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# Master Working Paper

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Assessing the Coherence of Mechanisms for the  
Recognition of Qualifications: Discerning Dimensions to a  
Multilevel Challenge

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## Introduction

The free movement of persons is extremely important in the European Union. It aims at ensuring an optimal allocation of resources in the EU thereby allowing the value of labour to be maximized.<sup>1</sup> Today, increased mobility is particularly important in the context of the knowledge economy. The Union set itself the goal of becoming a highly competitive and dynamic economy based on *knowledge* through the 2000 Lisbon Strategy.<sup>2</sup> The Union currently sets out to optimize its knowledge and innovation-based economy through the Europe 2020 Strategy.<sup>3</sup> Two of the Strategy's flagship initiatives aim at improving mobility for young people and workers.<sup>4</sup>

The free movement may nevertheless be restricted by Member States imposing requirements with regards to what qualifications a professional needs to possess to work in another Member State.<sup>5</sup> The same goes for students wanting to study in another Member State. Therefore, the recognition of qualifications is an extremely important precondition to mobility.<sup>6</sup> Before moving to another Member State to pursue economic activity or a course of study, one has to make sure access to that other Member State's labour market or educational system is guaranteed. For this reason several initiatives have been taken to facilitate mobility by ensuring that qualifications obtained in one Member State will be recognized in another.

The recognition of qualifications concerns many parties and accordingly knows many dimensions. Multiple organizations both international and regional along with individual States have created various different mechanisms to regulate the recognition of qualifications. In this Thesis, the term "recognition mechanisms" is used to describe the instruments and cooperation initiatives that will be observed. In particular, it is used as an umbrella term to describe Directive 2005/36/EC, the European Qualifications Framework for lifelong learning, the Lisbon Recognition Convention and the Bologna Process. Furthermore, when reference is made to recognition concerning education, the focus will be on higher education.

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<sup>1</sup> P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (6<sup>th</sup> edition, Oxford University Press, Oxford 2015), p. 608.

<sup>2</sup> Lisbon European Council 23 and 24 March 2000 Presidency Conclusions.

<sup>3</sup> Communication from the Commission – Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, p. 5.

<sup>4</sup> *Ibid.*, p. 13 and p. 18.

<sup>5</sup> European Commission Directorate General Internal Market and Services, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), European Commission, p. 9.

<sup>6</sup> A. Rauhvargers, 'Recognition and qualifications frameworks', 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 111.

The four mechanisms that will be studied in this Thesis can be identified as the most relevant ones applicable in the Member States. It is important to stress that not all of these mechanisms have been adopted under the Union framework. Only Directive 2005/36/EC and the European Qualifications Framework for lifelong learning have been adopted within that framework. The Lisbon Recognition Convention and the Bologna Process were created outside the Union framework. The former was created under the cooperation between the Council of Europe and Unesco. The latter was created by States acting individually, without any influence being exercised by international organizations. The fact that the EU has not created the latter recognition mechanisms has not stopped Member States from taking part in them. This means that they are taking part in the Union mechanisms in their capacity as Member States, and in the others as individual States.

The different mechanisms created at the international level require implementation. The particularity of mechanisms being created by different organizations and being implemented by Member States in different capacities raises questions as to the coherence of the resulting system for the recognition of qualifications. The purpose of this Thesis is to assess the coherence of the abovementioned mechanisms for the recognition of qualifications in the EU. In this analysis special attention will be paid to discerning the various dimensions of the recognition of qualifications by looking at the mechanisms both in their original form, and upon implementation into a Member State's legal order. The coherence of the four recognition mechanisms will be assessed from the perspective of the EU by looking at their content and the way they relate to each other to see if they are able to efficiently provide for recognition. A similar type of analysis will be carried out at the national level to see whether there is coherence upon implementation in a Member State's legal order.

For the purpose of this Thesis a case study will be made of these mechanisms' implementations in the Netherlands. This particular Member State has been selected due to its status as one of the six Member States initiating the process of European integration in 1951.<sup>7</sup> Next, the Member State is a Party to the Lisbon Recognition Convention,<sup>8</sup> as well as a firm supporter of the Bologna Process.<sup>9</sup> The Netherlands is particularly dedicated to the cause of the recognition of qualifications. Not only does it enthusiastically take part in the recognition mechanisms, it also cooperates with its neighbouring countries to facilitate recognition. The Netherlands created a Treaty with the Flemish part of Belgium through

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<sup>7</sup> P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials*, p. 3.

<sup>8</sup> Council of Europe, Chart of signatures and ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=&DF=&CL=ENG> (last visited on 30 August 2015).

<sup>9</sup> K. Dittrich et al., 'The Implementation of "Bologna" in Flanders and the Netherlands', 39 *European Journal of Education* 3 (2004), p. 299.

which the two Parties set up an organization playing an essential part in the recognition process.<sup>10</sup> Similarly, it is part of a Benelux recognition cooperation with revolutionary potential.<sup>11</sup>

The assessment for the coherence of the recognition mechanisms will take place on two levels: the international and the national. Accordingly, this Thesis consists of two parts. Part One is concerned with setting the scene of the recognition of qualifications and assessing the coherence of the recognition mechanisms. It will start by providing some preliminary observations essential to understanding the recognition of qualifications. The recognition mechanisms will be looked at next. Part One closes off with the assessment for coherence. Part Two of the Thesis contains the case study of the mechanisms' implementation in the Dutch legal order. First, a look will be taken at the Netherlands' attitudes towards education, the labour market and recognition. Next, the implementation of the mechanisms will be discussed after which their coherence at the national level will be assessed. Finally, the Conclusion reflects on the findings made throughout the Thesis. The Annexes provide a glossary of core terms and abbreviations, and a schematic overview of the different dimensions and mechanisms of the recognition of qualifications discussed throughout the Thesis.

## **Part One: Setting the Scene**

### **1. Preliminary Observations to Understanding the Recognition of Qualifications**

The recognition of qualifications knows many dimensions. The fact that differing international and regional organizations along with individual States are creating legislation and cooperating in this area contributes to the existence of these dimensions. This Chapter

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<sup>10</sup> Treaty between the Flemish Community of Belgium and the Kingdom of the Netherlands concerning the accreditation of programmes within Flemish and Dutch higher education, the Flemish Community of Belgium and the Netherlands, 3 September 2003.

<sup>11</sup> Beschikking van het Benelux Comité van Ministers betreffende de automatische wederzijdse generieke niveauserkenning van Diploma's hoger onderwijs, Benelux Committee of Ministers, 18 May 2015.

is dedicated to providing some preliminary observations key to understanding the recognition of qualifications as it currently stands in the EU. The Chapter revolves around an essential piece of information concerning the classification of recognition into two types: professional and academic recognition.

Professional recognition refers to the situation in which an individual will want to gain recognition for the purpose of using his or her qualifications in the context of the labour market.<sup>12</sup> Typically, this type of recognition is the domain of the EU, as the recognition of professional qualifications expressly falls under the TFEU's Part Three Title IV concerning the free movement of persons, services and capital. Under this Title Article 45 TFEU ensures the right of free movement to workers in the Union and prohibits discrimination based on nationality. Articles 46, 53 and 62 TFEU are the most important Articles for professional recognition as they provide the legal basis for Union instruments concerning the recognition of professional qualifications.<sup>13</sup> From these, Article 53 TFEU is the quintessential Article on professional recognition. Article 46 TFEU awards the Union competence to create legislation realizing the free movement of workers, while Article 62 TFEU establishes that professional recognition stretches to the free movement of services.

Article 53 TFEU is vital for professional recognition because it grants the Union competence to create hard law on this topic. Article 53(1) TFEU specifically establishes that the Union shall facilitate the free movement of self-employed persons by creating Directives to realize 'the mutual recognition of diplomas, certificates and other evidence of formal qualifications'. The 1957 Treaty of Rome first codified the recognition of professional qualifications.<sup>14</sup> Article 57 EEC Treaty set out to facilitate the transition between the Member States' professional systems.<sup>15</sup> Although the Treaty Articles throughout the years do not explicitly differentiate between professional and academic recognition, the legislative competence contained in them has been taken to relate solely to professional recognition.<sup>16</sup> The difference between recognition types was made at first because professional recognition was taken to relate to formal qualifications, whereas academic recognition was

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<sup>12</sup> S. Bergan, 'Academic recognition: status and challenges', 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 39.

<sup>13</sup> Former Articles 40, 47 and 55 EC Treaty.

<sup>14</sup> M. van Riemsdijk, 'Obstacles to the Free Movement of Professionals: Mutual Recognition of Professional Qualifications in the European Union', 15 *European Journal of Migration and Law* (2013), p. 52.

<sup>15</sup> H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft* (MAKLU Uitgevers Antwerpen – Apeldoorn, 1995), p. 105.

<sup>16</sup> K. Lenaerts, 'Education in European Community Law after "Maastricht"', 31 *Common Market Law Review* (1994), p. 16.

taken to concern the integration of study results and academic qualifications acquired in one Member State into the education system of another Member State.<sup>17</sup>

The free movement then, is inherent to the internal market. Following Article 4(1)(a) TFEU this competence is of a shared nature. Under Article 2(2) TFEU Member States are only allowed to act in the area of a shared competence when the EU has not exercised its competence in that area. Because the Union has created extensive legislation on professional recognition through Directive 2005/36/EC, the Member States are not allowed to create their own legislation anymore. Furthermore, the legislation created by the Union in this area has precedence over any national legislation in this area due to the supremacy of EU law. In 1964 the Court of Justice had already ruled that the Member States limited their sovereignty due to the creation of the EEC Treaty, which contained its own legal system.<sup>18</sup> This means that the Member States not only have to refrain from creating legislation on professional recognition but also have to give precedence to the Union legislation in this area.

When it comes to professional recognition it is important to emphasize that within this type one can further differentiate two subtypes: *de facto* and *de jure* professional recognition. *De facto* professional recognition generally refers to *any* kind of qualification being recognized for *any* use on the labour market.<sup>19</sup> It concerns unregulated professions. There is no secondary Union *recognition* legislation in this area because access to such professions is free in the Member States due to the fundamental freedoms. Access to unregulated professions is guaranteed by the free movement Articles in the TFEU.

*De facto* professional recognition is opposed by *de jure* professional recognition, which refers to the exercise of a regulated profession.<sup>20</sup> The Union legislation on this topic is based on Articles 46, 53, and 62 TFEU described above. A regulated profession is one for which the exercise is made contingent upon the possession of evidence showing that the holder has certain qualifications. Consequently, one can ask oneself whether all professions are not regulated in one way or another. Although such reasoning appears plausible, it is contravened by the existence of the European Commission's database laying down lists of regulated professions per Member State.<sup>21</sup> Furthermore, qualification

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<sup>17</sup> H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, p. 108.

<sup>18</sup> Case 6/64 *Costa v. ENEL*, EU:C:1964:66.

<sup>19</sup> S. Bergan, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 39-40.

<sup>20</sup> *Ibid*, p. 40.

<sup>21</sup> See European Commission, 'Regulated professions database', [http://ec.europa.eu/internal\\_market/qualifications/regprof/index.cfm?action=regprofs](http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?action=regprofs) (last visited on 30 August 2015).

requirements are preferred for certain professions because consumers are in need of particular protection and are most likely dependent on the capabilities of the professional.<sup>22</sup>

The second type of recognition that can be distinguished is academic recognition taking place within higher education institutions in which elements related to studying such as higher education entrance qualifications and study periods are recognized.<sup>23</sup> Here, the relevant degree needs to be recognized for the individual concerned to gain access to studies elsewhere. Recognizing such qualifications will not have an effect on access to the labour market.<sup>24</sup> The Union competence for this type of recognition is found in Part Three Title XII of the TFEU concerning education, vocational training, youth and sport.

Articles 165(1)(2) TFEU specify that the Union shall only promote academic recognition of diplomas by encouraging cooperation between the Member States but 'while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity'. Article 165(1) TFEU provides that the EU can *support* and *supplement* Member State action in this area. Under Article 2(5) TFEU actions carried out to support, coordinate or supplement Member State Action shall not entail harmonization, indicating the EU can only take soft law measures. Under Article 6(e) TFEU education, vocational training, youth and sport is indicated as one of the areas in which harmonization is prohibited. This is confirmed by Article 165(4) TFEU, according to which only 'incentive measures, excluding any harmonisation of the laws and regulations of the Member States' can be adopted.

Professional and academic recognition thus differ substantially when it comes to their legal basis. Only professional recognition, as opposed to academic recognition, has a competence in the Treaty enabling the Union to create hard law. Substantial differences can also be found when looking at the history of the competences on professional and academic recognition in the Union. Unlike professional recognition, academic recognition has not always had a legal basis in Union law. Whereas the Article 57 EEC Treaty competence was already bestowed to the Community in 1957, education first appeared in the Treaties through the adoption of the 1992 Maastricht Treaty.<sup>25</sup>

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<sup>22</sup> R.V.A. Bishoen and I.M. Welbergen, 'Herziening richtlijn erkenning beroepskwalificaties', 1 *NtEr* (2014), p. 8.

<sup>23</sup> F. Dalichow, 'Academic Recognition in the EC', in J. Pertek (ed.), *General Recognition of Diplomas and Free Movement of Professionals* (European Institute of Public Administration, Maastricht 1992), p. 91.

<sup>24</sup> H. Schneider and S. Claessens, 'The Recognition of Diplomas and the Free Movement of Professionals in the European Union', in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future – Volume I* (Forum Maastricht, Maastricht 2005), p. 126.

<sup>25</sup> K. Lenaerts, 31 *Common Market Law Review* (1994), p. 7.

The absence of a competence allowing the Union to create hard law in the area of academic recognition would lead one to believe that this type of recognition belongs exclusively to the Member States' competences. Nevertheless, Member State action in this area is not completely outside the scope of Union law. Through a line of cases on education the European Court of Justice established that when legislating in the area of education Member States have to hold due regard of Union law.<sup>26</sup> Union citizenship, the prohibition of nationality-based discrimination, and the presence of academic recognition in the Treaties as a way to encourage mobility, thereby affecting the free movement, make that Member States are not entirely free in the area of education. Restrictions to a Member State's education system limiting free movement are only acceptable in exceptional circumstances.

Turning back to the typology of recognition it has to be noted that academic recognition, like professional recognition, can also be divided into two subtypes. First, academic recognition *by substitution* covers initiatives like ERASMUS, where a student goes abroad to follow courses that can be seen as an integral part of the study programme followed in the home State.<sup>27</sup> Secondly, cumulative academic recognition describes the type of mobility where a student completes studies in one State and moves to another to progress to the next course of study, thereby being granted recognition of the home qualifications.<sup>28</sup>

To summarize, there is a basic divide in the recognition of qualifications consisting of professional recognition with *de facto* and *de jure* professional recognition on the one hand, and academic recognition by substitution or accumulation on the other. Differing mandates contained in Union legislation are the consequence of this division. This classification is important to understand the recognition of qualifications, and plays an important role in this Thesis. Now that the basic notions to understanding recognition have been elaborated the focus will shift to the mechanisms for the recognition of qualifications.

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<sup>26</sup> Case 9/74 *Casagrande v. Landeshauptstadt München*, EU:C:1974:74; Case 293/83 *Gravier v. City of Liège*, EU:C:1985:69; Case C-65/03 *Commission v. Belgium*, EU:C:2004:402; Case C-147/03 *Commission v. Austria*, EU:C:2005:427; Case C-73/08 *Bressol v. Gouvernement de la Communauté française*, EU:C:2010:181; Case C-275/12 *Elrick v. Bezirksregierung Köln*, EU:C:2013:684.

