

The Changing Regulatory Environment Affecting the Education and Training of Europe's Lawyers

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I. Framework and Dynamics of Integration

Pressures of a soft and hard law nature to change legal training have arisen from integration in the European Economic Area (EEA). European legal professions are differently configured in each jurisdiction to suit particular needs and reflect each country's historical developments.¹ Nevertheless, a uniform pattern in the various European national training regimes emerges: Before access to the legal profession is granted a university law degree (at the undergraduate level) is typically followed by professional training at a specialized institution normally coupled with a period of apprenticeship. This design has meant that many important legal skills are imparted not at the university (or academic) stage of education and training, but rather mainly through the practical training that follows academic studies.²

From a regulatory perspective, rules about the structure and content of legal education are not harmonized because the regulation of education is a matter reserved to member states;³ in fact, however, a miasma of European influences is quite keenly felt by those who regulate legal education in the numerous countries. The following essay explores how the various E.U. initiatives are gradually developing a transnational legal profession and shaping European legal education.

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1. Julian Lonbay, *Training Lawyers in the European Community* (The Law Society 1990).
2. Julian Lonbay, *Legal Education in England and Wales*, PILnet (The Global Network for Public Interest Law), August 2010, *available at* <http://www.pilnet.org/public-interest-law-resources/8-legal-education-in-england-and-wales-by-julian-lonbay.html> (discussing the English and Welsh examples).
3. Treaty on the Functioning of the European Union, art. 6, 165-166, 2010 O.J. (C 83) 52, 120-121 [hereinafter TFEU].

II. Impact of European Legal Integration

European Union law is integrated into the legal systems of all the member states with much national law now being created via the implementation of European Union directives.⁴ Thus, the study of law in all the member states includes a large element of European law, albeit sometimes disguised as national law.⁵ European law is given additional strength through national judicial enforcement of European Union law.⁶ In effect, we have seen the emergence of a partial transnational legal system. While competence regarding the content of the education the students receive is retained by the member states and exercised autonomously, they must respect and not “hinder” the overall free movement aims of the Union. This means that in many cases adjustments to the national legal “routes” to legal qualification and licensing are required.

III. Non-legal Integration Impacts

A. The Bologna Process

The member states, in wishing to create a European powerhouse economy,⁷ have concluded that the labor market is hindered by multiple qualification regimes that make cross border activities and employment more difficult. Their response has been to make the national higher educational systems structurally convergent through the Bologna Process,⁸ which now has well over forty state adherents, and to create a European Higher Education Area (EHEA).⁹ The EHEA has its own qualification framework covering the

4. *Id.* at 171–72 (Article 288 provides that “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”).
5. Also of significant influence is the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as amended, to which all European Economic Area states are parties. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5.
6. National law must be interpreted to achieve the results demanded by European Union law. This principle, often referred to as the Doctrine of Indirect Effect, was initially established by the European Court of Justice in the Von Colson case. *See* Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891.
7. Described optimistically as “the world’s most competitive, dynamic, and knowledge-based economy,” the Lisbon Agenda has now been replaced by the EU 2020 Strategy. Europe 2020 was adopted at the European Council on 17 June 2010; http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cc/115346.pdf.
8. Julian Lonbay, *The CCBE and ELFA Projects on Internationalizing Legal Education in Europe*, 26 *Penn St. Int’l L. Rev.* 889 (2008) [hereinafter *Internationalizing Legal Education in Europe*]; Laurel S. Terry, *The Bologna Process and Its Impact in Europe: It’s So Much More than Degree Changes*, 41 *Vand. J. Transnat’l L.* 107 (2008); *see generally* European Commission, Education & Training, *The Bologna Process: Towards the European Higher Education Area*, Feb. 24, 2011, *available at* http://ec.europa.eu/education/higher-education/doc1290_en.htm/.
9. This area was identified at a ministerial meeting in 2010. It covers the 47 participants of the

three stages of higher education (Bachelors, Masters, Doctoral) which sets a non-binding structure for the higher education sectors of the countries that participate. France, Norway and the Netherlands, for example, have adopted this Bologna structure for their higher education systems.

