

# THE STATUS OF UNIVERSITIES IN EU LAW

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Attempts to describe the legal status of Universities in EU law present a rather complex outline that is the result of analysis at various, different, levels.

The reasons for this are twofold: on one hand, within the member states the label “University” does not cover all post-scholastic education. Together with classical “universities” one finds technical schools, polytechnics, conservatories and academies of arts, each having a particular status. The term “higher education institutions” (HEI) is generally used to try to cover them all, but still differences remain, and this clearly influences the harmonization process.

Also their legal status, main goals and funding model may differ within and among member states: some institutions are mostly devoted to teaching; others are much more involved in research. Others still – such as medical schools – provide a vast number of health services to the general public and are part of both the national education system and of the national health service.

Differences also exist when it comes to recruitment policies, status of professors and teaching staff; and to student contribution, especially if alongside publicly funded and governed universities there are privately controlled universities which depend mostly, if not entirely, on student fees.

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On the other hand, higher education is not one of the policies enshrined in the EU treaties and therefore is not the object of overall sectorial regulation, as are financial services, agriculture, telecoms, air transport, fisheries, etc.

EU intervention in the field of higher education has been concentrated – understandably and meritoriously – on the harmonization of *curricula*. The so-called Bologna process has come a long way, and although much remains to be done, the agenda follows a typical incremental EU approach.

However, defining and homologating the output (students) in only a very limited way helps establish the legal status of universities under EU law.

This is becoming increasingly important, as one can see from the growing number of cases – mostly preliminary judgments – which are brought in front of the ECJ and which are clearly manifestations of a more complex situation. At any rate it is apparent that the present status of universities under EU law is mostly shaped by case-law. This is not uncommon in the long history of the evolution of EU regulation and its expansion into new fields. Generally this has happened via prior decisions of the ECJ which have subsequently been systemized in EU Directives or Regulations.

In this brief paper two aspects will be taken into account; and after some initial conclusions two more points will be investigated.

### 1. UNIVERSITIES AND STATE AID

In ECJ case-law one finds repeatedly expressed the principle that education – and higher education – is not, generally speaking, a service which has been put on the market by member States and therefore educational services – and higher education services – do not fall under articles 56 ff TFUE<sup>1</sup>.

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<sup>1</sup> See VON WENDLAND B., *State Aid and Public Funding for Universities and other Research Organisations* (published on-line at the EU Commission web page [http://ec.europa.eu/competition/publications/cpn/2010\\_2\\_10.pdf](http://ec.europa.eu/competition/publications/cpn/2010_2_10.pdf)). The article is extremely important because – taken into account the obvious disclaimers – it clearly reflects opinions circulating in the Commission.

Therefore there cannot be an issue of State aid, which arises only if the aid is given to undertakings which operate in the market. In this case, the aid is liable to alter the ordinary competitive relationships between enterprises. Otherwise it falls within the choice of individual governments, provided they comply with the financial stability principle.

This reply – however – appears to be too simplistic and requires careful distinguishing. In the first place we are all aware – and so are the EU institutions – that universities offer a vast array of services. Typically the main distinction is between education – which is from an economic (albeit not always legal) point of view, a service; and research, which is not necessarily a “service”: when a scholar publishes an article on troubadour poetry or on the social habits of certain insects he/she is not rendering a service to anybody but only fostering – one hopes – cultural or scientific knowledge. But this is only one of the many forms university research takes, and often the same departments and personnel are involved in various kinds. The most prized – for reasons which are self-evident and whose legal implications will be seen further on – is research for third parties, mostly industries, bringing in an important part of universities’ income. Furthermore universities – quite positively – do not live in a vacuum but build complex relationships with other institutions: other universities, local and national bodies, private and public research institutes and private undertakings.

The research they engage in may be purely academic (e.g. a bank finances a critical edition of a literary masterpiece); it may be for a specific public interest (e.g. an epidemiological survey to be used for the prevention of diseases); it may lead to some patentable discovery whose profits will be divided by the partners of the endeavor.