<sup>27</sup> S. Garben, 'On Recognition of Qualifications for Academic and Professional Purposes', 16 *Tilburg Law Review* (2011), p. 135.

<sup>28</sup> Communication from the Commission on recognition of qualifications for academic and professional purposes, COM(94) 596 final, p. 6.

## **2. Mechanisms for the Recognition of Qualifications**

Numerous instruments and cooperation initiatives on the recognition of qualifications have been created by many international and regional organizations along with individual States. From these, four mechanisms are particularly important, and will be presented in this Chapter. First of all, the focus will be on the EU mechanisms. Attention will be paid to Directive 2005/36/EC and its 2013 amendment along with the European Qualifications Framework for lifelong learning. Subsequently, the focus will shift to the 1997 Lisbon Recognition Convention created by the Council of Europe and Unesco. The Chapter closes off by providing a brief overview of the Bologna Process, which was created at the initiative of individual States.

## 2.1 The European Union

The free movement Articles in the TFEU encompass the rights that are at the basis of the EU. Still, however important those rights are, they are not unrestricted. Requiring professionals to hold specific qualifications imposes limitations. Because of the differences in qualification requirements among Member States, EU citizens wanting to exercise regulated professions in other Member States may encounter difficulties doing so.<sup>29</sup> Directive 2005/36/EC and the European Qualifications Framework for lifelong learning aim at remedying such difficulties. They are the result of a long and rich recognition history. The following Section is dedicated to the historical developments leading up to the present-day Union mechanisms.

### 2.1.1 The Freedom of Establishment and the Road to Professional Recognition

A large part of the progress made in the area of the recognition of qualifications can be ascribed to the European Court of Justice. When it comes to the developments in the recognition of qualifications a two-tier structure can be distinguished consisting of the Court's rulings on the one hand, and secondary legislation on the other.<sup>30</sup> Attention will first be paid to the Court's case law.

There are a number of cases that have been of great influence to the development of the recognition of professional qualifications in the EU. The first in this line of cases was *Reyners*.<sup>31</sup> He was a Dutch national having completed his law studies in Belgium who could not practice as a lawyer there because he was required to be of Belgian nationality. The Court started out by confirming that Article 52 EEC Treaty had direct effect.<sup>32</sup> With regard to the exercise of official authority the Court held that the most typical activities of the lawyer profession were not concerned with it.<sup>33</sup> This entailed that the exception in Article 55 EEC Treaty allowing Member States to restrict professions to nationals, could only be applied to lawyers when performing activities involving 'a direct and specific connexion with the

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<sup>29</sup> European Commission Directorate General Internal Market and Services, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), European Commission, p. 9.

<sup>30</sup> H. Schneider and S. Claessens, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future – Volume I* (Forum Maastricht, Maastricht 2005), p. 164-165.

<sup>31</sup> Case 2/74 *Reyners v. Belgium*, EU:C:1974:68.

<sup>32</sup> *Ibid.*, para. 32.

<sup>33</sup> *Ibid.*, para. 52.

exercise of official authority'.<sup>34</sup> Ultimately, this led to the ban of nationality requirements for lawyers.

Another case occurring round that time was *Van Binsbergen*.<sup>35</sup> His lawyer could not represent him due to a Dutch law prescribing lawyers to live in the Netherlands. Van Binsbergen's lawyer had moved to Belgium while still working in the Netherlands. The Court was asked to rule on the direct effect of Articles 59 and 60 EEC Treaty, which it confirmed.<sup>36</sup> Furthermore, the Court ruled on whether the residence requirement was reconcilable with those Articles. The Court established a justification test arguing that a residence requirement could be compatible 'where such requirement is objectively justified by the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respect for professional ethics'.<sup>37</sup> The Dutch residence requirement was found to be incompatible with the Treaty.

The next case concerned a Greek lawyer with a degree in German law who was denied access to the lawyer profession in Germany for lacking the relevant *German* qualifications.<sup>38</sup> In *Vlassopoulou*, the Court was asked whether the German qualification requirement infringed Article 52 EEC Treaty. It argued that although the requirement was applied in a non-discriminatory manner, other Member State nationals could feel discriminatory effects.<sup>39</sup> This would particularly be the case if the national rules took no account of pre-existing knowledge and qualifications.<sup>40</sup> Assessing States had to consider *all* evidence of *all* qualifications obtained.<sup>41</sup> If it was found that they were equivalent to those of the assessing Member State, the latter had to recognize them.<sup>42</sup> If there was a lack of knowledge the person concerned had to prove that he or she either had the necessary qualifications or had to acquire them through a course of study or practical experience.<sup>43</sup>

In *Kraus* a German citizen objected to needing prior authorization in order to be able to carry the title his foreign Master degree awarded him in his home State by arguing such authorization was contrary to the free movement.<sup>44</sup> In principle, Articles 48 and 52 EEC Treaty prohibited such rules but they could be justified if the measure pursued a legitimate

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<sup>34</sup> *Ibid.*, para. 54.

<sup>35</sup> Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131.

<sup>36</sup> *Ibid.*, para. 27.

<sup>37</sup> *Ibid.*, para. 14.

<sup>38</sup> Case C-340/89 *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, EU:C:1991:193.

<sup>39</sup> *Ibid.*, para. 15.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, para. 16.

<sup>42</sup> *Ibid.*, para. 19.

<sup>43</sup> *Ibid.*, para. 19-20.

<sup>44</sup> Case C-19/92 *Kraus v. Land Baden-Württemberg*, EU:C:1993:125.

objective compatible with the Treaty and if there were pressing reasons of public interest justifying such a rule.<sup>45</sup> The Court agreed with the Land Baden-Württemberg in that the rule could protect citizens against abuses of academic titles.<sup>46</sup> However, prior authorization would only be allowed if the procedure fulfilled certain requirements. The procedure could only aim at verifying whether the title was properly awarded following a course of study at an establishment of higher education; had to be easy to access and not depend on excessive administration fees; had to be carried out by national authorities in accordance with Community law; and the penalties for non-compliance had to be proportionate.<sup>47</sup>

*Gebhard* then concerned a German national and lawyer living and practicing law in Milan in his office using the title *avvocato*.<sup>48</sup> He was fined for the use of that title, as he did not comply with national legislation. *Gebhard* fell under the freedom of establishment because he lived and worked in Italy on a stable and continuous basis.<sup>49</sup> Member States are allowed to impose certain requirements on establishment; whether another Member State national can make use of that right depends on the activities he or she intends to pursue.<sup>50</sup> Taking up certain professional activities may be subject to certain provisions.<sup>51</sup> Again, national measures potentially hindering the fundamental freedoms can be justified as long as they are applied in a non-discriminatory manner; are justified by imperative requirements in the general interest; are suitable for attaining the pursued objective; and are proportionate.<sup>52</sup>

Now that the most important cases of the Court of Justice have been presented, the focus will shift to the developments in secondary legislation. Although the recognition of professional qualifications was already recognized in the Treaties since 1957 through Article 57 EEC Treaty, that Article did not oblige Member States to recognize foreign qualifications, which they often failed to do.<sup>53</sup> The Member States initiated the creation of secondary legislation to make sure professionals could receive recognition for their qualifications in other Member States. The development of secondary legislation in this area went through different stages. The 1960s transitional approach saw the adoption of Directives aimed at guaranteeing recognition of work experience gained in the home Member State in the host Member State, thereby facilitating access to specific occupations

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<sup>45</sup> *Ibid.*, para. 32.

<sup>46</sup> *Ibid.*, para 33-34.

<sup>47</sup> *Ibid.* para 38-41.

<sup>48</sup> Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

<sup>49</sup> *Ibid.*, para. 28.

<sup>50</sup> *Ibid.*, para 31-32.

<sup>51</sup> *Ibid.*, para 34-35.

<sup>52</sup> *Ibid.*, para. 37.

<sup>53</sup> M. van Riemsdijk, 15 *European Journal of Migration and Law* (2013), p. 52.

in commerce, industry and craft industries.<sup>54</sup> In the 1970s the approach to recognition shifted. The Community then created legislation, based on minimum standards agreed on by all Member States, focusing on specific professional sectors, which mainly covered medical and architect professions.<sup>55</sup> Each profession had its own Directive with its own minimum standards of qualifications.

However, these initial approaches organizing recognition per separate profession were soon abandoned. The impetus for change leading to a horizontal approach came at the 1984 Fontainebleau European Council meeting. The goal of strengthening and promoting the Community's identity and image was highlighted.<sup>56</sup> Measures to achieve that goal entailed creating a general system for ensuring the equivalence of university diplomas to promote the freedom of establishment.<sup>57</sup> These efforts resulted in three general system Directives.<sup>58</sup> The basic principle of these Directives was that a person fully qualified for the exercise of a profession in one Member State was seen as having the qualifications required in another Member State as well.<sup>59</sup> The sectoral Directives nevertheless did not cease to exist with the introduction of the three general system Directives. Instead, the two sets of Directives coexisted. However, if an individual was covered by a sectoral Directive, he or she would be granted automatic recognition, whereas the general system Directives required a case-by-case analysis for the possible grant of recognition.<sup>60</sup>

Directive 89/48/EEC's general system provided a lot of other professionals not covered by the sectoral Directives with the freedom attributed by Article 57 EEC Treaty.<sup>61</sup> The group of professionals falling under the Directive was nevertheless restricted, as it applied only to Community nationals wanting to pursue regulated professions in another

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<sup>54</sup> H. Schneider and S. Claessens, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future – Volume I*, p. 136.

<sup>55</sup> P. Craig and G. de Búrca, *EU Law Text, Cases, and Materials*, p. 842.

<sup>56</sup> The European Council Fontainebleau, 25 and 26 June 1984, p. 11.

<sup>57</sup> *Ibid.*

<sup>58</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, [1989] OJ L 19/16; Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, [1992] OJ L 209/25; Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, [1999] OJ L 201/77.

<sup>59</sup> Report from the Commission to the Council and the European Parliament on the application of Directive 92/51/EEC in accordance with Article 18 of Directive 92/51/EEC, COM(2000) 17 final, p. 5.

<sup>60</sup> R.C.A. White, *Workers, Establishment, and Services in the European Union* (Oxford University Press, Oxford 2004), p. 77.

<sup>61</sup> M. Ross, 'Legislative Comment: Freedom of establishment and freedom to provide services', 14 *European Law Review* 3 (1989), p. 162.

Member State.<sup>62</sup> Under the Directive's Article 3 Member States had to allow the pursuit of a regulated profession if the applicant had the required diploma or if the applicant had exercised the profession at stake for a number of years in a Member State where the profession was unregulated. Article 4 of Directive 89/48/EEC allowed Member States to require evidence of professional experience if the duration of the education and training was one year shorter than that required in the host Member State. If the matters covered by the education and training in the home Member State were substantially different from those in the host Member State adaptation periods or aptitude tests could be required.<sup>63</sup>

Directive 92/51/EEC established a second general system supplementing that of Directive 89/48/EEC. It essentially extended the first general system's recognition to diplomas containing one-year of full-time, post-secondary education and to the education and training specified in Annex C of the Directive.<sup>64</sup> Article 2 of the Directive still limited its application to regulated professions. Furthermore, Directive 92/51/EEC did not apply to professions subject to sectoral Directives, nor to the activities covered by the Directives in Annex A of the Directive.<sup>65</sup> That Annex contains the Directives adopted under the transitional approach.

Finally, Directive 1999/42/EC supplemented the other two general systems and established a mechanism to recognize the professional activities covered by Directives on liberalization and transitional measures. The Directive repealed all liberalization and transitional Directives adopted in the 1960s.<sup>66</sup> Directive 1999/42/EC thus lays down the rules for individuals and companies or firms who want to pursue activities listed in Annex A in a host Member State either in a self-employed or employed capacity.<sup>67</sup> Annex A of Directive 1999/42/EC subsequently concerns a large number of activities ranging from manufacturing to hairdressing.

### 2.1.2 Directive 2005/36/EC and its 2013 Modernization

Directive 2005/36/EC consolidated the three abovementioned general mutual recognition Directives along with the sectoral Directives in the area of craft, commerce and industry, health professions, and architects.<sup>68</sup> When the Directive was adopted, its main objective

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<sup>62</sup> Article 2 Council Directive 89/48/EEC.

<sup>63</sup> Article 4(1)(b) Directive 89/48/EEC.

<sup>64</sup> R.C.A. White, *Workers, Establishment, and Services in the European Union*, p. 72.

<sup>65</sup> Article 2 Directive 92/51/EEC.

<sup>66</sup> Recital 4 Preamble Directive 1999/42/EC.

<sup>67</sup> *Ibid.*, Article 1.

<sup>68</sup> Recital 9 Preamble Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L255/22.

was to facilitate labour mobility so that Union citizens can benefit from employment opportunities in other Member States and, at the same time, allowing businesses to recruit professionals from all over the EU.<sup>69</sup>

It is evident that Directive 2005/36/EC falls under professional recognition. Its main legal basis is current Article 53 TFEU.<sup>70</sup> Furthermore, Article 1 clarifies that the Directive establishes rules to recognizing professional qualifications. That same Article also states that the rules in the Directive facilitate access to regulated professions, indicating *de jure* professional recognition. According to Article 3(1)(a) a regulated profession is a professional activity to which access is subject to the possession of specific professional qualifications. Such qualifications entail the use of a professional title that is limited by legislative, regulatory or administrative provisions.<sup>71</sup> However, selection procedures restricting access to a profession to successful candidates are not a limitation causing a profession to be considered regulated.<sup>72</sup>

Before turning to the content of Directive 2005/36/EC it is important to highlight a specific aspect of the assessment of a professional's qualifications. When professional qualifications are being assessed for their equivalence in the EU and under the Directive, the knowledge taken as a reference point is that of the qualification required in the Member State in which the professional wishes to work.<sup>73</sup> The qualifications as required in the host Member State are thus taken as the standard to which the qualifications obtained in the home Member State are assessed.

Structure wise, Directive 2005/36/EC consists of six Titles from which Titles II and III are the most important. Title II of the Directive is concerned with the free provision of services, and serves to facilitate it by making sure professionals can pursue professional activities in other Member States under the title acquired in the home Member State.<sup>74</sup> Under Article 5(1), the service provider needs to be legally established in one Member State, and needs to exercise a regulated profession in the home Member State before being able to freely provide services under the Directive. Nevertheless, the provisions under Title II only apply when the service provider exercises his or her profession in another Member State 'on a temporary and occasional basis'.<sup>75</sup> When making use of the free provision of services, the service provider may nonetheless be subject to rules directly

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<sup>69</sup> European Commission Directorate General Internal Market and Services, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), European Commission, p. 9.

<sup>70</sup> Former Article 47 EC Treaty, old Article 57 EEC Treaty.

<sup>71</sup> Article 3(1)(a) Directive 2005/36/EC.

<sup>72</sup> Case C-586/08 *Rubino v. Ministero dell'Università e della Ricerca*, EU:C:2009:801.

<sup>73</sup> Case C-345/08 *Pešla v. Justizministerium Mecklenburg-Vorpommern*, EU:C:2009:771.

<sup>74</sup> Recital 4 Preamble Directive 2005/36/EC.

