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## Higher Education Reform in Search of Bologna

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### *Summary*

The author addresses the issue of diverging national readings of the key Bologna concepts against the backdrop of national traditions of higher education – comparability of degrees, finality of qualifications relevant for the labour market, implementation of the ECTS system, and mobility. The basic proposition of the paper is that, in circumstances of semantic dissonance, the open method of coordination (OMC) is barely effective and may create a number of disparate effects. The OMC, having the form of free discourse and lacking enforcement mechanisms, is likely to encourage states to insist on their traditional concepts. On the other hand, a hard law method and guided discourse applicable within the legal framework of the EU may serve as a corrective force. The same counts even more in the pre-accession period if proper conditionality mechanisms are applied.

*Key words:* Bologna Declaration, Bologna Process, open method of coordination, higher education

*Yankee Doodle went to town,  
A-riding on a pony,  
Stuck a feather in his hat  
And called it macaroni.<sup>1</sup>*

### **Introduction**

There is a huge discrepancy between the goals envisaged by the Bologna Declaration and the state of play in its implementation. The main reason for such a discrepancy, I argue, is a lack of common understanding of the key elements of the process. The widening gap between the desired uniformity and the increasing diversity

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<sup>1</sup> 18<sup>th</sup>-century traditional song recorded by American lyricist Richard Shuckburgh. At the time when the song was written, “macaroni” was a fancy Italian outfit.

of higher education systems calls the methodology of the entire process into question.

As it was reported in the Report on Progress in Quality Assurance in Higher Education, published by the European Commission in 2009,

The standards provide useful generic references, but are still interpreted in different ways in various countries, agencies and HEIs. They are seen either as a checklist of formal requirements, as a code of good professional practice, or as soft guidelines. The notion that agencies should have overall compliance rather than meet each of the standards seems reasonable, but it leaves the door open to a wide range of interpretations.<sup>2</sup>

The Bologna Declaration<sup>3</sup> was originally signed by 29 European states. Today, 46 states are its signatories, including Croatia. The main commitment under the Declaration is to approximate their respective higher education systems and to achieve the creation of the European higher education area by coordination of public policies.

The Declaration is not legally binding but is based on principles of autonomy and diversity. It strives to find solutions to common problems of European higher education by coordinated reforms and the creation of mutually compatible systems. Substantially, that compatibility is supposed to lead to better employability, increased mobility of students and professors and, ultimately, to increased competitiveness of higher education. These goals are supposed to be achieved by 2010.

The more specific objectives of the Declaration are:

- acceptance of the common framework of comprehensible and comparable degrees;
- introduction of undergraduate and graduate cycles of higher education, where the first cycle is not shorter than 3 years and is relevant for the labour market;
- introduction of the European Credit Transfer System (ECTS), which is also relevant for lifelong learning activities;
- introduction of the European dimension of quality assurance, which presupposes comparable benchmarks and methods;

<sup>2</sup> Report from The Commission to The Council, The European Parliament, The European Economic and Social Committee and The Committee of the Regions, Brussels, 21.9.2009, COM(2009) 487 final.

<sup>3</sup> Joint declaration of the European Ministers of Education convened in Bologna on the 19<sup>th</sup> of June 1999, available on the website <http://ec.europa.eu/education/policies/educ/bologna/bologna.pdf>.

- eradication of remaining obstacles to mobility of students, trainees, professors, researchers and higher education administrators at all levels of higher education.

The implementation of the Bologna Declaration produced a large number of secondary documents that are in function of coordination of national policies.<sup>4</sup> Croatia also adopted a number of legislative and implementing acts,<sup>5</sup> and Croatian universities amended their statutes accordingly.

One of the key problems of the Bologna Process is a lack of consensus about its benchmarks. In other words, since the stakeholders in the process have widely different understandings about concepts such as “Bologna cycles”, “qualifications” or “employability”, meeting the Bologna benchmarks is in danger of remaining purely nominal.

The aim of this paper is not to give a comprehensive report on the implementation of the Bologna Declaration. Instead of presenting a descriptive count of the

<sup>4</sup> To mention just the most important documents: Salamanca Convention of March 30, 2001; Student Declaration from Göteborg of March 25, 2001; the Prague Communiqué of May 19, 2001; the Berlin Communiqué of September 19, 2003; the Bergen Communiqué of May 20, 2005; the London Communiqué of May 17-18, 2007.

