:288).

[98] In *Zanotti* the Court, however, allowed a maximum limit for reimbursement set at the level of the costs of the same education in a national public HEI.

[99] C-153/02 *Neri* (Judgment of 13 November 2003, EU:C:2003:614).

[100] C-523/12 *Direxta* (Judgment of 12 December 2013, EU:C:2013:831).

[101] C-523/12 *Direxta* para 25. The Court found a justification ground in the desire of the local authorities to ensure that 'the post-graduate education to which access for young, unemployed graduates is made easier through the award of a study grant is of a high standard, in order to facilitate the access of such students to the labour market' and also declared the measure as proportionate.

[102] See on concerns regarding private providers in higher education UCU 2011.

[103] C-10/10 *Commission v Austria* (Judgment of 16 June 2011, EU:C:2011:399).

policy of allowing only gifts to HEIs established in Austria to be deducted from income tax as an infringement of the free movement of capital. With HEIs becoming increasingly reliant on external sources including private donation, this decision could potentially also become consequential in the future.

### 2.3.3 The Competition Rules

Competition and state aid law aims to avoid anti-competitive collusion, unilateral conduct by dominant undertakings, mergers and state interference. However, entities only fall under these provisions, if they are 'undertakings'. The CJEU has defined an undertaking as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[104] An economic activity consists, according to the Court, of 'offering goods or services on the market'.[105] With ongoing commodification of HEIs, they might qualify as undertakings. How far this can be expected and what consequences this could have for them will be discussed in detail in Chap. 3.

### 2.3.4 Public Procurement Law

Though not directly applicable, as passed as a directive, the public procurement rules could equally affect HEIs and should thus be briefly discussed here.[106] Directive 2014/24/EU[107] lays down rules public authorities need to follow when purchasing goods, services and works. This could affect HEIs as buyers and providers of educational and research services.

As buyers they are bound if they have to be regarded as 'contracting authorities'. According to Article 2(1) of the Directive this is the case when they classify as state authorities per se which is of less relevance to HEIs[108] or if they need to be classified as a 'body governed by public law'. The latter question largely depends on the funding they receive, as, according to the Court in *University of Cambridge*,[109] over 50 % of public funding would be necessary for an HEI to be regarded as a body governed by public law. Funding will only be considered as

[104] C-41/90 *Höfner* (Judgment of 23 April 1991, EU:C:1991:161) para 21.

[105] 118/85 *Commission v Italy* (Judgment of 16 June 1987, EU:C:1987:283) para 7.

[106] For an extensive discussion see Gideon and Sanchez-Graells 2016.

[107] Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC OJ [2014] L 94/65.

[108] As regards central government authorities these are laid down in a closed list determined by the Member States in Annex I of the Directive which does not normally include HEIs.

[109] C-380/98 *University of Cambridge* (Judgment of 3 October 2000, EU:C:2000:529).

public in nature if it is provided 'without any specific consideration'. Thus contract research, for example, even if it is conducted for a public sector entity would not constitute public funding. With increasing income from fees and research contracts, HEIs might thus be able to free themselves from the public procurement rules, though this would have to be determined on a case by case basis. However, in a situation, where the public funding exceeds 50 %, yet HEIs are obliged to compete with private providers on a market, they might perceive the obligation to comply with the public procurement rules as a disadvantage.[110]

As providers HEIs could fall under the public procurement rules if the services they provide are classified as economic activities. As has been seen above (Sect. 2.3.3) this question is equally relevant for the application of the notion of undertaking in competition law and will thus be discussed in Chap. 3 (Sects. 3.2.1 and 3.2.4). Further the way through which HEIs receive public funding for teaching and research would need to be classified as a contractual relationship. Both would depend on the system a Member State adopts. Suffice to say here that this means that in cases where there indeed is an economic activity and a contractual relationship, HEIs could not necessarily be directly entrusted with a service anymore without going through a public procurement procedure.[111] For educational activities this would mean applying the Directive's light touch regime in Article 74 seq and for research applying the general regime of the Directive or the alternative arrangements under the Research Framework. In particular, this includes that in such situations it would be difficult to per se exclude foreign and/or private providers from public funding arrangements.[112] HEIs might also come in conflict with the procurement rules if they submit abnormally low tenders due to their public funding[113] or if HEI experts are involved in committees deciding about tenders and work for a participating HEI at the same time.[114]

