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Higher Education Institutions and EU Competition Law

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The European Union does not (yet) use the supranational method of integration in higher education and research. Instead, Member States have agreed on soft law mechanisms (Open Method of Coordination 'OMC' as part of the Lisbon Strategy) and extra-EU law modes (the Bologna Process). However, higher education institutions (HEIs) are not immune to the forces of directly applicable Treaty provisions, such as those on Union Citizenship, the free movement provisions and the provisions on competition law and state aid. The fact that the application of EU law can interfere with national policy concepts as regards HEIs has already been highlighted by recent cases in the field of Union Citizenship. As regards the free movement provisions, competition and state aid law, higher education and research in public institutions in the public interest were originally regarded as non-economic services rendering these provisions inapplicable. However, this is not a fixed concept; with increasing commodification of HEIs their activities can come into the ambit of these provisions and tensions could arise. Commodification is a topic discussed increasingly not only in academic literature, but also in the wider public sphere. The Browne Report and the creation of a consumer market for higher education in England was only the latest step in this direction. This paper gives insights into the competition law aspects of this developing area.

INTRODUCTION

European HEIs have increasingly been urged to move towards market principles. This development is particularly pronounced in England with the policy developments after the publication of the Browne report. However, in the discussion about tensions between public service provision at the national level and directly applicable provisions of EU law, the HEI sector has received little attention.

As in other public policy fields, the European Union does not (yet) use the supranational method of integration as regards HEIs. Instead, Member States have agreed on soft law mechanisms (OMC as part of the Lisbon Strategy) and extra-EU law modes (the Bologna Process). However, HEIs are not immune to the forces of directly applicable Treaty provisions, such as those on Union citizenship, the free movement provisions and the provisions on competition law and state aid. This has been highlighted by recent cases in the field of EU citizenship.

As regards the free movement provisions and competition and state aid law, higher education and research in public institutions in the public interest were originally

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regarded as non-economic services. These provisions were therefore not applicable to HEIs. However, it is clear that research with a commercial interest is regarded as an economic service and later case law and Commission practise shows that the definition of higher education as 'non-economic' is not a fixed concept. With increasing commodification of HEIs their main activities can thus come into the ambit of the above mentioned provisions and tensions could arise.

This paper will explore the competition law aspects in this regard. It will start by illuminating the background to the problem as sketched above using insights from political theory, history and educational studies. The main part will be based on legal doctrinal analysis. The question under which circumstances HEIs could be regarded as providing economic services will first be explored. This will be followed by an analysis of the competition law problems which could arise as a result of this for HEIs. The findings will then be integrated in a conclusion.

THEORETICAL BACKGROUND

The EU integration project started mainly as economic integration which was hoped would then lead to welfare, peace and stability automatically.[1] The economic dimension of European integration is thus better institutionalised and supported by hard law than the social dimensions of European integration. Even though the latter is not expected to just happen as a side effect of economic integration anymore, it is more often pursued by policy coordination through the OMC ('soft law') than by creating binding legislation using the supranational method. At the same time, however, the directly applicable Treaty provisions insert influences on national public service provision causing tensions between economic EU law and national public service concepts.[2]

This could also lead to unforeseen consequences for HEIs.[3] Given that European integration started as economic integration, HEIs have not played a role in the European project initially,[4] as their economic value was not apparent at the time.

[1] Article 2 EEC originally stated that: 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it'. See further on the interrelation of economic and social integration Schiek, 'Re-embedding economic and social constitutionalism: Normative perspectives for the EU' in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011, p 33 seq.

[2] This has been widely discussed in literature. See, for example, the contributions to the edited collections: Schiek, Liebert & Schneider, *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011; Neergaard, Nielsen & Roseberry, *Integrating Welfare Functions into EU Law - From Rome to Lisbon,* Copenhagen, DJØF, 2009; de Búrca, *EU Law and the Welfare State - In Search of Solidarity,* Oxford, OUP, 2005; and, Dougan & Spaventa, *Welfare and EU Law,* Oxford/Portland, Hart, 2005.

[3] Unless otherwise indicated the term 'HEIs' is used for public HEIs, as this paper aims to look at constraints on HEIs as one manifestation of EU law constraints on public services.

[4] See on the development of EU education policy Hummer, 'Vom "Europäischen Hochschulraum" zum "Europäischen Forschungsraum". Ansätze und Perspektiven einer europäischen Bildungs- und Forschungspolitik', in Prisching, Lenz & Hauser (eds), *Bildung in Europa - Entwicklungsstand und Perspektiven*, Wien, Verlag Österreich, 2005, and Walkenhorst, 'Explaining change in EU education policy' (2008) 15 (4) Journal of European Public Policy 567.

However, the free movement provisions already 'spilled over'[5] into one aspect concerning HEIs, namely diploma recognition. The free movement of persons required that a common approach in this area had to be found and a set of Directives[6] has been adopted in this respect.

