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The Bologna Process
From a European Law Perspective

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**EUROPEAN UNIVERSITY INSTITUTE
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Abstract

The Bologna Process, an intergovernmental process of voluntary policy convergence towards a common higher education structure, poses several concerns from a European law perspective. The Bologna Process takes place outside the institutional framework of the EU, while there would have been legal competence to enact the content of the Bologna Declaration as a Community measure. Hence it could be argued that it was illegal for the Member States to avoid the institutional framework of the EC with its built-in checks and balances. They have obstructed the Community in the attainment of its tasks, which is contrary to Article 10 EC. Moreover, there exist several other objections against the Bologna Process, particularly in terms of democracy, transparency and efficiency. The Bologna Process resembles a deal done in a smoke-filled room, and its voluntary character combined with a lack of coordination prevents its effective implementation.

Keywords

Higher Education - Bologna Process - Community Competence - Harmonization - Parallel Agreement

The Bologna Process.
From a European Law Perspective

Sacha Garben*

Introduction

1. A curious thing 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, with a view to create a European Area of Higher Education. This revolutionary development is coming about under the name of the ‘Bologna Process’, a process that 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 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 European Ministers to a follow-up conference, which was to take place in Bologna the following year.¹ This conference indeed took place, in June 1999, and it was on this occasion that 29 European countries agreed on a declaration that would fundamentally change the future of their higher education systems. From this Bologna Declaration ensued the Bologna Process, which currently involves no less than 46 European countries, making it a true pan-European undertaking.²

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¹ E. Hackl, Towards a European Area of Higher Education: Change and Convergence in European Higher Education, *EUI Working Paper*, RSC No. 2001/09, 2001, p. 21.

² Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Serbia, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

2. This expeditious course of proceedings might give one 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, i.e. of system differences, across Europe”?³ 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*”, and continues that

“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 is difficult to imagine that these phrases stem from the same countries that have been keen on keeping higher education safely within the hands of the nation-state. 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. Hackl points out that the developments concerning the Bologna process seem to contradict the “traditional resistance of the EU Member States to any harmonisation policy in education and to increased Community competences”.⁴ 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 might actually illustrate their resistance against EU involvement and their desire to remain fully sovereign.

3. It is interesting to see this resistance in the light of the fact that educational matters such as student/teacher mobility and diploma recognition have been the subject of EC legislation, case law and policy ever since the beginning of the EEC. Not only have workers and their family members been equipped with educational rights, the European Court of Justice (ECJ) has also developed a fully-fledged right to study in another Member State than one’s own, under equal conditions of access and arguably even maintenance. Furthermore, the ERASMUS programme has allowed over 1.5 million students to enjoy a period of temporary study in a foreign Member State.⁵ Some would argue that this makes the opposition of the Member States against EU involvement in educational matters behindhand and obsolete. Conversely, others might defend the exclusion of the EU in the Bologna Process as a legitimate response to the alleged educational competence creep. This exclusion could qualify as a ‘re-

³ B. Wächter, The Bologna Process: developments and prospects, *European Journal of Education*, Vol. 39, No. 3, 2004, p. 268.

⁴ E. Hackl, *op cit*, p. 2.

⁵ See European Commission Website, at http://ec.europa.eu/education/news/erasmus20_en.html.

nationalization' of education, allowing the Member States to fend off further meddling of the EU in their educational affairs. Regardless the merits of these arguments, it should be noted that pursuing action on two different planes is problematic. The content of the Bologna Declaration substantially overlaps with well-established Community policy fields. Without proper coordination this results in overlaps and double standards. Potential divergence and inconsistency threaten the credibility and the success of both the Bologna Process and the EU's educational policy.

4. This makes the relationship between the EC and the Bologna Process a strained one, interesting for political as well as legal study. Therefore it is remarkable that relatively few commentators have taken up the Bologna Process as a subject of legal enquiry.⁶ The academic literature in other disciplines, such as political science and higher education studies, does devote an overwhelming amount of attention to the developments surrounding the Bologna Process,⁷ but seems to ignore the many pressing legal issues. This might stem from the commonly shared assumption that the Bologna Process could not have been adopted as a Community measure, due to a lack of competence. This paper is primarily aimed at investigating this taken-for-granted lack of competence. As we shall come to see, the competence of the EC in the area of education is indeed limited, but broader than generally assumed. Secondly, besides the question of competence, there are many constitutional concerns about the way the Bologna Process has come into being and is currently operated. To a certain extent, these concerns root in fundamental questions of Europe and European law, such as the hard-soft law dichotomy and the current identity/popularity crisis of the EU. This is interesting because it allows one who researches the Bologna Process to touch upon broader issues as well. In this sense, the Bologna Process becomes a case study to illustrate important developments in the realm of EC law.

Community Competence in Higher Education

5. Would there have been legal competence to adopt the content of the Bologna Declaration as a Community measure? In trying to answer this question, Article 149 EC (ex Article 128 of the EC Treaty), which sets out the formal powers of the Community in educational matters, constitutes the obvious starting point.⁸ Although the provision

⁶ An important exception is M. Verbruggen, who has written a rich and extensive critical legal analysis of the Bologna Process. See M. Verbruggen, *De Bolognaverklaring kritisch getoetst aan het Europees onderwijsbeleid*, *SEW*, 2003, pp. 199-212.

⁷ A selection: A. Rauhvargers, *Improving the Recognition of Qualifications in the Framework of the Bologna Process*, *European Journal of Education*, Vol. 39, No. 3, pp. 331-347; C. Tauch, *Almost Half-time in the Bologna Process- Where Do We Stand?* *European Journal of Education*, Vol. 39, No. 3, 2004, pp. 275-288; V. Tomusk, *Three Bolognas and a Pizza Pie: notes on institutionalization of the European higher education system*, *International Studies in Sociology of Education*, Vol. 14, No. 1, 2001, pp. 75-95; B. Wächter, *The Bologna Process: developments and prospects*, *European Journal of Education*, Vol. 39, No. 3, 2004, pp. 265-273.

⁸ Article 149 EC provides: "1. 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 the

contains the promising statement that one of the aims of Community action is “*encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study*”, the general impression is that Community powers are severely restricted in this field. The first paragraph defines the role of the Community as supportive and supplementary to Member State action, basically restricted to encouraging cooperation between Member States. It stresses that the Member States remain responsible for the organization of their education systems. Moreover, paragraph four stipulates that the Community may only adopt so-called “*incentive measures*”, excluding any harmonization of the laws and regulations of the Member States. The *ratio legis* of Article 149 EC is quite clear, and the prohibition of harmonization seems to put all discussion on legislative competence instantly to an end. However, such a conclusion would be premature. First, it should be assessed whether the Bologna Process actually entails harmonization. Secondly, the Treaty also provides other potential legal bases for Community action in the field of education. Is there such an alternative legal basis that could have supported Bologna as a Community measure? Does Article 149(4) EC stand in the way of the use of another Treaty provision to adopt a harmonising measure in the field of higher education?

6. The question whether the Bologna Process constitutes or amounts to a harmonization of the laws and regulations of the Member States obviously depends on one’s definition of the term harmonization. In the context European law, harmonization is generally taken to mean the approximation of national laws in order to create one European standard, by means of legislation.⁹ The strongest argument to support the view that the Bologna Process implies such harmonization is that Bologna standardizes the structure of the higher education systems of the participating states by constructing a

content of teaching and the organization of education systems and their cultural and linguistic diversity. 2. 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 encouraging 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, - encouraging the development of youth exchanges and of exchanges of socioeducational instructors, - encouraging the development of distance education. 3. 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. 4. In order to contribute to the achievement of the objectives referred to in this Article, the Council: - acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States, - acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.”