Can one say that in all these cases the research falls within the typical and historical mission of universities? Can one say – in the XXI century global economic environment – that it is an activity which has been taken out of the

market? Replies may vary, but as will be seen it is not straightforward, even in ECJ case-law<sup>2</sup>.

But reverting to educational services: here one has also to make a distinction. Clearly first and second degree courses appear to pursue a predominantly public mission. But when it comes to the so-called third level of higher education, can one put in the same basket PhD courses, post-graduate master degrees, and the multiplicity of life-long-learning activities that are increasingly offered by universities? Again, a blanket classification does not appear to be adequate. In this extremely variable situation what are the fixed points (or those that at least appear as such)?

#### *A. UNIVERSITIES AS PUBLIC LAW BODIES*

Repeatedly the ECJ has qualified universities as public law bodies, inasmuch as they are “*established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; having legal personality; and financed for the most part from the State*” (case C-380/98, *University of Cambridge*, para. 18).

#### *B. NOT ALL PUBLIC PAYMENTS TO UNIVERSITIES ARE “PUBLIC FINANCING”*

Not all payments made by the State “*have the effect of creating or reinforcing a specific relationship of subordination or dependency*”. “*Only payments which go to finance or support the activities of the body concerned without any specific consideration may be described as public finance*” (*UoC*, para. 21).

Therefore payments arising from a contract for services comprising research work or as consideration for other services do not constitute “public financing” (*UoC*, para. 26).

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<sup>2</sup> “there is a large grey area”: KLEIS M., NICOLAIDES P., *The Concept of Undertaking in Education and Public Health Systems*, (9.6.2006), on line at the European Institute of Public Administration web-page [http://www.eipa.eu/files/File/state\\_aid/The\\_concept\\_of\\_undertakings\\_in\\_education\\_and\\_public\\_health\\_systems.pdf](http://www.eipa.eu/files/File/state_aid/The_concept_of_undertakings_in_education_and_public_health_systems.pdf)

C. *THE NATIONAL EDUCATION SYSTEM IS NOT A SERVICE*

The State “*in establishing and maintaining such a system [the national education system] is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields*” (case C-263/86, *Humbel*, para. 18).

This conclusion is not affected by the fact that students or their parents pay a tuition fee. Therefore courses taught in secondary education cannot be considered as services for the purposes of art. 60 ff TFUE (*Humbel*, para. 18).

The same principle is stated in case C-109/92, *Wirth*: “*Courses given in an undertaking of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty*” (para. 19).

The consequence is that articles 59 and 62 (in the text at that time in force) setting a ban on the introduction of any new restrictions on the freedom to provide services do not apply (*Wirth*, para. 21) and subsidies for education in an institution that does not provide services do not constitute State aid (*Wirth*, para. 22; and *Lair v. Universität Hannover* (C-39/86, para. 15).

In this line of thought one can detect a logical flaw: when the ECJ concludes in *Wirth* that “*courses given in an undertaking of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty*” (para. 19) it is qualifying an activity not per se but because it receives public funds. But this is the question – can it freely receive public funds? – not the answer. The consequence of the ECJ’s statement would be that when educational activities are rendered by a publicly funded institution, they are not a service, but when they are rendered by a privately funded entity, they are services. At this point the question lies in the broader definition of services of general interest (SGI), and their qualification as “economic” or “non-economic”. But this is still lacking because, as already

mentioned, there is no clear policy, or policy statement, on the status of universities and their activities<sup>3</sup>.

## 2. UNIVERSITIES AND PUBLIC PROCUREMENT

The relationship between universities and public procurement regulations can be seen from two perspectives: on one hand it is necessary to establish if, when and to what extent universities, when they are in need of goods and services provided by the market, must comply with public procurement procedures. On the

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<sup>3</sup> The 2012 “**Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest**” (in OJ C 8, 11.1.2012) *[footnotes omitted]* simply summarizes ECJ case-law: <<2.1.5. Education

26. Case-law of the Union has established that public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. In this regard, the Court of Justice has indicated that the State:

"by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents ... does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas".

27. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true cost of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse. These principles can cover public educational services such as vocational training, private and public primary schools and kindergartens, secondary teaching activities in universities and the provision of education in universities .

28. Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, commercial enterprises offering higher education financed entirely by students clearly fall within the latter category. In certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.

29. In the Community Framework for State aid for research and development and innovation, the Commission has clarified that certain activities of universities and research organisations fall outside the ambit of the State aid rules. This concerns the primary activities of research organisations, namely:

- (a) education for more and better skilled human resources;
- (b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; and
- (c) the dissemination of research results.

30. The Commission has also clarified that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organization) are non-economic where those activities are of an internal nature and all income is reinvested in the primary activities of the research organisations concerned.

other hand, universities may be purveyors of services to public bodies, and the question is, again, if and to what extent such directives apply.

#### A. *THE UNIVERSITY OF CAMBRIDGE CASE*

The first issue was examined in the *University of Cambridge* case (C-380/98). It is important to specify the facts of the case, in which *UoC* had brought an action to avoid been classified as a public law body, subject to the regulations set out by Directive 93/37. In particular the questions put to the ECJ revolved around the notion of “publicly financed” and whether this included a) awards or grants paid by one or more contracting authorities for the support of research work; b) consideration paid by one or more contracting authorities for the supply of services comprising research work; c) consideration paid by one or more contracting authorities for the supply of other services, such as consultancy or the organization of conferences; d) student grants paid by local education authorities to universities in respect of tuition for named students (para. 13).

To answer the various questions the ECJ takes into account the different sources of financing and the influence they may have in qualifying a university as a “contracting authority” (*UoC* para. 15). The decision also sets out the scope of Directives 92/50, 93/36 and 93/37 *i.e.* to avoid national offerors being preferred in the adjudication of public procurement procedures, and to avoid a publicly financed or controlled entity being guided by considerations “other than economic” (para. 17).

In order to establish if a university should be considered a “public body” one has to see if it is “closely dependent”: “*Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency. Only payments which go to finance or support the activities of the body concerned without any specific consideration therefore may be described as “public financing”*” (para. 21).

Having set this criterion, the ECJ establishes that awards and grants for the support of research work that go to the institution as a whole should be classified

as “public financing” (para. 22). Also grants for tuition of students, not having a “contractual consideration”, fall into the same category (para. 23).

When instead monies are paid by public bodies to universities which constitute consideration for contractual services provided by the university, such as particular research work or the organization of conferences they do not fall within the concept of “public financing”, because the relationship “*is analogous to the dependency that exists in normal commercial relationships*” (para. 24, 25).

From the conclusions of Advocate-General Alber it is clear that *UoC*’s aim was not to qualify as a “contractual authority” in order to avoid the restraints posed by the public procurement Directives.

Therefore the *UoC* decision can provide an answer to the question of whether universities, in acquiring goods and services, should follow public procurement procedures. But it should not be authoritative when it comes to the other question, *i.e.* if those Directives apply when universities provide services.

#### B. THE CONISMA CASE

This second question has arisen in two other cases, *Conisma v. Regione Marche* (C-305/08) and *Università del Salento v. Ordine Ingegneri* (C-159/11), both raised by Italian administrative judges.

In the first case an Italian region had organized a public tender for the acquisition of marine seismic data in the Adriatic Sea. Conisma was a consortium of 24 universities and three ministries and was excluded from the tender on the basis that it was not an “economic operator”.

The ECJ replies that EU law does not discriminate against public bodies which intend to participate in public procurement procedures. However “*Directive 2004/18 imposes an obligation on Member States to ensure that the participation of a body governed by public law in a public tendering procedure does not cause a distortion*” (para. 32). This implies that contracting authorities should take into account abnormally low tenders by offerors who have obtained State aid, and that



State aid may justify the exclusion of entities that receive such aid (para. 33), but not on an *a priori* basis (paras. 34, 40).

