European Universities and Competition: The EU Market Rules for Higher Education

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In a speech on the future of the EU the French President Macron stressed the importance of the EU single market. Furthermore, he called for the creation of European universities, which should be a network of universities. The EU competition and internal market rules contain the legal framework for regulating a wide range of economic activities. Policy areas subjected by the Member States to market forces fall within the scope of these rules. Over the years higher education has been made subject to a process of commodification. This contribution explores to what extent EU competition and internal market law is capable of paving the way for a network of European universities. The case law of the CJEU shows that EU competition and internal market law applies to privately funded universities. This area of law provides important requirements for supplying economic educational services. This contribution argues that the applicability of EU competition and internal market law fosters values such as, freedom of choice, accountability, freedom of education, mutual trust and transparency in higher education. The values identified are capable of tying together various privately funded universities: these institutions share common values and are governed by laws being influenced by common values. Publicly funded universities fall outside the scope of EU competition and internal market law. This is different for their services that can be severed from their core tasks and are of an economic nature. All in all, a great imbalance exists between publicly and privately funded universities. At the current stage of the European integration process it is in the hands of the Member States to solve this imbalance. By doing so, they may take into account the values, such as freedom of choice and accountability, developed in EU competition and internal market law.

1. INTRODUCTION

In his thought-provoking speech on the future of the EU the French President Macron presented a blueprint for a sovereign, united and democratic Europe. He stressed the importance of the single market. Furthermore, he called for the creation of European universities, which should be a network of universities that enable students to study abroad. The EU needs to create a network of European universities that serve as cement of culture and knowledge for building a united Europe. It is clear from the outset that this objective is in line with the Bologna process, the most important aim of which is the establishment of a European Higher Education Area.

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Although, this may seem striking on first sight, particularly given the complementary and limited competences of the EU for educational policy set out in Articles 165 and 166 TFEU, in my view, the EU rules for the single market, such as competition law, may contribute to the creation of a network of European universities. EU competition and internal market law contains the legal framework for regulating a wide array of economic activities. The case law of the CJEU has shown that policy areas that are made subject to market forces by a member state fall within the scope of the competition and the internal market rules. A case in point is health care and, accordingly, these European rules have shaped the direction of travel of these policies. In some member states the government has decided to introduce competition in the various sectors of higher education. As a result, the national legislation governing these market-oriented sectors and the measures taken by the institutions operating therein must be assessed under EU competition and internal market law.

This contribution will explore to what extent EU competition and internal market law is capable of paving the way for a network of European universities. For this purpose, a network is defined as a number of institutions of higher education that have a connection with each other by sharing the same values. Accordingly, the question is to what extent the EU rules on competition and the internal market provide “cement” for building a common academic culture.

A very important matter to be addressed with a view to the research question concerns the scope: which universities fall within the ambit of the EU rules for competition and the internal market. At first this issue will be addressed. Then, attention will be paid to the relationship between the competition rules respectively EU internal market law on the one hand and the universities on the other hand. It should be noted that the analysis carried out is limited to institutions of higher education, such as universities and universities of applied sciences. Primary and secondary education is not included in this analysis. For the sake of convenience, in the present paper providers of higher education will be referred to as universities, which term also encompasses universities of applied sciences. Furthermore, the emphasis will be on the providers of higher education, rather than on students moving from their own member state to other member states (free movement of students). The reason for this is that the question to be addressed focuses on the creation of a network of universities operating in a European environment. Also matters of public procurement law will not be addressed, as these matters are concerned

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with the purchasing activities of universities and not with the supply of educational services.

2. ARE UNIVERSITIES GOVERNED BY EU COMPETITION AND INTERNAL MARKET LAW?

Higher education as a service in EU internal market law

In various free movement cases the CJEU was confronted with the question as to whether universities fall within the ambit of EU internal market law. In these cases Article 57 TFEU, which provides that services that are normally provided for remuneration are considered to be services within the meaning of the Treaty, played a significant role. In the early case law it was held that in national educational systems the services supplied are not of an economic nature, provided that these services are predominately financed by the State. The CJEU contended that in these systems the State does not seek gainful activity but aims at fulfilling, “… its duties towards its own population in the social, cultural and educational fields.” In this line of reasoning the emphasis is on the method of the funding of the university services. Collective financing by public authorities has an important bearing on the nature of the services rendered. These services are non-economic, which justifies that they are immune from EU internal market law. In my view, in the event of collective funding an individual educational service is not supplied in exchange of payment and, accordingly, the costs incurred with the provision of these services do not correspond with the contributions (tuition fees) due. The (small) contributions to be paid by the students or their parents should not be considered as the determination of remuneration for a particular service but rather as financial support that is part of the entire system of collective financing and, in essence, have the same function as taxation.

However, if universities are not depending on public funding for some specific activities, the qualification of these activities may be different. Thus in Neri, the CJEU found that the services concerned had an economic dimension, since they were provided in exchange of payment. At issue was the organisation of courses in various cities of some member states on behalf of a university based in the UK. The operator responsible for the ‘pan European organisation’ of the courses taught was paid for its services. It did not come as a surprise that in this case free movement law applied. The Neri case makes clear that some services must be severed from the core activities of a publicly funded university. If these services are provided for consideration they are economic and must be reviewed under EU internal market law. As a result, publicly funded universities may fall partly within the ambit of this area of law, i.e., as far as the services being offered on the market place is concerned. Consequently, their core tasks fall outside the scope of

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7  See para. 18 of Humbel, ibid.
EU internal market law, whereas some of their subsidiary business activities may be covered by this area of law.

The CJEU was also called upon to shed light on disputes involving universities that were not predominately financed out of the public purse. The CJEU held with regard to these disputes that educational services that are essentially financed by private funds, for example by fees paid by students or their parents, are of an economic nature.\(^9\) The consequence of this finding is that the services offered, including their core activities such as teaching courses, fall within the scope of EU internal market law.\(^{10}\) It is striking that in *Wirth* the CJEU combined the argument of private funding of a university with the aim of profit seeking, and by doing so suggested that both elements must be present in order to find the applicability of EU internal market law.\(^{11}\) In subsequent case law, however, references made to the aim to be for profit are left out by the CJEU,\(^{12}\) which entails to my mind that the test boils down to pinpointing the proportion of the private money of the entire funding a university receives. Interestingly, in *Kirschstein* the CJEU ruled that a private institution providing services of higher education fell within the scope of EU internal market law, as its services were financed by private funds.\(^{13}\)

The predominate role of private financing triggers the applicability of the EU internal market law. In some cases it will be difficult to establish the tipping point of the level of private financing: how much money must a university get in order to escape from EU internal market law. However, it may be assumed that on the basis of educational legislation of many member states it is possible to find out which universities are entitled to substantial public funding and which are not. In those circumstances, no serious problems regarding the qualification of the services at issue will occur. What is important in my view, is that the fee paid somehow corresponds with the costs of the educational services received: it must be possible to regard this fee as payment for specific services. In any event, a member state increasing the private dimension of university funding should be aware of the EU law consequences of this action.