<sup>5</sup> Zakon o znanstvenoj djelatnosti i visokom obrazovanju, *Narodne novine* [Official Gazette], No. 123/03; Uredba o izmjeni Zakona o znanstvenoj djelatnosti i visokom obrazovanju; *Narodne novine*, No. 198/03; Zakon o izmjenama i dopunama Zakona o znanstvenoj djelatnosti i visokom obrazovanju; *Narodne novine*, No. 105/04; Zakon o izmjenama Zakona o znanstvenoj djelatnosti i visokom obrazovanju, *Narodne novine*, No. 174/04; Zakon o potvrđivanju konvencije o priznavanju visokoškolskih kvalifikacija u području Europe, *Narodne novine – Međunarodni ugovori*, No. 9/02 i 15/02; Zakon o priznavanju inozemnih obrazovnih kvalifikacija, *Narodne novine*, No. 158/03; Uredba o izmjeni Zakona o priznavanju inozemnih visokoškolskih kvalifikacija, *Narodne novine*, No. 198/03; Zakon o izmjenama i dopunama Zakona o priznavanju inozemnih obrazovnih kvalifikacija, *Narodne novine*, No. 138/06; Uredba o osnivanju Agencije za znanost i visoko obrazovanje, *Narodne novine*, No. 101/04; Zakon o akademskim i stručnim nazivima i akademskom stupnju, *Narodne novine*, No. 107/07; Pravilnik o Upisniku znanstvenika, *Narodne novine*, No. 72/04; Pravilnik o izmjenama i dopunama Pravilnika o Upisniku znanstvenika, *Narodne novine*, No. 101/04; Pravilnik o Upisniku znanstvenih organizacija i Upisniku visokih učilišta, *Narodne novine*, No. 72/04; Ispravak Pravilnika o Upisniku znanstvenih organizacija i Upisniku visokih učilišta, *Narodne novine*, No. 80/04; Pravilnik o mjerilima i kriterijima za osnivanje visokih učilišta, *Narodne novine*, No. 9/05; Pravilnik o mjerilima i kriterijima za vrednovanje kvalitete i učinkovitosti visokih učilišta i studijskih programa, *Narodne novine*, No. 9/05; Pravilnik o sadržaju diploma i dopunskih isprava o studiju, *Narodne novine*, No. 9/05; Pravilnik o vođenju evidencija o studentima visokih učilišta, *Narodne novine*, No. 9/05; Pravilnik o sadržaju studentske isprave, *Narodne novine*, No. 9/05; Pravilnik o vrednovanju znanstvenih organizacija, *Narodne novine*, No. 39/05; Pravilnik o visini naknade i oslobođenjima od plaćanja naknade za troškove postupka priznavanja inozemnih visokoškolskih kvalifikacija i razdoblja studija, *Narodne novine*, No. 60/05.

growing number of national and European sources of reference, I would like to address the issue of diverging national readings of the key Bologna concepts against the backdrop of national traditions of higher education. In another text I have called this phenomenon – the problem of semantic dissonance.<sup>6</sup> I will restrict myself to addressing only the basic Bologna concepts: comparability of degrees, finality of qualifications relevant for the labour market, implementation of the ECTS system, and mobility.

The **basic proposition** that I will try to substantiate in this paper is that, in circumstances of semantic dissonance, the OMC is barely effective and may create a number of disparate effects. The OMC, having the form of free discourse and lacking enforcement mechanisms, is likely to encourage states to insist on their traditional concepts. On the other hand, as I will argue, a hard law method and guided discourse applicable within the legal framework of the EU may serve as a corrective force. The same counts even more in the pre-accession period if proper conditionality mechanisms are applied.

This paper comprises four parts. In the first part, I will describe the pre-Bologna system of higher education in Croatia. In the second part, I will proceed with explaining the regulatory effort that was undertaken in the course of the Bologna Process. There I will show how the open method of coordination facilitated, or indeed resulted in a perversion of the basic goals of the Bologna Process in Croatia. In the third part, I will contrast the OMC method to existing Community market freedoms regulation. In the fourth and final part, I will try to substantiate my initial proposition that the OMC lacks effectiveness in circumstances of semantic dissonance.