⁹ With the exception of one provision regarding indirect taxes in the EEC Treaty (Article 99 EEC) the term harmonization was introduced in European law by the Single Act, most notably in what was then Article 100a EEC (now Article 95 EC). The wording of this provision indicates that harmonization refers to Community law measures for the approximation of the provisions laid down by law, regulation of administrative action in Member States, which have as their object the establishment or functioning of the internal market. See W. Van Gerven, *Harmonization of Private Law*, in: A. McDonnell (ed.), *A Review of Forty Years of Community Law*, The Hague: Kluwer Law International, 2005, pp. 227-254. The concept of harmonization has been broadly interpreted by the ECJ, e.g. also the creation of a coordinating agency can constitute harmonization in the sense of Article 95 EC.

system of undergraduate studies followed by graduate studies, and comparable degrees. The Declaration states that

“access to the second cycle shall require successful completion of first cycle studies, lasting a minimum of three years. The degree awarded after the first cycle shall also be relevant to the European labour market as an appropriate level of qualification. The second cycle should lead to the master and/or doctorate degree as in many European countries.”

The introduction of the 2-cycle Bachelor-Master system clearly constitutes a uniform standard. Furthermore, the Sorbonne Declaration, which is seen as the basis for the Bologna Declaration and Process, carries the term ‘harmonization’ in its very title. However, in contrast with the Sorbonne Declaration, the Bologna Declaration carefully avoids the use of the word. In fact, the question whether the envisaged Bologna project constituted ‘harmonization’ is reported to have been a highly contentious issue that had to be resolved before the Declaration could be signed.¹⁰ There had already been discussion about the use of the term in the run-up to the conference. Most of the participating countries deemed the type of standardisation entailed by harmonization to be undesirable in the field of higher education. Although the French minister Claude Allègre tried to convince his colleagues that ‘harmonization’ as used in the text of the Declaration was not to mean ‘standardization’ in its unwanted sense, the majority of participants preferred to stay on the safe side and leave out the term. Hence, it appears that the participants have agreed that the Bologna Process does not constitute harmonization. Moreover, the Process does not entail substantive harmonization, seeing that the content of each course is still determined by the individual countries and their universities. The Bologna Declaration aims for structural comparability but content diversity.¹¹ The Process resembles a voluntary cooperation project towards policy convergence, unfit for the label ‘harmonization’. However, the relevant question to answer is whether the Bologna Declaration *if adopted as a binding Community measure* would qualify as harmonization. Indeed, the imposition by a Community legislative measure of the Bachelor-Master system as the uniform standard meets the definition, even if the content of the courses and the duration of the cycles are left to the Member States. Hence, a directive or regulation with the content of the Bologna Declaration could not have been based on Article 149 EC.

7. Nonetheless, the Treaty provides for other provisions attributive of competence in higher education. Because of the fact that the Community is endowed with a number of functional powers, such as the creation of the common market and therein the free movement of persons, many policy fields that were initially not intended to be ‘Community business’ can be and have been affected in the slipstream of the

¹⁰ T. Kirkwood-Tucker, *Toward a European Model of Higher Education Processes, Problems, and Promises*, *European Education*, Vol. 36, No. 3, 2004.

¹¹ M. Vogel, *Diversity and comparability—towards a common European Higher Education Area*, *Anal Bioanal Chem*, 2007, pp.131–133. The Bologna Declaration claims to take full respect of “*the diversity of cultures, languages, national education systems and of University autonomy*”. It states that to that end, “*the ways of intergovernmental co-operation*” will be pursued, “*together with those of non governmental European organisations with competence on higher education*”. See Annex 2.

implementation of these functional powers.¹² Higher education constitutes such a policy field. Considering the close ties between higher education and the labour market, it is not surprising that internal market legislation can indeed also deal with educational matters. Especially the free movement of persons, which is one of the fundamental pillars underpinning the internal market, is interrelated with educational matters. In the recent *Schwarz* case, the ECJ held that privately funded education constituted a service within the meaning of the Treaty, and that restrictions on cross-border movement to receive these services would have to be justified.¹³ Furthermore, the objective to abolish obstacles to the free movement of persons and services includes the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than the one where a European citizen has obtained his professional qualifications.¹⁴ Articles 40, 47 and 55 EC (ex Articles 49, 57 and 66 of the EC Treaty) grant the Community competence to adopt measures to bring about the free movement of workers, make it easier for persons to take up and pursue activities as self-employed persons, and to facilitate the provision of services. It is common ground that the mutual recognition of diplomas as a part of the free movement of persons is a well-established policy field of the Community. After all, diploma requirements “can as much constitute obstacles to the completion of the internal market as e.g. the use of different safety standards for technical goods”.¹⁵ Ever since the Treaty of Rome, the Community has been competent to enact legislation in this area, including harmonizing measures, even dealing with the content of certain studies. The medical profession, for example, has been almost completely harmonized by Community legislation. As the Bologna Process aims to enhance the readability and compatibility of degrees to facilitate mutual recognition thereof, one could argue that the Bologna Declaration could have been adopted in the form of a Community measure making use of (one of) these legal bases.

8. The standard counterargument is that Community competence under Article 47 EC is limited to the *professional* recognition of diplomas.¹⁶ *Academic* recognition, on the other hand, allegedly lies outside the realm of the EC’s legislative powers, as this is where Article 149(4) EC applies.¹⁷ This situation leads to the curious result that

¹² B. De Witte, The Scope of Community Powers in the field of Education and Culture in the light of Subsequent Practice, in: R. Bieber & G. Ress (eds.), *The Dynamics of EC-law*, Baden-Baden: Nomos Verlagsgesellschaft, 1987, p. 236.

¹³ Case C-76/05, *Schwarz v. Finanzamt Bergisch Gladbach*, judgment of 11 September 2007, not yet reported.

¹⁴ See paragraph 1 of the Preamble of *Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications*, OJ 2005 L255/22.

¹⁵ H. Schneider & S. Claessens, The Recognition of Diplomas and the free Movement of Professionals in the European Union, in: H. Schneider (ed.), *Migration, Integration and Citizenship, A Challenge for Europe’s Future*, Vol. I, Maastricht: Forum Maastricht, 2005, p. 123.

¹⁶ Professional recognition deals with the rules of Member States that make access to or pursuit of a regulated profession in their territory contingent on possession of specific professional qualifications. At the European level, legislation may be adopted to oblige Member States to recognize professional qualifications obtained in one or more other Member States, which allows the holder of the qualifications to pursue the same profession there.

¹⁷ Academic recognition is concerned with the academic status of obtained degrees. An example of academic recognition would be if a graduate is granted a degree in another country on the basis of his/her studies in his/her home country, or if a student is admitted to further studies in another country

Member States have attributed the EC with full competence to legislate in the sensitive area of education/diploma recognition for the regulated and liberal professions, such as medicine, law and architecture, which are the professions where public interest plays an important role and hence legal standards are deemed necessary, whereas the Community is not competent to deal with the much less politically sensitive matter of academic recognition of all other higher education. It could be argued that the doctrinal distinction made between academic and professional recognition is artificial and should be abolished, which would allow for a fully-fledged Community competence in diploma recognition. This is supported by the fact that the text of Article 47 EC does not explicitly exclude the academic recognition of diplomas. Its first paragraph stipulates that:

“In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.”