**Higher education as economic activity in EU competition law**

In comparison with EU internal market law only limited case law on the applicability of the competition rules in education is available. It is, however, a well-known fact that these rules apply to undertakings and that the interpretation of this concept is based on a functional approach by the CJEU.\(^{14}\) Every entity engaged in economic activities is an

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\(^{11}\) See para. 17 of *Wirth*.

\(^{12}\) See para. 40 of *Schwarz and Goetjes-Schwarz* para 69 of case C-318/05, *Commission v. Germany* and para. 32 of case C-56/09, *Zanotti*.

\(^{13}\) See paras 53-63 of Case C-393/17, *Kirschstein*, 4 July 2019, ECLI:EU:C:2019:563.

undertaking for the purposes of EU competition law. Furthermore, the offering of goods or services on the market is regarded as an economic activity. The broad definition of the concept of undertaking is capable of covering a wide range of activities.

In CEPPB the CJEU was called upon to decide on the applicability of the competition rules to an organisation providing educational services. In addressing this issue the CJEU drew on its case law on free movement and education. By referring to these cases it stressed that services that are normally provided for remuneration amount to economic activities. The essential characteristic of remuneration is, in the view of the CJEU, that it constitutes consideration for the service concerned. Then it cited the judgments mentioned above, such _Schwarz and Gootjens_, and held that private courses offered by an educational establishment and essentially financed by private funds constitute economic services, as such an establishment aims to offer a service for remuneration. In contrast, courses provided by educational establishments integrated in a system of public education and financed, entirely or mainly, by public funds are not of an economic nature. By financing these courses the State has not the aim to be engaged in gainful activity but rather seeks to fulfil, “its social, cultural and educational obligations towards its population”. This line of reasoning exactly mirrors what the CJEU has decided in its judgments on free movement and education. Apparently, full convergence exits in matters concerning the scope of EU competition and internal market law in relation to education. In this respect it must be noted that the CJEU even held that a single education establishment might be engaged in both economic and non-economic activities. As in EU internal market law, the activities carried out by a provider of educational services may partly be covered by competition law and partly not.

Of interest in this regard is also a judgment handed down by the EFTA Court. In _Private Barnehagers Landsforbund_ this court found that municipal kindergartens were not undertakings for the purposes of competition law, as these organisations were mainly financed by public authorities: 80% of the costs were borne by these authorities, while no connection existed with costs of the services at hand and the fees due by the parents. In this case also references were made to the CJEU’s case law on free movement and education.

In my view, in the light of the foregoing it should be argued that universities predominately financed by the State are immune from competition law, which may be different for some subsidiary business activities. More precisely, with regard to the

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17 Case C-74/16, _Congregación de Escuelas Pías Provincia Betania_, 27 June 2017, ECLI:EU:C:2017:496.
18 See para. 47 van CEPPB.
19 See para. 48 of CEPPB.
20 See para. 50 of CEPPB.
21 See previous note.
22 See in this respect paras 52 and 53 of CEPPB.
courses or other activities, such as particular research projects, they are undertaking, in so far as these activities are financed by private money. Furthermore, universities that are mainly depending on private funding (paid, for instance, by students or their parents) are undertakings for the purpose of the Treaty provisions on competition.

The divide in EU internal and competition law: public and private funding

In sum, the test regarding the scope of EU internal market and competition revolves around the role played by public and private funding. For reasons of religion or belief some universities are private according to the national laws of some member states. As longs as these universities are mainly depending on public financial support, they are immune from EU competition and internal market law. In contrast, universities that are of public nature according to national law do fall within the ambit of EU internal market law, if they, probably as a result of a change of government policy, are (increasingly) depending on private funding. For example, Gideon has argued that English universities may be regarded as undertakings, as students have to pay a high fee (around £9,000) and are to be made customers purchasing services of higher education on the market place.24

This example shows that the policy of introducing significant fees in the sector of higher education may trigger the applicability of the competition and internal market rules. A policy geared towards increasing competition in the supply of university services is referred to as the commodification of higher education, meaning that higher education and academic research is transformed in a service tradeable on the market (turning these activities from a public good into a commodity).25 Such developments have taken place in various member states of the EU,26 as is testified by the example of the tuition fees of English universities. Furthermore, according to information from 201427 in Austria (apart from 22 public universities) 13 private universities offer programmes to students and do not receive any funding from the federal government for these programmes but may be awarded subsidies by regional authorities. In the Netherlands universities financed by the government also offer programmes for which they do not receive public funding. For example, the costs of a second bachelor and master programme taken by a student (after completion of the first bachelor and master programme) are not borne by the State.28 The second programme is financed by private means and, therefore, a tradeable service offered on the market place.

From these examples it is apparent that commodification of higher education can take different forms: - (virtually) all teaching and research programmes are turned into tradeable services, - privately universities operate next to publicly financed universities


26  Ibid.


and universities receiving public funding for their programmes also offer tradeable services of higher education. The last two forms result into a hybrid system, where higher education is partly treated as a public good and partly as a tradeable service on the market place.

It should be noted that commodification does not suffice in itself to trigger the applicability of EU competition and internal market law. It depends greatly on the exact design of the policy to introduce competition in higher education. If such policy is geared towards shifting the costs from the government to private parties, such as students, their parents and the private sector, the result could be that the higher education activities concerned are of an economic nature. That is the case if the majority of the costs of the services rendered to individuals are borne by private parties. In contrast, if the policy is limited to introducing benchmarks for dividing the public funding among the universities, the State still cover the costs of these institutions, which entails that the activities concerned are not turned into economic activities for the purposes of EU competition and internal market law.

In the light of the foregoing it should be concluded that the member states have considerable freedom in enacting legislation for publicly funded universities, because EU competition and internal market law does not apply. It should be pointed out, however, that this legislation must be compatible with the general principles of EU law. For example, according to Article 18 TFEU any discrimination on grounds of nationality is prohibited. Provisions of national educational law ought not to discriminate against universities of other member states. As this contribution focuses on competition and internal market law, the analysis to be carried below will be limited to universities predominately financed by private funds and to the economic activities that must be severed from the core tasks of publicly financed universities.