The shift towards a service and knowledge society[7] and increasing globalisation required further cooperation regarding higher education and research; the two main activities of HEIs.[8] However, the Member States seemed reluctant to do so at the supranational level.[9] The competences given to the Union in the field of education are only complementary; the main competences remain with the Member States.[10] Regarding research the Union and the Member States now share competence. This is, however, only a result of the Treaty of Lisbon and thus a rather recent development.[11] The Member States instead used the OMC as part of the Lisbon strategy[12] (a soft law mechanism) and the Bologna process[13] (an extra EU mode) to achieve cooperation. In particular the Bologna process, however, was heavily criticised, despite some

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[5] 'Spill-over' is a concept of neo-functionalism, a theory of European integration. Neo-functionalism assumes that eventually a full union will be the end state of regional integration. However, the main focus of the theory is the process of integration. According to it, integration in one area will have certain insufficiencies, which, when fixing them, lead to 'spill-over' into other areas. See further on neo-functionalism Schmitter, 'Neo-Neofunctionalims', in Wiener & Diez (eds), *European Integration Theory,* 1st ed (discontinued in 2nd ed), Oxford, OUP, 2004, and Niemann & Schmitter, 'Neofunctionalism', in Wiener & Diez (eds), *European Integration Theory,* 2nd ed, Oxford, OUP, 2009.

[6] The original regime of directives has by now been replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 'on the recognition of professional qualifications'.

[7] A development endorsed by the Lisbon Strategy the aim of which is to create 'the most competitive and dynamic knowledge-based economy in the world'. See Lisbon European Council 23 and 24 March 2000 Presidency Conclusion available on http://www.europarl.europa.eu/summits/lis1_en.htm. The Lisbon strategy has been re-launched as the Europe 2020 Strategy in 2010. See European Council Conclusions EUCO13/10 CO EUR 9 CONCL 2, 17 June 2010.

[8] On the aims and purposes of HEIs throughout history see Wissema, *Towards the Third Generation University* Cheltenham/Northampton, Edward Elgar, 2009, Scott, 'The Mission of the University: Medieval to Postmodern Transformations' (2006) 77(1) The Journal of Higher Education 1.

[9] See further Garben, 'The Bologna Process: From a European Law Perspective' (2010) 16(2) ELJ 186 who argues that the competences for supranational integration as regards HEIs could have been seen in Article 115 TFEU, despite the limited competences for the policy areas of higher education and research.

[10] Articles 165-166 TFEU are basically giving the Union the competence to pass educational programmes in support of national policies.

[11] Article 4 TFEU made research a shared competence. The details of the common research policy are foreseen in Article 179-190 TFEU. The Union can, next to the Framework Programmes (which are an older development originally based on Article 235 EEC (now Article 352 TFEU), which allowed the EEC to 'take the appropriate measures' when deemed necessary to achieve the Community's goals), now also pass legislation to achieve the European Research Area following the ordinary legislative procedure (Article 182(5) TFEU). Research and technological development became a Union objective and the free circulation of 'researchers, scientific knowledge and technology' is to be achieved (Article 179(1) TFEU).

[12] On HEIs and the Lisbon strategy see Van der Ploeg & Veugelers, 'Higher education reform and the renewed Lisbon strategy: role of member states and the European Commission' (2007) 1901 CESifo Working Paper.

[13] Further on the Bologna process see Eurydice, *Focus on Higher Education in Europe 2010: The impact of the Bologna Process,* Brussels, Eurydice, 2010.

successes.[14] This unpopularity may make further integration in this respect at the supranational level even more unlikely.[15]

However, that does not prevent 'spill-over' from directly effective EU law. The general tendency of the European integration project has shifted from a focus on the 'European Social Model' towards a more neo-liberal endeavour.[16] In this neo-liberal phase the application of directly effective Treaty provisions on ever more public services has taken place and we have seen, first, the utilities sector and, later, other areas of welfare provision falling into the ambit of EU law, with partly negative consequences for the Member States' social models.[17]

In the HEI sector the cases of Austria and Belgium are prominent examples of such influences.[18] The Court decided that these Member States had to abolish provisions requiring non-residents to fulfil additional requirements for university access, while own residents only had to be in possession of a secondary school diploma, as this would infringe EU citizenship. The 'free and open access' policy for their own residents had, however, been chosen, as the percentage of population with tertiary education was comparably low in these Member States. After abandoning the provision, a disproportionate number of foreign students registered for studies, in particular in medical subjects,[19] which then raised concerns regarding the health systems in the

[14] On the successes see Van der Ploeg and Veugelers (n 12) p 22 with further references. See further regarding criticism e.g. Garben (n 9), Hummer (n 4) pp 52 & 78 seq, Banscherus et al., *Der Bolongna-Prozess zwischen Anspruch und Wirklichkeit*, Coburg, Leutheusser Druck, 2009, pp 11 seq, 78 seq and foreword by Keller p 7, Cippitani & Gatt, 'Legal Developments and Problems of the Bologna Process within the European Higher Education Area and European Integration' (2009) 34 (3) Higher Education in Europe 385, p 391.

[15] This conclusion is based on social constructivist thinking. Social constructivism, another approach in European integration theory, explains European integration by focussing on the actors in the European social space who influence the space and vice versa. Thus a negative assessment of the Bologna process, which the general public often regards as an EU measure, might make a common strategy increasingly unlikely. Further on social constructivism see Risse, 'Social Constructivism and European Integration', in Wiener & Diez (eds), *European Integration Theory*, 2nd ed, Oxford, OUP, 2009.

[16] This is an assumption of critical political economy, also an approach in European integration theory. Critical political economy explains integration with economic reasons. It argues that the first phase of European integration was the logical choice for the war deprived economies of the Member States and the European social model was seen as a competitive advantage. Beginning with the Bretton Wood Crisis this model was later followed by a more neo-liberal approach which was then deemed necessary. Further on critical political economy see Cafruny & Ryner, 'Critical Political Economy', in Wiener & Diez (eds), *European Integration Theory,* 2nd ed, Oxford, OUP, 2009.