Indeed, Davies argues that the assumption that the EU’s jurisdiction over qualifications is confined to the “professional” is mistaken, and that Article 47 of the Treaty:

“enables broader legislation covering the mutual recognition of diplomas, certificates and other evidence of formal qualifications. It extends the recognition of qualifications beyond the professional and into the ‘purely’ academic. In doing so, it does more than merely impinge on the Bologna Process, it actually offers an instrument for instituting its overarching qualifications framework.”¹⁸

Although far from unconvincing, this argument does seem to run counter the prevalent understanding of Article 47 EC. That latter, more restrictive interpretation is not without foundation, as the Treaty does place academic recognition explicitly, and probably not coincidentally, within the limited ambit of Article 149 EC. Thereby, academic recognition appears to have been implicitly carved out of the material scope of Article 47 EC, where it operates under the direct application of the prohibition of harmonization instead. Without a ruling of the ECJ to ‘re-interpret’ the scope of Article 47 EC (and interaction with Article 147 EC) in terms of academic recognition of diplomas, it seems that the restrictive interpretation of Article 47 EC applies. Even so, there might be other Treaty provisions to offer legislative competence, potentially in conjunction with Articles 40 and 55 EC.

9. As O’Leary points out, in addition to the specific legal provisions on free movement, the Community may also revert to a number of general legislative provisions designed to permit legislation that facilitates the achievement of the internal market.¹⁹ Article 95 EC (ex Article 100a of the EC Treaty), which is the most commonly used general internal market competence, is not applicable in the field of

without having to sit remedial or additional examinations. See: http://ec.europa.eu/education/programmes/socrates/agenar_en.html.

¹⁸ H. Davies, Higher Education in the Internal Market, *UACES European Studies Online Essays*, available at www.Uaces.org, p. 8.

¹⁹ S. O’Leary, *The Evolving Concept of Community Citizenship*, London: Kluwer Law International, 1996, p. 152. Note that the specific legal bases take priority, so it is only in absence of those that one may revert to the general legal bases of Article 94, 95 and 308 EC.

persons.²⁰ Its less powerful twin provision, Article 94 EC (ex Article 100 of the EC Treaty), does apply.²¹ This provision grants competence to the EC to approximate the laws of the Member States in the context of the functioning of the internal market by means of directives. The fact that the provision requires unanimity in the Council explains and counterbalances its rather flexible wording. Relying on Article 94 EC, one would have to argue that the Bologna Declaration directly affects the functioning of the internal market. It does not seem impossible to argue that establishing a uniform structure of higher education requiring a two-tier system, guaranteeing an improved mutual recognition of degrees, directly affects and benefits the functioning of the internal market. After all, such would substantially facilitate the free movement of persons. Disparities in the higher education systems leading to a hampered recognition of degrees or credits due to incompatibilities and obscurities constitute an important obstacle to free movement, not only for students but also for the labour force in general. The existence of structural disparities between the education systems of the Member States hampers seeking access to a foreign labour market. Not only is it more difficult to temporarily study in the foreign country where one would like to ameliorate employment opportunities, seeing that differences in term, credit and degree structures will obstruct a smooth exchange, but the differences between the Member States will also deter employers from hiring a person with whose study programme and credentials he cannot identify. The ECJ has gone a long way in providing students with the right to study in other Member States. The case could be made that students need to be facilitated in making use of this right, and that when they become workers they need to be able to reap the rewards of their (domestic and/or foreign) study in the entire territory of the EU, which is something that a Bologna Directive would help them to do.

10. The foregoing shows that with enough political will, it would not have been impossible to find an appropriate legal basis to adopt a Bologna-like measure. But does Article 149(4) EC not prevent any legislative measure, no matter what legal base, that entails the harmonization of national laws in higher education? Hablitzl has argued for such a far-reaching interpretation, maintaining that the creation of a specific and narrowly formulated competence in the field of education, in the form of Article 149 EC, has prevented any further action in the field of education on the basis of the internal market competences.²² In his view, the ‘Harmonisierungsverbot’ of Article 149(4) EC is of general application, thereby prohibiting any harmonization on any legal basis, including the internal market competences, in the field of education. This might remind one of a similar argument, raised by the German government in the *Tobacco Advertisement* case²³ in the context of public health. In this case, Germany challenged a directive that imposed a general ban on the advertising or sponsorship of tobacco

²⁰ Article 95(2) EC declares this provision not to be applicable in the field of the free movement of persons.

²¹ It states: “*The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.*”

²² H. Hablitzel, Harmonisierungsverbot und Subsidiaritätsprinzip im europäischen Bildungsrecht, *Die Öffentliche Verwaltung*, Vol. 10, 2002, pp. 407-414.

²³ Case C-376/98, *Germany v. European Parliament and Council*, [2000] ECR I-8419.

products in the EU, maintaining that it had been adopted *ultra vires*. As the Community did not have a general power to legislate in the area of public health, the measure had been adopted on the basis of Articles 100a, 57 and 66 of the EC Treaty (now Articles 95, 47(2) and 55 EC). The relevant provision dealing with public health, Article 152 EC (ex Article 129 of the EC Treaty), has a structure very similar to Article 149 EC. In particular, Article 152(4)(c) also expressly excludes harmonization of national law. The German government argued that this ‘Harmonisierungsverbot’ lead to the invalidity of the directive. It is relevant to quote Advocate General Fennelly, who disagreed with the German government:²⁴

“Although it is not contested that the Directive could not have been adopted on the basis of Article 129(4), it would be surprising (and inimical to legal certainty) if the authors of the Treaty on European Union had, when providing new Treaty powers in respect of public health, so severely restricted existing competence in a different field simply because it sometimes has a bearing on health. Articles 100A and 129 are not, in any respect, inconsistent. As we have seen, Articles 100A(3) and 129(1), third indent, combine to show that Article 100A may be used to adopt measures which aim at the better protection of health. The limitation expressed in Article 129(4) is not in conflict with these provisions. It affects, in its own terms, only the ‘incentive measures for which it provides.’”²⁵

11. In essence, the Court agreed with the view expressed by the Advocate General. It stated that the prohibition of harmonization as laid down in Article 129(4) EC (now Article 152(4)(c) EC) did not mean that harmonizing measures adopted on the basis of other provisions of the Treaty were prohibited to have any impact on the protection of human health. Although other articles of the Treaty were not to be used as a legal basis in order to circumvent the express exclusion of harmonization laid down in Article 129(4) of the EC Treaty, this was not to mean that the Community legislature was prevented from relying on the legal basis of Articles 100a, 57(2) and 66 of the EC Treaty on the ground that public health protection was a decisive factor in the choices to be made. Although the Court ultimately annulled the Directive, as the internal market rationale could not justify a general ban on advertisement, this was not because Article 129(4) of the EC Treaty prohibited all harmonization *per se*. Applying the same reasoning here, Article 149(4) EC does not prevent the adoption of a harmonizing measure affecting the field of higher education, if fulfilling the conditions of e.g. Article 40, 55 and/or 94 EC. Although Article 94 EC does not contain a reference to education similar to the reference to public health in Article 95 EC, the logic applies just the same.²⁶ It is unlikely that the authors of the EU Treaty have, when providing Treaty powers in the field of education, so severely restricted existing competence in a different field, namely the internal market, simply because it sometimes has a bearing on education. Such an interpretation would be contrary to the spirit of the Treaty, especially in the way the Treaty has been interpreted by the European Court of Justice (ECJ). As was explicitly stated by the ECJ, already in 1974,

²⁴ Note that Article 100A is now Article 95 EC and that Article 126 is now Article 154 EC.