<sup>75</sup> *Ibid.*, Article 5(2).

linked to professional qualifications.<sup>76</sup> However, such rules only apply when they directly concern the actual practice of the profession and failing to follow them would seriously harm the protection of the consumer.<sup>77</sup>

When a professional does not temporarily and occasionally provides services but instead relocates to another Member State permanently, he or she falls under Title III concerning the freedom of establishment.<sup>78</sup> This Title is the core of Directive 2005/36/EC. It comprises three Chapters each embodying a system for the recognition of professional qualifications.<sup>79</sup> These systems are found in Chapters I through III of Title III and are the general system for the recognition of evidence of training, recognition of professional experience, and recognition on the basis of coordination of minimum training conditions.

The general system, found under Title III Chapter I of the 2005 Directive, establishes rules for professional recognition of regulated professions for the professions not falling under Chapters II and III of that Title. It encompasses rules applying to all types of professional qualifications that are not automatically recognized.<sup>80</sup> Article 11 is the general system's core provision as it establishes the levels of qualifications that are recognized in the Directive. The conditions under which recognition is subsequently granted are found in Article 13. It obliges Member States to allow professionals from other Member States to pursue their profession if they possess the attestations of competences mentioned in Article 11 issued by a competent authority.

Article 14 of the Professional Qualifications Directive provides for the possibility of compensation measures in case the qualifications are not up to par to those of the host Member State. Such measures take the form of adaptation periods or aptitude tests.<sup>81</sup> Professionals can choose between the two.<sup>82</sup> While applying such compensation measures the host Member State must hold due regard of the principle of proportionality, meaning that it has to carry out a comprehensive assessment of the knowledge, skills and competences acquired by the applicant.<sup>83</sup>

Title III Chapter II lays down the conditions under which professional experience gained in the past is recognized in the host Member State. Some Member States make access to or the pursuit of certain activities contingent on practical knowledge. According to

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<sup>76</sup> Ibid., Article 5(3).

<sup>77</sup> Case C-475/11 *Konstantinides*, EU:C:2013:542.

<sup>78</sup> Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

<sup>79</sup> S.J.F.J. Claessens, 'Modernisering van de Richtlijn erkenning beroepskwalificaties', 1 *SEW* (2014), p. 4.

<sup>80</sup> See Article 10 Directive 2005/36/EC.

<sup>81</sup> Ibid., Article 14(1).

<sup>82</sup> Ibid., Article 14(2).

<sup>83</sup> Ibid., Article 14(5).

Article 16 those activities are listed in Annex IV. The Member State needs to ‘recognise previous pursuit of the activity in another Member State as sufficient proof of such knowledge and aptitudes’.<sup>84</sup> This system mainly regulates access to certain industrial, commercial and crafts professions.<sup>85</sup>

Title III’s Chapter III concerning recognition on the basis of coordination of minimum training conditions lays down rules for the *automatic* recognition of qualifications for specific professions. Section 1 first lays down the General Provisions concerning automatic recognition. Following Article 21, the principle of automatic recognition entails that each Member State recognizes evidence of formal qualifications for the designated professions and gives such evidence the same effect on its territory as the State would give the evidence of formal qualifications it issued itself. The designated professions included in the system for automatic recognition are those of doctor with basic training or a specialization, nurse responsible for general care, dental practitioner both general and specialized, veterinary surgeon, pharmacist, and architect.<sup>86</sup> Automatic recognition for these professions is subsequently elaborated in Sections 2 through 8, which mainly establish the minimum training requirements needed for automatic recognition.

The system for automatic recognition leaves no discretion to the Member States so that they are prohibited from requiring holders of the qualifications in Sections 2 through 8 to obtain additional qualifications or to prove that they have already acquired them.<sup>87</sup> Situations exist in which a professional qualification deviates from the one required by Chapter III’s system for automatic recognition but is nonetheless automatically recognized. In such cases, automatic recognition is granted through ‘acquired rights’.<sup>88</sup> In principle, professionals from acceding Member States are granted such rights when they have received their training pre-accession and do not fulfil the Directive’s requirements but nevertheless have recent professional experience in this area.<sup>89</sup>

Directive 2005/36/EC was transposed in the Member States for about a year when the Commission presented a proposal for its modernization.<sup>90 91</sup> Under the 2011 Single

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<sup>84</sup> *Ibid.*, 16.

<sup>85</sup> R.V.A. Bishoen and I.M. Welbergen, *NtEr* 1 (2014), p. 10.

<sup>86</sup> Article 21(1) Directive 2005/36/EC.

<sup>87</sup> Case C-365/13 *Ordre des architectes v. État belge*, EU:C:2014:280.

<sup>88</sup> Articles 23, 27, 30, 33, 37, 39, 43 and 49 Directive 2005/36/EC.

<sup>89</sup> European Commission Directorate General Internal Market and Services, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), European Commission, p. 50.

<sup>90</sup> *Ibid.*, p. 9.

<sup>91</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System, COM(2011) 883 final.

Market Act the simplification of the procedures for the recognition of professional qualifications was seen as a key action to enhancing citizens' mobility.<sup>92</sup> The impetus for change resulted in the 2013 amendment to the Professional Qualifications Directive.<sup>93</sup> Apart from altering the existing Articles it introduced some new instruments. The most important innovations are the introduction of the European Professional Card and partial access.

The European Professional Card (EPC) was introduced to strengthen the internal market and promote the free movement of professionals while ensuring recognition on a more efficient and transparent basis.<sup>94</sup> The EPC is an electronic certificate demonstrating the adequacy of professional qualifications obtained.<sup>95</sup> The modernization of the 2005 Directive thus draws on the latest technology offering new tools for mobility based on present-day communication technologies.<sup>96</sup> Articles 4a through 4e of the consolidated version of the 2005 Directive establish the EPC's rules. The Cards are granted by the Member States upon request of the professional when they have been introduced for the profession that individual exercises.<sup>97</sup> This means that they cannot be acquired by *any* professional meaning to pursue a regulated economic activity in another Member State. The professions for which an EPC can be requested shall be established by Commission implementing act in accordance with the criteria specified in Article 4a(7) of the Directive.

Partial access potentially enhances mobility. The principle of partial access is the codification of the Court's case law. The *Colegio* case concerned an Italian engineer specialized in hydraulics wanting to take up the general position of civil engineer in Spain.<sup>98</sup> The *Colegio* filed for the annulment of the decision allowing him to do so because of the differences between the two professions. The Court ruled that Directive 2005/36/EC allows Member States to partly allow a professional to carry out a regulated profession by limiting the scope of that profession to the activities for which the individual is qualified in the home

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<sup>92</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Single Market Act: Twelve levers to boost growth and strengthen confidence “Working together to create new growth”, COM(2011) 206 final, p. 7.

<sup>93</sup> Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), [2013] OJ L354/132.

<sup>94</sup> Recital 4 Preamble Directive 2013/55/EU.

<sup>95</sup> Article 3(1)(k) consolidated version Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, [2005] OJ L 255/22.

<sup>96</sup> European Commission Green Paper – Modernising the Professional Qualifications Directive, COM(2011) 367 final, p. 2.

<sup>97</sup> Article 4a(1)(2) consolidated version Directive 2005/36/EC.

<sup>98</sup> Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado*, EU:C:2006:45.

Member State.<sup>99</sup> Member State legislation prohibiting partial access is able to seriously hinder the free movement.<sup>100</sup>

Still, partial access possibly confuses consumers as to what the professional is actually qualified for. In order to strike a balance between consumer protection and the free movement two situations may be distinguished: two professions can either be so similar that shortcomings can be made up through compensatory measures, or be so different that a full programme of study would be required to make them similar.<sup>101</sup> The latter situation dissuades individuals to make use of their free movement rights so that partial access needs to be allowed but only if the activity the individual wants to carry out is capable of being separated from the full range of activities falling under the profession in the host Member State.<sup>102</sup>

The *Colegio* principle is codified in Article 4f of the consolidated version of the Professional Qualifications Directive. Competent authorities decide on the grant of partial access on a case-by-case basis based on the criteria in Article 4f(1)(a-c). Rejection of partial access is allowed on the strict condition that it is 'justified by overriding reasons of general interest, suitable for securing the attainment of the objective pursued, and does not go beyond what is necessary to attain that objective'.<sup>103</sup>

Partial access potentially increases mobility because it allows more professionals to access another Member State's labour market. There are currently still numerous cases in which recognition is not granted because the applicant's professional qualifications are seen as inadequate while they could be sufficient to grant partial access. An example of this situation is a Dutch case concerning a Belgian preschool teacher (2-6 year olds).<sup>104</sup> Whereas that profession is regulated in Belgium, the Netherlands only considers the profession of primary school teacher (4-12 year olds) as regulated. The teacher's request was denied. In the end, the Dutch court argued that partial access had to be granted and referred to the *Colegio* case in its ruling. Cases like this one continue to arise for various professions.<sup>105</sup> Therefore, even if partial access has legal status through the Court's case law, its execution in practice is not always honoured. Codification might improve the grant of partial access in practice, as Member States will be obliged to implement the principle into national law.

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<sup>99</sup> Ibid., para. 26.

<sup>100</sup> Ibid., para. 31.

<sup>101</sup> Ibid., para. 34-35.

<sup>102</sup> Ibid., para. 38.

<sup>103</sup> Article 4f(2) consolidated version Directive 2005/36/EC.

<sup>104</sup> Rb. Arnhem 3 juni 2010, ECLI:NL:RBARN:2010:BM6837.

<sup>105</sup> See for example Case C-575/11 *Nasiopoulos v. Ipourgos Igias kai Pronoias*, EU:C:2013:430.

The transposition of the amendments imposed by Directive 2013/55/EU is currently taking place. Member States have until the 18 January 2016 to implement them.<sup>106</sup> It will be interesting to see whether the innovations of the EPC and partial access are able to ensure a higher degree of mobility in the EU. However, whether the amendments will result in an advance for the recognition of professional qualifications depends on how and to which extent Member States and the relevant authorities make use of the innovations.

### 2.1.3 The European Qualifications Framework for Lifelong Learning

The European Qualifications Framework for lifelong learning (EQF) came into existence through the adoption of the 2008 Recommendation of the European Parliament and of the Council.<sup>107</sup> The initiative came from the 2002 Council Resolution on lifelong learning according to which a framework recognizing education and training qualifications was to be developed based on transparency and quality assurance.<sup>108</sup> The need for such a system was stressed in the 2004 and 2006 joint Council and Commission reports on the implementation of the Education and Training 2010 work programme.<sup>109</sup> The concept of lifelong learning ‘from cradle to grave’ is recognized by all Member States as a ‘key factor for growth, jobs, and social inclusion’.<sup>110</sup>

The EQF is a fairly unique instrument, as becomes apparent when trying to classify the instrument into a type of recognition. It covers qualifications acquired in both professional and academic settings.<sup>111</sup> In this context, it is important to stress that the EQF is merely a soft law instrument adopted on the basis of the current Articles 165(4) and 166(4) TFEU.<sup>112</sup> These Articles allow the EU to create Recommendations to contribute to developing quality education and implementing a supplementary Union vocational training policy. The soft law nature of the EQF is furthermore evidenced by the fact that it is a

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<sup>106</sup> Article 3(1) Directive 2013/55/EU.

<sup>107</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1.

<sup>108</sup> Council Resolution of 27 June 2002 on lifelong learning, [2002] OJ C 163/1, p. 3.

<sup>109</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1., para. 4.

<sup>110</sup> Council 2010 joint progress report of the Council and the Commission on the implementation of the ‘Education and Training 2010 work programme’, [2010] OJ C 117/1, p. 4.

<sup>111</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, para. 12-13.

<sup>112</sup> Former Articles 149(4) and 150(4) EC Treaty, old articles 126(4) and 127(4) EEC Treaty.

Recommendation, and essentially non-binding.<sup>113</sup> Being a Union instrument, the EQF addresses Union priorities instead of national ones thereby depending on the mutual trust and willingness to cooperate of the Member States to achieve an efficiently functioning framework.<sup>114</sup>

Content wise, the EQF has been designed to cover every qualification from the most basic to the most advanced.<sup>115</sup> It creates a common reference framework able to serve as a translation device between different qualification systems and levels so that the transparency, comparability and portability of qualifications can be improved.<sup>116</sup> The Framework revolves around eight reference levels that are defined by a set of descriptors indicating the learning outcomes belonging to the qualification at stake.<sup>117</sup> Learning outcomes are 'statements of what a learner knows, understands and is able to do on completion of a learning process'.<sup>118</sup> By assessing learning outcomes as opposed to formal learning and qualifications the EQF creates the opportunity to recognize *any* type of learning outcome.<sup>119</sup> The choice for an orientation based on learning outcomes results from an increased awareness of concepts of work-based, informal and non-formal learning.<sup>120</sup>

The Framework will be implemented in the Member States in light of the Education and Training 2020 cooperation.<sup>121</sup> Participating States will identify how their national qualifications relate to the eight EQF levels through a national referencing process based on the criteria set at the European level.<sup>122</sup> This will result in the Member States relating their national qualifications frameworks (NQFs) to the EQF.<sup>123</sup> The referencing process takes place through extensive stakeholder consultations at the national level.<sup>124</sup>

The EQF differs from Directive 2005/36/EC, first of all, because it is not a hard law instrument, and does not grant a right to recognition to individuals. Secondly, the EQF has

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<sup>113</sup> Article 288 TFEU.

<sup>114</sup> S. Bohlinger, 'Qualifications frameworks and learning outcomes: challenges for Europe's lifelong learning area', 25 *Journal of Education and Work* 3 (2012), p. 284.

<sup>115</sup> A. Rauhvargers, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 116.

<sup>116</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, para. 12.

<sup>117</sup> Ibid., Annex II.

<sup>118</sup> Ibid., Annex I(f).

<sup>119</sup> S. Bohlinger, 25 *Journal of Education and Work* 3 (2012), p. 288.

<sup>120</sup> Ibid.

<sup>121</sup> European Commission, 'How does the EQF work?', <https://ec.europa.eu/ploteus/content/how-does-eqf-work> (last visited on 30 August 2015).

<sup>122</sup> Ibid.

<sup>123</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, p. 3.

<sup>124</sup> European Commission, 'How does the EQF work?', <https://ec.europa.eu/ploteus/content/how-does-eqf-work> (last visited on 30 August 2015).

eight reference levels based on learning outcomes whereas the Directive has five levels and focuses on input criteria such as course duration.<sup>125</sup> The EQF facilitates the transferability of qualifications as follows: Member States A and B will link their qualifications to the EQF through their NQFs. When an individual subsequently wants to go from Member State A to Member State B to work or study, the qualifications will be classified within the NQF of Member State A and subsequently linked to the corresponding EQF level. From the EQF level the qualification can then again be classified in the NQF of Member State B to see whether the qualification is comparable in both Member States. It thus helps in deciding whether qualifications are similar and thus recognizable, but does not regulate conditions for recognition.

## *2.2 The Council of Europe and Unesco's Lisbon Recognition Convention*

The Council of Europe and Unesco created the Convention on the Recognition of Qualifications concerning Higher Education in the European Region in 1997 in Lisbon. The document is, however, more commonly referred to as the Lisbon Recognition Convention (LRC). The Convention was proposed to Unesco by the Council of Europe in 1992 to deal with the major changes higher education underwent since the adoption of several other Conventions between the 1950s and 1960s.<sup>126</sup> One of the most important changes was the rapid spread of academic mobility in the 1980s causing established Conventions to quickly become obsolete.<sup>127</sup> One of the LRC's prime objectives thus became to promote academic mobility through recognition.<sup>128</sup> As of now, 53 States, including most of the Member States, have ratified or acceded to the Convention.<sup>129</sup>

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<sup>125</sup> Report from the Commission to the European Parliament and the Council: Evaluation of the European Qualification Framework (EQF) – Implementation of the Recommendation of the European Parliament and the Council on the Establishment of the European Qualifications Framework for Lifelong Learning, COM(2013) 897 final, p. 7.