3. UNIVERSITIES AND COMPETITION LAW

Privately funded universities must observe EU competition law, while the same is true for the other universities, as far as their subsidiary business activities of economic nature is concerned. Consequently, their policies must be in line with the EU antitrust rules. Furthermore, government funding of universities engaged in economic activities has to be compatible with EU state aid law.

EU antitrust law and universities

Any cooperation regarding the fees due could amount to price fixing, which is strictly forbidden under Article 101 TFEU, in so far as the trade between member states is influenced. If a network of European universities emerges, it may be expected that in many cases cross-border effects will occur. This will be reinforced by the rise and spread of ICT, which foster services, such as online provision of education. Accordingly, exchange of information on tuition fees may give raise to serious issues under EU

Furthermore, it is clear from the outset that practices, such as market sharing, are also not permitted. Under Article 101 TFEU universities are not allowed to make arrangements on the (maximum) number of students to be enrolled in specific programmes and courses. Other forms of co-operation must be reviewed with great care under Article 101 TFEU. For example, setting up particular research projects must not lead to market foreclosure. Agreements leading to restrictive effects could be justifiable under Article 101(3) TFEU or the Block Exemptions. Article 101(3) specifically states that anti-competitive practices that contribute to promoting technical and economic progress could be justifiable. It goes without saying that promoting progress is at the heart of the activities undertaken by universities. Furthermore, the Block Exemption on Research and Development declares agreements setting up research and development project compatible with the internal market, provided that particular conditions, relating, for example, to market shares, are satisfied.

Universities having large market shares with regard to particular teaching programmes or research activities are precluded from developing policies that amount to abusive behaviour. For example, they should not be engaged in predatory pricing in order to exclude competing universities from the market.

In this regard it must be pointed out that many member states have a national system of competition law in place, modelled after the Treaty provisions on competition. The main difference between those national systems on the one hand and the European competition rules on the other hand lies in the criterion of the inter-state effect. National competition law also applies in absence of such effects. Nevertheless, as is demonstrated in cases, such as Bronner, the provisions of a national Act on competition that is aligned with EU law will be interpreted in the light of the equivalent EU rules. To a certain extent, approaches to doctrines developed at the EU level will also be reflected in many national systems of competition law.

It is apparent from the analysis of the case law dealing with economic activities in higher education that universities are bound by Articles 101 and 102 TFEU and the equivalent provisions from the national laws on competition, in so far as their activities are privately funded. This could give rise to unexpected problems. For example, in the Netherlands a student is obliged to pay only a limited tuition fee for the first bachelor or master programme she or he takes. The level of this fee is fixed in national law. The fee for the second bachelor or master programme, however, is determined by the universities, as the

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31 Regulation 1217/2010 of the Commission on the application of Article 101 (3) of the Treaty to certain categories of research and development agreements, OJ 2010 L335/36.
costs of these programmes are not covered by the State. Accordingly, the student must entirely bear the costs. With regard to these activities the Dutch universities operate as undertakings, which is striking as they offer exact the same teaching programmes to the students concerned. In the same class room students taking their first programme and their second programme may be present. The practices regarding the ‘second programme students’ must, nevertheless, be in line with the competition rules. Thus, when two universities based in Amsterdam aligned their tuition fees for the second bachelor and master programmes, the Dutch competition authority (the then NMa, now the ACM) intervened, as it could not be excluded that both universities were engaged in price fixing. When these two institutions promised to end the alignment of tuition fees, the Dutch competition authority decided not take further action and no official decision imposing fines was taken. This example shows that institutions of higher education providing programmes of both economic and non-economic nature must be aware of the serious issues of competition law that could arise. The hybrid nature of their activities has a considerable bearing on their operations. Then again, in my view the application of the cartel prohibition contributes to the freedom of choice of the students. Some competition regarding the level of the tuition fees between universities could enhance this freedom. In educational law the freedom of choice for the students is an important value and, accordingly, competition law may have a positive effect on that.

Could the alignment of tuition fees in the case of the Amsterdam universities be justifiable with a view to the public interest (ensuring access to education)? In my view, this is very questionable for two reasons. First, provisions such as Article 101(3) TFEU are mainly concerned with exempting efficiencies from the scope of the cartel prohibition. It is, therefore, very difficult to justify a practice aimed at achieving a public interest goal on the basis of such provisions, particularly as that practice constitutes price fixing. Second, in a hybrid system the government finances the provision of teaching programmes with a view to the public interest, leaving other services to market. As a result, the added value of a restrictive practice carried out on the market place with a view to the same public interest is very doubtful. In other words, such a practice seems to go beyond what is necessary.

Furthermore, the useful effect doctrine, which is based on Article 3(4) TFEU and Article 101 TFEU, may impose some limits on the measures and policies of the national educational authorities. According to this doctrine it is not permitted for a member state to deprive the Treaty provisions on competition law of their useful effect. This is the case if a member state requires or favours the adoption of measures contrary to Article 101 TFEU or reinforces the effects of these measures. Another way of depriving the

35 See ‘Bedrijfsbezoeken NMa bij Amsterdamse universiteiten’, press release of 2 September 2011, available at: https://www.acm.nl/nl/publicaties/publicatie/6587/Bedi...Universiteiten
37 See paras 48-72 of the Guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) of the TFEU).
38 See for example case C-245/91, Ohra, 17 November 1993, ECLI:EU:C:1993:887.
useful effect is delegating to private operators the power to intervene on the market. If for example, a university wishing to provide privately funded courses must ask for prior permission from a public authority and this public authority only grants this permission upon approval of the universities already operating on the market in question, serious issues may arise under the useful effect doctrine. Under such circumstances it cannot be excluded that powers to intervene on the market are delegated by the State to private operators, which is incompatible with Article 3(4) TFEU in conjunction with Article 101 TFEU.

It is clear that the useful effect doctrine imposes some restraints on the public educational authorities as to what extent private operators may be involved in the process of decision-making. More in particular, public educational authorities could consult institutions of higher education when developing policies. This consultation must be in line with useful effect doctrine, if the institutions concerned are engaged in economic activities. In other words, commodification of higher education could change the relationships between the government and the universities, since the useful effect doctrine leads to a sharp divide between public authorities and the providers of tradeable services of higher education, when it comes to the development of policies and the setting of norms. In my view, an important value embodied in this doctrine is that independent policy making and norm setting should be guaranteed.