²⁵ Opinion of Advocate General Fennelly, delivered on 15 June 2000 in Case C-376/98, *Germany v. European Parliament and Council*, [2000] ECR I-8419.

²⁶ Article 95(3) EC refers to a high level of health protection in the adoption of harmonizing measures: “The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new developments based on scientific facts. (...)”

“although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training”.

Hablitzel argues that the ‘Harmonisierungsverbote’ as introduced by the Treaty of Maastricht have broken through this Treaty system of functional powers, at least in the sense that these negative limitations of competence are absolute. It is submitted here that this is an overly extensive interpretation of Article 149(4) EC, and an incorrect reading of the *Tobacco Advertisement* judgment. It does not follow from the ruling that Article 152(4)(c) EC (ex Article 129(4) of the EC Treaty) prevents all harmonization related to public health. The ECJ merely signalled that precaution is necessary and that Article 152(4)(c) EC should not be deprived of all meaning by reverting to internal market competences at will. The judgment implies that it remains possible to enact internal market legislation that has a bearing on public health, which is explicitly confirmed by the Treaty in Article 95(3) EC, as long as it does not constitute ‘circumvention’ i.e. a legislative measure that has health policy as its centre of gravity and only marginal internal market side-effects. The same reasoning should hold for the field of education.

12. Admittedly, the impact of the hypothetical Bologna Directive on the higher education sectors of the Member States would be greater, or more fundamental, than the impact that the Tobacco Directive had on the public health sector. The measure in the *Tobacco Advertisement* case was not concerned with partial harmonization of the structure of the national healthcare systems, while the Bologna Process fundamentally reorganizes the higher education systems of the Member States, which is normally considered to be a national prerogative. Still, nothing in the case law of the ECJ suggests that the extent of the impact of a legislative measure on the respective policy field constitutes a criterion to determine competence. The decisive point in the *Tobacco Advertisement* case, causing the directive in question to fall, was that the measure was in fact really aimed at public health protection rather than internal market functioning, because it hardly contributed to free trade. As it contained a full prohibition of tobacco advertisement, it actually dealt with substantive health policy, arguably even restrictive of trade.²⁷ The directive did not contain a provision guaranteeing the free movement in the Community of the products satisfying the relevant requirements (magazines), and for other banned advertisement material (ashtrays and parasols) the prohibition did not really facilitate trade in any way. The Bologna Community measure, on the other hand, would be truly aimed at increasing the mobility of students/teachers/general labour force, in the same line of reasoning as the existing legislation on the mutual recognition of diplomas. Therefore, the Bologna Directive or Regulation could qualify as a ‘real’ internal market measure, not circumventing the prohibition of Article 149(4) EC. Such an interpretation of Article 149(4) EC would not deprive the prohibition of harmonization of its meaning. There are plenty types of actions or measures in the field of education that are firmly excluded, due to paragraph four. For instance, the

²⁷ Although the restricted tobacco market was different from the markets intended to benefit from the measure, the overall restrictive effect on trade of the directive was arguably larger than its trade-facilitating effect.

Community has to steer clear of elementary school, both in terms of content and organizational structures. Also secondary school would most probably be deemed off-limits in its entirety. Common sense implies that internal market measures are not likely to intrude in these areas of education. It is only at the crossroads of higher education and the market, where education links in with labour market entry, that the internal market competences really become relevant for this policy field.

13. In line with Davies, therefore, it is submitted here that subsuming the Bologna Process into internal market regulation would have been (and perhaps still is) a realistic option.²⁸ The foregoing analysis clearly shows that it is probable that the Court would uphold a measure like the ‘Bologna Directive’ as legitimately adopted on a basis of an internal market competence.²⁹ Having said that, the question of competence also has an external dimension that should not be neglected. As was stated before, the Bologna Process is not an exclusive Member State happening; on the contrary, it involves many non-EU countries. Although the four initiators of the Sorbonne Declaration are all Member States, currently also 19 non-Member States take part. Some of them were actually among the first to sign the Sorbonne and Bologna declarations. Yet, this does not exclude the possibility of the Bologna Declaration as a Community instrument. The Community is endowed with external competence, also in the field of education. Article 149 provides that “*the Community and the Member States shall foster cooperation with third countries and the competent international organizations in the field of education, in particular the Council of Europe*”. The Member States could have arranged matters as a Community measure internally, without having to exclude other countries from participation in general. An argument that could be made is that in such a scenario the other countries would not feel equal members of the project, because it would be primarily ‘known’ or ‘felt’ as a EU project. Not having any formal position in the internal decision-making process of the EU, the other countries would only have the possibility to ‘opt-in’ on a ‘take it or leave it’ basis. However, depending on the mode of proceedings, the non-EU countries could have negotiated on an equal footing, before putting the international agreement down in an internal EU measure. Moreover, we can see that even now, in the intergovernmental non-EU Bologna Process, the EU Member States play a dominant role. The follow-up relies heavily on the EU presidency. Member States are in a better position to influence the Process, in ways that non-EU states do not have at their disposal. In sum, the argument that also non-EU states take part is not convincing in terms of negating competence, nor does it take into account the current reality of the Bologna Process.

²⁸ H. Davies, Higher Education in the Internal Market, *UACES European Studies Online Essays*, available at www.Uaces.org, p. 8.

²⁹ Practically speaking, the fact that Article 94 EC requires unanimity in the Council implies that there is less chance that a measure adopted on that basis would find itself challenged as having been adopted *ultra vires*. All the Member States need to agree on the measure, so challenging it after adoption would be illogical. Also the Commission as initiator of the measure and the consulted Parliament are unlikely to bring a claim, which means that the only probable source of challenge would be an illegality plea before the national court.

Consequence of Competence

14. What would be the legal consequence should we assume that the EC indeed possessed sufficient competence to adopt a ‘Bologna Directive’? Is it so that once the conditions of a provision attributive of legislative competence in the EC Treaty are satisfied, Member States are forced to make use of this competence when they desire to legislate jointly? This would mean that Member States have forfeited their right to intergovernmental cooperation among themselves in the field of mobility in the higher education sector, and that therefore they have gone out of bounds with the Bologna Process. Admittedly, Community competence in the area of educational qualifications and mobility in the educational sector is not exclusive but shared, which means that Member States remain free³⁰ to act unilaterally, cooperate bilaterally and -in principle- multilaterally in this field. It is, however, not a matter of distinguishing the competence of the Community from that of an individual Member State to act autonomously, but of defining the competence of the Member States to conclude an agreement collectively, *i.e.* all Member States together, outside the Community framework.³¹ The question relates to distribution of competence between the Member States and the Community horizontally rather than vertically.