<sup>126</sup> P. Zgaga, 'The Lisbon Recognition Convention as a paradigmatic shift and a change of the philosophy of the philosophy of recognition: between reflection and sentiments', in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014), p. 22.

<sup>127</sup> Ibid.

<sup>128</sup> Preamble Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>129</sup> See Council of Europe, Chart of signatures and ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=&DF=&CL=ENG> (last visited on 30 August 2015). Only Greece does not appear to have signed or ratified the Convention.

As to the classification into a type of recognition, the LRC is the prime example of academic recognition, as it is *the* international legal framework for academic recognition.<sup>130</sup> Furthermore, the LRC provides for cumulative academic recognition.<sup>131</sup> The LRC's preamble attests to this, as it states that facilitating access to other States' educational institutions in order for students to continue their education is an important element to having people benefit from the great cultural diversity of education systems in the European region. The LRC can be seen as the academic recognition counterpart of the Professional Qualifications Directive. However, the LRC provides a lot less regulation and is less extensive than the 2005 Directive. Furthermore, despite the fact that most of the Member States ratified the Convention, the EU is not part of the Convention.<sup>132</sup> Instead, the Member States participate in this Convention in their capacity as Council of Europe and Unesco members.

The Convention builds on several pre-existing international and European Conventions adopted within the Council of Europe and Unesco framework.<sup>133</sup> An example is the 1953 Convention on the Equivalence of Diplomas leading to Admission to Universities. The LRC arches over the previous Conventions. Whereas the former Conventions concerned very specific areas of recognition, the LRC provides a means of recognition for all those areas. Taking the 1953 Convention as an example, the qualifications formerly seen as equivalent in order to give access to higher education are now recognized under Section IV of the LRC. The creators of the LRC decided to establish a new convention because the existing Conventions related to the topic of recognition in higher education called for an update, and updating them separately would have been an extremely extensive process.<sup>134</sup>

The example above of the 1953 Convention's principles taken up by the LRC leads to the identification of the biggest change realized by the latter Convention: the term *equivalence* was replaced by the term *recognition*.<sup>135</sup> According to the LRC recognition entails 'a formal acknowledgement by a competent authority of the value of a foreign

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<sup>130</sup> S. Bergan, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 40.

<sup>131</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 135.

<sup>132</sup> See Council of Europe, Chart of signatures and ratifications, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=&DF=&CL=ENG> (last visited on 30 August 2015).

<sup>133</sup> Preamble Convention on the Recognition of Qualifications concerning Higher Education in the European, 11.IV.1997, ETS no. 165.

<sup>134</sup> S. Bergan, 'Origins, history and evolution of the Lisbon Recognition Convention: a view of the past and a look at the future', in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014), p. 34.

<sup>135</sup> A. Rauhvargers, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 112.

educational qualification with a view to access to educational and/or employment activities'.<sup>136</sup> Recognition should always be given 'unless substantial differences can be shown'.<sup>137</sup> Recognizing qualifications unless there are substantial differences has become a fundamental principle of the recognition of qualifications and is referred to as the *principle of substantial differences*.<sup>138</sup> It is not only used when recognizing academic qualifications but is also used for professional recognition as guaranteed by Directive 2005/36/EC.<sup>139</sup>

The LRC is divided into several sections dealing with various subjects. The first three Sections concern definitions, the authorities' competences, and the Convention's basic principles. Sections IV, V, VI, and VII are the heart of the LRC as they concern actual recognition on the topics formerly recognized in separate Conventions. Apart from recognition in the area of university admission, these Sections also regulate recognition of periods of study, higher education qualifications and qualifications held by refugees, displaced persons and persons in a refugee-like situation. The LRC's final Sections are concerned with the supply of information, implementation and the provision of final clauses.

It follows from Section II of the LRC that all authorities competent to take decisions with regard to recognition shall be *immediately* bound by the document.<sup>140</sup> This means that they have to apply the minimum level of recognition contained in the Convention's provisions directly when assessing requests for recognition. When making such assessments, Member States are allowed to apply more favourable conditions of recognition stemming from any existing or future agreements or legal documents a Party may become a part of.<sup>141</sup>

Section III of the Convention is particularly important as it ensures the basic principles. Article III.1(1) LRC ensures that holders of qualifications have access to assessment of their qualifications. That assessment is to take place under the prohibition of discrimination enshrined in Article III.1(2) LRC. Transparency, coherence and reliability are other principles ensured.<sup>142</sup> The person applying for recognition of his or her qualifications plays an important role under the Convention. That individual is responsible for providing

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<sup>136</sup> Article I Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>137</sup> *Ibid.*, Articles IV.1, IV.3, V.1, VI.1.

<sup>138</sup> A. Rauhvargers, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 112.

<sup>139</sup> Article 14(1)(b) Directive 2005/36/EC allows host Member States to require compensation measures if the training received is substantially different than the training required in that Member State.

<sup>140</sup> Article II.1(1) Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>141</sup> *Ibid.*, Article II.3.

<sup>142</sup> *Ibid.*, Article III.2.

adequate information, in good faith, for the relevant authority to assess.<sup>143</sup> Qualification issuing institutions have the duty to provide relevant information on the qualification to any individual, institution or authority.<sup>144</sup>

The principle of substantial differences lies at the base of the LRC. However, access to a Party's higher education system is not automatic if there are no substantial differences. Sections IV through VII provide some extra requirements an individual seeking recognition under the Convention may have to fulfil. For example, Article IV.4 prescribes that additional requirements needing to be fulfilled for access to education have to be fulfilled by nationals of the assessing Party as well as individuals from other Contracting Parties seeking recognition. Recognition may also be restricted when it comes to higher education programmes' selectivity in the sense of a *numerus clausus* or language requirements.<sup>145</sup> Under Article VI.3 LRC the consequences of recognition entail access to other higher education studies, the use of academic titles and a possible facilitation of access to the labour market.

### *2.3 The Bologna Process and the EHEA Qualifications Framework*

The Bologna Process, aimed at establishing the European Higher Education Area (EHEA), was initiated through the 1998 Sorbonne Declaration. In that document, the French, Italian, English and German Ministers for education expressed their wish to create a common frame of reference through which student mobility and employability would be facilitated through recognition.<sup>146</sup> The Process was subsequently solidified through the 1999 Bologna Declaration. There, the objective of increasing Europe's higher educational competitiveness internationally was reiterated: Europe's attractiveness was to be enhanced.<sup>147</sup>

Although the Bologna Process does not specifically aim at realizing recognition, it is the key instrument to improving academic as well as professional mobility, which is at the heart of the Process.<sup>148</sup> Indeed the common frame of reference called for in the Sorbonne Declaration had to be aimed at improving recognition and facilitating student mobility as

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<sup>143</sup> Ibid., Article III.3(2).

<sup>144</sup> Ibid., Article III.3(4).

<sup>145</sup> Ibid., Articles IV.6 and IV.7.

<sup>146</sup> Sorbonne Joint Declaration on harmonisation of the architecture of the European higher education system, Paris 25 May 1998.

<sup>147</sup> Bologna Declaration of 19 June 1999 – Joint declaration of the European Ministers of Education.

<sup>148</sup> S. Bergan, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 49.

well as employability.<sup>149</sup> Like the LRC, the Bologna Process primarily concerns cumulative academic recognition.<sup>150</sup> However, that type of recognition is achieved differently. The LRC is concerned with realizing cumulative academic recognition “from the outside”, meaning it ensures recognition for pre-existing qualifications. The Bologna Process, on the other hand, generally ensures cumulative academic recognition “from the inside” by tackling the structure of educational systems throughout its participating States.

Turning to the content of the Bologna Process, it is important to first look at the objectives established in the Bologna Declaration. These objectives reflect the achievements and main characteristics of the Bologna Process. The objectives were the following:<sup>151</sup>

- Adopting a system of easily readable and comparable degrees, among others, by implementing the Diploma Supplement.
- Adoption of a system based on the undergraduate and graduate cycles.
- Establishing a system of credits – the European Credit Transfer System (ECTS).
- Promoting mobility by overcoming obstacles to the free movement for students, teachers, researchers and administrative staff.
- Promoting European cooperation in quality assurance.
- Stimulating the European dimension in higher education.

The Bologna Process pursues its objectives through intergovernmental cooperation placed outside the EU framework.<sup>152</sup> Advances are made through Ministerial Conferences at which so-called *communiqués* are adopted. In between the Conferences the Bologna Follow-Up Group is responsible for overseeing the Bologna Process and is, among others, able to set up working groups.<sup>153</sup>

Of the *communiqués*, the 2005 Bergen Communiqué is of particular importance. The Ministers had previously expressed their wish for the creation of an overarching

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<sup>149</sup> Sorbonne Joint Declaration on harmonisation of the architecture of the European higher education system, Paris 25 May 1998.

<sup>150</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 135.

<sup>151</sup> Bologna Declaration of 19 June 1999 – Joint declaration of the European Ministers of Education.

<sup>152</sup> R. Keeling, ‘The Bologna Process and the Lisbon Research Agenda: the European Commission’s expanding role in higher education discourse’, 41 *European Journal of Education* 2 (2006), p. 207.

<sup>153</sup> EHEA, ‘How does the Bologna Process work?’, <http://www.ehea.info/article-details.aspx?ArticleId=5> (last visited on 30 August 2015).

framework of qualifications for the EHEA.<sup>154</sup> At the Bergen Conference the overarching EHEA Qualifications Framework was solidified.<sup>155</sup> The EHEA Qualifications Framework encompasses three cycles with their corresponding learning outcomes and fixed credit ranges for each cycle.<sup>156</sup> For example, the first cycle qualification is taken to include 180 to 240 ECTS credits thus amounting to a Bachelor. The learning outcomes included in the first cycle describe what the student is able to do at the end of the Bachelor.

The EHEA Qualifications Framework serves as an overarching framework over national qualifications frameworks (NQFs). The Bologna States had previously been encouraged to create their own national qualifications frameworks (NQFs) where qualifications would be described in terms of workload, level, learning outcomes, competences and profile.<sup>157</sup> Apart from describing their qualifications in such terms the States taking part in the Bologna Process also had to classify their higher education according to the three-cycle system and define credit ranges for their study programmes to bring their NQFs in line with the EHEA Qualifications Framework. This process was to be completed by 2010.<sup>158</sup>

The legally non-binding nature of the EHEA's texts is the consequence of the Bologna Process' intergovernmental nature. The Bologna Process currently consists of 47 countries and a number of consultative members.<sup>159</sup> Yet, Member States of the European Union initiated the Process. However, they did not initiate the Process in their capacity as Member States of the Union, but as individual States outside the Union framework. The Sorbonne and Bologna Declarations nonetheless appear to pay particular attention to achieving the objectives mentioned above in the European Community. Furthermore, all current EU Member States are part of the EHEA. Why did the Member States create and take part in the EHEA as individual States as opposed to creating a Union instrument?

According to Garben the EU could have adopted a Union measure for the Bologna Process. Although the EU appears to lack competence to legislate in the area of education,

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<sup>154</sup> Berlin Communiqué, "Realising the European Higher Education Area", Communiqué of the Conference of Ministers responsible for Higher Education, Berlin, 19 September 2003, p. 4.

<sup>155</sup> Bergen Communiqué, The European Higher Education Area – Achieving the Goals, Communiqué of the Conference of European Ministers Responsible for Higher Education, Bergen, 19-20 May 2005, p. 2.

<sup>156</sup> The framework of qualifications for the European Higher Education Area.

<sup>157</sup> Berlin Communiqué, "Realising the European Higher Education Area", Communiqué of the Conference of Ministers responsible for Higher Education, Berlin, 19 September 2003, p. 4.

<sup>158</sup> Bergen Communiqué, The European Higher Education Area – Achieving the Goals, Communiqué of the Conference of European Ministers Responsible for Higher Education, Bergen, 19-20 May 2005, p. 2.

<sup>159</sup> See EHEA, 'Members', <http://www.ehea.info/members.aspx> (last visited on 30 August 2015).

she argues that academic recognition could well have been established through a Union legislative instrument by using what is now Article 115 TFEU.<sup>160</sup> The Bologna Process could be adopted as a Directive as the existence of disparities in the education systems of Member States hampers individuals from seeking access to a foreign labour market, thereby affecting the internal market.<sup>161</sup> The exclusion of harmonization in Article 165 TFEU does not appear to definitively preclude the creation of a Directive. By following the reasoning in the Tobacco Advertisement case,<sup>162</sup> such a Directive could be adopted as long as it would truly fulfil the conditions of Article 115 TFEU,<sup>163</sup> which the Bologna Process appears to do. Garben's argument is supported by the fact that the Sorbonne and Bologna Declarations set the goal of enhancing citizen's mobility and *employability*.

It appears from the Sorbonne Declaration that the Member States taking the initiative for the EHEA wished to include other European countries in the Process.<sup>164</sup> This is given as the reason for which the Member States did not utilize a Union instrument for the Bologna Process. According to Garben that argument cannot be upheld. The Member States could have made it possible for non-Member States to join in on this cooperation through the conclusion of agreements with third countries while internally arranging the issue as a Community measure.<sup>165</sup> Nevertheless, the fact that non-EU countries are also taking part in the Bologna Process prevents its adoption outside the EU from being in violation of Union law.<sup>166</sup>

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<sup>160</sup> S. Garben, 'The Bologna Process: From a European Law Perspective', 16 *European Law Journal* 2 (2010), p. 193.

<sup>161</sup> *Ibid.*, p. 194.

<sup>162</sup> Case C-376/98 *Germany v. European Parliament and Council*, EU:C:2000:544.

<sup>163</sup> S. Garben, 16 *European Law Journal* 2 (2010), p. 195.

<sup>164</sup> Sorbonne Joint Declaration on harmonisation of the architecture of the European higher education system, Paris 25 May 1998.

<sup>165</sup> S. Garben, 16 *European Law Journal* 2 (2010), p. 197.

<sup>166</sup> *Ibid.*, p. 205.

### **3. Assessing Recognition Mechanisms: Piecing Together the Puzzle of Recognition**

The previous Chapters were concerned with providing the necessary background to assessing the coherence and completeness of recognition mechanisms. In this Chapter, an attempt will be made at piecing together the puzzle of recognition by seeing how the mechanisms described in the previous Chapter relate to each other. This in order to see whether we can indeed say that the mechanisms form a coherent whole before their transposition into Member States' legal orders.

When it comes to the way in which Directive 2005/36/EC recognizes qualifications it is worth noting that the instrument establishes its own scheme of qualification levels.<sup>167</sup> This means that it is largely unrelated to the LRC, and to the other recognition mechanisms studied in this Thesis. Rauhvargers is critical of the position the 2005 Directive holds towards the other mechanisms. He argues that there is a lack of coordination between the education and employment sectors evidenced by the principal difference between the Directive, and the EHEA Qualifications Framework and the EQF.<sup>168</sup> This discrepancy results from the EHEA Qualifications Framework and the EQF being based on learning

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<sup>167</sup> A. Rauhvargers, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 117.

<sup>168</sup> *Ibid.*

outcomes and competences, whereas the Directive is purely based on the duration and content of the relevant training.<sup>169</sup> Indeed, there appear to be no direct links or referrals between the Bologna Process' EHEA Qualifications Framework and the 2005 Directive.