Having reached the conclusion that universities are allowed to submit bids in public procurement procedures, the ECJ adds: “*The effect of a restrictive interpretation of the concept of ‘economic operator’ would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as ‘public contracts’, could be awarded by mutual agreement and would thus not be covered by Community rules on equal treatment and transparency, which would be inconsistent with the aim of those rules*” (para. 43).

Although this should be considered an *obiter dictum*, here the ECJ touches upon a crucial question: when a public body wishes to confer services upon a university, may it do so without resorting to a public procurement procedure?

The Conisma decision contains a further indication: if universities are entitled to offer certain services to the market they cannot be precluded from taking part in public procedures (para. 49). However it is up to Member States to decide if universities “*which are non-profit making and whose primary object is teaching and research*”, are authorized to operate in the market (para. 48).

### C. THE UNIVERSITÀ DEL SALENTO CASE

These further issues arise in the *Università del Salento* (hereinafter *UdS*) case decided by the *Grand Chambre* in December 2012. Here the factual basis is opposite to *Conisma*, where a university consortium was excluded from a tender. In *UdS* a local health authority conferred upon the university a study aimed at identifying the seismic vulnerability of hospital structures in the province of Lecce. The contract was awarded directly without any public tender and included clauses establishing close cooperation between the two public institutions, and the transferal of ownership of the results to the local health authority.

The conferral of the services upon *UdS* was challenged by the local professional associations of engineers and of architects for whom the activity

should have been offered to the market via a competitive tender procedure. The administrative judge of first instance upheld such claims and voided the contract. *UdS* and the local health authority appealed, claiming that the contract covered institutional activities and therefore was outside the scope of the public procurement Directives. Furthermore the consideration did not exceed the costs incurred in the performance of the service.

The ECJ starts from the *Conisma* decision, where it stated that universities can be economic operators and therefore may be allowed to take part in tendering procedures because although the services rendered by *UdS* might be classified as academic research, they actually fall under either research and development services covered by Annex II A, category 8, of Directive 2004/18, or engineering services and related scientific and technical consulting services covered by category 12 of the same annex (para. 28).

The fact that remuneration is limited to the reimbursement of costs incurred by the university does not remove the contract from the scope of the Directive (para. 29).

Nor can *UdS* be considered an in-house entity of the local health authority (para. 33); nor could the contract be considered a form of “*cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out*” (para. 34) because the “*public task*” which is pursued by the contract is not common to the local health authority and to *UdS*, inasmuch as it does not constitute “*academic research*” because it corresponds at large “*to activities usually carried out by engineers and architects*” (para. 37).

Conclusively, if one tries to join the dots between the *University of Cambridge*, *Conisma* and *Università del Salento* decisions, the result is that universities live in amphibious world, sometimes governed only by public interest concerns and sometimes by concerns for market protection. Practically, all the traditional activities of universities are liable to be classified as services: if one looks at Annex II of the 2004/18 Directive one finds not only R&D services and architectural and engineering services mentioned in *UdS* but also “*urban planning*

*and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services*” (category 12); publishing services (category 15); “*Education and vocational educational services*” (category 24); health and social services (category 25); cultural services (category 26).

From this perspective the three mentioned ECJ decisions form a slippery slope down which universities will inevitably slide, especially in times of public finance restrictions.

To this one should add the connection between State aid and public procurement profiles. In other terms, allowing universities to take part in tendering procedures (*Conisma*), and even forcing them to do so (*UdS*) are rules that contain the poison pill of the application of the *Altmark* principles<sup>4</sup> to universities.

### 3. A DIFFERENT PERSPECTIVE

One should point out from the start that universities are, as institutions, a few centuries older than the EU: the foundation of Bologna University is commonly dated back to 1088.