[17] On the inclusion of public services into internal market law see Chalmers, Davies & Monti, *European Union Law,* Cambridge, CUP, 2010 p. 1013 seq, Neergaard, 'Services of general economic interest under EU law constraints', in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011 p 174 seq, and Steyger, 'Competition and Education', in de Groof, Lauwers & Dondelinger (eds), *Globalisation and Competition in Education,* Nijmegen, Wolf Legal Publishers, 2002.

[18] Cases C-147/03 *Commission vs Austria,* C-65/03 *Commission v Belgium.*

[19] See on numbers regarding Austria e.g. Mandl, 'Deutsche NC-Flüchtlinge - Österreich darf auf die Piefkebremse treten' (2007) Spiegel online 18th October 2007 http://www.spiegel.de/unispiegel/studium/0,1518,512303,00.html (accessed 12th October 2011) and regarding Belgium the opinion of Advocate General Sharpston in case C-73/09, *Bressol,* para 20. On numbers for both countries with further references see Damjanovic, '"Reserved areas" of the Member States and the ECJ: the case of higher education' in Micklitz & De Witte (eds) *The European Court of Justice and the Autonomy of the Member States,* Cambridge, Intersentia, 2012, 162.

future.[20] In the case *Bressol*[21] the Court later allowed the concerns regarding the health system as a justification for the newly introduced quota system in Belgium. However, these cases show how, in special circumstances, unrelated provisions of EU law can 'spill-over' significantly into national policies regarding HEIs.

At the same time, the nature of European HEIs has recently increasingly developed towards commodification.[22] The Browne Report[23] and the creation of a consumer market for higher education in England were only the latest steps in this direction.

THE ECONOMIC NATURE OF HEIs

The assumption in internal market and competition law has thus far been that higher education and research conducted in public HEIs in the public interest are not economic services in the meaning of the Treaty. These provisions would therefore not be applicable to these activities, as Article 56 TFEU requires a 'service' which is 'normally provided for remuneration' and the competition law provisions only apply to 'undertakings'. The latter has been defined by the Court as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[24] It further defined an economic activity as every activity that consists of 'offering goods or services on a market'.[25]

In *Humbel*,[26] a case considered under the free movement provisions, the Court decided that public education was not a service in the meaning of the provisions, as education systems are generally 'funded from the public purse' without a profit-oriented goal, but rather in the pursuit of satisfying the Member States' obligations towards their 'population in the social, cultural and educational fields'. Insignificant fees 'in order to make a certain contribution to the operating expenses of the system' do not change this assessment. In *Wirth*[27] the Court confirmed that this was also applicable for higher education unless such education is taking place in HEIs which are 'financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit'. Following the Courts reasoning in the free movement cases it can be assumed that HEIs originally would have also been regarded as conducting a typical

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[20] See also on these cases Reich, 'Herkunftsprinzip oder Diskriminierung als Maβstab fuer Studentenfreizuegigkeit?' (2009) 18 EuZW 637, and Rieder, 'Case C-147/03, *Commission of the European Communities v Republic of Austria*' (2006) 43 CML Rev 1711.

[21] Case C-73/08 *Bressol*.

[22] See further on the changing nature of HEIs and, in particular, on the recent developments e.g Wissema (n 8), Scott (n 8), Deiaco, Holmen & McKelvey, 'From social institution to knowledge business', in McKelvey & Holmen (eds), *Learning to compete in European Universities*, Cheltenham/Northampton, Edward Elgar, 2009, Palfreyman & Tapper, 'What is an 'Elite' or 'Leading Global' University?', in Palfreyman & Tapper (eds), *Structuring Mass Higher Education* New York/London, Routledge, 2009.

[23] Browne et al., *Securing a sustainable future for higher education,* 2010, www.independent.gov.uk/browne-report, accessed 9th September 2011.

[24] See Case C-41/90 *Höfner,* para 21.

[25] See Case 118/85 *Commission v Italy,* para 7.

[26] See Case 263/86 *Humbel,* para 14 seq.

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

government activity which does not fall into the ambit of competition law. The Commission indeed adopted this reasoning in Decision 2006/225/EC.[28]

As the caveat in *Wirth* shows, the definition of (higher) education as non-economic is not absolute. Indeed, in newer case law a variety of educational activities have been defined as economic services. The case *Neri*[29] concerned a private HEI which provided university courses in cooperation with a British university. This HEI also had a branch in Italy. The question in the case was whether Italian rules not recognising the diplomas given by this HEI were infringing the freedom of establishment, which would require the higher education service provided to be a service in the meaning of the free movement provisions in the first place. The Court decided that the 'organisation for remuneration of university courses is an economic activity'.[30] This case was also not an isolated decision. In the case *Schwarz*[31] private schools and in the case *Jundt*[32] teaching activities conducted by an individual for a HEI in another Member State have been regarded as economic services. Regarding competition law HEIs would be conducting an economic activity if they offered services on a market. This does not require the HEIs to actually make a profit. Neither can their public character prevent the classification as undertaking. All that matters is the (potentially) economic nature of the service. Thus it very much depends on the way a system is organised; if it is organised as a market and private for-profit providers (potentially) compete with them, HEIs are more likely to be classified as 'undertakings'.[33] Therefore the Commission pointed out in Decision 2006/225/EC:

> 'that the concept of economic activity is an evolving concept linked in part to the political choices of each Member State. Member States may decide to transfer to undertakings certain tasks traditionally regarded as falling within the sovereign powers of States. Member States may also create the conditions necessary to ensure the existence of a market for a product or service that would otherwise not exist. The result of such state intervention is that the activities in question become economic and fall within the scope of the competition rules'.[34]

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[28] See Commission Decision 2006/225/EC 'on the aid scheme implemented by Italy for the reform of the training institutions' (para 41 seq).