### **1. The Pre-Bologna System of Higher Education in Croatia**

The pre-Bologna system of higher education in Croatia has developed from the former Yugoslav framework, and its structure was identical to those of other former socialist republics. University education was organized through four academic years, plus an additional year that was allowed for completing a program. The actual length of studying was often significantly longer than the nominal one. As documented by Ajduković *et al.*, based on the sample of 433 students who graduated in 2004, the average length of studying for a law degree was 6 years, 11 months and 12 days. One year later, based on the sample of 482 students, the actual length of studying was 7 years and 15 days (Ajduković *et al.*). According to official figures of the University of Zagreb, "... the studying success, i.e. the ratio of students who graduate to enrolled students, as well as the actual length of studying, significantly varies from one faculty to another. In average, approximately 35% of enrolled stu-

<sup>6</sup> For the notion of semantic dissonance, see Rodin, 2005.

dents graduate, and the actual length of studying is, in average, somewhat more than 50% longer than nominal.”<sup>7</sup>

The outcome of a completed, nominally four-year long cycle were university qualifications that allowed access to the labour market or the continuance of studying at the postgraduate level. A four-year university degree was a necessary and sufficient condition for most professions.

The postgraduate level was typically a two-year “scientific master’s” program, the successful completion of which was a condition for doctoral studies. According to the National Office of Statistics<sup>8</sup>, the number of Croatian students who earned a master’s degree in 2005 was 973; 86.1% of them earned a Master of Science degree, and the remaining 13.9% a master’s degree. The average age of Masters of Science and other masters was 34.8 years, and the highest frequency was found in the range of 30 to 34 years. In other words, a student who studied seven years to obtain the first university degree and graduated at the age of 26 dedicated an average period of eight years to becoming a Master of Science at the age of 34.

Not many master’s degree holders would continue their education at the doctoral level, which was, as a rule, organized as supervised scientific research, no formal studies being required. According to some sources, the average length of doctoral studies was not shorter than five years.<sup>9</sup> In other words, the average Croatian student would acquire a doctoral title at the age of 39.

The student workload at the bachelor’s and master’s levels is based on class attendance. In the case of law degree students, it is between 22 and 24 hours per week. The work is measured on the basis of class attendance and, when it comes to written assignments, on the basis of text length. Quality assurance is administrative and performed by institutional managers, typically deans. Student appeals are decided by the Ministry of Science.

Student mobility is possible, but restricted. In the former Yugoslavia it was possible to discontinue the studies at one university and continue at another. For example, a law student from Belgrade could have continued to study in Zagreb or Ljubljana. Exams were automatically recognized and students had to take differential classes. One-semester mobility did not exist. Also, it was not possible to take

<sup>7</sup> Sveučilište u Zagrebu – Odbor za upravljanje kvalitetom, Projekt: Ustroj sustava upravljanja kvalitetom na Sveučilištu u Zagrebu, on the website [http://www.unizg.hr/fileadmin/rektorat/dokumenti/kvaliteta/sadrzaj\\_5.pdf](http://www.unizg.hr/fileadmin/rektorat/dokumenti/kvaliteta/sadrzaj_5.pdf) (visited on January 4, 2008).

<sup>8</sup> Državni zavod za statistiku, available on the website [http://www.dzs.hr/Hrv/publication/2006/8-1-5\\_1h2006.htm](http://www.dzs.hr/Hrv/publication/2006/8-1-5_1h2006.htm) (visited on January 4, 2008).

<sup>9</sup> Želimir Janjić, Secretary of State at the Ministry of Science, Education and Sports, published in *Glas Slavonije*, 02.02.2004, p. 7.

courses from other programs at the same university. A student of architecture or economics would take a course in mathematics at his or her faculty. Taking the same course at another faculty was not possible.

A four-year degree from a foreign university could be recognized as a first university degree. Anglo-Saxon degrees of B.A. and B.Sc. or German graduate qualifications (e.g. Diplom-Ingenieur) were approximated to a four-year university degree. Access to studies abroad was opened at the master's level and students holding a four-year degree from Croatian universities were able to continue their studies at the M.A. or M.Sc. level abroad.

In return, students who acquired an M.A. or M.Sc. degree abroad would have had to have it "nostrified". The process of nostrification was administered by universities and the practice significantly varied from one university to another.

## 2. The "Bologna Reform"

The legal basis for most of the Bologna-related regulation in Croatia is provided by the Science and Higher Education Act (2003) (hereinafter the SHEA).<sup>10</sup> The SHEA was subsequently complemented by a number of regulations setting the institutional framework for higher education and laying down the basic assumptions for the implementation of quality control mechanisms. In the broadest terms, the outcome of those regulatory efforts can be described as follows.

### *The Two Cycles of Bologna and Employability*

As far as the structure of Bologna cycles is concerned, the legislative framework enables flexible application of the three cycles. However, different universities have opted for different length and in practice one could find 3+2, 4+1 and even 5+0 structures. Such diversity has detrimental effects on student mobility and recognition of qualifications.