State aid and universities

Financial support given by the State to universities engaged in economic activities is subject to scrutiny under the EU state aid rules. Public educational authorities should be aware that these rules considerably limit their room for manoeuvre if higher education is moved towards the market. Article 107(1) TFEU precludes member states from granting state aid to undertakings, if this aid affects competition on the internal market and influences the trade between member states. It goes without saying that this prohibition applies to the financing of universities engaged in economic activities too. A few exceptions may moderate the impact of Article 107(1) TFEU. For example, pursuant to the de minimis rule aid that is not in excess of €200,000 over any period of three years is exempted from the obligation to notify to the Commission. Furthermore, national aid measures could be permitted on the basis of the exceptions laid down in Article 107(2) and (3) TFEU. However, these exceptions can only be invoked successfully, if the aid measure concerned is notified to the Commission. In absence of such notification, the financial support given is illegal and must be paid back according to the standstill provision enshrined in Article 108(3) TFEU. It is settled case law of the CJEU that this provision has direct effect and, accordingly, must be enforced by domestic courts.

The applicability of the state aid rules has various kinds of consequences for the national authorities of the member states. Directly giving financial support to universities that are predominately financed by private means gives rise to serious issues under EU law.

Above it was pointed out that in Austria private universities offer programmes to students, for which they do not receive any funding from the federal government. In fact, this means that they are undertakings for the purposes of competition law. However, it is not excluded that regional authorities grant subsidies to private universities for instance to make establishment in their region more attractive. The fair chance exists that these subsidies are incompatible with EU state aid law, which means that the money given must be recovered.

Strikingly, it must be recalled that the level of government funding is at the heart of the test for qualifying a university as an undertaking. In my view, this implies that if public funding exceeds a particular level, the university concerned is not engaged in economic activities anymore. It goes without saying that it is very hard to pinpoint the exact tipping point for concluding that an activity has lost its economic nature. An important criterion for finding an economic activity is, nevertheless, as was already pointed out, that the educational activity concerned is provided to an individual recipient who has to pay for it, while the fee due largely covers the costs of this service. Thus, a subsidy given by an Austrian region to a private university constitutes state aid, if a great part of the costs must still be covered by students or other private players. In fact, the funding awarded will be immune from EU state aid law, if the region concerned accepts the majority of the costs incurred with the offering of all teaching (and research) programmes. This would mean that the regional body concerned has to develop a system of public higher education and it may be (highly) doubted whether this authority wishes to set up such a system.

All in all, circumventing the EU state aid rules by giving a huge amount of financial resources to a private university in order stimulate this university to move to a particular region and to turn the educational services at play into non-economic activities is a course of action full of risk. Moreover, it is also very cost-intensive.

In general, it should be noted that a change of policy concerning the financing of universities could have far-reaching consequences under the EU state aid rules. If for example, a system of vouchers for students is set-up and the money given to students is ‘earmarked’ for the payment of tuition fees for particular courses or specific universities (engaged in economic activities), it cannot be excluded that this system amounts to an indirect transfer of financial resources from public authorities to undertakings. Scrutiny of the essential features of a market-oriented method for financing higher education is inevitable in order to prevent state aid issues from occurring. In the same vein, tax benefits, such as VAT exemptions, given to institutions of higher education should also be reviewed under the EU state aid rules. If these benefits are selective and particular universities when carrying out economic activities are entitled to these benefits, while their competitors are excluded therefrom, the Treaty provisions on state aid could be violated.

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41 See A. Hoogenboom, ‘Commodification of Higher Education: Students, Study Loan Systems and State Aid’, EStAL 2015, p. 496.

As already was pointed out, activities that are carried out by publicly funded universities and can be severed from their core tasks may be of an economic nature. Courses commissioned by external clients for training purposes of their staff or contract research projects are often of an economic nature. Accordingly, this subsidiary business is governed by EU state aid law. The EU state aid rules oblige publicly funded universities not to transfer public money from their core tasks to these business activities. Furthermore, it should be noted that undertakings having exclusive or special rights as well as undertakings being entrusted with a task to provide Services of General Economic Interest must maintain separate accounts pursuant to Article 4 of the Transparency Directive.\textsuperscript{43} As a result, publicly funded universities must have in place a system of separate accounting. Such a system is also required, if they co-operate with commercial enterprises in research projects.\textsuperscript{44} Cross-subsidisation of economic activities and the public tasks assigned must be avoided.\textsuperscript{45} This requirement imposes serious restraints on publicly funded universities that closely co-operate with various market players and act as entrepreneurs in some areas. As soon as the publicly financed activities of universities are intertwined with commercial business, transparent arrangements on the flow of money and remunerations based on the costs incurred are needed to prevent competition being distorted.\textsuperscript{46}

The aim of the state aid rules is to prevent distortions of competition. In my view, by doing so these rules contribute to fair competition. The level playing field should be equal in order to allow for the provision of educational services at affordable prices. Fairness is an important value embodied in the state aid rules. Public resources must not be spent to give universities unjustified benefits, if these institutions operate on the market place. This is, in particular, a significant issue for universities in hybrid systems of higher education: public finding received to guarantee access for all to education must not be used for commercial purposes.

Having said that, I would like to point out that, if competition fails to provide essential services consistent with the public interest, financial intervention from the part of the government could be needed. The concept of Services of General Economic Interest (SGEI) may be capable of reconciling the tensions resulting from the collision of the market and higher education interests. In \textit{Altmark}\textsuperscript{47} the CJEU held that State compensation of the costs incurred with the performance of a SGEI mission does not constitute state aid, if such a mission is designated by a public authority, the compensation given is calculated in advance in a transparent and objective manner, this compensation does go beyond what is necessary, and the costs of a well-run company are used as a benchmark. If these conditions are met, the financial support given does

\textsuperscript{43} Directive 2006/111 of the Commission on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ 2006 L318/17.


\textsuperscript{47} Case C-280/00, \textit{Altmark}, 24 July 2003, ECLI:EU:C:2003:415.
not need to be notified to the Commission. Moreover, in its Decision on Public Service Obligations, 48 which is in fact a block exemption for national measures financing particular SGEIs, the Commission has created a safe harbour for national measures financing particular SGEIs. This exemption is of relevance, as far as the conditions set out in Altmark are not fulfilled.