15. Schwartz argues that resort to subsidiary conventions is excluded whenever the Community could itself have attained the objective by means of legislation.³² In his opinion, once the conditions contained in the Treaty conferring legislative power upon the Community institutions are satisfied, the governments of the Member States no longer have the power to regulate the subject between themselves by means of an agreement under international law (treaty, convention, protocol, act, declaration, etc.).³³ This means that there is no freedom to choose between the international and the Community procedure, even if the institutions have not yet exercised their legislative powers. One of the main arguments brought forward in favour of this proposition is that the law-making powers of the Community are framed in ‘the legal imperative’, requiring the institutions to act if necessary. According to Schwartz, the provisions do not contain any reservation in favour of any law-making powers on the part of the Member States acting jointly. Indeed, also Article 94 EC is phrased in the legal imperative, stating that the institutions *shall* issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. As the establishment and

³⁰ Do note that their actions need to be in accordance with Community law nonetheless. In the *Matteucci* case, the ECJ held that: “Article 5 of the Treaty provides that the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty. If, therefore, the application of a provision of Community law is liable to be impeded by a measure adopted pursuant to the implementation of a bilateral agreement, even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law.” (Article 5 of the EC Treaty is now Article 10 EC). See Case 235/87, *Matteucci v. Communauté Française de Belgique* [1988] ECR 5589.

³¹ See I. Schwartz, Article 235 and Law-Making Powers in the European Community, *International and Comparative Law Quarterly*, 1978, vol. 27, pp. 615-616.

³² I. Schwartz, *op cit*, p. 614.

³³ I. Schwartz, *op cit*, p. 615.

functioning of the internal market is a Community objective, it is a valid argument that this objective should be attained by making use of Community structures.

16. This point of view has been expressed before the insertion of the subsidiarity principle in Article 5 EC. Does this principle alter the claim that Member States are excluded from acting jointly outside the Community framework if the Community is in fact competent? Article 5 EC provides that in areas which do not fall within its exclusive competence, the Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. It is not clear from this wording whether ‘achieved by the Member States’ is meant to include collective action by the Member States in the form of intergovernmental cooperation. That interpretation would undermine Community action in all but the fields in which it has exclusive competence. The subsidiarity principle deals with the vertical relation between the Community vis-à-vis the Member States unilaterally. It is not likely that it entails that Member States, should they consider collective action at the European level necessary, should first try to achieve these objectives by means of intergovernmental conventions before taking Community action. It appears that if Member States cannot sufficiently deal with a certain matter alone, for example because of the cross-boundary characteristics of the matter, it is pre-eminently a case for the Community to take up. That is exactly what the Community is for and any other interpretation would deprive the EC of its very meaning. In fact, the subsidiarity principle works both ways. Apart from containing a prohibition, it also constitutes an authorization for Community action if Member State level action does not come up to the mark. It might actually *oblige* the Community to take action if such is necessary to achieve the objectives in question. Therefore, the most logical interpretation of the term “*Member State level*” in Article 5 EC is that it refers to the action of a Member State alone. It means action *by* the Member States themselves, not *between* themselves.

17. The ECJ has ruled on the question of collective Member State action in areas of Community competence in the *Bangladesh* case.³⁴ The European Parliament brought actions for the annulment of an act adopted at the 1487th session of the Council with a view to the grant of special aid to Bangladesh and of the means adopted by the Commission for the implementation of that act. As the contested act was not an act of the Council but an act taken by the Member States collectively, the application brought by Parliament against the Council was declared inadmissible. The importance of the judgment for our purposes, however, lies in the statement of the Court that

*“the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it”.*³⁵

³⁴ Joined Cases C-181/91 and 248/91, *European Parliament v. Council of the European Communities and Commission of the European Communities*, [1993] ECR I-3685.

³⁵ Paragraph 16 of the judgment.

Although at first glance, this statement seems to mean that in cases of shared competence Member States are free to embark on collective action, it is also possible that the statement is less general than it seems. If the statement of the Court is seen in the particular context of humanitarian aid, where action by the Member States in addition to action by the Community cannot do much harm -and is actually never enough, it becomes less obvious to extend the ruling to all situations of shared competence. In other instances of shared competence it might be that the exercising of a competence by one actor (either the EC or Member States collectively) will imply that the other actor can no longer act, by nature of the subject matter, in that two measures regulating the same issue could not co-exist.³⁶ The principle of primacy, entailing that all national law needs to be in accordance with Community law, and Article 10 EC³⁷, which requires the Member States to cooperate loyally with the Community and to refrain from action that would obstruct the Community in the attainment of its tasks, imply that if the subject matter excludes simultaneous acting it is for the Community to act, excluding joint Member State action.

18. Despite the fact that this interpretation of the judgment seems most reasonable, it is at odds with the literal wording of the statement. The Court states that Member States are not precluded from collective action *as a consequence* of the fact that the Community does not have exclusive competence. There is no reference to compatibility or the special nature of development assistance, and although the words “*in that regard*” might seem to confine the ruling to humanitarian aid, the reasoning as displayed in the holding would also be valid in other areas. If the Court did not mean to give carte blanche to Member States to act collectively whenever they see fit, the wording of the judgment is somewhat careless, to say the least. If the ECJ did mean to give such a blank check, it is submitted here that a revision of this case law is desired, as it leads to objectionable results. The distinction between shared and exclusive competence is designed to deal with questions of vertical division of competence, and the doctrine should not be applied by simple analogy to the present question of horizontal division of competence. As De Witte notes, the possibility for Member States to jointly conclude international agreements in areas of Community competence is problematic for reasons of democracy, legal protection and efficiency.³⁸ In fact, it threatens the effectiveness of European law and the European Community as a whole. As Schwartz notes, allowing the Member States to jointly create law on the same subjects as the Community impairs the capacity of the Community to carry out its tasks, destroys the unitary nature of its legal system and substantially limits the scope of Community law.³⁹ It is therefore

³⁶ For this argument I thank Professor M. Cremona, European University Institute, Florence.

³⁷ Article 10 EC provides: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

³⁸ B. De Witte, *Internationale Verdragen tussen lidstaten van de Europese Unie*, in: R. Wiesel & B. De Witte, *Preadvieszen, Mededelingen van de Nederlandse Vereniging voor Internationaal Recht nr. 123, De plaats van de Europese Unie in het veranderlijke bestel van de volkenrechtelijke organisatie*, 2001, The Hague: Asser Press, p. 104.

³⁹ I. Schwartz, *op cit*, p. 625.

submitted here, in line with De Witte, that ‘autonomous parallel agreements’ in areas of concurrent Community competence are unnecessary and damaging, and therefore might be contrary to Article 10 EC.

19. The Bologna Process serves well to exemplify these dangers of subsidiary action by Member States. Although the Bologna Process in terms of its aims could be argued to be consistent with Community objectives (such as convergence in higher education for the purpose of facilitating mobility of students and the labour force in general), the way in which it takes place is indeed less laudable. Not only are certain aspects of Community policy, such as credit transfer, being doubled in Bologna, which impedes their proper functioning on both levels, the fact that Member States are doing ‘it’ collectively prevents the Community from doing ‘it’, and from doing ‘it’ better. The Bologna Process is plagued with coordination problems and divergent implementation. As will also be discussed in the following section, the Declaration grants no rights (of e.g. diploma recognition) to individuals. There is no authority to appeal to in case of an uncertainty of the content of one of the obligations, let alone an enforcement mechanism to guarantee that *pacta sunt servanda*.⁴⁰ Thus, the actual attainment of the objectives set by Bologna, which are also the objectives of the Community, is severely threatened. And because the adoption of the Bologna Declaration impedes such an initiative from the Community, it has become difficult (if not impossible) to successfully attain these objectives. This would lead to the conclusion that with the Bologna Declaration and Process, the Member States have obstructed the Community institutions in the exercise of their tasks, and have thereby failed to meet their obligations under Community law, in particular Article 10 EC.⁴¹

20. In the previous section relating to legal competence it has already been discussed that the Bologna Process does not only involve the Member States of the EU, but also third European countries. This did not seem to make a difference as to the existence of competence to enact a ‘Bologna Directive’, as it could have been adopted as an internal measure, combined with external agreements. The question that should be addressed here is whether the fact that also third countries are involved alters the legal obligations of the Member States to follow the Community procedures. Could the Bologna Declaration still be classified as a ‘subsidiary convention’ or an ‘autonomous parallel agreement’ for which the Member States were not free to opt for intergovernmental cooperation and which hence cannot be reconciled with EC law? It might be argued that the situation is one of classic international cooperation, stretching beyond what is the EU, for which international lawmaking is most suited. However, the mere fact that there are additional participants does not relieve the concerns and objections as outlined

⁴⁰ In fact, there is not even a real ‘pact’, because participation in the process is merely voluntary. States can decide to deviate from the set norms, and can decide to disembark the whole project altogether, at any point they see fit.