Its model flourished and was exported throughout medieval Europe. The assertion does not aim at establishing some kind of ancestral privilege but only at underlining that universities have played a fundamental role in the formation,

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<sup>4</sup> *Altmark Trans GmbH v. Regierungspräsidium Magdeburg* (Case C-280/00): public subsidies intended to enable the operation of certain services are not caught by article 87 (now 107) where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

development and dissemination of culture and – from the 17<sup>th</sup> century – of science in Europe. Before national states, before corporations, before political parties and trade unions, universities have enshrined a European model of the creation of knowledge and of transnational communities of scholars. But also – and this is an essential point – universities have fought for and obtained a special legal status since the Middle Ages, notwithstanding generally absolutist political regimes. Self-government of universities was recognized in the earliest charters and is now recognized in many of the contemporary constitutions of Europe.

Compared with this impressive history, the basic texts of the EU are somewhat perplexing. Universities are mentioned only *en passant* in Title XIX of the TFUE devoted to “*Research and technological development*”: article 179, para. 2, establishes that the EU “*shall encourage undertakings, research centres and universities*” [the order is revealing] in their research and technological development “*of high quality*”. And article 180 indicates as a policy aim “*promoting cooperation with and between undertakings, research centres and universities*”.

This scarce interest is consistent with the very slight attention that the Lisbon Treaty shows towards education: a short reference in the last indent of the Preamble (“*wide access to education and through its continuous updating*”). A generic competence on education (article 6) not followed by a more specific implementation. An invocation for a “*high level of education*” at article 9. And that is all.

The least one can conclude is that universities are not recognized as one of the actors of the EU system and therefore are not the object of a specific policy. And if one carefully analyses the lengthy EU documents on services of general interest one finds an obvious reference to education services, which together with health services are the first and basic services provided by modern European States since the 18<sup>th</sup> century. But there is absolutely no reference to universities.

Against this near-to-silent background, it appears to be somewhat limited to frame the status of universities in EU law assuming as a standpoint that of

competition law in its many facets (public procurement, State aid, public service obligations *et similia*).

A similar approach – which is evident (and somehow inevitable) in ECJ case-law – appears to be totally inadequate from a systematic point of view. Universities are not some new entity that has emerged from the complex social and economic interactions of contemporary Europe. As already stated, universities have been here for centuries and have been the main drivers of what now is called a “knowledge society”. Universities have always created wealth, both individual and social. And one might add that centuries before the foundation of the EU, the idea of Europe as a community united by culture and knowledge was forged in and by universities.

Their services – whether educational or research – have always been prized by students, scholars and private undertakings. It is – and would be – limited, at its best, to view higher education simply as some kind of activity that the State has taken away from the market in order that it should be provided for in conformity with general public interest. This for two reasons: one subjective, the other objective.

In the first place, although universities are mostly financed by the State and provide their educational services through publicly approved *curricula*, universities are not the State. Generally, government interference stays away from the designation of their governing bodies, and academic freedom is seen as a precondition for a university to be considered as such. Universities are in no way comparable with a state-run undertaking<sup>5</sup>.

In the second place, because of their autonomous status, universities have always operated in a special ‘market’, that of higher education and specialized research that has its own peculiar and historical rules. The first of these is that universities move on two legs – education and research – which allow them to

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<sup>5</sup> One should therefore express serious doubts that the “**Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings**” is applicable to universities. The Directive sets the principle of separate accounts.

create and advance knowledge, disseminate it amongst students, and then move on to new knowledge in a perpetual ascending spiral. There cannot be education if there is no research behind it; but research that cannot be transmitted through education is of little social value. Separating educational services from research activities – as one has seen in the *UoC* and the *UdS* decisions – is like trying to divide two sides of the same coin. No other entity – whether non-economic or economic – operates in the same way. For this unique feature universities have always attracted not only public subsidies, but also private donations and contracts for services in which the foremost value is given by the fact they are rendered not by any other institution or undertaking, but by a university<sup>6</sup>.