A very important prerequisite for relying on the EU approach developed in Altmark, however, is that the university services concerned qualify as SGEIs. This means that these services must be designated as such by the State in, for example, a piece of legislation or an official decision. Potentially, SGEIs may play an important role in education, as one the important goals at play in this sector is to provide universal coverage. 49 In my view, it is not clear whether this would be possible in a hybrid system, where next to publicly funded universities institutions of higher education mainly financed by private means operate. It may be assumed that publicly funded universities (which are not undertakings for the purposes of their core activities) are entrusted with the task to guarantee access to education for all and other essential services, whereas the privately funded universities are supposed to focus on commercial services. Why should privately funded universities be entrusted with a SGEI mission, if the State spends a huge budget on public universities for achieving various public interest objectives? In other words, in a hybrid system of higher education (where both publicly and privately universities operate) arguments to entrust universities engaged in economic activities with a SGEI mission are not very convincing.

This may be different, if a member state moves (virtually) the entire system of higher education from the public domain towards the market place. Such a policy would not create a hybrid system, but rather may turn all or the majority of the universities into undertakings for the purposes of EU (competition and) state aid law. In that event, compelling arguments could exist for identifying educational services all students or other persons must have access to and to entrust particular universities with the supply of these essential services. Accordingly, such entrustment may be combined with the compensation of the costs incurred with the performance of the task concerned, provided that conditions, set out in, for example, Altmark, are satisfied.

The lesson that should be learned from Altmark is that national measures financing services that are supposed to play an essential role in society must be specifically targeted. The contours of the service to be financed must be identified and the objectives pursued must be clarified. In other words, the accountability of the spending of public resources is a value embodied in Altmark and the EU decisions and policies adopted subsequent to this judgment.

48 Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2012 L7/3.

4. UNIVERSITIES AND EU INTERNAL MARKET LAW

The scope of the Services Directive

The policies of the member states regarding privately funded universities and the economic activities of other universities must be in line with EU internal market law. In my view the Services Directive applies to the activities of these universities. The definitions in Article 4, 1 and 5, of this Directive provide that activities, as referred to in Article 57 TFEU, and the actual pursuit of these activities on a permanent basis, as referred to in Article 49 TFEU, are covered by it. Given these broad definitions the activities of privately funded universities and the economic activities of other universities fall within the scope of the Services Directive. Admittedly, according to recital 34 the Services Directive does not apply to courses provided under the national education system. However, it is specified that this is the case if remuneration is absent for activities performed by the State or on behalf of the State in the context of its duties in, inter alia, education. As already was pointed above, the core activities of the publicly funded universities are not performed for economic consideration. Consequently, these activities are immune from the Services Directive, but this is not true for their economic activities as well as for the educational services of privately funded universities. A similar conclusion is drawn in the opinion of the Advocate-General in Kirschstein. He points out that the Services Directive does not apply to non-economic services of general interest according to Article 2(2). This carve-out does not have any bearing on the economic services of institutions of higher education for the sole reason that these services are of an economic nature. This was confirmed by the CJEU in paras 54-60 of its judgment in the Kirschstein case (already mentioned). The Advocate-General is, therefore, of the opinion that Article 2(2) contains a redundant carve-out, as the scope of the Service Directive is limited to economic services.

Some services are explicitly excluded from the scope of the Services Directive by Article 2, but educational activities are not amongst them. As a result, the Services Directive contains the relevant framework of EU internal market law for privately funded universities and the economic activities of other universities. It is settled case law that national measures of a member state must no longer be assessed under the Treaty provisions on free movement, if those matters are subject to harmonisation by an EU directive or regulation. This entails that the majority of the national laws dealing with educational activities that are of an economic nature must be reviewed under the Services Directive. Only if a specific matter is not governed by the Services Directive, then the Treaty provisions on free movement are relevant. In this regard, it should be noted that

51 At the time of the adoption of the Services Directive this provision was Article 50 EC Treaty.
52 At the time of the adoption of the Services Directive this provision was Article 43 EC Treaty.
53 See paras 69-71 of the AG Opinion in Case C-393/17 Kirschstein ECLI:EU:C:2018:918.
54 See paras 54-60 of Kirschstein, n 13.
55 See para 66 of the AG Opinion in Kirschstein, n 53.
pursuant to Article 3 of the Services Directive in case of conflict between provisions of this piece of EU legislation and a provision of another EU measure, the provision of the other EU measure prevails. In this respect reference is made to Directive 2005/36, which governs the matter of professional qualifications. It goes without saying that this matter is of great relevance for universities, as these institutions issue diplomas testifying that particular qualifications are obtained.

National legislation governing educational services of economic nature must be compatible with the provisions of the Services Directive. This Directive has laid down rules for the provision of services on a permanent basis (freedom of establishment) and for the provision of services on a temporary basis (free movement of services). These two sets of rules differ significantly in some respects, which will be outlined below. On top of that the Services Directive aims at protecting the rights of service recipients.

In what follows, the rules on the provision of services on a permanent basis, the provision on services on a temporary basis and the rights of service recipients will be discussed. Also attention will be paid to the supervisory mechanisms introduced by the Services Directive.

The provision of services on a permanent basis

Articles 9-15 of the Directive concern the freedom of establishment. It must be pointed out that it is apparent from the CJEU judgment in Visser Vastgoed that Articles 9-15 of the Services Directive apply to internal situations. Accordingly, even in absence of cross-border effects these provisions must be observed, which entails that domestic suppliers of economic educational university services may rely on these Articles against the public authorities of their home state. A privately funded university only operating in a single member state has the right to challenge national laws containing restrictions of the freedom of establishment.

In my view the CJEU ruling in Visser Vastgoed has great ramifications for the constitutional dimension of the educational services of economic nature. As is apparent from Article 51 of the Charter of the Fundamental Rights of the European Union and the case law of the CJEU, this Charter applies to matters that fall within the scope of EU law. As the Services Directive does not only apply to cross-border provision of economic services but also to the domestic supply of these services, Article 14 of the Charter is of great interest for the national laws dealing with university services supplied for economic consideration. Pursuant to this provision everyone has the right to education and the freedom to found educational establishments must be respected in accordance with national law. This Charter provision enables the CJEU to give a constitutional dimension to the freedom to provide university services for economic consideration. When interpreting the relevant provisions of the Services Directive or other provisions of EU law, the CJEU could pay due consideration to the freedom to,

58 See joined cases C-360/15 and C-31/16, Visser Vastgoed, 30 January 2018, ECLI:EU:C:2018:44.
59 See for example case C-617/10, Åkerberg Fransson, 26 February 2013, ECLI:EU:C:2013:105.
for example, found educational establishments. If a provision of national law virtually makes it impossible to open a new privately funded university branch, the CJEU could rule that the proportionality principle is not satisfied on, *inter alia*, the ground that the freedom to found educational establishments is not respected. Article 14 of the Charter provides a very important tool for interpreting the provisions laid down in the Services Directive. This is also true for the competition rules but Articles 9-15 of the Services Directive also apply in absence of any cross-border effect, which confers upon domestic providers the right to invoke the Charter. Consequently, the value of access to education as well as the value of the freedom to found educational establishments are protected in EU internal market law. Those values are capable of contributing to the emergence of a network of universities, as Article 14 of the Charter facilities the provision of education to all.