Secondly, the first Bologna cycle in most cases does not lead to employable qualifications. For example, a Bachelor of English Language and Literature does not qualify for a teaching position, not even in a kindergarten. Employable qualifications, comparable to those of the pre-Bologna four-year degree, are earned only after having completed the second cycle.

The described situation is making difficult the selection of candidates at admission to master's level education, and any specialization or diversification of individual studying paths is almost impossible. Since employable qualifications are acquired only after five years of nominal studying, the selection of candidates at admission to master's degree programs is not only undesirable, but also meaning-

<sup>10</sup> Zakon o znanstvenoj djelatnosti i visokom obrazovanju, as amended.

less. Being so, it is not rational to discontinue the studies after the first cycle and it is reasonable to expect large numbers of students at the master's level. Certainly, the lack of selection upon entry is detrimental for the quality of studying. It makes work in small groups difficult, overstretches the workload of professors and teaching staff and makes the achievement of master's level learning outcomes difficult, if not impossible.

In effect, the nominal length of studying leading to employable qualifications has not been shortened to three years but extended to five. Some professions, e.g. legal or medical, have even opted for integral degrees of five or six years of nominal length, respectively. It is more than clear that in such circumstances, student mobility, both internal and external, remains an exception rather than the rule. A clear consequence of the described "integral" approach in structuring the first two cycles is the inability of Croatian universities to offer master's level programs that would attract students from other countries or even horizontal mobility after the bachelor's degree.

No less importantly, due to the functional merger of the first two Bologna cycles, the master's programs did not develop in the direction of diversity and multidisciplinaryity but, as a rule, remained monodisciplinary and substantively related to the first Bologna cycle.

As regards the universal comparability of qualifications, the situation has deteriorated when compared to the pre-Bologna transformation. For example, four-year pre-Bologna degrees, which used to be universally recognized, were replaced by mutually incompatible degrees. One of the reasons is the different length of the first two Bologna cycles (3+2 or 4+1). For example, a three-year Bachelor of Political Science from the University of Skopje does not qualify to enrol in a Master of Political Science program at the University of Zagreb, since the latter features a 4+1 structure.

### *The Third Cycle*

The third Bologna cycle is the doctoral one. The assumption is that students seeking admission at that level will have acquired competences equivalent to Level 7 of the European Qualifications Framework, i.e. competences that are acquired at the master's level.<sup>11</sup> However, due to the fact that a large number of pre-Bologna degrees have been *ex lege* converted into equivalents of Bologna master's degrees, stu-

<sup>11</sup> Having acquired such competences, students:

- have demonstrated knowledge and understanding that is founded upon and extends and/or enhances that which is typically associated with the Bachelor's level, and which provides a basis or opportunity for originality in developing and/or applying ideas, often within a research context;

dents who want to enrol in the third cycle often lack Level 7 competences. In order to remedy that situation, a specific form of third-cycle programs was introduced. So-called “postgraduate specialist” programs (hereinafter PSP) are actually transferring Level 7 competences, however, not within the second, but within the third cycle. Such “postgraduate specialist” degrees correspond to similar “post-master master” programs that, according to the European University Association, represent an anomaly within the Bologna system.<sup>12</sup> Nevertheless, the postgraduate specialist form of education has become a dominant form of postgraduate education in social sciences and humanities (particularly, in law, economics, and political science).

Admission to a PSP is open to students holding a four-year pre-Bologna degree and to students holding a Bologna master’s degree (3+2 or 4+1). However, students holding four-year Bologna or Bologna-equivalent bachelor’s degrees are legally barred from taking such a program.

#### *Universal Comparability of Degrees*

The other reason for the lack of universal comparability is the fact that the standards of assessment are based largely on formal rather than on substantive criteria, such as, for example, the Dublin Descriptors.<sup>13</sup> In fact, the SHEA explicitly relies on formal criteria when it prescribes the equivalence of pre-Bologna four-year degrees and Bologna master’s degrees.<sup>14</sup> The same is reinforced by Art. 14 of the Academic and Professional Titles Act (2007),<sup>15</sup> which explicitly puts an equation mark be-

- can apply their knowledge and understanding, and problem solving abilities in new or unfamiliar environments within broader (or multidisciplinary) contexts related to their field of study;
- have the ability to integrate knowledge, handle complexity, and formulate judgements with incomplete or limited information, but which include reflecting on social and ethical responsibilities linked to the application of their knowledge and judgements;
- can clearly and unambiguously communicate their conclusions, and the knowledge and rationale underpinning these, to specialist and non-specialist audiences;
- have the learning skills to allow them to continue to study in a manner that may be largely self-directed or autonomous.