There are exemptions for public-public and in-house cooperation in public procurement law (Article 12 Directive 2014/24/EU). Considering the recent case

[110] Gideon and Sanchez-Graells 2016 p. 7 seq. As analysed there, fees paid through a public student loan company directly to the HEIs thereby guaranteeing the receipt of the funds, as is the case in England, may qualify as public funding.

[111] See also C-159/11 *Ordine degli Ingegneri della Provincia di Lecce* (Judgment of 19 December 2012, EU:C:2012:817).

[112] Gideon and Sanchez-Graells 2016, p. 22 seq. In the case of England, for example, according to the analysis conducted there, it might mean that funding for educational activities from the Higher Education Funding Council should comply with the light touch regime of Directive 2014/24/EU or at least with the general principles of transparency and non-discrimination.

[113] See, on a public hospital, 568/13 *Data Medical Service* (Judgment of 18 December 2014, EU:C:2014:2466).

[114] C 538/13 *eVigilo* (Judgment of 12 March 2015, EU:C:2015:166).

*Datenlotsen*,[115] it seems unlikely, though, that HEIs could benefit from this as providers.[116] However, these exemptions might be beneficial if universities are buyers attempting to commission services from their own spin-offs. This could lead to increased use of these for commercialisation activities.[117]

## 2.4 Conclusion

This chapter has illuminated the rather complicated situation of HEIs in EU policy and law. Whilst HEIs did not originally play a role in EU policy and law, ongoing commodification and internationalisation seem to have required a certain amount of coordination. Nevertheless, the policy areas appear to be too treasured by Member States to provide the EU with far reaching competences. Rather than utilising the supranational framework, Member States have thus opted for EU and extra-EU soft law mechanisms. It has been suggested that these cause democratic concerns, as they are agreed upon by national governments without involvement of the European Parliament and without review by the Court. Furthermore, despite their soft law character, many have pointed to implementation pressures on national legislators, the intertwining of the two mechanisms and the emanating tendency towards commodification. It has thus been suggested that especially the Bologna 'rules' serve to justify unpopular, national policy choices.

Additionally, HEIs are not immune to other areas of EU law. Spill-over can result from the citizenship, free movement, competition and public procurement law provisions. That this can have severe effects on national policy choices has been shown by the cases of Austria and Belgium. Whilst the Court has suffered a great deal of criticism for ruling on matters affecting HEIs due to spill-over from directly applicable EU law, Member States remain reluctant to establish a coherent supranational strategy. Therefore the law in this area is made on a case to case basis without a coherent strategy, which creates fragmentation and can lead to legal uncertainty.[118] As regards the economic provisions of EU law, the likeliness that HEIs will fall into their ambit increases with ongoing commodification which, in turn, might require even further commodification potentially endangering the traditional non-economic mission of European HEIs as discussed in the Chap. 1. In the remainder of the book this will be studied more specifically on the example

[115] C-15/13 *Datenlotsen* (Judgment of 8 May 2014, EU:C:2014:303).

[116] However, the approach adopted by the Court does not seem to take into account the specific characteristics of HEIs. A more sensible approach has been advocated by AG Mengozzi in this case (Opinion of the AG para 73). If the latter were to be adopted in the future HEIs in some systems might be more likely to benefit from the in-house exemption. See further Gideon and Sanchez-Graells 2016 p. 48 seq.

[117] Gideon and Sanchez-Graells 2016, p. 47 seq.

[118] Similar Schrauwen 2009, p. 10 seq.

of EU competition law, a thus-far less explored area. The next chapter will begin this study with an in-depth legal doctrinal assessment of potential competition law constraints on HEIs.

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