[29] Case C-153/02 *Neri*.

[30] Case C-153/02 *Neri* para 39. It is to be noted here that the tuition fees concerned only amounted to € 2,065.83 per annum and were thus in comparison to the amount of tuition fees which English students will have to pay not even that high.

[31] Case C-76/05 *Schwarz*.

[32] Case C-281/06 *Jundt*.

[33] See also Swennen, 'Onderwijs en Mededingsrecht' (2008/2009) 4 Tijdschrift voor Onderwijsrecht en Onderweisbeleid 259, p 265 seq, 275 seq, Steyger (n 17) p 277 seq.

[34] See above (n 28) para 50. This has also been reinforced in Commission Communication 'on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest' (2012/C 8/02) para 28.

Regarding research in HEIs the Commission in its 'Community framework for state aid for research and development and innovation'[35] made clear that it considers 'that the primary activities of research organisations are normally of a non-economic character'. It refers in particular to research 'for more knowledge and better understanding', 'the dissemination of research results' and internal, not-for-profit technology transfer. The Commission further explains, however, that activities 'such as renting out infrastructures, supplying services to business undertakings or performing contract research' are economic in nature.[36]

It is therefore apparent that with further commodification of HEIs, their major activities can fall under the free movement provisions and competition and state aid law. In the following section it will be analysed what consequence competition and state aid law can have for HEIs. Of course, the possibility of exemption as services of general economic interest (SGEIs) under Article 106(2) TFEU remains in such cases. However, the placing in the market of such services can in itself be regarded as problematic as it might change the nature of such services. The character of Article 106(2) TFEU as an exemption means that 'there has to be a good reason for setting aside competition and what that exactly could be is still not clearly defined'.[37] Thus not all constellations will necessarily be exempted. Additionally, this will require a more market oriented way of operation in order to avoid going beyond the proportionality requirement of Article 106(2) TFEU.

POSSIBLE PROBLEMS ARISING FROM EU COMPETITION LAW FOR HEIs

Market Definition

As will be seen below the application of the competition rules often depends on the share an undertaking holds in the relevant market. Therefore a few observations regarding market definition seem in order before moving to the competition law provisions themselves. To establish the market, the relevant product and geographical market has to be defined. The Commission focuses on 'demand substitution' when defining markets. 'Supply substitution' only plays a role in cases where an undertaking can easily switch between the products it produces, even if these products are not interchangeable from a 'demand substitution' perspective. Other considerations are only taken into account at a later stage. In establishing 'demand substitution' the Commission uses the SNIP (small but significant and non-transitory increase in price) test. All products which are an alternative if such an increase in price would take place are within one product market and all regions from which the consumers would be willing to receive the product, would be in the same geographical market.[38]

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[35] Commission 'Community framework for state aid for research and development and innovation' 2206/C 323/01 para 3.1.1.

[36] Para 3.1.2. of the framework (n 35). One might assume that a similar distinction would be drawn in the field of the free movement provisions.

[37] Neergaard (n 17) p 194.

[38] Commission Notice 'on the definition of the relevant market for the purposes of Community Competition law' OJ 1997, C372/5, para 7 seq.

For the product market as regards HEIs this would mean that research and teaching are not in the same market. Furthermore, undergraduate and post-graduate education would be in a different market. Considering 'supply substitution' undergraduate and postgraduate taught education might, however, be considered to be in the same market, as it might be easy for the HEIs to switch between the two. Postgraduate research education, however, would have to be considered as an own market, as not all HEIs even have the right to issue doctoral degrees[39] and the position between student and researcher inherent to postgraduate research students[40] might also require significant office and laboratory space, which would make a switch less easily conductible. Furthermore, the different subjects are to be considered as separate markets. However, problems in this respect might lie in the details. One might, for example, wonder if a specialised course in international law belongs to the same market as legal education in general and if very specific research constitutes an own market. If such specialisation leads to separate markets the market shares of the HEIs in question would be likely to be very high. Another aspect to take into account here, would be activities in different languages, in particular as regards education. The market for courses in Lithuanian would surely have to be differentiated from the market for courses in Spanish. Finally, some Member States have different types of HEIs which might constitute different markets, as, for example, degrees of a more vocational character (e.g. Fachhochschulen in Germany) do not necessarily qualify for postgraduate research degrees at universities. Even in England, where the divide has officially been abandoned, prestige questions might lead to the approximation as separate markets for courses provided by pre and post 1992 HEIs. Concerning the geographical market one might assume that this is narrower for undergraduate education than for postgraduate education, as undergraduate students might prefer to stay closer to their parents' homes. Thus the market might only comprise one Member State or even just a region within one Member State. On the other hand, the cases of Austria and Belgium mentioned above indicate that in some situations the market penetrates national borders. As regards research, the market is even more likely to be international.[41]

These considerations show that market definition is a complex exercise and it is not possible to describe the markets as regards HEIs in general terms. Instead it very much depends on the individual case to determine what exactly the market is.