<sup>12</sup> “To illustrate the diversity of provision, Trends V pointed to Master qualifications tied to the first cycle, to Master qualifications located within the third cycle, and to apparently aberrant forms as the ‘post-Master Master’” (Davies, 2009: 16).

<sup>13</sup> See A Framework for Qualifications of the European High Education Area, Bologna Working Group on Qualifications Frameworks, Copenhagen 2005, available on the website [http://www.bologna-bergen2005.no/Docs/00-Main\\_doc/050218\\_QF\\_EHEA.pdf](http://www.bologna-bergen2005.no/Docs/00-Main_doc/050218_QF_EHEA.pdf).

<sup>14</sup> Article 120 (2) of the SHEA, as amended by Art. 45 of the SHEA Amendment Act (2004), *Narodne novine*, No. 105/2004.

<sup>15</sup> *Zakon o akademskim i stručnim nazivima i akademskom stupnju*, *Narodne novine*, No. 107/2007. See, e.g., section (3) thereof. Stručni naziv stečen završetkom sveučilišnoga dodiplom-

tween the old four-year degrees and Bologna master's degrees. The practice of the Science and Higher Education Agency which is responsible for recognition of qualifications follows suit. In their practice, pre-Bologna Croatian four-year degrees are an equivalent of Bologna master's qualifications. Accordingly, any four-year Bologna bachelor, or indeed, a four-year degree from a non-European university, e.g. Harvard, will be recognized as a bachelor's degree, whereas a Croatian pre-Bologna four-year degree is equivalent to a Bologna master. By the same token, three-year Bologna bachelor's degrees will not be sufficient to qualify for enrolment into one-year master's programs.

In other words, the legal framework for the recognition of qualifications is formal and not substantive, and does not take into account actual qualifications acquired, but only the temporal framework within which education took place. The described legislative acrobatics that has made unequals equal and equals unequal discloses another shortcoming of the Croatian higher education system. Namely, the level of qualifications acquired after each of the first two cycles often does not correspond to the so-called Dublin Descriptors. Bachelor-level qualifications are not achieved after three years of studying, while mechanical extension of the nominal length of studying did not contribute to the achievement of master level learning outcomes. On the contrary, they have largely remained at the level of bachelor qualifications. Formalistic joggling does not help to remedy the situation.

#### *Student Mobility*

The above mentioned policy choices have also affected student mobility, the most significant obstacle being the functional integration of the first two cycles. Master's degree programs functionally integrated with the first Bologna cycle are not internationally recognizable and discourage international mobility, both outgoing and incoming. International students are likely to be attracted only by self-standing and functionally independent master's degree programs leading to corresponding master level competences (Level 7 of the European Qualifications Framework).

#### *Quality Assessment*

In April 2009 the Croatian Parliament adopted the Science and Higher Education Quality Control Act (hereinafter the SHEQCA).<sup>16</sup> The Act was adopted as part of

skog studija, čijim završetkom se stječe visoka stručna sprema (VSS), izjednačen je s akademskim nazivom magistar odnosno magistra uz naznaku struke ili magistar inženjer, odnosno magistra inženjerka uz naznaku struke ili doktor, odnosno doktorica uz naznaku struke, sukladno članku 4. ovoga Zakona.

<sup>16</sup> Zakon o osiguravanju kvalitete u znanosti i visokom obrazovanju, *Narodne novine*, No. 45/2009.

the general effort to harmonize the Croatian legal system with requirements of the European High Education Area. Arguably, it is doing just the opposite.

The establishment of an institution of higher education is subject to accreditation. A successful process of accreditation results in an administrative act called “*dopusnica*” (permit). The permit is described in Art. 2 of the SHEQCA as an “administrative act adopted by the ministry, subject to prior evaluation procedure...”. In other words, the entire process of accreditation is managed and controlled by Croatian public authorities.

Subject to Art. 19, an institution seeking institutional accreditation has to produce a contract signed with an already existing higher education institution. Such a contract should stipulate a commitment to implement a study program jointly with the duly accredited institution, more precisely, in the language of the SHEQCA, “with an institution already having the permit”. The language is precise enough to leave no doubt that the permit (Croatian: *dopusnica*) has to be issued by Croatian public authorities (Art. 19(3)1).