⁴¹ If Member States fail to cooperate loyally with the Community an infringement action can be brought against them by the European Commission (Article 226 EC). It is highly unlikely that the Commission will ever start such infringement proceedings against the Member States on the basis of the Bologna Process. In the current political situation, where also the Commission is strongly involved in the Bologna Process as a full participating member, the Commission’s hopes seem to lie with trying to steer the Process from the inside towards better compatibility with the Community.

above. It would be easy for the Member States to circumvent their Community obligations simply by inviting a third country to participate in a certain project. In order to avoid such frustration of Community interests, but at the same time taking into account the need for some flexibility in the realm of international relations, it is submitted here that a ‘mitigated obligation’ lies on the Member States when, in an area where the Community is also competent, they decide to act jointly but together with third countries. The default position should be that Member States enact a Community measure internally whenever possible, also when third countries are involved, and that the burden of proof rests with the Member States to show why it was necessary to avoid the Community framework whenever they decide to deviate from that default position. Once the threshold of participation by all the Member States is reached, this presumption of precedence of the Community procedure kicks in. The decision to adopt and implement a certain legal instrument outside the EC might be justified, but it is for the Member States to show why the course of proceedings in question did not obstruct the Community in the attainment of its tasks.

21. If the foregoing holds true, the most likely conclusion is that Member States should have followed the EC legislative procedure, resulting in a binding Bologna Directive. But what if they did not want a binding legal instrument? The Bologna Declaration is a declaration of intention, and hence a classic example of ‘soft law’. The participating states have at several occasions expressed the opinion that the voluntary character of the Bologna Process constitutes one of its most important advantages. Is it possible for the Member States to embark on non-binding cooperation in accordance with Community obligations? The EC framework does provide for non-legislative means of action. For one, there exists the possibility of intergovernmental cooperation in the Council. In the 1970s, when ministers responsible for education in their respective Member States first met, they did not meet as an ‘Education Council’ but ‘within the Council’ and later as a ‘Council and Ministers of Education meeting within the Council’.⁴² This so-called mixed formula leaves room for Member State autonomy as it allows for educational cooperation without having to respect the formal decision-making procedures. It enables the states to issue non-binding resolutions, on the basis of intergovernmental cooperation.⁴³ As De Witte notes, the “*Resolution of the Council and of the Ministers of Education, meeting within the Council of 9 February 1976, comprising an action programme in the field of education*” forms the starting point of this form of cooperation.⁴⁴ However, it is doubtful whether this mode of governance would have constituted a legitimate method to enact the Bologna Declaration and Process. After all, it would qualify as an ‘autonomous parallel agreement’ and would constitute a circumvention of the Community procedures all the same. If it is held that Member States were not free to adopt the Bologna Declaration outside the Community

⁴² C. Racké, The emergence of the Bologna Process: Pan-European instead of EU Governance, in: *The Dynamics of Changing Modes of Governance in Europe*, p. 40.

⁴³ B. De Witte, Higher Education and the Constitution of the European Community, in: C. Gellert (ed.), *Higher Education in Europe*, 1993, London: Jessica Kingsley, p. 194.

⁴⁴ B. De Witte, The Scope of Community Powers in the field of Education and Culture in the light of Subsequent Practice, in: R. Bieber & G. Ress (eds.), *The Dynamics of EC-law*, Baden-Baden: Nomos Verlagsgesellschaft, 1987, p. 273. Since the insertion of a specific legal basis for education in the Treaty of Maastricht, the mixed formula has been used less frequently.

framework, they were not free to adopt it as a ‘Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council’ either.

22. Perhaps the Open Method of Coordination (OMC) could have provided for a possibility for the Member States to cooperate on a voluntary basis, whilst respecting EC law. The OMC is a relatively new mode of governance that is rapidly winning ground in the EU. In defining the OMC, use is often made of terms as decentralization, best-practice, mutual learning, qualitative and quantitative indicators, targets, benchmarking, periodic reporting, monitoring, peer review and multi-lateral surveillance.⁴⁵ These terms, at times rather bewildering for a European lawyer, indicate that the OMC does not involve a ‘traditional’ legislative procedure. The OMC is in fact commonly perceived as a ‘soft’ or ‘political’ policy instrument, with a focus on cooperation rather than harmonization, thereby leaving considerable discretion to the Member States. The Lisbon summit of 2000 mentioned education as one of the sectors in which the OMC would find application.⁴⁶ Setting the goals of the Bologna Declaration to be achieved in a such a framework of voluntary policy convergence seems to concur with the needs and desires expressed by the participating states in the Bologna Process, to wit their wish to remain fully in charge so as to respect diversity and national autonomy, while at the same time allowing for better coordination with other EU mobility and degree recognition policies. In fact, the Bologna Process so strongly resembles the entire set up of the OMC, that some authors mention the Bologna Process as part of the OMC.⁴⁷ This might also be due to the fact that the European Commission, as a member of the Bologna Follow Up Working Group, is increasingly involved in the Process, and even characterizes its own contribution as part of the Lisbon Strategy.⁴⁸ This is not only illustrative of the lack of transparency, caused by the double action at the ‘European level’, but also shows how peculiar it actually is that the Bologna Process was not adopted in the EU framework. Admittedly, at the time of the

⁴⁵ See C. De La Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?*, *European Law Journal*, Vol. 8, No. 1, 2002, p. 38.

⁴⁶ As specified in the Lisbon Conclusions, paragraph 37, the OMC entails: “- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; - establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; - translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; - periodic monitoring, evaluation and peer review organised as mutual learning processes.”

⁴⁷ J. Lonbay, *Reflections on Education and Culture in EC Law*, in: R. Craufurd Smith (ed.), *Culture and European Union Law*, Oxford: Oxford University Press, 2004, p. 253.

⁴⁸ “*The Lisbon Strategy encompasses the Commission’s contribution to the intergovernmental Bologna Process, aiming to establish a European Higher Education Area by 2010, mainly in the areas of curricular reform and quality assurance. The Bologna process coincides with Commission policy in higher education supported through European programmes and notably Socrates-Erasmus, Tempus and Erasmus Mundus. The Commission stimulates Bologna initiatives at European level and participates as a full member in the Bologna Follow-up Group and the Bologna Board.*” European Commission, *Realising the European Higher Education Area*, Contribution of the European Commission to the Berlin Conference of European Higher Education Ministers on 18/19 September 2003.