B. Europe 2020

The Lisbon agenda (now styled the “E.U. 2020” strategy) only involves E.U. member states and comprises a process which has also spawned the European Qualification Framework for Lifelong Learning. This mechanism was “authorized” by recommendation from the Council of the European Union and the European Parliament¹⁰ which covers all aspects of education (not just higher education) yet the recommendation has no binding legal force, and does not replace or define national qualifications, illustrating the lack of E.U. authority to adopt binding acts in this area. One of the results of this E.U. 2020 strategy is the slow creation of the European Qualifications Framework for Lifelong Learning.

The goal is to make all national standards more transparent using national qualification regimes combined in and interpreted by the common European framework. Both the Bologna and E.U. 2020 processes developed outside of the normal supranational union decision-making processes in order to respect national sovereignty. They are instead taking place under the aegis of the so-called open method of co-ordination (OMC), a decentralized planning process through which member states implement agreed-upon policies supervised by the Council of the European Union. This can be a rocky road; the U.K., for example, has recently refused to set national targets under the OMC.¹¹ The current goal is to finalize the national qualification frameworks (for the most part still being created) by 2013.

Bologna Process. See European Higher Education Area, available at <http://www.ehea.info/>.

10. Recommendation, On the Establishment of the European Qualification Framework for Lifelong Learning, 2008 O.J. (C 111) 1.
11. At a February 2011 meeting of Council of the European Union in Brussels, the U.K. refused to set educational targets as requested by the EU 2020 Strategy. A weakness of the 2020 process is that states are not required to comply, and the U.K. insisted on an alternative interpretation of its obligations. Press Release, Council of the European Union, 3066th Council meeting on Education, Youth, Culture and Sport (Feb. 14, 2011) available at https://docs.google.com/viewer?url=http://www.consilium.europa.eu//uedocs/cms_data/docs/pressdata/en/educ/119297.pdf&pli=1.

C. Transnational Legal Practice, Education and Training

Against this background, how is Europe educating and training lawyers for transnational legal practice?¹² The pressures from both hard and soft E.U. law have had a telling impact on the development of cross-border legal practice. Of course, there are two specific, and mostly successful, directives¹³ that enable lawyers to practice across borders.¹⁴ They allow relatively easy cross-border access to legal service markets for an E.U. national who is qualified as a lawyer in one of the EEA states. There has also been some discussion under the auspices of the European Law Faculties Association (ELFA) about how legal education might be re-structured¹⁵ in Europe, but scant follow-through has occurred. Only a small minority of law schools in Europe offer double law degrees.¹⁶ The Erasmus Program¹⁷ has encouraged bilateral and multi-lateral links, and student and staff exchanges, but it includes a limited