Still, the Directive is not entirely unrelated to the other mechanisms. First of all, the principle of substantial differences established in the LRC is also found in Article 14 of Directive 2005/36/EC under which host Member States are allowed to apply compensation measures if the training received is substantially different than that required. Similarly, the 2008 EQF Recommendation creates a small connexion with the 2005 Directive by stating that the EQF is without prejudice to Directive 2005/36/EC.<sup>170</sup> The Directive itself furthermore states that the Member States should promote the goal of lifelong learning.<sup>171</sup> However, the lack of coherence between the eight reference levels of the EQF and the five levels contained in Directive 2005/36/EC remains.<sup>172</sup>

Directive 2013/55/EU institutes some convergence between the Professional Qualifications Directive and the Bologna Process. The 2013 Directive ensures that the Article 11 levels of qualification are consistent with the degree structure realized by the Bologna Process.<sup>173</sup> Indeed, Articles 11(d)(e) of the consolidated version of the 2005 Directive now refer to Bachelor's and Master's degrees respectively. Similarly, the ECTS credits are now included in the Professional Qualifications Directive as a way to express the duration of a programme.<sup>174</sup> The credits are included both in the general system and in the system for automatic recognition. The 2013 Directive also recognizes the existence of the EQF: competent authorities can now use the EQF as an additional source of information when they are examining professional qualifications issued in other Member States.<sup>175</sup> However, the issue of the different levels has not been tackled yet.

When looking at the relationship between the Bologna Process and the LRC a strong link can be found between the two mechanisms. The Convention is a crucial element of the Bologna process, as it is the only legally binding text in the intergovernmental

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<sup>169</sup> Ibid.

<sup>170</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, para. 11.

<sup>171</sup> Recital 39 Preamble Directive 2005/36/EC.

<sup>172</sup> Report from the Commission to the European Parliament and the Council: Evaluation of the European Qualification Framework (EQF) – Implementation of the Recommendation of the European Parliament and the Council on the Establishment of the European Qualifications Framework for Lifelong Learning, COM(2013) 897 final, p. 7.

<sup>173</sup> Recital 11 Preamble Directive 2013/55/EU.

<sup>174</sup> Ibid., Recital 17.

<sup>175</sup> Ibid., Recital 11.

project.<sup>176</sup> The EHEA consists of legally non-binding guidelines that establish a common understanding of European standards.<sup>177</sup> However, no guidelines were needed on recognition because the countries taking part in the EHEA are bound by the LRC.<sup>178</sup>

The creation of the EHEA Qualifications Framework and the EQF took place around the same time. For this reason the Ministers for education in the Bologna Process requested the European Commission to ensure complementarity between the two Frameworks.<sup>179</sup> As a consequence, the two systems do complement each other to a certain extent. Indeed, the EQF Recommendation ensures compatibility with the EHEA Qualifications Framework and builds on the achievements made in the Bologna Process.<sup>180</sup> The EHEA Qualifications Framework cycles one to three correspond to the EQF's highest levels six to eight.<sup>181</sup> However, the two still differ when it comes to the type of qualifications they cover. Whereas the EHEA Qualifications Framework covers higher education, the EQF covers all types of learning in all settings.

The EQF's link with the other mechanisms has been presented above. It is without prejudice to Directive 2005/36/EC and can be used as an assessment tool under Directive 2013/55/EU. Furthermore, it is compatible with the EHEA Qualifications Framework. Only the possible connexion of the EQF and the LRC has not yet been elaborated. However, there does not appear to be any direct link between the two mechanisms. The report on the Evaluation of the EQF nonetheless states that the instrument is consistent with the LRC.<sup>182</sup>

It has become apparent that there are very modest links between the recognition mechanisms. Although this lack is partially the consequence of the mechanisms originating from different organizations and mandates, the fact that they are transposed in the Member States makes the absence in legislation of clear links between the mechanisms potentially problematic. This makes that the divide between professional and academic recognition is

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<sup>176</sup> P. Zgaga, in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014), p. 25.

<sup>177</sup> S. Bergan, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 50.

<sup>178</sup> Ibid.

<sup>179</sup> Bergen Communiqué, The European Higher Education Area – Achieving the Goals, Communiqué of the Conference of European Ministers Responsible for Higher Education, Bergen, 19-20 May 2005, p. 2.

<sup>180</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, para. 3 and 9.

<sup>181</sup> Author unknown, 'The Bologna Framework and National Qualifications Frameworks – An Introduction', [http://www.ehea.info/Uploads/QF/Bologna\\_Framework\\_and\\_Certification\\_revised\\_29\\_02\\_08.pdf](http://www.ehea.info/Uploads/QF/Bologna_Framework_and_Certification_revised_29_02_08.pdf) (last visited on 30 August 2015), p. 2.

<sup>182</sup> Report from the Commission to the European Parliament and the Council: Evaluation of the European Qualification Framework (EQF) – Implementation of the Recommendation of the European Parliament and the Council on the Establishment of the European Qualifications Framework for Lifelong Learning, COM(2013) 897 final, p. 7.

not merely a way to order recognition types or to decide on mandates, but a possible dichotomy inhibiting efficient recognition.

Chapter Two has clarified that Directive 2005/36/EC regulates professional recognition, the LRC and the Bologna Process primarily concern academic recognition, and the EQF concerns all types of recognition. Union instruments are thus primarily concerned with professional recognition whereas the other instruments primarily concern academic recognition. The explanation to this phenomenon is rooted in the EU's history and the difference in competences between professional and academic recognition. Because of the fact that the Union was a purely economic organization at first, recognition for professional purposes was held to clearly concern the internal market and thus held to be strongly economically motivated, whereas academic recognition was considered of a less economic nature.<sup>183</sup>

Professional recognition had a solid legal basis in Community law from early on whereas academic recognition did not. The resulting imbalance led to action in the area of academic recognition being undertaken much later than professional recognition, thereby preventing the two areas from being developed coherently.<sup>184</sup> This is a conclusion already reached by the Commission in 1994 that is still very much applicable to the present situation. The same imbalance in competences has caused professional and academic recognition at Union level to be driven apart. The two recognition types belong to different Directorates General (DGs) within the European Commission. Whereas DG Internal Market regulates professional recognition, DG Education runs academic recognition.<sup>185</sup> There appears to be a corresponding disconnexion between developments related to the fundamental freedoms and the Internal Market, and the actions in the area of education.<sup>186</sup> This demonstrates the general lack of coordination between the education and employment sectors as identified by Rauhvargers.

All the findings made so far in the Thesis have given the impression that professional and academic recognition are different. However, several academics find that the distinction between professional and academic recognition is less black and white than one is led to believe.

In her 2011 contribution Garben argues that although part of the division into subtypes of recognition is correct, this cannot be said for all subtypes. When looking at *de jure* professional recognition and academic recognition by substitution, it is clear that the

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<sup>183</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 131.

<sup>184</sup> Communication from the Commission on recognition of qualifications for academic and professional purposes, COM(94) 596 final, p. 7.

<sup>185</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 153.

<sup>186</sup> H. Schneider and S. Claessens, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future – Volume I*, p. 164.

distinction is well-founded, as recognition for the exercise of a regulated profession and for the purpose of temporarily studying abroad are of an entirely different nature.<sup>187</sup> However, this cannot be said for *de facto* professional recognition and academic recognition by accumulation.<sup>188</sup> *De facto* professional recognition is often not identified as such, something that becomes apparent when looking back at the Bologna Process and LRC.<sup>189</sup> The academic recognition contained in the Bologna Process also serves to benefit employability and thus the internal market,<sup>190</sup> thereby concerning *de facto* professional recognition. Similarly, the LRC also mentions the possible facilitation of labour market access as one of its consequences.<sup>191</sup>

Pertek supports the overlap of *de facto* professional recognition and academic recognition by accumulation by arguing that if an individual studies in another Member State it is likely that this individual will want to pursue professional activities there as well.<sup>192</sup> There are many cases in which an academic diploma at the same time forms a qualification granting access to a profession.<sup>193</sup> If the profession is unregulated the diploma is likely to grant the necessary skill set to be able to carry out that profession.<sup>194</sup> However, if the profession is regulated, the diploma can still grant access to the training or study programme needed to be able to pursue the regulated profession.<sup>195</sup>

The previous paragraphs attest to the fact that the nature of the division between professional and academic recognition is more of a gradual transition as opposed to a dichotomy. Although the gradual transition between recognition types appears to be a reality, this is an observation that is not mirrored in the recognition mechanisms of Chapter Two. The mechanisms classify themselves as concerning professional or academic recognition. By seemingly ignoring the gradual transition that actually exists between professional and academic recognition, the mechanisms risk promoting a divide that is less prominent and relevant as portrayed. The dividing line between professional and academic

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<sup>187</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 136.

<sup>188</sup> *Ibid.*, p. 137.

<sup>189</sup> *Ibid.*

<sup>190</sup> Sorbonne Joint Declaration on harmonisation of the architecture of the European higher education system, Paris 25 May 1998.

<sup>191</sup> Article VI.3(c) Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>192</sup> J. Pertek, 'Une dynamique de la reconnaissance des diplômes à des fins professionnelles et à des fins académiques: réalisations et nouvelles réflexions', in J. Pertek (ed.), *La reconnaissance des qualifications dans un espace Européen des formations et des professions* (Bruylant, Bruxelles 1998), p. 138.

<sup>193</sup> H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, p. 108.

<sup>194</sup> J. Pertek, in J. Pertek (ed.), *La reconnaissance des qualifications dans un espace Européen des formations et des professions* (Bruylant, Bruxelles 1998), p. 138.

<sup>195</sup> *Ibid.*

recognition was always blurry, and is likely to become evermore so. An example concerns the growing trend in education of the acquisition of practical experience. This trend is responding to the preference on the labour market for graduates to have already obtained professional experience through an internship during their academic careers.<sup>196</sup>

Why is the division between professional and academic recognition so pronounced in recognition mechanisms? Why are there no *progressive* initiatives to reconcile the gap between professional and academic recognition mechanisms? Verbruggen's article provides an explanation to such questions. According to her, the Member States did not so much oppose to the idea of cooperation in education, but wanted to retain complete control over the organization of their educational systems.<sup>197</sup> Verbruggen criticizes the Member States' for restricting their progressiveness in the EU's education policy to non-binding instruments.<sup>198</sup>

Indeed, in its 1994 Communication the Commission established that there was a 'European area for the professions and training', which was based on the free movement and for which professional and academic recognition were the main course of action.<sup>199</sup> The creation of this area under the EU framework, as opposed to that of the EHEA placed outside the Union framework, was never pursued. Here lies the core explanation for the continuance in the divide of professional and academic recognition mechanisms: the Bologna Process was created outside the EU framework so that the Member States could retain control over their own educational systems and renationalize European educational cooperation.<sup>200</sup> The Bologna Process is also frequently used by the Member States to pursue their own agendas in the area of education.<sup>201</sup>

However, there are several developments in the EU that somewhat reconcile the professional/academic divide. The first is the *Morgenbesser* case where a French national having completed a *maîtrise en droit* was refused access to the Genoa Bar Council's register of *praticanti* for not having an Italian diploma.<sup>202</sup> Morgenbesser tried to get recognition at an Italian university but was told to complete an entire course of study. The

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<sup>196</sup> See for example ICEF Monitor, 'International internships are increasingly valued by employers', <http://monitor.icef.com/2013/04/international-internships-are-increasingly-valued-by-employers/> (last visited on 30 August 2015).

<sup>197</sup> M.L.W. Verbruggen, 'De Bolognaverklaring kritisch getoetst aan het Europees onderwijsbeleid', 6 *SEW* (2003), p. 200.

<sup>198</sup> *Ibid.*, p. 201.

<sup>199</sup> Communication from the Commission on recognition of qualifications for academic and professional purposes, COM(94) 596 final, p. 1.

<sup>200</sup> M.L.W. Verbruggen, 6 *SEW* (2003), p. 204.

<sup>201</sup> A. Veiga and A. Amaral, 'The open method of coordination and the implementation of the Bologna process', 12 *Tertiary Education and Management* 4 (2006), p. 287.

<sup>202</sup> Case C-313/01 *Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, EU:C:2003:612.

Court was asked whether refusing recognition of a foreign diploma, thereby denying access to the *praticanti* register, was lawful. Directives 98/5 and 89/48 did not apply because the position of *praticante* was not equal to that of a qualified lawyer, nor of someone exercising a regulated profession.<sup>203</sup> Instead, the Court reapplied *Vlassopoulou*. Every individual gets recognition of qualifications upon correspondence with those of the host Member State, irrespective of whether or not the individual is fully qualified as a professional.<sup>204</sup> Therefore, the *Vlassopoulou* doctrine is now also used when judging strictly academic qualifications.<sup>205</sup> However, the Court refrained from explicitly pointing out that an academic degree was recognized for professional purposes, thereby not establishing it as the professional recognition it actually was.<sup>206</sup> Morgenbesser is thus an important example of the divide between professional and academic recognition being somewhat reconciled in case law, although the Court did not explicitly mention this.

Secondly, the EQF can be pointed out as a progressive recognition mechanism because of the fact that it facilitates both professional and academic recognition. It thereby accommodates and respects the gradual transition in recognition types. However, its progressiveness is inhibited due to its non-binding nature. Whether its progressive character will prove to be capable of facilitating recognition in practice heavily depends on the use Member States, institutions, and companies are making of the instrument. This uncertainty stemming from the EQF's non-binding nature indicates that Verbruggen's critique in relation to the Member States in the Bologna Process proves to be accurate present-day.

A third development aimed at reconciling the gap between professional and academic recognition is the involvement of the EU in the Bologna Process through the European Commission's membership of the EHEA.<sup>207</sup> Apart from being a member of the Bologna Follow-up Group in charge of developments between ministerial conferences, the Commission has also aligned its own activities with those of the Bologna Process, and actively takes part in it.<sup>208</sup> However, an issue seen before concerning the Commission resurfaces here. The Commission potentially has the role to reconcile professional and academic recognition by bringing the two types of recognition in line with each other were it not for the lack of coordination between DGs, and even within the Commission's higher

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<sup>203</sup> Ibid., para. 45, 50-52.

<sup>204</sup> H. Schneider and S. Claessens, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future – Volume I*, p. 151.

<sup>205</sup> Ibid.

<sup>206</sup> S. Garben, 16 *Tilburg Law Review* (2011), p. 143.

<sup>207</sup> EHEA, 'Members', <http://www.ehea.info/members.aspx> (last visited on 30 August 2015).

<sup>208</sup> R. Keeling, 41 *European Journal of Education* 2 (2006), p. 208.

education policy itself.<sup>209</sup> This fragmentation reduces the chances of the Commission assuming the role as the unifier of professional and academic recognition.

Needless to say, the juxtaposition of the EU and Bologna Process is bound to create inefficiencies. The EU runs professional recognition while individual States in the Bologna Process run academic recognition. Developments are being made in the Bologna Process with Member States and non-Member States while the Union and its Member States are also bringing professional and academic recognition closer together through *Morgenbesser* and the EQF. Nevertheless, the Union and actors in the Bologna Process have taken steps towards “reconciling their differences”. The European Commission being one of the official members of the Bologna Process and the EHEA is an example of this. Although this is an important first step, there is more to be done in this area. Particularly since the Commission’s potential in the Bologna Process is limited due to its internal lack of coordination. Greater cooperation between the Union and the actors in the Bologna Process offers the possibility of creating actual legislation and making it more efficient resulting in a more coherent and complete picture for the recognition of qualifications.