Bologna Declaration in 1999, the OMC had not yet officially been introduced in the field of education, as the Lisbon Council took place in 2000. Nevertheless, it seems that the governments involved could have anticipated it, or could have decided to transform the Bologna Declaration into an OMC process, after 2000.

23. Still, it can also be questioned whether the OMC would have been a legitimate way to implement the Bologna Process within the Community framework. As the European Commission has stated, “*the use of the open method of co-ordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions*”.⁴⁹ According to the Commission, the OMC should not be used when legislative action under the Community method is possible. Although this position has not (yet) been confirmed by the ECJ, it does go to show how tense the relationship is between intergovernmental cooperation and the Community interest. Moreover, it fits perfectly in the reasoning as outlined above against the conclusion of subsidiary conventions. The conclusion of the foregoing inquiry should therefore be, albeit somewhat harsh, that the Member States did not dispose of a free choice between the Community and the international framework, nor between binding and non-binding measures. In other words, the Bologna Process could not legitimately have been adopted as soft law, either way. This means that the freedom of the Member States in European policy making is limited, but that is not for nothing. The justness of this outcome is confirmed by findings in the following section, where several concerns inherent in international soft lawmaking are considered.

Constitutional Concerns

24. For years, the EU has been criticized for lacking transparency and openness. In the field of education, this criticism is mainly directed at the way in which the institutions have somehow managed to gain influence in the sector even in the absence of real competence. 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.”⁵⁰ But ironically, the same can be held against the Bologna Process. The Sorbonne Declaration, where the essential ideas were born and introduced, came into being at the birthday-party of a prestigious university by a select group of ministers among themselves. Also the subsequent Bologna Declaration was signed without any recourse to the institutional framework of the EU, thereby avoiding its built-in safeguards, checks and balances. With regard to the higher education actors involved in the Bologna Process, it should be recalled that the two organisations representing universities at the European level, the Confederation of European Union Rectors’ Conferences and the Association of European Universities, were both kept informed about the preparation of the Bologna

⁴⁹ European Commission, *European Governance- A White Paper*, COM(2001) 428 final, p. 22.

⁵⁰ M. Murphy, Covert action? Education, social policy and law in the European Union, *Journal of Education Policy*, Vol. 18, No. 5, 2003, p. 560.

conference and have also been involved in drafting the final declaration.⁵¹ Still, although the governments proudly speak of the bottom-up approach of the Bologna Process, meaning that the state is in full control as opposed to supranational rule-making, the changes of the Bologna Process were imposed on the actors in the field in a top-down manner with little or no opportunity of debate.⁵² Furthermore, the activities undertaken in the framework of the Bologna process substantially overlap with already well-established EU policies, such as the Diploma Supplement, the ECTS system, and the promotion of teacher and student mobility.⁵³ The fact that activities in these areas are now pursued on two different planes is not transparent, nor efficient. In a field where European action is on the one hand necessary to meet the needs of contemporary societies but which is on the other hand so culturally sensitive and hard to sell to the general public, one should proceed with caution. This caution requires transparency more than anything. Having various actors acting in various capacities on various European levels does not foster intelligibility.

25. Closely related to the fact that the Bologna Process leaves a lot of transparency to be desired, are the pressing democratic concerns. Although the EU has since long suffered from allegations concerning its so-called democratic deficit, the intergovernmental mode can be said to be even less democratic. The Community, in all its complexity, does provide for a relatively transparent and democratic legislative process, with an increasingly important role for the European Parliament, representative of the people of Europe. The ECJ is there to ensure respect for the rule of law, and safeguards the interests of the individual. The Commission has in recent years shown its commitment to good governance by frequently openly consulting the sector in issue, the specialists as well as the public at large. The intergovernmental process merely involves governmental officials and a limited number of higher education actors. Furthermore, many universities have complained about the fact that the far-reaching changes have been imposed on them in a short period of time, without any real consultation. In some views, the fact that the governments remain fully in charge actually does democracy justice, as they can – at least in theory – count on the support of their national parliaments. The course of proceedings of the Bologna Declaration, however, shows the dangers of international cooperation from a democratic perspective. The international level can constitute an efficient smokescreen for governments to agree on unpopular reforms, as the conferences and conventions where the deals done between governmental officials are largely distracted from parliamentary scrutiny. When the country representative returns, the international agreement already stands, and reforms can be passed as if there was no choice, referring to the international political obligations. These concerns apply especially when it concerns international soft law such as the Bologna Declaration. Since the Bologna Declaration is not a Treaty, but merely an intergovernmental proclamation, it does not require ratification. Although the participating states are not legally bound, there is political pressure to implement the

⁵¹ C. Racké, The emergence of the Bologna Process: Pan-European instead of EU Governance, in: *The Dynamics of Changing Modes of Governance in Europe*, p. 37.

⁵² J. Lonbay, Reflections on Education and Culture in EC Law, in: R. Craufurd Smith (ed.), *Culture and European Union Law*, Oxford: Oxford University Press, 2004, p. 253.

⁵³ E. Hackl, Towards a European Area of Higher Education: Change and Convergence in European Higher Education, *EUI Working Paper*, RSC No. 2001/09, 2001, p. 26.

Declaration nonetheless. Especially the governments are pushing the Declaration's implementation, arguing that these 'international obligations' need to be met. Within the context of the EU, these concerns have been responded to by the creation of a complex system of checks and balances. The ever-increasing powers of the European Parliament should compensate for the loss of parliamentary control at the national level, a loss that is partly inherent in international law/policy making. The European Parliament has become the expression of a European concept of democracy; where the will of the majority of the European population prevails. It is submitted here that in adopting a measure with the content of the Bologna Declaration, the necessary standards of democracy would have been more easily fulfilled within the EU framework.

26. Not only can the way the Bologna Declaration was adopted and found implementation be said to be less democratic than if it would have been a measure adopted via the Community method⁵⁴, it is arguably also less effective. Precisely because the EU is supranational, because it diminishes national sovereignty to a certain extent, because it has the power to impose obligations on the Member States and because it can actually enforce these obligations, it has been able to effectively implement many policies. Concessions in terms of sovereignty are often necessary to reach the goals that the Member States set themselves. According to Barnier and Vitorino, it is clearly shown that cooperation based on an independent regulatory system with independent bodies ensuring sound operation on a permanent basis is much more effective than traditional international cooperation.⁵⁵ International treaties, whose implementation has been left to the goodwill of the contracting states, have generated less effect than the EC Treaty.⁵⁶ Admittedly, the foregoing might paint a picture too rosy, as there are problems with the timely and correct implementation of Directives and Regulations. Furthermore, it can be argued that the more flexible and lenient modes of policy-making are more respectful of diversity and Member States' interests, and can therefore rely on more support and compliance. Perhaps, in certain fields, soft steering can achieve more than a hard approach. Regarding the Bologna Process, it is indeed true that already half way the deadline most of the signatories have adapted their national legislation so as to meet the requirements of the Declaration. And it could be speculated that the Bologna Process would not have been embarked upon at all, if not for its soft character. It is also true that a certain amount of flexibility and discretion is desirable, as it concerns a far-reaching reform project in a politically sensitive area. Member States should be granted the freedom to adapt their systems so as to bring them in line with the Bologna commitments in the way they see fit. They are in the best position to judge their educational structures, and are the ones ultimately responsible for it. Nonetheless,

⁵⁴ In a 2002 contribution from Mr Barnier and Mr Vitorino, members of the Convention, to the European Convention on the Future of the Union, the Community method is defined as: "the decision-making process in areas coming under the EC Treaty and, in particular, the interaction of the institutions as part of this process." The so-called *pure* Community method is the system whereby the Commission enjoys the monopoly of legislative initiative, and whereby the Council and the European Parliament adopt acts proposed by the Commission in co-decision. In particular, the Council votes by qualified majority. Barnier and Vitorino, *The Community Method*, CONV 231/02, 3 September 2002.

