

Quality Assurance of Cross-border Higher Education and the Services Directive

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Education services are an important component of the exports of some countries such as the U.S., the UK and Australia. It was in this context that the U.S. made a proposal to the World Trade Organisation to consider education as a tradable service or commodity to be included in the GATS (General Agreement on Trade and Services) aiming at removing barriers to the provision of higher education services by foreign institutions and companies.

Progress in the GATS agenda for education was modest, and many countries decided not to make commitments in education. Even the U.S., one of the most zealous proponents of liberalisation of education services, although having submitted a proposal on education in the first phase of negotiations (2000–2001), so far made no commitment in higher education (Tilak, 2011: 69-70; Bashir, 2007: 56) while Canada explicitly rejected to schedule commitments under GATS.

GATS recognises “the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives” (WTO, 1995: 285).

A country, even after making a commitment to GATS in higher education, is entitled to protect consumers from rogue providers and to safeguard the achievement of educational goals, for instance by means of quality assurance and accreditation processes, provided they are non discriminatory, meaning that they apply equally to national and foreign providers.

The UNESCO/OECD Guidelines for Quality Provision of Cross-border Higher Education (2005) recommend that governments establish a comprehensive, fair and transparent registration or licensing for CBE operators and reliable quality assurance and accreditation mechanisms.

The European Commission based on the ECJ case law (e.g. Case 274/05 Commission vs. Greece) sustains that franchised “programmes and their diplomas are covered by the education system of the Member State where the awarding authority is located and it is their responsibility to ensure the quality of the training and education at issue as they are not part of the education system of the Host Member State”.

Therefore “a Member should not check again the conditions of training, programmes of study, admission and assessment criteria, number and qualifications of teachers which are set by the educational institution awarding the diploma and should be controlled by the authorities of the Member State where this awarding body is located”.

This position of the Commission reveals substantial ignorance of the problems of cross-border higher education (CBHE) and of the present state of development of European Quality Assurance Systems. As argued by ETUCE, the liberalisation of education boils down to a critical choice between market freedoms versus the quality and accessibility of education: should higher value be granted to 'the right to free trade in an open education market' or to 'member states' right to fully regulate their education sector with a view to securing high quality and equal access throughout life to its population?'

Article 165 of the TEFEU

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

The European Court of Justice has in several law cases upheld this principle.

Case C-523/12 Dirextra Alta Formazione v Regione Puglia (ECLI:C:2013:831)

The aim of ensuring high standards of university education appears to be a legitimate objective capable of justifying restrictions on fundamental freedoms (see, to that effect, Case C-153/02 Neri [2003] ECR I-13555, paragraph 46).

Case C-451/03 Servizi Ausiliari Dottori Commercialisti [2006] ECR I-2941 38, 39, 40, 41

In that regard, it must be observed *that the public interest in the protection of recipients of the services* in question against harm which they could suffer as a result of services provided by persons without the necessary professional or personal qualifications can justify a restriction on the freedom of establishment and on the freedom to provide services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraphs 15 to 17).

Case C-153/02 Neri [2003] ECR I – 13555 § 46, 51

Whilst *the aim of ensuring high standards of university education appears legitimate to justify restrictions on fundamental freedoms*, such restrictions must be suitable for securing the attainment of the objective, which they pursue and must not go beyond what is necessary in order to attain it (see Case C-439/99 Commission v Italy [2002] ECR I-305, paragraph 23).

Does the proposal of the Commission guarantee the quality of the education services? It does not as there is, in general, a significant difference between quality of the services offered in the Exporting country and in the Host country. The fact that a programme has its quality recognised by accreditation in the exporting Member State does not guarantee its quality in the Host Member State. The quality of education will strongly depend on the available local conditions such as academic staff, laboratories and libraries, facilities, etc.

A recent study produced by ENQA (2016) on quality assurance of CBHE refers that “While CBHE is expected to be of “comparable quality” to education provided “at home” in the provider country, there are no specific criteria at the European level to assess this and no consistent approach to ensure that it happens”.

Difficulties:

- ❖ determining whether student learning outcomes for courses delivered outside are equivalent to those for the same course of study when delivered by the higher education provider at home.
- ❖ obtaining accurate information about a provider’s full range of CB activities”
- ❖ lack of “resources to undertake thorough assessments of CB activities, including site visits”.
- ❖ the absence of a common European approach to CBHE and its quality assurance.
- ❖ lack of developed systems for the QA of outbound CBHE, with the exception of the United Kingdom and Australia.

The Commission cynically argues “The “borderless” delivery of higher education has made cross-border quality assurance increasingly important. The emergence of so-called “degree mills” (fake universities selling fake “degrees” on the internet) makes it vital to distinguish legitimate education undertaken abroad from spurious qualifications (European Commission, 2009)”, although it apparently wants to deprive Member States of the capacity of protecting their citizens against the poor quality of services offered within its borders.

A recent report of the European Commission (2014) suggests that it is gaining some awareness about the real problems of CBHE and the use of the Services Directive: Bilateral agreements mandating the QA agency in the receiving country to act on behalf of the sending QA agency, or to allow an EQAR-registered agency to evaluate the CBHE institution, would help meet quality concerns and have the added advantage of encouraging cross-border cooperation and mutual learning.

Article 165 of the TEFEU explicitly recognises the full responsibility of the Member States for the content of teaching and the organisation of education systems and the European Court of Justice accepts restrictions on fundamental freedoms to ensure high quality standards of university education and the public interest in the protection of recipients of services. However, those restrictions must be suitable for securing the attainment of the objective, which they pursue and must not go beyond what is necessary in order to attain it.

It is also obvious that at present there are neither a common European approach to CBHE and its quality assurance nor developed systems for the quality assurance of outbound CBHE. This means that most franchising operations develop without any quality control either from the authorities of the Exporting Member State or of those of the Host Member State, which creates evident problems of consumer protection. It is also accepted that accreditation at home does not guarantee the quality of operations abroad.

Therefore, at present, it is not possible to accept the arguments put forward by the European Commission in favour of the full implementation of the Services Directive in the case of CBHE.