According to Articles 9 and 10 national authorisation schemes for services are permitted in so far as they do not discriminate, are justified by an overriding reason of public interest and proportionate. In its free movement case law the CJEU has based its review under the proportionality principle on a ‘coherence test-approach’: national measures that are not drafted in a consistent and systematic way are deemed to be not proportionate.60 This approach is recycled by the CJEU in its case law on Articles 9 and 10 of the Services Directive.61 As a result, in my view, under EU law the member states are required to have in place national laws on ‘economic’ educational services that are drafted in a consistent and systematic way. In court proceedings incoherent provisions of national law could be challenged by operators in the educational sector.

In *Kirschstein* the issue is whether an accreditation procedure for universities is in line with Article 9 of the Services Directive. Such a procedure is an authorisation scheme, as the right to supply educational services is subject to the acquisition of the accreditation issued by the competent public authorities. According to the Advocate General in *Kirschstein* the accreditation under review is necessary in order to pursue an overriding reason of public interest, which is a high standard of university education. He has a very interesting and significant observation regarding an additional advantage of guaranteeing a high quality of university training: this contributes to a high level of (mutual) trust, which is important “for free movement and the setting up of a European Higher Education Area”.62

If the CJEU follows this line of reasoning, it could be argued that mutual trust in the degrees issued in other member states is an important value. The member states are entitled to enact legislation in order to guarantee the high level of university degrees, provided that this legislation is drafted in a consistent and systematic way. It also means that questioning the degrees issued in other member states is, in principle, not permitted. It is apparent from *Neri* that a university must have the right to establish branches in other member states. At issue was a network set-up by a UK university and a commercial

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62 See para. 116 of the opinion of the Advocate-General in *Kirschstein*, n 53.
institute. This network enabled students to take courses taught by this UK university in branches in Italy, which eventually led to the award of a degree under UK law. The Italian authorities refused to recognise the degrees resulting from programmes taken in branches in Italy, while degrees awarded to students having followed in the same programme in the UK were recognised. Thus, the CJEU found that refusing to recognize these degrees by the authorities of a host state for the role reason that the students concerned have taken programmes in branches on its territory is not proportionate. Consequently, the value of mutual trust does not only enable member state to have in place high standards, but also foster universities to set-up networks in various member states. Mutual trust is, therefore, an important incentive for building a European network of universities.

In this regard it should be noted that in the Netherlands a specific set of rules is in place dealing with creating university branches by foreign institutions of higher education. According to Dutch law, a university of an EU or EEA country, has the right to establish a branch in the Netherlands, which awards degrees under the laws of its home country, provided that this university makes clear that these grades are awarded under the law of its home country.63 Apart from the Services Directive, such national laws as in place in the Netherlands may stimulate university networks.

Articles 14 and 15 of the Services Directive lay down specific rules for national requirements regulating the access to or the exercise of service activities. For example, an economic need or market demand test is not permitted pursuant to Article 14 of the Services Directive, requirement 5; this prohibition does not concern planning requirements pursuing public interest objectives (and not economic aims). It is apparent from Rina Services64 that no exception is available regarding the prohibitions enshrined in Article 14. As a result, member states are not allowed to limit the number of operators on the market for economic educational services solely for economic reasons. This contributes to the cross-border activity in higher education.

Article 15 provides that specific requirements, such as quantitative or territorial restrictions, obligations to take a specific legal form, requirements relating to the shareholding of a company, a ban on having more than one establishment in the same member state and fixed minimum and maximum tariffs, are only permitted, if they do not discriminate, are justified by an overriding reason of public interest and proportionate. Interestingly, Article 15(4) of the Services Directive provides that the performance of SGEIs must not be obstructed. In Hiebler and Commission vs Hungary65 the CJEU accepted that the need to provide these services is capable of justifying violations of Article 15. As was already pointed out above, it depends on the organisation of the university sector of a particular member state to what extent arguments based on SGEIs are convincing.

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63 See Article 1.22 section 2 and Article 1.22 section 3 of the Dutch Higher Education and Scientific Research Act (Wet op Hoger Onderwijs en Wetenschappelijk Onderzoek).
64 Case C-593/13, Rina Services, 16 June 2015, ECLI:EU:C:2015:399.
65 Case C-171/17, Commission vs Hungary, 7 November 2018, ECLI:EU:C:2018:881.
The provision of services on a temporary basis

Articles 16-18 of the Services Directive deal with the supply of services on a temporary basis (free movement of services). Strikingly, to date only limited case law is available dealing with these provisions. Nevertheless, it is clear from Article 16 that nationals laws making the access to or the exercise of the provision of services on a temporary basis subject to compliance with certain requirements must be non discriminatory, have to be justified by reasons of public policy, public security, public health, the protection of the environment and employment conditions, and must be proportionate. A very important difference with the rules on the freedom of establishment is that the list of reasons for justifying restrictions of the free movement of services is limited.66 Unlike Articles 9, 10 and 15 of the Services Directive, Article 16 acknowledges only a few reasons of public interest for limiting the freedom to provide services on a temporary basis. It should be noted that no education-specific reason of public interest is listed in Article 16. Another important difference between the regimes of Articles 9-15 and of Articles 16-18 of the Services Directive is that the latter provisions seem to apply only to cross-border cases. Article 16 specifically stipulates that member states must respect the right of providers to provide services in a member state other than in which they are based. On first sight this wording seem to exclude the applicability to internal situations. However, case law of the CJEU on this matter must be awaited.