The creation of hard law in the area of education is crucial for at least two major reasons. First of all, hard law would ensure democratic legitimacy on the subject and could be achieved by involving the EU in regulating academic recognition. The EU has often been accused of lacking democratic legitimacy. However, even with its democratic deficit, the Union is still more democratic than the intergovernmental Bologna Process.<sup>210</sup> Assuming that, following Garben’s reasoning explored in Section 2.3 above, hard law in this area were to be adopted on the basis of Article 115 TFEU, this would entail the use of a special legislative procedure with unanimity in the Council and consultation of the European Parliament and the Economic and Social Committee. Although the European Parliament is then left out of the law-making process, democratic legitimacy is still ensured through the directly elected Ministers in the Council. It may be argued that the Bologna Process was created by the Ministers of education of the partaking States – who are of course elected – but some States solidified their commitment to the Bologna Process through highly placed civil servants.<sup>211</sup>

Secondly, the creation of hard law offers individuals judicial protection. As of now, students are not guaranteed recognition of their diploma when applying for a subsequent course of study because the Bologna Process does not grant them any rights.<sup>212</sup> The implementation of the Bologna Process’ declarations still does not grant diploma holders an

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<sup>209</sup> *Ibid.*, p. 216.

<sup>210</sup> S. Garben, ‘The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law’, *LSE ‘Europe in Question’ Discussion Paper Series – Paper No. 50* (2012), p. 18.

<sup>211</sup> M.L.W. Verbruggen, 6 *SEW* (2003), p. 209.

<sup>212</sup> S. Garben, 16 *European Law Journal* 2 (2010), p. 208.

individual right to diploma recognition, as opposed to the Union Directives and case law from which individuals do derive rights.<sup>213</sup>

In conclusion of Part One of this Thesis, it can be said that many different dimensions can be discerned in the recognition of qualifications. It can be classified into two main- and four subtypes of recognition. Furthermore, the variety of recognition mechanisms in the EU is the consequence of the existence of differing competences for professional and academic recognition. When it comes to coherence, it can be said that the recognition mechanisms' interrelationships leave plenty of room for improvement. As of now, the mechanisms fall short in realizing coherence across the board. Is this lack of coherence perceptible at the national level? In order to answer this question a look needs to be taken at what happens to the mechanisms upon transposition into a Member States' legal order. Part Two of the Thesis is dedicated to this issue.

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<sup>213</sup> M.L.W. Verbruggen, 6 *SEW* (2003), p. 209.

## Part Two: Case Study the Netherlands

### 4. Education, the Labour Market and Recognition in the Netherlands

In the Netherlands the development of the knowledge economy is considered to be a crucial aspect of economic life. This has resulted in a competitive economy striving for the acquisition and amelioration of knowledge capital. Its success in this respect is evidenced by the 2014-2015 Global Competitiveness Report according to which the Netherlands is the eighth most competitive economy in the world.<sup>214</sup> In this Chapter, a look will be taken at the Netherlands' attitudes towards education and the labour market, and collaborations with other Member States.

Attracting and training skilled international and national students is high on the agenda for the Netherlands in order to further develop its knowledge economy.<sup>215</sup> Furthermore, the internationalization of Dutch education has been an important element of its educational policy since the 1990s.<sup>216</sup> This internationalization should take place, among others, by attracting foreign talent, facilitating transnational education, and establishing an ambitious policy agenda for the Bologna Process and the EU.<sup>217</sup> Similarly, the Netherlands aims at empowering the development of higher education in the EU and desires to make education an important point during its 2016 EU Presidency.<sup>218</sup>

However, the Netherlands is not only concerned with attracting foreign students: it also sets out to keeping these young and talented individuals. In 2013 the Netherlands launched its Action plan 'Make it in the Netherlands'. One of its most important goals is to facilitate the transition of international students from study to labour market.<sup>219</sup> This goal is to be achieved by ameliorating the means of information thereby raising awareness of the opportunities for international students in the Netherlands, and by connecting these students to the labour market by introducing them to Dutch companies during their studies.<sup>220</sup> Similarly, the Netherlands has been concerned with attracting highly skilled

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<sup>214</sup> K. Schwab (ed.), *The Global Competitiveness Report 2014-2015*, World Economic Forum, p. 288.

<sup>215</sup> *Kamerstukken II 2013/14*, 22452, 41, p. 5.

<sup>216</sup> See for example *Kamerstukken II 1994/95*, 22452, 6.

<sup>217</sup> *Kamerstukken II 2013/14*, 22452, 41, p. 17-18.

<sup>218</sup> *Ibid.*, p. 11.

<sup>219</sup> Action plan Make it in the Netherlands – Programme 2013-2016, p. 14.

<sup>220</sup> *Ibid.*, p. 14-15.

migrants to improve its knowledge economy through the 2004 Knowledge Migrant Scheme (*Kennismigrantenregeling*).<sup>221</sup>

Enhancing the degree of professional recognition is also of great importance for the Netherlands. In 2014 Members of Parliament Straus and Jadnanansing issued a motion asking the administration to tune professional recognition with neighbouring countries, and to streamline the supply of information surrounding academic recognition.<sup>222</sup> However, the Dutch Minister of Education, Culture and Science Bussemaker prioritized the more ambitious goal of optimizing the recognition of professional qualifications *at the EU level* and the implementation of Directive 2013/55/EU.<sup>223</sup> It will be interesting to see how the Netherlands transposes the latter Directive in light of such observations.

The Netherlands is also very ambitious in the area of academic recognition. Not only was the Netherlands enthusiastic about the Bologna Process – more of which will be discussed in the following Chapter – the Netherlands is still very much committed to maintaining a close relationship with its neighbouring countries. Here, another dimension of the recognition of qualifications can be distinguished, namely that of the Member State's individual initiatives on recognition. The Netherlands has concluded legislation with several of its neighbouring countries and regions to benefit recognition.

Back in 2003, the Netherlands concluded a Treaty with the Flemish part of Belgium on the accreditation of education programmes.<sup>224</sup> Through this Treaty the two Contracting Parties set up the Dutch-Flemish Accreditation Organization (*Nederlandse en Vlaamse Accreditatie Organisatie* – NVAO), and symbolized their willingness to cooperate in light of the Bologna Process.<sup>225</sup> However, the principal aim of the NVAO was to submit Dutch and Flemish higher education programmes to an initial accreditation or to accredit them in accordance with national law.<sup>226</sup> According to the NVAO the process of accreditation 'relates to the assessment of the quality of the programme and focuses on learning outcomes'.<sup>227</sup>

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<sup>221</sup> E. Obradović, *Monitor Kennismigranten: Kwantitatieve analyse*, IND Informatie- en Analysecentrum 2013, p. 11.

<sup>222</sup> *Kamerstukken II* 2013/14, 21501-34, 230, p. 1.

<sup>223</sup> *Kamerstukken II* 2014/15, 22452, 42, p. 2.

<sup>224</sup> Treaty between the Flemish Community of Belgium and the Kingdom of the Netherlands concerning the accreditation of programmes within Flemish and Dutch higher education, the Flemish Community of Belgium and the Netherlands, 3 September 2003.

<sup>225</sup> NVAO, 'Legal Framework', [http://nvaio.com/legal\\_framework](http://nvaio.com/legal_framework) (last visited on 30 August 2015).

<sup>226</sup> Article 1(1) Treaty between the Flemish Community of Belgium and the Kingdom of the Netherlands concerning the accreditation of programmes within Flemish and Dutch higher education, the Flemish Community of Belgium and the Netherlands, 3 September 2003.

<sup>227</sup> NVAO, 'Accreditation', [http://nvaio.com/three\\_steps\\_of\\_accreditation](http://nvaio.com/three_steps_of_accreditation) (last visited on 30 August 2015).

In the Netherlands the role and competences of the NVAO are laid down in the Law regarding Higher Education and Scientific Research (*Wet op het hoger onderwijs en wetenschappelijk onderzoek*). Chapter 5a Title 2 of that Law is concerned with the practice of accreditation. Articles 5a.82(a-g) of the Law regulate the specific criteria which are used in the accreditation process. The NVAO will look at the aimed and achieved end-level of the course of study and whether it is internationally desirable; the content of the programme; the validity of assessment, testing and examinations; the quality of the personnel and the rules concerning personnel affecting the quality of the programme; the specific facilities connected to the programme that are of an influence on its quality; and the set-up and organization of the internal quality assurance aimed at improving the programme. Following Article 5a.10a(2) of the Law the same criteria are used to assess a new study programme. However, the criteria concerning the end-level, and the validity of assessment, testing and examination of students are only included if the study programme is already in place.<sup>228</sup> If accreditation is not renewed students are informed in time and are either given the opportunity to finish their study programme at another institution, or at the same one if going to another institution is impossible.<sup>229</sup>

The NVAO Treaty was updated by Protocol in 2013.<sup>230</sup> The most important change was the introduction of mutual recognition of Dutch and Flemish degrees.<sup>231</sup> This means that the Netherlands and Flanders consider the diplomas documented in the Protocol as being equal in both States. Mutual recognition for designated diplomas is now ensured through the new Article 11(1)(a-d) of the Treaty.

The effect of the 2003 Treaty is fairly limited, as it only concerns a relatively small geographic area with only the Netherlands and Flanders being a part of it. Accordingly, the effect of the mutual recognition ensured by the Protocol is also of a limited nature. The NVAO Treaty can be seen as a way for the Netherlands and Flanders to honour their obligations in respect of quality assurance under the Bologna Process. Indeed, in early 2000 the two parties decided to work together on the introduction of the Bachelor/Master structure and on accreditation.<sup>232</sup>

The Netherlands is part of another cooperation initiative with its neighbouring States having potentially revolutionary consequences for recognition. This current development stems from the Benelux. The organization is considered a frontrunner of other economic

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<sup>228</sup> Article 5a.10a(3)(a)(b) Law regarding Higher Education and Scientific Research.

<sup>229</sup> Article 5a.12(1) Law regarding Higher Education and Scientific Research.

<sup>230</sup> Protocol tot wijziging van het Verdrag tussen Koninkrijk der Nederlanden en de Vlaamse Gemeenschap van België inzake de accreditatie van opleidingen binnen het Nederlandse en Vlaamse hoger onderwijs, the Netherlands and the Flemish Community of Belgium, 26 February 2013.

<sup>231</sup> *Ibid.*, Article 11.

<sup>232</sup> K. Dittrich et al., 39 *European Journal of Education* 3 (2004), p. 300.

cooperation projects such as the EU, and was created through the 1944 Customs Convention.<sup>233</sup> The organization became operative in 1948 and rapidly continued on the road of cooperation, which led to the 1958 Benelux Economic Union Treaty through which the Parties pledged to ensure a free movement of people, goods, capital and services along with continued cooperation in the area of economic, financial and social matters.<sup>234</sup>

The cooperation between the Netherlands and its neighbours continues: on 18 May 2015 the Benelux adopted a Decision concerning the automatic mutual recognition of higher education diplomas.<sup>235</sup> The particular objective of this Decision for the Netherlands is the amelioration of cross-border mobility and diminution of the procedural burden for students and jobseekers willing to move across these Member States' borders.<sup>236</sup> The Decision, recently renamed the 'Germain Dondelinger Decision' in memory of one of the founders of the Bologna Follow-Up Group, and one of the driving forces behind this Decision,<sup>237</sup> proves to be potentially revolutionary. The Decision is the first regional achievement of the EU objective of automatic recognition.<sup>238</sup>

The high level of mutual trust between the Benelux States lies at the basis of the Decision and ensures that every citizen of those countries has the right to *automatic* degree recognition of recognized higher education degrees.<sup>239</sup> The Decision is specifically aimed at realizing automatic recognition of the generic levels of higher education diplomas. Under Article 1(1)(b) of the Decision such recognition entails the generically recognizing of the level of a higher education diploma from one Benelux State as being equal to the similar level of a diploma granted under the law of another Benelux State. Generic level recognition falls under academic recognition, meaning the degrees covered by the Decision are only recognized on the basis of their value as learning qualifications.<sup>240</sup>

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<sup>233</sup> CVCE, 'Benelux', <http://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/02d476c7-815d-4d85-8f88-9a2f0e559bb4> (last visited on 30 August 2015).

<sup>234</sup> Ibid.

<sup>235</sup> Beschikking van het Benelux Comité van Ministers betreffende de automatische wederzijdse generieke niveauserkenning van Diploma's hoger onderwijs, Benelux Committee of Ministers, 18 May 2015.

<sup>236</sup> *Kamerstukken II* 2014/15, 22452, 42, p. 2.

<sup>237</sup> Benelux, 'Benelux vernoemt recent onderwijs-besluit naar Germain Dondelinger', <http://www.benelux.int/nl/nieuws/benelux-vernoemt-recent-onderwijs-besluit-naar-germain-dondelinger/> (last visited on 30 August 2015).

<sup>238</sup> Benelux Secretariat-General, 'Benelux Higher Education Ministers Agree on Automatic Recognition of Higher Education Degrees Across the Three Countries', <http://www.benelux.int/files/9314/3196/3718/Basisnota.pdf> (last visited on 30 August 2015).

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

Put simply, this means that a Bachelor granted by a higher education institution in one Benelux State will be recognized as a Bachelor in another Benelux State.<sup>241</sup> Consequently, the Decision does not concern the content of the courses of study that need to be followed in order to obtain the diploma.<sup>242</sup> Similarly, the Decision does not concern the professional recognition as regulated under Directive 2005/36/EC.<sup>243</sup>

It is important to stress that the generic level recognition is not unrestricted. Article 3 of the Decision lays down the conditions that have to be fulfilled in order for a diploma to be recognized. There are two criteria: first of all, only diploma's having a minimum level of quality that is ensured by the competent higher education authority and by the evaluation of an organization tasked with realizing quality assurance in line with the Standards and Guidelines for Quality Assurance in the European Higher Education Area are recognized.<sup>244</sup> The second criterion requires the diploma to be granted and recognized by the competent authority in accordance with the law of the Benelux State in which the diploma is obtained. The competent authority and study programme also have to be recognized according to the law of the relevant State.<sup>245</sup> Automatic recognition under Article 2 of the Decision takes place if these conditions are fulfilled. Automatic generic level recognition then takes place without any further formalities.

The Decision has a strong revolutionary potential because the automatic generic level recognition can serve as an example for other broader cooperation initiatives in the area of recognition, thereby extending to more States and students. Although one may criticize that only generic levels are automatically recognized, this is nevertheless a big step in the sensitive area of higher education. At the same time, the realization of automatic generic level recognition provides an impetus for the States to also proceed also in the area of specific recognition.<sup>246</sup> The Decision's revolutionary potential lies in the "double domino effect" it can unchain: on the one hand, it can lead to automatic generic level recognition becoming common in more States. On the other hand, it can be responsible for putting

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<sup>241</sup> Explanatory Memorandum Beschikking van het Benelux Comité van Ministers betreffende de automatische wederzijdse generieke niveauserkenning van Diploma's hoger onderwijs, Benelux Committee of Ministers, 18 May 2015, p. 2.

<sup>242</sup> Ibid.

<sup>243</sup> Benelux Secretariat-General, 'Benelux Higher Education Ministers Agree on Automatic Recognition of Higher Education Degrees Across the Three Countries', <http://www.benelux.int/files/9314/3196/3718/Basisnota.pdf> (last visited on 30 August 2015).

<sup>244</sup> Article 3(1)(a) Beschikking van het Benelux Comité van Ministers betreffende de automatische wederzijdse generieke niveauserkenning van Diploma's hoger onderwijs, Benelux Committee of Ministers, 18 May 2015.

<sup>245</sup> Ibid., Article 3(1)(b).