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[39] In Germany, for example, only universities usually have the right to issue doctoral degrees. See, for example, the provision regarding this in the federal state of Bremen; § 65 (1) Bremisches Hochschulgesetz (Bremen HEIs Act 2007). Being a federal republic, the federal states mainly regulate the HEI sector in Germany.

[40] While PhD researchers are mainly regarded as students in some Member States (e.g. in England), they are regarded more as academic staff in others. The latter is, for example, the case in the Netherlands where the academic place for a PhD researcher is usually a salaried position. See VSNU (vereniging van universiteiten - association of universities in the Netherlands), 'Doctoral education' (2011) http://www.vsnu.nl/Focus-areas/Research/Doctoral-education-.htm accessed 20th September 2011.

[41] See also on market definition in the context of HEIs Amato & Farbmann, 'Applying EU competition law in the education sector' (2010) 6(1-2) IJELP 7 and Greaves & Scicluna, 'Commercialization and competition in the education services sector - Challenges to the education service sector from the application of Articles 101 and 102 TFEU' (2010) 6(1-2) IJELP 13 p 16 and 20 seq.

ARTICLE 101 TFEU - THE PROHIBITION OF COLLUSION HARMING COMPETITION

Article 101(1) TFEU prohibits any collusion between undertakings which has as its 'object or effect the prevention, restriction or distortion of competition', if it is of a Union dimension. For the latter to be the case the collusion has to 'affect trade between Member States' appreciably[42] and it has to have an appreciable effect on competition.[43]

For HEIs this would mean that any cooperation regarding prices for research or tuition fees could come under the scrutiny of the provision. While there has not been a case on HEIs under EU law yet, the Office of Fair Trading (the UK's competition Authority, OFT) already found that private schools had established a cartel. The schools had exchanged confidential price information over an extended period of time and were thus fined with £10,000 each for 'participating in an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition in the relevant markets for the provision of educational services'.[44] The Dutch competition authority (Nederlandse Mededingsautoriteit, NMa) recently started investigations into a possible price fixing cartel of two universities based in Amsterdam. Dutch universities are allowed to set their prices themselves since the Wet Versterking Besturing (Strengthening Administration Act) entered into force in 2010. The NMa is now investigating whether the Universiteit Amsterdam and the Vrije Universiteit Amsterdam fixed their prices for second bachelor and/or master degrees except for medical subjects.[45] According to 'de Volkskrant' there have even been minutes of common discussions between the universities to this end which have been included in a writ by the student organisation Stichting Collectieve Actie Universiteiten (Foundation Collective Action Universities, SCAU).[46] This writ apparently started the investigations.[47] Price fixing was also the issue in a case regarding a German music

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[42] This has been interpreted widely, though. The closing of a national market (Case 8/72 *Vereeniging van Cementhandelaren* para 29) as well as potential effects (Case 56/65 *Maschinenbau Ulm* [1966] ECR 235, 249) fall under this criterion. See further on this criterion Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' (OJ 2004, C101/81).

[43] Case 5/69 *Völk* para 7. The Commission deems that generally not to be the case if the market share is below 10% in horizontal and 15% in vertical cases. See Commission Notice 'on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)' (OJ 2001, C368/07) section II 7 seq.

[44] OFT Decision CA98/05/2006 from 20th November 2006 available on http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/schools. The OFT applied the national equivalent to Article 101(1) TFEU; s 2(1) Competition Act 1998. See also on the case Greaves and Scicluna (n 41) p 13, 21 seq, Amato and Farbmann (n 41) p 10 seq, and Swennen (n 33) p 277.

[45] See NMa Press Release, 'Bedrifsbezoeken NMa bij Amsterdamse universiteiten' (2011) http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/webberichten/2011/20_11_bedrijfsbezoeken_nma_bij_amsterdamse_universiteiten.aspx accessed 12th October 2011.

[46] de Pous, 'Amsterdamse universiteiten gedaagd om prijsafspraken' (2011) de Volkskrant 1st September 2011, http://www.volkskrant.nl/vk/nl/4884/Bezuinigingen-in-het-hoger-onderwijs/article/detail/2880822/2011/09/01/Amsterdamse-universiteiten-gedaagd-om-prijsafspraken.dhtml accessed 14th October 2011.

[47] Dijkstra, 'Amsterdam Universities fix prices: how to prevent this from happening?' (2011) http://www.rug.nl/kennisdebat/onderwerpen/actueel/universitiesFixPrices, accessed 14th October 2011, Myklebust & O'Malley, 'NETHERLANDS: Dawn raids over 'illegal' tuition fees' (2011) University World

school. The public music school had set maximum prices which the self-employed teachers teaching in this music school were able to charge, in order to keep prices low and make music education accessible for everybody. A teacher wanting to charge higher prices challenged the arrangement. The Bundesgerichtshof (German Federal Court of Justice, BGH) considered the self-employed teachers as well as the school as undertakings engaged in price fixing.[48] While in the first case it is unclear whether the application of competition law had positive or negative social consequences as such and in the second case the student organisation is trying to use competition law to prevent excessive pricing, the latter case indicates that negative social consequences can in fact arise from the application of competition law, as the low prices in this case were meant to achieve equal access for everybody. As public market regulation can also be challenged under Article 4(3) TFEU in conjunction with Article 101(1) TFEU,[49] one might even wonder if in certain circumstances governmental provisions setting fees or caps on fees could be challenged.