⁵⁵ *Ibid*, p. 6.

⁵⁶ Barnier and Vitorino mention the area of cross-border television broadcasting services where both an international convention and a Community directive have been issued, and where the latter has been much more successful. Barnier and Vitorino, *op cit*, p. 6.

it cannot be denied that because the Bologna Process lacks a binding character there might be problems in effective enforcement. This is disturbing as its success does depend on coherent and consistent implementation and application in the participating countries. It is safe to say that nothing would be worse in promoting mobility than a hodgepodge of national legislation. What would be so wrong with agreeing to some kind of binding supervision or enforcement to make sure that all that is agreed, is actually achieved?

27. Indeed, although it appears as if the Bologna requirements are quite diligently followed by the signatories, various inconsistencies can be detected. Just to mention a few: in some countries vocational schools are included in the Bachelor-Master system, while in others they are not, and while some countries have opted for 4+1 structures, others have decided to go with 3+2, and a few have even settled for 3+1.⁵⁷ Also, the application of the 2-tier system is not equally applicable to all higher education in all countries. For example, in most countries medical education has been excluded from the Bachelor-Master system, whereas some others have included it. Furthermore, the practical value of the Bachelor degree is uncertain in many countries with regard to legal education, where a Master degree is needed to be admitted to the legal profession. In addition, only a small percentage of universities issue the Diploma Supplement with their degrees, although this is explicitly required under the Bologna Process. Regardless of good or bad faith, implementation will differ in the various countries in the absence of unambiguous standards, uniform interpretation of these standards and supranational coordination of their implementation. Furthermore, the Bologna Declaration does not grant any rights to individuals. There is no guarantee for students that have concluded a Bachelor programme to have it recognized at another university in order to be admitted to a Master programme. This is not only regrettable from the perspective of the individual, but also in terms of efficiency. Litigation by private parties constitutes a large part of the success of EC legislation. This bottom-up enforcement is absent in the context of the Bologna Process.

Conclusion

28. To say that Member States have infringed the EC Treaty by embarking on intergovernmental cooperation in the context of Bologna implies far-reaching interpretations of the Treaty, expressing what is probably a minority view. It would meet fierce controversy in the Member States, who since long have perceived educational policy as “an excellent subject for intergovernmental cooperation in close connection with Community action, but could not the subject of genuine Community action itself”.⁵⁸ Still, it is a fair statement that the objectives of the Community should be achieved using its own system of law, its own institutions and its own procedures.

⁵⁷ These figures indicate the length of the Bachelor and Master cycle, which means that countries with e.g. a 4+1 structure have implemented a 4 years Bachelor program followed by a 1 year Master.

⁵⁸ B. De Witte, Introduction in: Bruno De Witte (ed.), *European Community Law of Education*, Baden-Baden: Nomos Verlagsgesellschaft, 1989, p. 14-15.

With the Bologna Process Member States have rendered inoperative the Community institutions and their further development, by resorting to joint international action. They have avoided the Community law-making process with its institutional safeguards, the rules of the Treaty relating to supervision and implementation of Community law and the rules on the judicial protection of legal rights. The increased involvement of the Commission in the Bologna Process might be a positive development, but it is regrettable that the most democratic organ of the EU, the Parliament, remains practically excluded. By proceeding in the way they have done, Member States have chosen the less open, less transparent and less democratic manner to Europeanize higher education, and have obstructed the Community institutions to do it, and to do it better.

29. The EC institutional framework provides for several modes of governance, supranational as well as intergovernmental. Although the foregoing critique lead to the conclusion that governments could not simply have picked the solution they deemed most fit for the goals they wanted to achieve, for also the OMC and intergovernmental cooperation in the Council should best be avoided if proper legislative competence exists, the fact that these intergovernmental methods within the EC framework were not even considered, indicates something. To a certain extent, the value of the ‘alternatives’ lies in the assumption that working through the EU would have provided for a ‘better’ project, in terms of content and implementation. ‘Better’, because it would have been easier to coordinate, both internally (the process itself) as externally (its relation with Community programmes), and hence more efficient. It would have provided Member States with practical institutional facilities to help them achieve their goals. Therefore, intergovernmental cooperation within instead of outside the EU would perhaps have constituted the lesser of two evils. However, the real value of the alternatives is rather that the fact that an intergovernmental declaration outside EU structures was preferred goes to show how badly the Member States wanted to exclude the EU.

30. Why did the Member States want to avoid the EU at all cost? It is often explained by the fear of the Member States that giving the Community one inch, it will lead to it taking a whole yard. It appears that with the Bologna Process the Member States have tried to avoid the growing influence on higher education by the Community. The case law of the ECJ has necessitated the restructuring of educational systems in several countries to ensure equal access (e.g. in terms of fees) to foreign EU students.⁵⁹ Also the Directives relating to the mutual recognition of qualifications have had serious impact as they have led to a harmonization of curricula of the regulated professions concerned. Probably because of this the Member States are mistrustful of the Community, and the European Commission in particular. Although the Commission has always respected the non-harmonization paradigm, the Member States suspected it to do so only *nolens volens*.⁶⁰ They suspected that the Commission would show its real face as a ‘harmoniser’ as soon as it would be provided with the opportunity to do so. Obviously, it would be rather difficult for the Commission to go and ‘harmonize’ the

⁵⁹ A recent case illustrates the impact of ECJ judgments in the domestic educational sector: *Case C-147/03, Commission v. Austria*.

⁶⁰ B. Wächter, *The Bologna Process: developments and prospects*, *European Journal of Education*, Vol. 39, No. 3, 2004, p. 271.

education sector on its own, without the Member States onboard. The Commission does not pass legislation by itself. It always seems rather curious when Member States allude to the dangers of the EU and accuse it of unwanted intrusion, as they – the Member States – *are* the EU. To some the EU resembles Frankenstein’s monster, with competence creep and spill-over left and right, and the terrifyingly extensive and teleological interpretations of the Treaty by the ECJ in the treacherous slipstream of economic integration, but it could be countered that the only thing the EU really does is executing and enforcing what the Member States themselves – at least in majority – have agreed upon. It is true that the expanding role of the Community gives rise to fear and debate in the Member States no matter what policy field is concerned, let alone if it relates to education. As education is closely connected to cultural identity, and seen as a traditional function of the nation-state, Member States guard their national educational autonomy jealously.⁶¹ It has also been argued that adopting the Bologna Process inside EU institutions would have led to a “top-down, centralized approach resulting in the bureaucratization of the Bologna Process, robbing it of its flexibility, responsiveness and creativity”.⁶² It turns out, however, that the complicated administrative procedure of Community lawmaking would most probably have guaranteed *better law*, from various perspectives applying various norms, and that a degree of centralization would not have been undesirable in order to make sure that what was agreed, was actually achieved.

⁶¹ R. Ryba, Toward a European dimension in education: intention and reality in European Community policy and practice, *Comparative Education Review*, Vol. 36, No. 1, p. 11.

⁶² See House of Commons, Education and Skills Committee, *The Bologna Process*, Fourth Report of Session 2006-07, p. 32.