After having obtained such a contract and other necessary documentation, the Agency can recommend the Ministry to give its consent to the establishment of a higher education institution. However, the final accreditation can follow only after two years, after which the institution seeking accreditation has to produce a certificate, issued by the above-mentioned accredited institution, that conditions of the contract have been met.

It is needless to discuss the chilling effect that the described regulation has on innovation in higher education – it runs against the freedom of establishment, (upon accession to the EU) discriminates service providers from other Member States, and creates an *ex lege* dominant position of already accredited institutions, contrary to Article 81 in conjunction with Articles 3(g) and 10 of the Treaty Establishing European Community.

#### *Interim Conclusions*

The implementation of the Bologna reform in Croatia is a failure. In essence, the majority of higher education establishments have extended their original four-year degree programs into five-year ones. At the same time, such extended programs were mechanically split in two parts in order to satisfy the formal requirement of 3+2 or 4+1 models.

In the process of doing so, the key goals of the Bologna Process were not achieved. New degrees are not leading to final and employable qualifications after the first cycle, mobility is not facilitated but discouraged, and degrees are not universally recognizable.

It remains unclear whether this development was accidental or intentional. In either case, both the policymakers and the universities misinterpreted the intentions of the Bologna Declaration, while the open method of coordination did not provide for an adequate corrective mechanism. The paperwork is done and the checkboxes are ticked. However, there is a huge discrepancy between the situation on paper and reality.

### 3. The Empire Strikes Back – Bologna Process and EU Law

In this part I will address the question whether a feather in the hat of Croatian higher education legislation can survive the scrutiny of Community law. In order to answer this question, I will contrast the outcomes of soft law regulation of higher education with hard law in the field. I will particularly address the issue of how free movement rules – more precisely, mutual recognition of qualifications – affect the national higher education system as described above. It is my argument that hard Community law may correct the disparate impact that was created in the process of the Open Method of Coordination.

First of all, it should be said that higher education falls outside the scope of Community law. In other words, neither the European Community nor the European Union, under the Lisbon Treaty, have the competence to harmonize national legislation in the field. That is one of the reasons why the OMC was applied to the Bologna Process. However, the lack of EU competence does not mean that the Member States are at liberty to regulate the field at will. It is a well-established case law of the European Court of Justice, most recently reiterated in *Morgan*<sup>17</sup>, that even where the Member States retain competence “... as regards the content of teaching and the organization of their respective education systems, it is none the less the case that that competence must be exercised in compliance with Community law”.<sup>18</sup> Briefly, the Member States, when exercising their competence which otherwise does not fall within the scope of EU law, must nevertheless respect other principles of EU law and must not do anything that could jeopardize their attainment. This follows from the principle of sincere cooperation enshrined in Art. 4(3) of the Treaty on European Union (Lisbon),<sup>19</sup> i.e. former Art. 10 of the EC Treaty.

<sup>17</sup> Joined cases C-11/06 and C-12/06 *Rhiannon Morgan v Bezirksregierung Köln and Iris Bucher v Landrat des Kreises Düren* [2007] ECR I-9161.

<sup>18</sup> See *Morgan*, § 24. See also Case C-308/89 *di Leo* [1990] ECR I-4185, §§ 14 and 15; Case C-337/97 *Meeusen* [1999] ECR I-3289, § 25; Case C-147/03 *Commission v Austria* [2005] ECR I-5969, §§ 31 to 35; and *Schwarz and Gootjes-Schwarz*, § 70.

<sup>19</sup> Art. 4(3) of the TEU: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular,

Having said this, it follows that national exercise of regulatory powers in the area of higher education is streamlined by other EU policies such as, for example, the free movement of workers, or the free movement of services, more particularly, by relevant provisions applicable to mutual recognition of qualifications.

#### *Bologna Cycles and Mutual Recognition of Qualifications*

The Bologna Process envisages three main cycles of post-secondary education – a three- or four-year bachelor, a one- or two-year master, and a three-year doctorate. The free movement of persons and services, including the freedom of establishment, in the EU are regulated upon the assumption of sufficiency of three years of post-secondary education, i.e. on completion of the bachelor cycle. This is based on provisions of the TFEU applicable to the freedom of movement of persons, services (including establishment) and capital, as regulated by Title IV of the TFEU (Lisbon), and by relevant secondary legislation.

When it comes to qualifications, main provisions are laid down by directives, more particularly by Directive 89/48,<sup>20</sup> which seeks to make it easier for European citizens to pursue professional activities which, in a host Member State, are dependent on the completion of post-secondary education and training. As specified in the Preamble to the Directive,

Whereas, in order to provide a rapid response to the expectations of nationals of Community countries who hold higher-education diplomas awarded on completion of professional education and training issued in a Member State other than that in which they wish to pursue their profession, another method of recognition of such diplomas should also be put in place such as to enable those concerned to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided they hold such a diploma preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State.