<sup>246</sup> Benelux Secretariat-General, 'Benelux Higher Education Ministers Agree on Automatic Recognition of Higher Education Degrees Across the Three Countries', <http://www.benelux.int/files/9314/3196/3718/Basisnota.pdf> (last visited on 30 August 2015).

pressure on partaking States to continue realizing further-going automatic recognition in other areas, such as that of specific recognition.

In conclusion, it can be said that the Netherlands is a frontrunner when it comes to the recognition of qualifications. It can thus be expected that it will have implemented the recognition mechanisms discussed in Chapter Two properly. The following Chapters will be dedicated to finding out how the Directive 2005/36/EC, the EQF, the LRC, and the Bologna Process have been implemented in the Netherlands. This to see whether the distinction between professional and academic recognition has the same consequences for the coherence and completeness of national law on recognition as it did on the recognition mechanisms discussed in Chapter Two.

## **5. Recognition Mechanisms in the Netherlands: Legislation and Practice**

This Chapter focuses on finding out how and where some of the most important elements of the recognition mechanisms of Chapter Two have been implemented in the Dutch legal order. The mechanisms' transpositions will be examined as follows: first of all, the EU mechanisms will be looked at by considering the transposition of Directive 2005/36/EC and its modernization after which the EQF's implementation will be presented. Due to the LRC

having been endorsed as the Bologna Process' only legal document and its implementation having taken place at a later stage, the Convention will be looked at after the Bologna Process' implementation.

### *5.1 Implementing the Union Mechanisms*

The previous Chapter has shown that the Netherlands appears to be ambitious when it comes to the Union mechanisms for the recognition of qualifications. This becomes apparent from the Dutch Minister of Education, Culture and Science Bussemaker prioritizing Union-wide recognition over enhanced recognition with neighbouring States. Considering this along with the high degree of internationalization in the Dutch education system and labour market, it is not farfetched to assume that the Member State is open towards the Union recognition mechanisms. The following Sections are dedicated to finding out whether this is the case.

#### 5.1.1 Directive 2005/36/EC and its 2013 Modernization

Chapter Two has shown that the 2005 Directive consists of the general system and a system for automatic recognition for certain professions. Space precludes a full analysis of the Directive. Instead, the implementation of the general system will briefly be looked at along with the implementation of the system for automatic recognition. When it comes to the transposition of Directive 2013/55/EU the fact that it is currently being transposed makes analysis of that Directive's implementation impossible. Nevertheless, the Chapter aims at providing some attitudes and reflections on the implementation process as seen in the Netherlands.

When Directive 2005/36/EC was first created, its Article 63 provided that the Directive had to be transposed into the Member States' legal orders by 20 October 2007. This proved to be too ambitious. The Netherlands took until February 2009 to complete the last alterations to its legal system as required by the Directive.<sup>247</sup> Transposing the Directive was an enormous task. Most of the Directive is found in the General Law on the Recognition of EC Professional Qualifications (*Algemene wet erkenning EG-beroepskwalificaties*). The law lays down the most important provisions found in the Directive.

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<sup>247</sup> *Kamerstukken II* 2009/10, 32123-XIV, 197 (blg-63695), p. 2.

The general system is found in Chapter 2 of the General Law. What is striking is that the Directive has largely been taken over and many of the Directive's Articles are easily traced back to the Dutch Law. It appears from the Explanatory Memorandum to the General Law that most Articles of the general system have been transposed as a whole into the national law, although in different sequences.<sup>248</sup> For example, Article 11 of the Directive concerning the levels of qualification is found in its entirety in Article 9 of the General Law. Article 14 of the Directive concerning the compensatory measures has also been taken over entirely, only one paragraph being implemented through sectoral legislation.<sup>249</sup> The only big difference that can be found regards Article 13 of the Directive concerning the conditions for recognition. This Article has not been implemented in its entirety. Instead, it has been taken apart and implemented in Articles 5 through 8 of the General Law.

The professions falling under the system for automatic recognition are not found in the Law described above but in laws and regulations of the Ministries involved.<sup>250</sup> It is here that the arduous character of the Directive's implementation process becomes apparent. Since the Directive concerns all regulated professions, almost all Ministries were involved in its transposition.<sup>251</sup> The rules concerning these specific professions are laid down in sectoral laws.<sup>252</sup> Almost every Ministry had to bring its lower legislation in line with the Directive, or had to introduce new ministerial regulations.<sup>253</sup> This resulting in a number of ministerial regulations concerning the regulated professions of Articles 21 through 49 of the 2005 Directive.<sup>254</sup>

The way in which the Professional Qualifications Directive is implemented in the Netherlands is extremely important to get an idea of how the recognition process will take place. However, migrants from another Member State will not necessarily be looking directly at the law. Because of this, the Directive established in its Article 57 that every Member State needed to designate a contact point. In the Netherlands, the Nuffic has been appointed as the national contact point for the Directive.<sup>255</sup> Under the Directive's Article 57(a)(b), the Nuffic is tasked with providing information on recognition under the Directive and to help migrants obtain professional recognition.

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<sup>248</sup> See *Kamerstukken II* 2006/07, 31059, 3, p. 35 and further for a complete overview of the transposition.

<sup>249</sup> Article 14(3) second alinea Directive 2005/36/EC.

<sup>250</sup> R.V.A. Bishoen and I.M. Welbergen, *NtEr* 1 (2014), p. 11.

<sup>251</sup> *Kamerstukken II* 2009/10, 32123-XIV, 197 (blg-63695), p. 2.

<sup>252</sup> See *Kamerstukken II* 2006/07, 31059, 3, p. 16.

<sup>253</sup> R.V.A. Bishoen and I.M. Welbergen, *NtEr* 1 (2014), p. 11.

<sup>254</sup> For a full overview of the sectoral laws see Overheid.nl, 'Algemene wet erkenning EG-beroepskwalificaties: Wetstechnische informatie', [http://wetten.overheid.nl/BWBR0023066/geldigheidsdatum\\_06-08-2015/informatie](http://wetten.overheid.nl/BWBR0023066/geldigheidsdatum_06-08-2015/informatie) (last visited on 30 August 2015).

<sup>255</sup> *Kamerstukken II* 2009/10, 32123-XIV, 197 (blg-63695), p. 7.

In its implementation report created in line with Article 60 of Directive 2005/36/EC the Dutch Government states not to have had particular difficulties in transposing the Directive.<sup>256</sup> Nevertheless, it identified some general difficulties: the administrative procedures were too complicated and the minimum qualification requirements for the sectoral professions left too much room for interpretation.<sup>257</sup> These are just some of the reasons for which the Government welcomed the Commission's initiative to modernize the Professional Qualification's Directive.<sup>258</sup>

Through its reaction on the Commission Green Paper on Modernising the Professional Qualifications Directive the Dutch Government expressed its general support for the modernization of the 2005 Directive.<sup>259</sup> It nevertheless remained critical on some aspects of the modernization. The introduction of the European Professional Card (EPC) is an example of this. The Netherlands feared that the EPC was going to entail an even heavier administrative burden because the home Member State now became responsible for many of the administrative tasks the host Member State used to carry out, which could even lead to regulating a whole profession being more efficient than using the EPC.<sup>260</sup> The Netherlands proposed certain conditions for the EPC, which have been integrated into Directive 2013/55/EU.<sup>261</sup> The Member State opposed to the idea of the EPC being an actual physical card, which it was originally intended to be, and proposed to turn the EPC into a digital form that can be used by authorities through the Internal Market Information system.<sup>262</sup> When looking at Article 3(1)(k) of the consolidated version of Directive 2005/36/EC it is apparent that this wish was honoured.

The Government proved more open to the principle of partial access. It supported the principle's explicit codification in Union legislation, as opposed to only existing through case law.<sup>263</sup> However, it remained critical stating that it would not back partial access gradually granting access to the whole profession.<sup>264</sup> It thus pledged for the host Member State to remain capable of demanding compensation measures for a professional to gain full access, and for the professional involved not being allowed to carry the title awarded to fully qualified professionals.<sup>265</sup>

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<sup>256</sup> Ibid., p. 4.

<sup>257</sup> Ibid.

<sup>258</sup> *Kamerstukken II* 2010/11, 22112, 1213, p. 2.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid., pp. 4-5.

<sup>261</sup> R.V.A. Bishoen and I.M. Welbergen, *NtEr* 1 (2014), p. 12.

<sup>262</sup> *Kamerstukken II* 2010/11, 22112, 1213, p. 5.

<sup>263</sup> Ibid., p. 6.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid., pp. 6-7.

The application of compensation measures is not explicitly mentioned but nevertheless ensured in the modernized Professionals Qualifications Directive. It follows from Article 14(1)(a) of the consolidated version of the 2005 Directive that in the case of substantial differences the host Member State may request compensation measures. The grant of partial access in another Member State means that only one element of that State's regulated profession is approved. Logically, the full exercise of the profession is substantially different, so that compensation measures can be required. Article 4f(5) of the consolidated version of the 2005 Directive subsequently only allows the professional who is granted partial access to carry the home Member State title, and provides that this individual has to indicate the limits of their professional activities to their service recipients.

The 2011 Single Market Act called for a review of the Member States' lists of regulated professions.<sup>266</sup> Article 59(1) of the consolidated version of Directive 2005/36/EC subsequently calls for the Member States to submit to the Commission an updated list of regulated professions by 18 January 2016. The Article furthermore requires the Member States to justify the regulated nature of a profession, and to explain why they believe the requirements to the profession are non-discriminatory, justified by overriding reasons of general interest, and proportionate.<sup>267</sup> The Netherlands has taken this task to heart and has produced a National Action Plan in which it sets out to evaluate the requirements for regulated professions and to simplify or abolish them where possible.<sup>268</sup> Diminishing the number of regulated professions is important because reducing restrictions enlarges the group of potential professionals and stimulates mobility.<sup>269</sup> It is important for the Netherlands to modernize regulated professions, as it is one of the Member States already having a relatively small number of regulated professions.<sup>270</sup> To simplify or abolish requirements to regulated professions entails the benefit of the Netherlands becoming a more attractive economy because it is easier to get to work.

These last paragraphs attest to the Netherlands being enthusiastic about the 2013 modernization of the Professional Qualifications Directive. Although updating its national legislation will most likely be an operation just as considerable as the transposition of the 2005 Directive was,<sup>271</sup> the Netherlands can be expected to implement the Directive as fully as it did with Directive 2005/36/EC.

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<sup>266</sup> European Commission Green Paper – Modernising the Professional Qualifications Directive, COM(2011) 367 final, p. 7.

<sup>267</sup> Article 59(2)(3)(5) consolidated version Directive 2005 2005/36/EC.

<sup>268</sup> Nationaal actieplan gereguleerde beroepen, p. 1.

<sup>269</sup> *Ibid.*, p. 2.

<sup>270</sup> *Ibid.*, p. 9.

<sup>271</sup> R.V.A. Bishoen and I.M. Welbergen, *NtEr* 1 (2014), p. 15.

### 5.1.2 The European Qualifications Framework and the NLQF

The previous Chapters have shown that the EQF is a special Union instrument. It is the latest instrument the Union has created to facilitate recognition. Furthermore, it proves to be particularly progressive as it consists of eight reference levels able to classify any type of learning, be it in a professional or academic setting. Because the EQF is created via recommendation it has a soft law character. This undoubtedly has consequences for its implementation.

By establishing the Recommendation the Council and European Parliament set out to achieve a number of goals for the EQF. The Member States were, among others, recommended to use the EQF as a translation tool, relate their national qualifications systems to the EQF, and base their approach on learning outcomes.<sup>272</sup> The process of linking the national qualifications systems to that of the EQF was to be completed by 2010.<sup>273</sup> The Netherlands finished the referencing activities surrounding the EQF in 2011.<sup>274</sup> Nevertheless, implementing the NLQF is a process that requires constant reevaluation, and amelioration.<sup>275</sup>

The NLQF and the EQF differ slightly in objectives. Whereas the NLQF functions as a transparency and comparison instrument for Dutch qualifications and provides the basis for referencing Dutch qualifications to the EQF ones, the EQF is a meta-framework aimed at translating the different national qualification systems.<sup>276</sup> The NLQF itself covers every type of qualification in the Netherlands. Two types of qualifications can be distinguished under the NLQF. First of all, there are qualifications regulated by several Ministries that are generically classified in the levels of the NLQF.<sup>277</sup> This generic classification for example results in a Dutch Bachelor degree being placed at the NLQF level 6, and at the corresponding EQF level 6.<sup>278</sup> The second type of qualifications under the NLQF are those

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<sup>272</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, p. 3.

<sup>273</sup> Ibid.

<sup>274</sup> Report from the Commission to the European Parliament and the Council: Evaluation of the European Qualification Framework (EQF) – Implementation of the Recommendation of the European Parliament and the Council on the Establishment of the European Qualifications Framework for Lifelong Learning, COM(2013) 897 final, p. 4.

<sup>275</sup> S. Broek and B. Buiskool, Implementatieonderzoek naar het NCP NLQF, Ockham IPS, p. 5.

<sup>276</sup> K. van der Sanden et al., The referencing document of the Dutch National Qualification Framework to the European Qualification Framework, NCP-NLQF, p. 35.

<sup>277</sup> Ibid., p. 25.

<sup>278</sup> For an overview of the full generic classification of qualifications see NCP-NLQF, 'Schematisch overzicht generieke inschaling in NLQF en EQF van door de overheid

having civil effect on the labour market but not being regulated by Ministries, which are classified at the request of the bodies typically providing the learning programme leading to the qualifications at stake.<sup>279</sup>

Apart from the difference in objectives another prominent difference between the NLQF and the EQF relates to the levels described above. The EQF Recommendation established eight reference levels.<sup>280</sup> The NLQF adds one more level to the eight EQF levels. The so-called 'entry level' includes learning outcomes that are below the EQF level 1.<sup>281</sup> This level should not include overly complicated learning outcomes so that individuals are encouraged to continue with their education until they obtain the corresponding qualification.<sup>282</sup> Furthermore, the levels are ranked according to the "best fit" principle. This principle entails that qualifications under the NLQF are not required to fulfil all of the descriptions set for one level but are placed within the level where they best fit.<sup>283</sup>

Another of the EQF's recommendations is that the Member States designate national coordination points to support and guide the relationship between the qualifications framework created in light of the EQF and the EQF itself.<sup>284</sup> The implementation of the NLQF was delegated to the NCP-NLQF by the Ministry of Education, Culture and Science.<sup>285</sup> This organization is mainly concerned with establishing the level for the second type of qualifications not issued by the Ministries, providing information on the NLQF and EQF, and monitoring and evaluating the NLQF and its implementation.<sup>286</sup> It thereby plays an important role in keeping the NLQF up-to-date.

## 5.2 Implementing the Bologna Process

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gereguleerde kwalificaties', [http://www.nlqf.nl/images/downloads/NLQF\\_niveaus/NLQF-schema.pdf](http://www.nlqf.nl/images/downloads/NLQF_niveaus/NLQF-schema.pdf) (last visited on 30 August 2015).

<sup>279</sup> K. van der Sanden et al., The referencing document of the Dutch National Qualification Framework to the European Qualification Framework, NCP-NLQF, p. 25.

<sup>280</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, Annex II.

<sup>281</sup> K. van der Sanden et al., The referencing document of the Dutch National Qualification Framework to the European Qualification Framework, NCP-NLQF, p. 36.

<sup>282</sup> Ibid., p. 38.

<sup>283</sup> Ibid., p. 31.

<sup>284</sup> Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, [2008] OJ C111/1, p. 3.