Cooperation of HEIs in a common body which leads to the foreclosure of the market could be problematic. For example, it might be conceivable that bodies allocating study places could not limit themselves to national HEIs anymore, as this would foreclose the market for new entrants. The press[50] has already reported on the exclusion of Maastricht University from the British Universities and Colleges Admission Service. In the article it was said that Maastricht University was planning to challenge the denial under 'European Union law for discriminating against Maastricht'. It is not entirely clear which provision of EU law was meant. However, one would assume that this refers to the free movement provisions. It would also be conceivable, though, that such situations could be challenged under Article 101(1) TFEU. Depending on which status such a body had, it could be regarded as a decision by an association of undertakings, a vertical cartel[51] or an infringing governmental regulation. The opening of such arrangements, however, could lead to additional costs and thus to constraints for the systems.

Another area that could lead to conflicts with Article 101(1) TFEU is cooperation between HEIs in which they agree to each specialise in specific areas, as this could be regarded as market division. Thus joint course agreements could, in principle, fall under Article 101(1) TFEU. Research cooperation could also be regarded as collusion if it is taking place with a view to exploit the results and limits competition. The latter might be the case if further limitations beyond the research cooperation are attached to it, if the individual undertakings were close to achieving the result of the cooperation

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News 7th September 2011, http://www.universityworldnews.com/article.php?story=20110907191951868, accessed 23rd September 2011.

48 BGH Judgement 23/10/1979 in (1980) 82 GRUR 249. See further on the case Kroitzsch, 'Anmerkungen BGH 23/10/1979 KZR 22/78 'Berliner Musikschule'' (1980) 82 (4) GRUR 251, and Swennen (n 44) p 277.

49 Case 13/77 *INNO v ATAB,* para 30 seq.

50 Grimston & Winch, 'Maastricht University is fighting for a listing in order to attract British students' (2010) The Sunday Times 24/10/2010, p 4.

51 See Case 107/82 *AEG,* para 35 seq, on distribution networks which are not open to everybody fulfilling the qualitative criteria being considered as vertical agreements.

individually or if the exploitation abilities of the parties are unduly limited.[52] In Member States where public funding is decreasing such common research or teaching arrangements might, however, be the only possibility for certain HEIs to survive.

Article 101(1) TFEU also prohibits the limitation of markets. This could possible lead to problems when HEIs or governmental regulations limit study places or research output. In particular the demand for study places is often higher than the places available[53] which might encourage students to challenge such a situation. Again, the systems might, however, not be able to accommodate more students and retain their public or, in some Member States, free of charge character.

Any collusion caught by Article 101(1) TFEU is automatically void under Article 101(2) TFEU unless it can be exempted under Article 101(3) TFEU; if it provides for efficiency gains which allow the consumer 'a fair share' of the gain, it is necessary to achieve these gains, and does not eliminate competition. The Commission seems to follow a rather narrow approach as regards these criteria taking mainly economic considerations into account.[54] Since Regulation 1/2003,[55] which decentralised competition law, prior notification is not necessary for an exemption. Yet, the Commission still issues block exemption regulations (BERs) to provide guidance on which kind of collusion it generally deems to be exempted some of which might be helpful for HEIs. The specialisation BER[56] allowing undertakings to specialise and receive products from competing undertakings might, for example, provide an exemption for joint course agreements. However, the exemption is only applicable to undertakings with a combined market share below 20%. It also does not apply to price fixing, limitation of outputs and market division (which are hardcore restrictions). The research and development BER[57] exempts all vertical agreements[58] and horizontal agreements of a common market share below 25%, if 'the parties have full access to the final results'. Certain hardcore restrictions are, however, excluded. The technology

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[52] See further Lübbig & Schroeder, '§8 Einzelfragen', in Wiedemann (eds), *Handbuch des Kartellrechts*, 2nd ed, Munich, Beck, 2008, para 120 seq.

[53] See, for example, the cases of Belgium and Austria mentioned above (n 18). As regards the problem of insufficient numbers of study places to satisfy all applicants in England see e.g. Richardson, 'Thousands "to miss out on university degree"' (2010) BBC News 1st February 2010 http://news.bbc.co.uk/1/hi/education/8487354.stm accessed 9th February 2010.

[54] See, for example, Commission White Paper 'on the modernisation of the rules implementing Articles 85 and 86 of the EC Treaty' Programme No 99/027 (OJ 1999, C132/01) para 57, and Commission Communication 'Guidelines on the application of Article 81(3) of the Treaty' (OJ 2004, C101/08) para 42. See also Monti, *EC Competition Law*, Cambridge, CUP, 2007 chapter 4 in particular pp 89 seq, 102 seq and 122 seq, and Jones & Suffrin, *EC Competition Law,* 4th ed, Oxford, OUP, 2011, p 244 seq. With a focus on HEIs see Greaves and Scicluna (n 41) p 20.

[55] Council Regulation 1/2003/EC of 16 December 2002 'on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty' Article 1(2).

[56] Commission Regulation 1218/2010/EU of 14 December 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements'.

[57] Commission Regulation 1217/2010/EU of 14 December 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements'.

[58] 'Agreements' also refers to tacit collusion and decisions of associations of undertakings in the research and development BER (ibid Article 1(1)(b)).

transfer BER[59] provides an exemption for technology transfer relating to the manufacture of contractual products in cases where the common market share is below 20% in horizontal and the individual market share below 30% in vertical cases. Certain hardcore restrictions and some other restrictions are, again, excluded. Finally, all vertical collusion below a market share of 30% of the individual undertaking is generally exempted by the vertical agreement BER[60] except for certain hardcore restrictions. It would depend on the individual case in how far HEIs can utilise these exemptions.