In any event, it is clear from the outset that member states have limited room for manoeuvre, when regulating economic services provided on a temporary basis by universities established in other member states. It may be difficult, for example, for a member state to preclude a privately funded university based in another member state from delivering a temporary course on its territory. Imposing on such universities the obligation to provide for prior authorisation is very problematic, as Article 16(2) TFEU has laid down a ban on national rules requiring that a provider of a service on a temporary basis must obtain authorisation. The emergence of ICT-based services has also had a major impact on higher education. Therefore, the online provision of educational services may increase in the years to come. Those services are pre-eminently suitable to be supplied from a particular member state to another member state in a commercial setting. An enterprise could establish a branch in a member state of its preference and from there offer services for remuneration, such as online courses (Massive Open Online Courses), online programmes and on line tutoring. The remuneration could consist of the payment of money, but the transfer of (big) data from service recipients to providers is also very valuable from a commercial perspective. Given the limited room for regulating temporary service supply the Services Directive is capable of boosting the online provision of higher education (of economic nature). In this regard it must be noted that the e-Commerce Directive67 applies as well. The concurrent applicability of these two directives does not lead to conflicts, as both these EU measures aim to stimulate

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cross-border service activity\textsuperscript{68} and to enhance the transparency of these activities.\textsuperscript{69} Accordingly, Article 3(1) of the Services Directive, which sets out that in the event of conflict between the provisions of this directive and the provisions of other Union acts the last provisions prevail, does not kick in.\textsuperscript{70}

In this regard, it must, however, be noted that Article 17 of the Services Directive contains derogations from Article 16 with a view to specific services, such as SGEIs and matters related to professional qualifications. Article 16 of the Services Directive does not apply to these services. In my view, Article 17 may make it possible for the member states to moderate the far-going effects of the prohibitions laid down in Article 16. More in particular, the member states could consider carving out specific university services from Article 16 by designating these services as SGEIs. In that event, the temporary provision of the educational services being SGEIs is not harmonised and, as a result, these services are covered by the Treaty provision on free movement.\textsuperscript{71} However, it would not be very convincing to designate every service of higher education as a SGEI and, as already was pointed out, in hybrid systems of higher education no compelling reasons for doing so seem to be present.

For reasons of completeness it should also be noted that Article 18 of the Services Directive contains a specific mechanism for services causing serious safety issues. It may be assumed that the relevance of this provision is limited to very specific circumstances.\textsuperscript{72}

\textbf{The Rights of Service Recipients}

Articles 19-21 of the Services Directive govern the rights of service recipients. According to Article 19 of the Services Directive member states are not permitted to impose on a service recipient requirements that restrict the use of a service of a provider established in another member state. Examples of such an illegal restriction are discriminatory limits on the grant of financial assistance for the sole reason that the provider operates from another member state. To my mind, this implies that students who are eligible for public study grants or loans when being enrolled in domestic privately funded universities must have the right to use these grants when they wish to study at a privately funded university (meeting the relevant conditions of higher education law) in another member state. At least, it is not permitted to preclude students from doing so for the sole reason that this university is based in another member state. Article 20 of the Services Directive provides that service providers are not discriminated on the basis of their nationality. National requirements regulating the access to economic educational services must be assessed under the Services Directive or, if the matter at hand is not harmonised by this directive,

\textsuperscript{68} For example, Article 3 of the e-Commerce directive precludes member states from restricting the freedom to provide information society services from another member state, save for exceptions related to, \textit{inter alia}, public policy. This provision sits well with Article 16 of the Services Directive, which also contains a ban on restrictions of the freedom to provide services save for some exceptions.

\textsuperscript{69} See M.Y. Schaub, \textquoteleft Why Uber is an information society service\textquoteright. Case Note to CJEU 20 December 2017 C-434/15 (Asociaciòn profesional Elite Taxi), EuCML 2018, p. 114.

\textsuperscript{70} Ibid.


under the Treaty provisions on free movement. Access to universities could be made subject to various kinds of limitations that may be restrictive but also justifiable on the basis of the public interest objectives at play. Thus, in Dirextra\textsuperscript{73} the CJEU ruled that free movement was restricted by a provision of Italian law, pursuant to which students are eligible to a public grant if they are enrolled in a programme of a private institution of higher education having at least 10 years of experience. This requirement was considered to be justifiable, since public universities were subject to a monitor system and lengthy procedures in order to gain recognition under Italian law. Such mechanisms were not in place for private institutions and, accordingly, experience of 10 years was seen as an adequate equivalence for the standards imposed on public universities.

Article 21 of the Services Directive sets out that service recipients are entitled to information facilitating them to receive cross-border services. This provision is concerned with transparent service supply. Consequently, transparency is an important value embodied in the Service Directive, which is also of importance for recipient of economic services of higher education.

**Mechanisms of supervision under the Services Directive**

All in all, the Services Directive is capable of giving a boost to the cross-border supply of educational services of an economic nature. The question arises how compliance with the relevant educational laws must be verified with regard to universities engaged in cross-border activity. Chapter VI of the Services Directive contains mechanisms for administrative cooperation between the competent authorities of the member states involved. For example, Article 29 of the Services Directive provides that the member state, where a service provider is established, must undertake inspections and investigations upon request by another member state. In my view, this means that if an university of a particular member state creates a branch in another member states, the competent authorities of the first member state is entitled to request the authorities of the last member state to verify whether the educational laws of the home state (which is the first member state) are complied with. According to Article 31 of the Services Directive in the event of temporary supply of an educational service by a provider, the authorities of the member state, where the service is supplied, must carry out inspections at the request of the member state, where the provider concerned is established. These inspections enable the last member state to supervise the service provider concerned.

It would not fall within the scope of this contribution to go in more detail of the Directive provisions on administrative cooperation. Nevertheless, it is clear from the outset that mechanisms are in place enabling the educational authorities of the member states to set up a joint system of supervision of the cross-border supply of educational services of economic nature. In my view, such a system could be very helpful. An interesting business model for a commercial university is creating a branch in another member state (provided that this is in accordance with the laws of this other member state). At this branch it will offer programmes to students (of the host country and, probably, also of other countries) and issue diplomas under its home state laws. The graduates holding

\textsuperscript{73} Case C-523/12, Dirextra, 12 December 2013, ECLI:EU:C:2013:831.
these degrees can then apply for recognition of the qualifications obtained under the Directive on professional qualifications74 in their home country. This directive has introduced mechanisms for (mutual) recognition of various professional qualifications obtained in the EU member states. The general rules of this Directive allow that under specific circumstances an authority of a member state requires that the applicant completes an adaption period or takes an aptitude test.75 Article 21 and further of the Directive lay down the principle of automatic recognition of various medical professional qualifications, such as those related to doctors and dental practitioners. The reason for this is that the standards applying to these medical professions are harmonised at the EU level. As a result, the point of departure is that the qualifications obtained in a particular member state satisfying the standards set out in the directive must be recognised by the competent authorities of other member states. If for example a university based in Romania sets up a branch in the Netherlands, offers medical training and issues diplomas under Romanian law, the students of this university are entitled to apply for recognition of the qualifications obtained in their member states (for example in the Netherlands, Germany or Belgium). It goes without saying that in cross-border networks of the supply of higher education services the maintenance of the high quality of the programmes offered is a significant issue. The students must be able to trust this quality when they take a higher education programme that is offered on the basis of the EU rules for cross-border service provision. As already was pointed out above, mutual trust is a very important value underpinning a European Higher Education Area. As a result, the transnational rules for administrative cooperation laid down in the Services Directive may prove very useful in this respect. These rules provide the national authorities with a great for ensuring educational services of high quality, which will benefit the students making use of their free movement rights.