12. See Internationalizing Legal Education in Europe, *supra* note 8.
13. Council Directive 77/249, 1977 O.J. (L 78) 17-18 (EEC); Council Directive 98/5, 1998 O.J. (L 77) 36-43 (EC). These directives are currently under review by the European Commission.
14. See generally Julian Lonbay, Assessing the European Market for Legal Services: Development in the Free Movement of Lawyers in the European Union, 33 *Fordham Int'l L. J.* 1629 (2010); Sjoerd Claessens, Free Movement of Lawyers in the European Union (Wolf Legal Pub. 2008).
15. Frans Vanistendael, Editorial: Sorbonne-Bologna: Are We on the Right Track?, 2 *Eur. J. Legal Educ.* vi (2004). See also Julian Lonbay, Reflections on Education and Culture in European Community Law, in *Culture and European Union Law* 243 (Rachael Craufurd Smith ed., Oxford Univ. Press 2004); Julian Lonbay, University Training: The Implications of the Bologna Declaration for the UK, 0 *Eur. J. Legal Educ.* (2001); various issues of the *Journal of Legal Education*, available at <http://elfa-afde.eu/EJLEISSUES.aspx> and newsletters published by the European Law Faculties Association [ELFA], available at <http://elfa-afde.eu>. See also Hege Brackhus & Olaug Husabø, The Impact of the Sorbonne-Bologna Declaration on Legal Education in Norway, 1 *Eur. J. Legal Educ.* 43 (2004); Evy De Batselier, Legal Education in Flanders: Introducing the Bachelor/Master Structure, 1 *Eur. J. Legal Educ.* 45 (2004); Peter M. Huber, Der "Bologna-Prozess" und Seine Bedeutung für die Deutsche Juristenbildung, 1 *Eur. J. Legal Educ.* 35 (2004); Jacek Petzel, Perception and Practice of the ECTS in Poland, 1 *Eur. J. Legal Educ.* 35 (2004); Mark Refalo, The Application of ECTS in Legal Studies: Bologna and ECTS—The Law Student View, 1 *Eur. J. Legal Educ.* 51 (2004); Luisa Antonioli, Legal Education in Italy and the Bologna Process, 3 *Eur. J. Legal Educ.* 143 (2006). See also Internationalizing Legal Education in Europe, *supra* note 8.
16. See Anne Klebes-Pelisser, Double Degrees in the Context of the Bologna Process, 4 *Eur. J. Legal Educ.* 173 (2007); Audrey Guinchard, The Double Degree Experience Between England and France: A Contribution to an Integrated European Legal Education, 4 *Eur. J. Legal Educ.* 1 (2007); Jose Garcia-Anon et al., A Joint Degree Programme in Business Administration and Law: Experience on Educational Innovation Applying ECTS, Tutorships, and E-learning in the Context of European Convergence, 4 *Eur. J. Legal Educ.* 67 (2007).
17. See The ERASMUS Programme—Studying in Europe and More, European Commission, Education & Training, June 8, 2010, available at http://ec.europa.eu/education/lifelong-learning-programme/doc80_en.htm.

number of students. The Lisbon and Bologna processes have engaged and galvanized non-state actors to build bridges to the EHEA and other member state education and qualification regimes.

Similarly, the hard law of the E.U. has established goals, but left to implementing authorities the task of filling in the missing pieces and generally doing much of the difficult work of implementing those goals and principles. The member states can hardly complain about the burdens imposed on their regulatory authorities as it is they who refused to permit the regulation of these areas at a supranational E.U. level. An illustration of the process can be found in the operation of 2005/36/EC, on professional qualifications,¹⁸ which is currently under review. This complex and lengthy directive consolidates fifteen previous directives.¹⁹

Under the directive, the professional gatekeepers in member states may not disallow admission to the legal profession by an E.U. national solely for lack of a national qualification. Instead, they must compare the migrant's existing qualifications to those required for entry into their particular profession. If this comparison shows that the migrant has the knowledge and skills required of the applicant state, he or she must be permitted entry. If there are gaps or substantial differences in the set of competencies held by the migrant, then additional requirements may be imposed. Such differences may consist of number of years needed for training, substantially different subjects covered in training, or activities regulated by the host state profession which are not regulated or do not exist in the home state. One can immediately see that national authorities need to understand not only their own criteria for licensing but also those of the other member states. There is no E.U. level guidance on how to apply the rules in particular circumstances, though the position of national coordinator was created to help ensure smooth implementation. These coordinators regularly meet in Brussels and have developed their own code of conduct to assist in implementation of the directive.²⁰

Lawyers using this scheme can effectively short-cut the national legal education and training required in their home states by passing an existing aptitude test in the host state.²¹ Through the *Morgenbesser* case,²² the Court of Justice of the European Union (ECJ) extended the scope of the principle

18. Council Directive 2005/36, 2005 O.J. (L 255) 22 (EC).

19. See Julian Lonbay, *The Education, Licensing, and Training of Lawyers in the European Union, Part II: The Emerging Common Qualifications Regime and its Implications for Admissions in Europe*, 79 *Bar Examiner* 25 (2010).

20. Code of Conduct Approved by the Group of Coordinators for the Directive 2005/36/EC on the Recognition of Professional Qualifications, available at http://ec.europa.eu/internal_market/qualifications/docs/future/cocon_en.pdf.