ARTICLE 102 TFEU - ABUSE OF A DOMINANT MARKET POSITION

Article 102 TFEU prohibits dominant undertakings abusing their market position. An undertaking is assumed to be dominant if it possesses a market share of more than 50% in the relevant market. However, this assessment might change if barriers to entry are low. The abuse lies in the anti-competitive behaviour of the dominant undertaking. The concept of abuse and dominance are closely linked, as certain behaviour might only be regarded as abusive if it is conducted by a dominant undertaking. Like Article 101 TFEU, Article 102 TFEU only applies if there is an effect on intra-Union trade.

Problems could, for example, arise for HEIs from this provision (given that they hold a dominant market position in the relevant market) if, due to their public position, they are able to hold their prices at a low level. Private competitors might try to challenge this as predatory pricing. Again, there is no case law regarding HEIs under EU law in this respect. The NMa, however, had to deal with a case similar to the German music school case mentioned above. In this case the private competitors of public music schools had accused the public schools of predatory pricing. The NMa denied the case as the prices of the public schools were foreseen in national legislation and the NMa had no authority to review this.[61] This would be different at the EU level. Such legislation could be challenged under Article 106(1) TFEU in conjunction with Article 102 TFEU.[62] Thus whether prescribed by national legislation or not, low tuition fees as well as low prices for research contracts could be challenged under Article 102 TFEU which might be counter-productive to the public service aim pursued by public HEIs.

MERGER CONTROL

EU merger control is not to be found in a Treaty provision, but in secondary legislation. According to the Merger Regulation,[63] mergers can be prohibited if they would lead to a significant impediment to effective competition and are of a EU dimension.

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[59] Commission Regulation 772/2004/EC of 27 April 2004 'on the application of Article 81(3) of the Treaty to categories of technology transfer agreements'.

[60] Commission Regulation 330/2010/EU of 20 April 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices'.

[61] Besluit bk005-9801available at www.nmanet.nl/Images/0005BEMP_tcm16-97472.pdf. See also on the case *Swennen (*n 44) p 275.

[62] Case 18/88 *RTT,* para 23 seq, C-49/07 *MOTOE,* para 50.

[63] Council Regulation 139/2004/EC of 20 January 2004' on the control of concentrations between undertakings (the EC Merger Regulation)'.

If due to decreasing public funding HEIs decide to merge, the Merger Regulation might apply to them and can lead to a prohibition of the planned merger. Again, there are, so far, only national cases available in this respect. The OFT has dealt with two mergers in the sector already. The first concerned the merger between the City College Manchester and the Manchester College of Arts and Technology. In this case the market shares of the colleges were, however, too low to justify further investigation.[64] The second merger concerned the University of Manchester, the Victoria University of Manchester and the University of Manchester Institute of Science and Technology. Here the OFT did investigate, but decided that these HEIs were only partly to be regarded as competitors and that the merger would not limit competition significantly enough, in those parts where they were, to prohibit the merger.[65] The cases illustrate, though, that HEIs have not only been regarded as undertakings, but have also been investigated at the national level and, in other cases, envisaged mergers might be prohibited.

ARTICLE 107 TFEU - ILLEGAL STATE AID

Any advantages imputable to the state, which are given selectively to undertakings, distort competition and have an effect on intra-Union trade, are illegal under Article 107(1) TFEU. The Commission, however, applies a *de minimis* clause excluding small amounts (€200,000 over three fiscal years) of state aid from the provision.[66] Article 107(1) TFEU has led to difficulties in the details; on the one hand, state aid should be prohibited and on the other hand, the state must be in the position to invest its money and commission public services for its population. For the former the 'private investor principle' is used; if the state acts like a private investor the investment does not constitute state aid. For the latter the Court has clarified its approach in the case *Altmark*[67] which was then followed by Commission legislation and guidelines laying down further details.[68] The commissioning of a service is, accordingly, not state aid, if it clearly defines the public service obligation, the compensation has been calculated transparently in advance, is not excessive and the estimated costs themselves are reasonable. The latter should normally be established by a public procurement procedure. The *Altmark* judgement and the following legislation led to Article 106(2) TFEU playing a less significant role for state aid. While the *Altmark* criteria have originally been used strictly, the General Court gave the Member States slightly more

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[64] Case ME/3080/07 available at http://www.oft.gov.uk/OFTwork/mergers/decisions/2007/City. See also on the case *Swennen (*n 44) p 277.

[65] Case ME/1613/04 available at http://www.oft.gov.uk/shared_oft/mergers_ea02/uompublish.pdf. See also on the case *Swennen (*n 44) p 277.

[66] Commission Regulation 1998/2006/EC of 15 December 2006 'on the application of Articles 87 and 88 of the Treaty to de minimis aid'.

[67] See case C-280/00 *Altmark*.

[68] Commission Decision 2012/21/EU of 20 December 2011 'on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest', 'European Union framework for State aid in the form of public service compensation' (Commission Communication 2012/C 8/03), Commission Directive 2006/111/EC of 16 November 2006 'on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings' and a Communication on SGEIs and state aid (above n 34).

leeway in *BUPA*[69] when it came to the definition of the public service obligation. This has been interpreted in literature as respecting the primary responsibility of the Member States in areas such as health.[70] It might thus also be a relevant precedent for a less strict approach as it comes to HEIs, at least in the field of education.