5. CONCLUSIONS

European competition and internal market law applies to privately funded universities and the economic activities of other universities. Consequently, the impact of EU law is higher on member states, where the level of public funding in higher education is relatively limited than in member states, where public funding still plays a significant role in this sector. EU competition and internal law provides important requirements for supplying economic educational services. Financial support given to these universities must not distort competition on the European single market. For example, no agreements may be concluded by these universities fixing the tuition fees. Furthermore, privately funded institutions of higher education are not allowed to collude on commercially sensitive matters. On top of that, the national laws governing the economic educational services must be drafted in a consistent and systematic way. The reason for this is that the economic educational services fall within the scope of the Services Directive.

75 See Article 14 of the Directive on professional qualifications.
The introduction of private financing is part of the process of commodification of higher education. In legal literature some issues surrounding this process, such as the negative effects on curiosity driven research, the problems with the employment conditions of early career researchers and the pressure on equality, are identified. Commodification, however, may also trigger the applicability of EU competition and internal market and this applicability fosters, in my view, the following values, as is apparent from the analysis carried out above. In the first place, freedom of choice will be stimulated, as alignment of fees is not permitted under competition law. In the second place, fairness is also of great importance. This value results from, for example, the EU state aid rules, which precludes universities from financing commercial activities by using the public funding received from the government. In the third place the importance of independent standard setting and policy making is reinforced. Players having an interest in providing particular services should not be involved in the setting of standards or the development of policies for these services. This could be incompatible with the useful effect doctrine. In the fourth place, accountability is an important value. The approach developed for financing SGEIs entails, for example, that the financial support to be granted must be specifically targeted. It must be made clear for what reason and under which conditions the public money will be given to finance particular essential services. In the fifth place, due to the broad scope of the Services Directive the constitutional rights concerning the access to education and the freedom to found educational establishments enshrined in the Charter must be observed by the member states, when regulating privately funded universities. This enhances the constitutional dimension of the economic educational services. In the sixth place, the analysis based on the Services Directive reveals that the standards applicable must be drafted in a consistent and systematic way. In order words, the value of coherence is acknowledged. In the seventh place, mutual trust is of great importance. The point of departure for cross-border educational activity is mutual trust in the degrees issued in the various EU member states. In the eighth place, the Services Directives also underlines the importance of transparency, as sufficient information must be given to students (in their capacity of service recipients).

The values identified are capable of tying together various privately funded universities. This does not mean that these universities belong to the same group of enterprises. The point is that they share common values and are governed by laws being influenced by common values. On the one hand EU competition and internal market law stimulates cross-border provision of services of higher education on the market place and, accordingly, reinforces the commodification of these services. On the other hand, the values identified recognises that particular principles must be observed in the sector of higher education, which means that the market dimension of the services of higher education is moderated by requirements related to these values. In my view, these values constitute “cement” for building a common academic culture in the EU.

Apart from a network that is of an abstract character (universities connected by common values) EU competition and internal market law also provides for mechanisms for

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concrete networks, i.e., for universities belonging to the same group. The analysis of both the Services Directive and the *Neri* judgment shows that a university has the right to create a branch in another member state. On top of that, the Services Directive contains provisions that enable the competent administrative authorities of the member states to co-operate in order to oversee cross-border service supply. In other words, there are specific EU rules for concrete networks of universities.

It should be stressed that, as point of departure, the publicly funded universities fall outside the scope of EU competition and internal market law. This is different for their services that can be severed from their core tasks and are of an economic nature. It is clear from the outset that a great imbalance exists as regards the publicly and privately funded universities, especially in hybrid systems of higher education. The latter universities are bound by EU market rules and the first are not, as far as their non-economic activities are concerned. This imbalance is partly addressed by the approach, according to which the economic activities of the publicly funded universities do fall within the scope of EU market and competition law, which, *inter alia*, entails that the cross-subsidizing of their commercial businesses by money received by the government is not permitted. In his opinion in the case *Kirschstein* the Advocate-General has suggested to bring universities (predominately) financed out of the public purse within the scope of the EU rules for the internal market and competition. In my view, this suggestion should not be followed, as collective financing of higher education by the government is based on concerns of solidarity, which do not sit well with market dynamics. The applicability of the rules, stimulating these dynamics, i.e. EU competition and internal market law, would put the organisation of higher education under pressure, which is not in line with Article 165(1) TFEU. Pursuant to this provision the organisation of the educational systems belongs to the competences of the member states. For example, bringing public funded universities within the scope of EU internal market and competition law would mean that all financial aid given by the government to these universities must be assessed under Articles 107-109 TFEU. This would trigger an enormous bureaucratic operation, as the aid given to the public-funded universities must be notified to the Commission. As a result, the Commission would be able to exercise control over the national educational systems but would also be faced with politically sensitive matters the handling of which does not belong to its core task. This example shows that extending the scope of economic activities to the public funding of higher education is very problematic. In this regard, it must be noted that the right to the access to education laid down in Article 14 of the Charter must be respected and banning financial support given by the government to universities is capable of putting under pressure this right. In my view, at the current stage of European integration it must be in the hands of the member states to solve the imbalance between privately and publicly funded universities. The member states could do this by introducing higher education-specific regulation.

EU internal and competition law is, accordingly, not capable of *directly* creating values for a network for *all* European universities. These values are mainly relevant for universities

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77 See paras 72-88 of the opinion of the AG in *Kirschstein*, n 53.
operating in member states that have moved higher education for a great part to the market place. For that reason, commodification of higher education stimulates, strikingly, the creation of a network of European universities.

It is clear from the outset that a relatively large number of member states do not wish to make the provision of higher educational services subject to a process of commodification. This does not mean that EU internal market and competition law is useless for their national educational system. Apart from the general principles of EU law, such as the principle of equal treatment, and other areas of EU law that have some impact on education (free movement of persons and public procurement law), these member states could learn lessons from the experience of applying the Services Directive and the competition rules to economic educational services. This experience could serve as a breeding ground for developing values for higher education. Member states can base their educational laws on values, such as freedom of choice, fairness, independent standard setting, accountability and access to education, identified in this conclusion. Consequently, EU competition and internal market law may indirectly contribute to creating building blocks for a pan-European approach towards a network of all universities.