That the EU institutions' present view of universities is narrow is clear in the *UdS* decision, when it examines whether universities can be considered as in-house providers and (quite rightly, as the law now stands) excludes it. The question should be: why should a public institution deprive itself of the unrivalled expertise and independency of universities to carry out a delicate task on the assumption that universities are placed on the same standing as private undertakings?

And if one looks at the 2006 “*Community framework for state aid for research and development and innovation*”<sup>7</sup> the conclusion is even more troubling. The approach of the “Framework” (albeit a sub-primary source of law) is clearly in contrast with the entire history of universities, because the Commission explicitly equates “*common interest*” with “*economic efficiency*”<sup>8</sup> and aims at avoiding “*market failures*”<sup>9</sup>. Although this approach is mitigated by the clarification that “*the public funding of the non-economic activities will not fall under Article 107(1)*”, the Commission's view is that one must avoid “*cross-subsidisation of the economic activity*”<sup>10</sup>. The statement clearly misses the point:

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<sup>6</sup> This is why one should not apply *sic et simpliciter* EU rules set out for public (or semi-public) research centres. The case is analyzed in the ECJ decision in the *ARGE* case (C-94/99).

<sup>7</sup> OJ C 323 30.12.2006.

<sup>8</sup> Para. 1.1.

<sup>9</sup> *ibidem*.

<sup>10</sup> Para. 3.1.1.

in the university research system it is not economic activity that is subsidized by public funding, but its opposite, *i.e.* universities are able to finance their institutional and ordinary (non-economic) activity by providing research services to third parties for a consideration<sup>11</sup>. Nor could one object that there is market distortion because the personnel engaged in this research are less costly as their salary is paid by the State. Again this approach ignores the enormous positive externalities created by university research: it increases the knowledge of public researchers who will contribute in improving the general knowledge of the scientific community and, subsequently, update the content of educational programmes, promoting the dissemination of new ideas. No accounting system can calculate the value of this spill-over: but this is exactly the reason why universities may not be equated to undertakings, or even to publicly owned undertakings<sup>12</sup>.

The solution – if one wants to avoid inefficient and inappropriate applications of EU law which has been created for completely different purposes<sup>13</sup> – is a specific legislative intervention which, starting from the uniqueness of universities and their role in the development of Europe and of EU institutions, should establish special rules for the provision of services towards other public bodies, excluding the application of public procurement rules. Clearly some precautions may be taken in order to avoid universities, thanks to their special status, taking away what is already on the market: one can easily devise special rules of accounting, quotas on the general revenues of the university balance, nature of services rendered.

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<sup>11</sup> See PASSALACQUA M., *Università e mercato. Il difficile «equilibrio» delle società partecipate*, in the Proceedings of the National Research Project, financed by the Italian Ministry of University, on "**Finanziamento, competizione, accountability nel governo dell'università**", **para. 1, at the end**.

<sup>12</sup> It should be noted that the "Framework" uses as a normative basis article (now) 179 of the TFUE: which is rather like Baron Munchausen freeing himself from a swamp by pulling on his own pig-tail.

<sup>13</sup> For an example of the absurdities that would ensue, suffice it to apply to higher education the "Procedure for establishing whether a given activity is directly exposed to competition" set by article of the **Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors**.

However one point should be firm: when public monies are given to universities, this falls within a typical public finance decision which is entirely justifiable, especially in a moment of serious financial crisis for all universities. Put very simply, preventing those public monies from going to universities means either increasing fiscal pressure or reducing other social services.

But if the definition of a special status for universities under EU law is an urgent task, there are two further questions that must be addressed.

#### 4. COMPETITION AMONG UNIVERSITIES

Universities are in competition with each other for students, professors, research grants and donations. Although this competition is in no way comparable to that among US universities and there is in Europe a general feeling of belonging to an academic community in which one can speak more appropriately of co-opetition<sup>14</sup>, it would be desirable for some rules to be set for the award of public procurements to universities: transparency, possibility for all universities to participate, forms and limits of consortia with private partners, possibility of long-term agreements and participation of universities from other EU countries on the basis of reciprocity. Obviously the solutions are many and vary a great deal. The problem is that of envisaging appropriate rules that have an endogenous positive effect in improving the efficiency of academic institutions and their ability to compete or cooperate when providing highly skilled services.