More precisely, pursuant to Art. 3 of the Directive, a host Member State may not refuse access to the market to holders of three-year postsecondary education diplomas.<sup>21</sup>

to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

<sup>20</sup> Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19, 24.1.1989, pp. 16-23.

<sup>21</sup> Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifi-

In other words, while the States are at liberty to opt for any model of higher education, whether 3+2 or 4+1, or even not to implement the Bologna Process at all, they are legally prohibited from denying the right of market access to qualifications holders from other Member States, provided they have at least three years of post-secondary education. While this may be understood as a race to the bottom, the fact remains that the system created by the Directive will strongly advocate in favour of three-year bachelor's degrees in order to avoid discrimination of domestic workers on the national market. Namely, since workers from other Member States will have access to the national market after three years anyway, insisting on longer bachelor cycles will on the one hand deter students from such programs, while not being able to protect the national holders of, for example, four-year bachelor's degrees from competition from other Member States.

This leads to the conclusion that the Bologna Process is structurally enforced by EU secondary legislation which, although it formally does not pertain to the area of higher education at all, has important effects in the field. However, this does not hold for non-EU states, which are not subject to the application of secondary EU law.

cations, refuse to authorize a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

(a) if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

(b) if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession, within the meaning of Article 1 (c) and the first subparagraph of Article 1 (d), and possesses evidence of one or more formal qualifications:

- which have been awarded by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of such State,
- which show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level of a Member State and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course and
- which have prepared the holder for the pursuit of his profession.

The following shall be treated in the same way as the evidence of formal qualifications referred to in the first subparagraph: any formal qualifications or any set of such formal qualifications awarded by a competent authority in a Member State if it is awarded on the successful completion of training received in the Community and is recognized by that Member State as being of an equivalent level, provided that the other Member States and the Commission have been notified of this recognition.

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My second line of argumentation claims that certain national accreditation practices, such as Croatian or Italian, run against the freedom of establishment.

As far as the freedom of establishment is concerned, it is guaranteed under Article 49 of the TFEU (former Article 43 of the EC Treaty).<sup>22</sup> It is a well-established case law of the European Court of Justice that national measures applicable to foreign undertakings seeking to establish themselves in the host Member States must not be discriminatory, and have to be appropriate and necessary (proportionality test).<sup>23</sup>

One of the obstacles to the freedom of establishment follows from restrictive accreditation practices. I have already described how the Croatian Quality Assessment Act restricts market access by making accreditation dependant on entering into contractual bonds with direct competitors. This will be discussed in more detail below. In the European Union, the leading case on the point of establishment of HEIs is the decision of the European Court of Justice in C-153/02 *Neri*.<sup>24</sup>

One Valentina Neri took courses, on a commercial basis, offered by a British-accredited higher education establishment in Italy. While the British university was not duly accredited in Italy, it had been so in the United Kingdom. According to the case file, the Italian Ministry for Universities and Scientific and Technological Research and the Ministry of Foreign Affairs issued memoranda and circulars which lay down that degrees awarded by universities in the Member States may be recognized in Italy only if students have attended courses in the States in which the

<sup>22</sup> Article 49 of the TFEU reads: “Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

<sup>23</sup> See the landmark case C-55/94 *Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165: “... national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.” See also Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, § 32.

<sup>24</sup> Case 153/02 *Valentina Neri v European School of Economics (ESE Insight World Education System Ltd)* [2003] ECR I-13555.

degrees are issued. By contrast, degrees awarded to Italian nationals on the basis of periods of study at establishments operating in Italy with which these universities have entered into private-law contracts are not to be recognized.

According to the European Court of Justice, such practice is incompatible with Article 43 of the EC Treaty (now Article 49 of the TFEU), since it deters students from enrolment in such programs and therefore amounts to a restriction of the freedom of establishment.