Problems with this provision could arise for HEIs if they conduct research or teaching activities as undertakings (thus in an economic way) and do not use 'full economic costing'. In that case even the use of the public infrastructure could be regarded as illegal state aid, unless rent at the full market price is paid for using the facilities.[71] If the HEI passes the savings on to private undertakings it conducts the service for, it could be regarded as provider of state aid. This might even go as far as requiring the state to commission all teaching and research activities which are qualified as economic in nature in a public procurement procedure to avoid coming in conflict with the *Altmark* principles. The consequence would then be a similar system as the English National Health Service system for secondary care where private provision is well advanced.[72]

Exemptions from Article 107(1) TFEU are provided in Article 107(2) and (3) TFEU and the Commission also issued specific legislation in this respect. Article 107(2) TFEU concerning aid for particular consumers, aid for the aftermath of natural catastrophes and aid in the German States which were disadvantaged due to the former division of Germany, is not particularly relevant for HEIs. Article 107(3) TFEU provides exemptions for: (a) aid given to promote the development of economically deprived regions, (b) to conduct a 'project of common European interest' or to provide help in case of economic disturbances, (c) 'to facilitate the development of certain economic activities or of certain economic areas', (d) 'to promote culture and heritage', and (e) other kinds of aid if these have been specified in a Council decision. Here it might be conceivable that HEIs could fall under one of the criteria mentioned in paragraph (b)-(d), but that would depend on the individual case.

Additionally, secondary legislation concerning research and development might provide for exemptions for HEIs. The General BER[73] contains a section on research and development activities. These are exempted from Article 107(1) TFEU if the state aid does not exceed €20M per project with an aid intensity of 100% as regards fundamental research, €10M per project with an aid intensity of 50% as regards industrial research

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69 See case T-289/03 *BUPA*.

70 Hatzopoulos, 'Services of General Interest in Healthcare: An Exercise in Deconstruction?', in Neergaard, Nielsen & Roseberry (eds), *Integrating Welfare Functions into EU Law - From Rome to Lisbon*, Copenhagen, DJØF Forlag, 2009.

71 See also Huber & Prikoszovits, 'Universitäre Drittmittelforschung und EG-Beihilfenrecht' (2008) 19(6) EuZW.

72 For a competition law analysis of this, in particular of the position of third sector providers in this respect, see Wendt & Gideon, 'Services of general interest provision through the third sector under EU competition law constraints: The example of organising healthcare in England, Wales and the Netherlands', in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011.

73 Commission Regulation 800/2008/EC of 6 August 2008 'declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)'.

and €7.5M per project with an aid intensity of 25% as regards experimental development (Article 6, 30 seq). The amounts double for EUREKA projects and there are also special provisions for research in the fisheries and agriculture sector. However, this always has to be transparent aid with clear eligible costs. The regulation also contains a passage on exemptions for training activities. This, however, refers only to trainings of employees not to general education in HEIs. Furthermore, it provides exemptions for small and medium sized enterprises (SMEs). The threshold in the definition of an SME with a maximum of 250 employees will, however, usually be too low for HEIs to fall under this exemption. The previously mentioned Research and Development Framework[74] in section 4 and 5 lies out guidance on how the Commission will apply Article 107(3)(b) and (c) to state aid for research and development activities. It does not per se exempt any such activities, however. They still have to be notified. Finally, the SGEIs Decision[75] exempts smaller aid (€15M per annum) in the form of public service compensation.[76] Again, it depends on the individual case in how far HEIs can utilise these exemptions.

CONCLUSION

This paper aimed to illustrate some constraints which could arise from EU competition law for HEIs as one, thus far largely unexplored, area of tensions between economic and social integration. It has been shown that due to the increasing commodification of HEIs their main activities, teaching and research, could increasingly be regarded as economic services and that would allow the internal market and competition law to 'spill-over' into these areas.

Some examples of possible tensions of national policy concepts with EU law have been discussed. These are by no means exclusive. There might be other areas where problems could arise. The result of any such tensions would be that HEIs would have to operate in an even more commercial way and adhere to 'full economic costing' and separate accounting for economic and non-economic services. With such an approach it might be questionable if certain subjects can even survive. Additionally, the possibility of fines can cause further constraints. If an HEI would infringe competition law and thus have to pay a fine, this would either mean that they would have to cut costs in other areas which could reduce quality and/or quantity or they would have to pass on the costs to students or research clients.[77]

Article 106(2) TFEU, of course, still offers an exemption for SGEIs. However, this might not be applicable in every case and it would still require a more commercial approach towards university management in order to satisfy the proportionality

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[74] See above (n 35).

[75] See above (n 68).

[76] There are also a variety of procedural rules, rules for specific kinds of aid and transparency rules which might lead to a particular assessment of an aid scheme in particular circumstances dealing with which, however, would go beyond the scope of this paper. See for a 'Compilation of State aid rules in force' http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html accessed 13th September 2011.

[77] Similar Greaves and Scicluna (n 41) p 21, 24.

requirement. Even if EU institutions might possibly be more reluctant to become involved in this area of main responsibility of the Member States, as the *BUPA* judgement possibly suggests, the national competition authorities (NCAs) are mostly responsible for the enforcement of competition law after decentralisation. In the national cases evaluated here the NCAs have, however, been rather active.

In conclusion one might wonder, if it would not be more advisable to work on the side of social integration and find a common European approach towards HEIs at the supranational level. A shared competence and a clear strategy could help to avoid tensions with seemingly unrelated provisions of EU law in this area and help HEIs to fulfil their missions in the public interest.