#### 5. COMPETITION BETWEEN PUBLIC UNIVERSITIES AND PRIVATE UNIVERSITIES

Although most universities in the EU are public bodies, entirely or mostly supported by public funds, there are a certain number of universities that are private in their legal nature. Many are denominational, some are dependent upon foundations and a few –mostly operating in the field of e-learning – are run by

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<sup>14</sup> This attitude is confirmed by the OECD report, *Internationalisation and Trade in Higher Education*, 2004, at 102 ff.



private undertakings. The amount of public funding may vary considerably: from nothing, to salaries of the academic staff paid by public authorities, to availability for nominal fees of public premises.

The scarcity of private universities is the result, on the one hand, of history and of the importance that national states, especially from the 19<sup>th</sup> century, have given to higher education and on the other, of the fact that running a university is not a profitable business. If one has to rely mainly on student fees it is clear that the amount that can be asked by a private university depends very much on the amount of tuition fees in public universities, which in some countries are nil. Why pay for something that – often at a very high level – is offered for free?

If one had to adopt a confrontational view, the approach would be very simple: public universities are financed by State aid, which alters the competition with private universities. All must keep up with certain standards set by law: however private universities must put up their own monies, whilst public universities simply levy the taxpayer. In other words applying general competition law to the relationship between public and private universities would mean demolishing most of the unique model that has been built in recent centuries, and lead to the unwanted consequences forecast in the ECJ decisions that have been analyzed. Furthermore, this approach is most likely to backfire; inasmuch as private universities receive, to a greater or lesser extent, public subsidies this would be even more unacceptable under ordinary State aid regulations.

A different approach is necessary.

Universities – whatever their legal nature – cannot be freely established, but must comply with a very strict selection procedure which can limit their number, their location, their faculties, and the kind of degrees offered (BA, MA, PhD). Their teaching staff must be selected following certain public procedures<sup>15</sup>.

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<sup>15</sup> See the Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers. The first principle of the Charter is “Researchers should focus their research for the good of mankind and for expanding the frontiers of scientific knowledge, while enjoying the freedom of thought and expression, and

Their activity – both educational and research – is subject to penetrating and substantive periodical evaluation from which their status depends. *Curricula* are near-to-identical. The degrees they award have the same legal value.

In this context it would seem appropriate that all universities – whether public or private – have the same opportunities when services are required by public bodies.

From an educational and research point of view private universities are providing services of general economic interest. They are already bound by public service obligations, for which it would be legitimate for them to receive public funds provided that they abide by *Altmark* principles.

If one could develop a suggestion by Advocate General Trstenjak in the *UdS* case, private universities would be entrusted with special (although not exclusive) rights<sup>16</sup> which allowed them to be awarded contracts by public bodies without following the public procurement regulations but in accordance with the general principles of transparency and accountability set out in para. 4. One could therefore replicate a not uncommon model in the area where public choices and private activities overlap: not competition *in* the market, but *for* the market. Private entities wanting to enter the – surely not lucrative – field of higher education could either comply with all the extremely complex and costly procedures to receive accreditation or, more simply, take control of an existing university.

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In conclusion what these notes aim at is stimulating a debate over the legal status of universities in EU law. It is obvious that universities themselves – where immense reserves of creative and legal knowledge are stored – must take the forefront, through their individual members or their numerous representative associations.

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the freedom to identify methods by which problems are solved, according to recognised ethical principles and practices.” A principle clearly incompatible with the market approach of the ECJ.

<sup>16</sup> para. 53.

In the absence of active intervention, universities will have to face a eurocratic approach whose outcome is largely anticipated by the case-law that has been examined. And even a staunch supporter of the beneficial effects of the free market (such as the author of these notes) is able to see that the result would be far from optimal and would amount to harnessing a oxen's yoke on a thoroughbred.