In pursuance of their supportive role in higher education, the European Parliament and the Council issued two Recommendations applicable to quality assurance in higher education.<sup>25</sup> The 2006 Recommendation addresses the issue that had emerged in *Neri* and encourages Member States to enable HEIs to seek accreditation (or other quality seals) from registered agencies outside their own country. According to the Recommendation, this can only become reality if several conditions co-exist:

- HEIs need sufficient autonomy to apply for a foreign quality seal;
- Agencies need to be able, allowed and willing to operate beyond their national borders;
- National governments and quality assurance agencies must acknowledge registered agencies from other countries and recognize their conclusions.<sup>26</sup>

In other words, there is no reason why priority, or indeed exclusivity, should be given to national accreditation agencies. As a matter of fact, national monopoly of national accreditation agencies may create practices that directly infringe the freedom of establishment. As a net result, as a matter of EU law, under the principle of mutual recognition, HEIs duly accredited in a Member State of origin should have market access in all Member States.

#### 4. Conclusion

The implementation of the Bologna Process is steered by two tiers of regulatory efforts. The first tier comprises national regulation enacted in pursuance of ministerial communiqués and periodic reports. Those communiqués and reports have been subject to a variety of national interpretations that has ultimately brought about more diversity than before the process was initiated. For example, pre-Bologna four-year bachelor's degrees have been diversified into Bologna three-year and four-year degrees. Former postgraduate master's degrees have been transformed into so-called "post-master master" degrees that are, according to the European University Asso-

<sup>25</sup> Recommendation 98/561/EC of 24 September 1998 (OJ L 270 of 7.10.1998) and Recommendation 2006/143/EC of 15 February 2006 (OJ L 64 of 4.3.2006).

<sup>26</sup> Commission report, *supra*, note 2, pt. 3.2. at p. 8.

ciation, an anomaly. The multiplicity of understandings of the Bologna Process is a consequence of its non-normative nature. Being independent as they are, national regulators are at liberty to give different meanings to the key concepts of the Bologna Process. That can be illustrated by the following anecdote.

In 1969, the Hungarian director Péter Bacsó directed a movie that was subsequently blacklisted by the Communist authorities.<sup>27</sup> In one of the episodes, the protagonist, Jozsef Pelikan, a Communist apparatchik, participates in the red tape ceremony of a Hungarian orange plantation opening. With Hungary's climate being entirely inappropriate for farming oranges, the Communist leadership is able to publicly present only a single orange that is being kept under a glass bell. However, immediately before the commencement, a little girl eats the only fruit. In order to avoid a scandal, Communist leaders substitute the orange with a lemon, declaring it a "Hungarian orange", with the following explanation: We (Communists) know that this is not an orange, but we are not going to tell anyone. The others have never seen either an orange or a lemon, so they could not tell anyway.

Apparently, in the absence of a general consensus about the meaning of the key concepts of the Bologna reform, reaching beyond the narrow circle of national authorities, any attempt to reform national systems of higher education is likely to only bring about more diversity than before.

On the other hand, the Bologna Process does not operate in a vacuum. It is supported by collateral policies and legislative instruments within the legal framework of the EU internal market, more particularly, by market freedoms, competition policy, or mutual recognition of qualifications. In such areas where the European Union does have regulatory competences, national measures adopted in the area of higher education encounter systemic requirements of the internal market. Due to the lack of regulatory competence in higher education on the part of the EU, those systemic requirements typically take form of negative obligations, for example, prohibition of discriminatory treatment of education providers from other Member States, prohibition to disallow market access to the holders of qualifications who satisfy the European three-year requirement, prohibition of anti-competitive regulation, etc. In other words, in the area of higher education, EU law plays the role of negative regulatory power, but lacks the integrative driving force. Nevertheless, even within such limited powers, EU law transmitted important messages to national regulators. For example, you are at liberty to introduce four-year bachelor degrees, but thou shalt not prohibit market access to three-year bachelor's degree holders from other Member States. If you want to discriminate against your own nationals, that is fine with the EU, but not the other way round. Or, the national quality assurance

<sup>27</sup> See Pavičić 2006.

process must not create obstacles to market access of service providers from other Member States. You can insist on any national requirements of quality, as long as you recognize assessments of quality assessment agencies from the Member States of origin.

These requirements, however, are applicable only to Member States, and do not concern non-member signatories of the Bologna Declaration. Therefore, in absence of collateral EU policies and rules, even more diversity in third countries is to be expected. As far as Croatia is concerned, all regulatory efforts have so far been based on the national interpretation of Bologna concepts. As I have demonstrated in Part 2, the net result of those regulatory efforts did not contribute to the achievement of the main goals of the Bologna Declaration. On the contrary, I argue, the reform contributed to further insulation of the national labour market and pre-empted competitive development of higher education services. This issue will have to be addressed during EU membership negotiations, within chapters on the free movement of services and competition. However, the question remains whether a meaningful continental reform of higher education is possible to begin with in the absence of supranational regulation.

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