21. Only Denmark allows for an adaptation period for lawyers.

22. Case C-313/01, *Christine Morgenbesser v. Consiglio Dell'Ordine Degli Avvocati di Genova*, 2003 E.C.R. I-13467; see also Julian Lonbay, *Have Law Degree—Will Travel: Christine Morgenbesser v. Consiglio Dell'Ordine Degli Avvocati di Genova* (case C-313/01), 5th Chamber (13 November 2003), 1 *Eur. J. Legal Educ.* 69 (2004).

to those who have not completed their legal training in their home state. In that case, a French law graduate applied and was ultimately allowed to train as an Italian *avvocata*. The ruling of the ECJ means that E.U. admission authorities (to post-university legal training) must now make admission decisions without resorting to homologation of university law degrees.²³ The challenge of assessing and measuring the knowledge, competence and skills of these migrants is tough and causing admitting authorities to re-assess and evaluate what it is they seek in their new lawyers. What are the core skills and knowledge required? How can they be measured?

This search for training outcomes mirrors developments occurring in the creation of the national and European qualification frameworks under the Bologna and E.U. 2020 pressures. Here, too, things are measured in outcomes rather than inputs. The Council of Bars and Law Societies of Europe (CCBE) has, after a period of looking at training inputs, used this new approach to agree on a set of common training outcomes for all European lawyers.²⁴ These CCBE outcomes stress, above all, the importance of the ethical dimension of legal practice,²⁵ a key differentiating feature of the new, transnational lawyer.

IV. Moving Towards Common Legal Training Goals

The desire among budding lawyers to find the shortest route to practice is pressuring European authorities to change European legal education. The *Morgenbesser* case may be one example of European-induced flexibility; the recent *Koller* case²⁶ is another. In *Koller*, the ECJ confirmed that Austria could not refuse to allow Mr. Koller, an Austrian national, access to the aptitude test under the professional qualification directive. Mr. Koller, having earned an Austrian four-year law degree, decided to finish his professional qualification in Spain. After taking further education and training there, he was recognized as a Spanish lawyer (*abogado*) and succeeded in having his Austrian law degree accepted there. At that time, Spain required no further post-university training for law graduates. He returned to Austria as a qualified Spanish lawyer and requested access to the aptitude test under provisions of the mutual recognition directive, but was refused. The Austrian view was that he was trying to circumvent its internal training route that mandated a five-year period of apprenticeship for law graduates. The Spanish route had saved

23. Council of Bars and Law Societies of the European Union, CCBE Chronology (I), Analysis (II) and Guidance (III) to Bars and Law Societies Regarding Case C-313/01 *Christine Morgenbesser v. Consiglio Dell'Ordine Degli Avvocati di Genova*, 5th Chamber (13 November 2003), Jan. 2004, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/morgenbesser_guidanc1_1183976940.pdf.

24. Council of Bars and Law Societies of the European Union, CCBE Recommendation on Training Outcomes for European Lawyers, Nov. 11, 2007, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf.

25. This matter is currently under review in England and Wales.

26. Case C-118/09, *Koller*, 2010 E.C.R. I-0000.

him several years. The Court of Justice confirmed that Mr. Koller was entitled to use the European route. His story demonstrates an element of regulatory competition between the member states and increased the pressure on Bars and Law societies to agree on common European legal training standards. In fact, a new Spanish post-university legal training regime has now come into force after years of pressure.

The twin pressures of the European hard and soft law are reshaping the structure of higher education both toward common requirements and measurable outputs rather than inputs.²⁷ For example, Directive 2005/36 has pushed authorities in the member states (including Bars and Law societies) to list the necessary knowledge and competences of lawyers in order to better assess whether incoming migrant lawyers qualify for practice. Both this convergence and European law that permits the mobility of lawyers in Europe are helping to create a legal services market with increasingly common training goals. One can predict further stormy debates²⁸ and legal wrangles, but progress towards commonality is being made.

27. For example, the “diploma supplement” is a lengthy document, describing in much more detail than a simple diploma, the provenance, level, context and substance of a degree. These supplements are being introduced subsequent to the Lisbon Recognition Convention in an effort to promote transparency for qualifications. Lisbon Convention on the Recognition of Qualifications Concerning Higher Education in the European Region, Apr. 11, 1997, E.T.S. No. 165.
28. Complex issues such as partial practice rights, recognition of specialist lawyers, coping with multi-disciplinary practices and the like will still continue to raise new challenges for legal educators.