<sup>285</sup> S. Broek and B. Buiskool, Implementatieonderzoek naar het NCP NLQF, Ockham IPS, p. 5.

<sup>286</sup> Ibid., p. 10.

The swift adaptation of the Bologna Declaration calling for the restructuring of higher education in Europe was greeted with much surprise.<sup>287</sup> The fact that higher education is not particularly open to radical change along with the ease with which the Bologna Declaration and its consequences were accepted made its adoption particularly surprising.<sup>288</sup> The surprise stems from the establishment of a higher education space by the EU being extremely complicated. Many spectators were surprised that the EHEA was created as swiftly as it was outside the EU framework.

The first radical change to be made to the Dutch education system in light of the Bologna Process came through the modification of several laws concerning higher education and research. The modification was necessary to provide for the introduction of the Bachelor/Master structure.<sup>289</sup> The implementation of this quintessential element of the Bologna Process meant that from September 2002 onwards it was possible to provide for Bachelor and Master courses at universities and universities of professional education.<sup>290</sup> However, a note should be added to the implementation of the Bachelor/Master structure. The 2015 Report on the implementation of the Bologna Process establishes that the Netherlands has not introduced the Bachelor/Master structure in its entire education system.<sup>291</sup> The main reason for this is that the Netherlands has a high number of students enrolled in programmes leading them to be qualified in regulated professions not following the Bachelor/Master structure.<sup>292</sup> Although the Netherlands was thus quick to introduce the Bachelor/Master structure it has not introduced this structure for *all* study programmes.

The ECTS, like the Bachelor/Master structure, had been included in the modification of the Dutch legal order from an early stage as well.<sup>293</sup> This resulted in the replacement of the old system with units of credit being immediate upon adoption of the law implementing the Bachelor/Master structure.<sup>294</sup> According to Articles 7.4 and 7.4a of the Law regarding Higher Education and Scientific Research every academic year is worth 60 ECTS amounting to 180 ECTS at Bachelor level, and 60 ECTS at Master level.

The Diploma Supplement is another element of the Bologna Process that plays an important role in facilitating recognition. As opposed to the Bachelor/Master structure and the ECTS, the Supplement was not immediately introduced in the Dutch legal order. However, it soon followed the 2002 Bologna Process implementations. On 23 December

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<sup>287</sup> K. Dittrich et al., 39 *European Journal of Education* 3 (2004), p. 299.

<sup>288</sup> Ibid.

<sup>289</sup> See *Kamerstukken II* 2001/02, 28024, 1.

<sup>290</sup> K. Dittrich et al., 39 *European Journal of Education* 3 (2004), p. 302.

<sup>291</sup> D. Crosier et al., *The European Higher Education Area in 2015: Bologna Process Implementation Report*, European Commission/EACEA/Eurydice, p. 50.

<sup>292</sup> Ibid.

<sup>293</sup> See *Kamerstukken II* 2001/02, 28024, 54.

<sup>294</sup> K. Dittrich et al., 39 *European Journal of Education* 3 (2004), p. 312.

2004 a law was adopted introducing the Supplement in Dutch higher education.<sup>295</sup> From 1 March 2005 onwards, higher education institutions have been obliged to grant the Diploma Supplement when issuing certificates of higher education.<sup>296</sup>

Like the other crucial elements of the Bologna Process, the Netherlands was again well in time when implementing its NQF (not to be confused with the implementation of the EQF, the NLQF). The Framework was certified and published on the Bologna website by February 2009.<sup>297</sup> In order for the partaking States to create a NQF in line with the EHEA Qualifications Framework a ten-step process had to be completed set out in the 2007 report by the Bologna Working Group on Qualifications Frameworks.<sup>298</sup>

The aim of the Dutch NQF is to first of all provide a clear overview of the level of qualifications while paying extra attention to ‘transfer, intake and lateral entry, and of the meaning of the qualifications for Dutch society, including the labour market’.<sup>299</sup> Furthermore, the Framework must also show how Dutch qualifications are compatible with the EHEA Qualifications Framework to realize an international understanding of Dutch qualifications.<sup>300</sup> The Dutch NQF revolves around the three cycles as instituted by the Bologna Process, and establishes every cycle’s exit level through the Dublin descriptors.<sup>301</sup> These descriptors signify what capacities students must have in order to complete the different cycles of higher education.<sup>302</sup> In essence, the system shows what is needed in the Netherlands to complete a cycle of higher education and what is required to gain access to the next cycle.

Implementation of the NQF is realized by the use of the instrument in practice by the Higher Education Institutions that will apply the NQF when granting or assessing diplomas.<sup>303</sup> The NQF, like the NLQF, furthermore requires constant updating due to the

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<sup>295</sup> Aanpassingswet invoering bachelor-masterstructuur.

<sup>296</sup> Article 7.11(4) Law on Higher Education and Scientific Research.

<sup>297</sup> Bologna Process, ‘National Qualifications Frameworks’, <http://www.ond.vlaanderen.be/hogeronderwijs/bologna/qf/national.asp> (last visited on 30 August 2015).

<sup>298</sup> Ibid.

<sup>299</sup> The Ministry of Education, Culture and Science, The Higher Education Qualifications Framework in the Netherlands, a presentation for compatibility with the framework for Qualifications of the European Higher Education Area, the Ministry of Education, Culture and Science, p. 6.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid., p. 8.

<sup>302</sup> See Joint Quality Initiative informal group, Shared ‘Dublin’ descriptors for Short Cycle, First Cycle, Second Cycle and Third Cycle Awards, Joint Quality Initiative, p. 2-3.

<sup>303</sup> The Ministry of Education, Culture and Science, The Higher Education Qualifications Framework in the Netherlands, a presentation for compatibility with the framework for Qualifications of the European Higher Education Area, the Ministry of Education, Culture and Science, p. 5.

changes made in education. This task is reserved for the Accreditation Organization – NVAO.<sup>304</sup>

### 5.3 Implementing the Lisbon Recognition Convention

Back in 2003 the Ministers of education of the States in the Bologna Process stressed the importance of the ratification of the LRC.<sup>305</sup> The Netherlands waited fairly long before ratifying the Convention. The first ratifications of the LRC took place in 1999.<sup>306</sup> The Netherlands did not sign the Convention until 2002, with the ratification and coming into force of the document not taking place until 2008.<sup>307</sup>

Article X.1 of the LRC states that the Convention's implementation shall be facilitated by a Committee especially established under the Convention, and by the European Network of National Information Centres on academic mobility and recognition (ENIC Network). The Committee was established under Article X.2(1) of the Convention, and consists of one representative of each Party. In order to realize the goal of implementation the Committee may adopt recommendations, declarations, protocols and models of good practice.<sup>308</sup> So far, the Committee has adopted several such measures.<sup>309</sup>

The Council of Europe and Unesco created the ENIC Network in 1994.<sup>310</sup> This network already had a pre-existing counterpart in the European Community created by the European Commission in 1984 called the National Academic Recognition Information Centres (NARIC Network).<sup>311</sup> The two Networks are closely related as to their objectives: the ENIC Network focuses on developing policy and practice for the recognition of qualifications under the LRC and its Contracting Parties, and the NARIC Network aims at

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<sup>304</sup> Ibid.

<sup>305</sup> Berlin Communiqué, "Realising the European Higher Education Area", Communiqué of the Conference of Ministers responsible for Higher Education, Berlin, 19 September 2003 p. 5.

<sup>306</sup> S. Bergan, in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014), p. 31.

<sup>307</sup> Council of Europe, 'Chart of signatures and ratifications', <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM=&DF=&CL=ENG> (last visited on 30 August 2015).

<sup>308</sup> Article X.2(5) Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>309</sup> See Council of Europe, 'The Lisbon Recognition Convention: The Convention Committee', [http://www.coe.int/t/dg4/highereducation/recognition/lrc\\_EN.asp](http://www.coe.int/t/dg4/highereducation/recognition/lrc_EN.asp) (last visited on 30 August 2015).

<sup>310</sup> Article X.1(b) Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

<sup>311</sup> P. Zgaga, in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014), p. 23.

improving academic recognition of both diplomas and periods of study in the Union, EEA and Turkey.<sup>312</sup> Since the late 1990s the two Networks have been cooperating closely in light of the LRC spirit.<sup>313</sup> In the Member States the ENICs and NARICs are the same organizations. To put it in Bergan's words: 'all NARICs are ENICs but some ENICs are not NARICs'.<sup>314</sup>

The department for the comparison of education (*afdeling Onderwijsvergelijking*) of the Nuffic has been appointed as the designated ENIC/NARIC for the Netherlands.<sup>315</sup> This organization is responsible for applying the LRC in practice. Depending on the goal of the request, Nuffic will assess which Dutch diploma is comparable to the foreign diploma to see whether there are substantial differences.<sup>316</sup> Subsequently, the organization will check the authenticity of the documents and previous recognition granted to a diploma from the same State, and makes a comparison of the foreign study programme with the Dutch programme granting access to the aimed profession.<sup>317</sup> It is important to note here that Nuffic merely has an advisory role and does not grant the final verdict on recognition, a role that is reserved for the authority requesting a validation of the diploma.<sup>318</sup>

The LRC's implementation is heavily reliant on its execution in practice. Furthermore, its Treaty status means that the instrument is applicable in its entirety.<sup>319</sup> Accordingly, only the LRC's principle of substantial differences is explicitly mentioned in Dutch law. More precisely, Chapter 7 Title 2 of the Law on Higher Education and Scientific Research concerns admission and the requirements needed for admission to a study programme, and is where the principle is found. Article 7.28(1) of that Law states that someone who has access to higher education in one of the countries party to the LRC does not need to fulfil the requirements for access to a higher education institution of Article 7.24. However, in line with Article IV.1 LRC the higher education institution can still demonstrate that there are substantial differences between the Dutch and foreign qualifications.

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<sup>312</sup> ENIC/NARIC, 'Welcome to the enic-naric website: about us', <http://www.enic-naric.net/welcome-to-the-enic-naric-website.aspx> (last visited on 30 August 2015).

<sup>313</sup> P. Zgaga, in S. Bergan and C. Blomqvist (eds.), *The Lisbon Recognition Convention at 15: making fair recognition a reality* (Council of Europe Publishing, Strasbourg 2014) p. 23.

<sup>314</sup> S. Bergan, 16 *Assessment in Education: Principles, Policy & Practice* 1 (2009), p. 43.

<sup>315</sup> Line Online Kennisomgeving Internationalisering, 'Erkenning in Nederland', <https://www.internationalisering.nl/diensten-en-expertise/notities-rapporten-en-onderzoeksverslagen/notities-rapporten-en-onderzoeksverslagen/erkenning-in-nederland/>.

<sup>316</sup> EP-Nuffic, 'Toepassing van de Lissabon Erkenningconventie', <https://www.nuffic.nl/diplomawaardering/buitenlands-diploma-in-nederland/wetgeving-toelating-hoger-onderwijs/lissabon-erkenningconventie/toepassing-van-de-lissabon-erkenningconventie> (last visited on 30 August 2015).

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> Article II.1(1) Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11.IV.1997, ETS no. 165.

Moreover, persons coming from another State party to the LRC are exempt from having to fulfil certain admission criteria granting access to certain Master programmes in the Netherlands.<sup>320</sup>

## **6. The Effects of Implementation: Recognition Lost in Translation?**

In the course of the Thesis the different dimensions and particularities of the recognition of qualifications have become apparent. The divide between professional and academic recognition resulting from different Community mandates has had repercussions for the coherence of the recognition mechanisms of Chapter Two. This Section will be dedicated to assessing whether this divide also has repercussions as to the coherence of the recognition mechanisms as implemented in the Netherlands' legal order and practice.

Chapter Five has shown how the different recognition mechanisms have been implemented in the Netherlands. Starting with the Union mechanisms, Directive 2005/36/EC has been implemented in the General Law on the Recognition of EC Professional Qualifications, and in sectoral laws concerning the professions granted automatic recognition. The Nuffic plays an important role in actually putting that legislation into practice.

Next, the NLQF has been established, and has linked all generic education levels to those of the EQF. The NCP-NLQF is the relevant organization putting the NLQF in practice and keeping it up-to-date. Nevertheless, the legal status of the NLQF is uncertain. The NLQF was adopted both by the stakeholders involved and at the political level, but its legal

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<sup>320</sup> Article 7.30d Law on Higher Education and Scientific Research.

status was not addressed,<sup>321</sup> and does not appear to be addressed yet. The lack of a clear legal status follows from the EQF being a soft law measure. However, establishing a legal status for the NLQF could be beneficial for the clarity of recognition in the Netherlands.

The Bologna Process' three cycle structure, ECTS, and Diploma Supplement have been implemented in the Dutch legal order through the Law regarding Higher Education and Scientific Research. The NQF linked to the EHEA Qualifications Framework poses the same difficulty as the NLQF: its legal status is uncertain due to the fact that it is an instrument allowing institutions to describe the level and learning outcomes in a manner that can be internationally understood and is not a legal document.<sup>322</sup> Nevertheless, it is an important element of the Bologna Process, its implementation and updating being ensured by the Accreditation Organization – NVAO.

The LRC is applicable as a whole in the Dutch legal order, its principle of substantial differences being implemented into the Law regarding Higher Education and Scientific Research. The Nuffic is the appointed ENIC/NARIC responsible for putting the LRC into practice.

Therefore, the professional recognition contained in the Professional Qualifications Directive finds its way into the Dutch legal order through the General Law on Recognition of EC Professional Qualifications and various sectoral laws. Academic recognition as ensured by the Bologna Process and the LRC is found in the Law regarding Higher Education and Scientific Research. Meanwhile the NLQF and NQF do not have legal status in the Netherlands, their soft law character being reflected at the national level.

It is clear that there is a professional/academic divide in the Dutch legal order as well. However, it remains to be seen if some coherence is ensured at the national level. The NLQF and NQF appear to make no connexion to either the General Law on the Recognition of EC Professional Qualifications or to the Law on Higher Education and Scientific Research. Nevertheless, the latter two laws are somewhat connected. When the General Law on the Recognition was introduced in 2007 it made multiple changes to pre-existing laws. One of the changes it instituted was to the Law on Higher Education and Scientific Research. Article 44 of the General Law introduced a new paragraph for Article 7.6(2) of the Law on Higher Education and Scientific Research. Article 7.6(1) establishes that if an institution offers a study programme aimed at preparing an individual for the exercise of a regulated profession, that institution should at least offer such individuals the opportunity of

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<sup>321</sup> K. van der Sanden et al., The referencing document of the Dutch National Qualification Framework to the European Qualification Framework, NCP-NLQF, p. 71.

<sup>322</sup> The Ministry of Education, Culture and Science, The Higher Education Qualifications Framework in the Netherlands, a presentation for compatibility with the framework for Qualifications of the European Higher Education Area, the Ministry of Education, Culture and Science, p. 5.

fulfilling the requirements the regulated profession sets. Article 7.6(2) of the Law on Higher Education and Scientific Research subsequently establishes that the requirements meant in Article 7.6(1) are those of the professions granted automatic recognition under Directive 2005/36/EC.<sup>323</sup>

Therefore, there is a link between the two Dutch Laws providing some coherence between the General Law on the Recognition of EC Professional Qualifications and the Law on Higher Education and Scientific Research, and thus somewhat reconciles the professional/academic divide. Unfortunately though, the link is too modest to realize coherence throughout the entire Dutch legal order.

Despite Article 7.6 the professional/academic divide perceived in the recognition mechanisms of Chapter Two remains similar in the Netherlands. The fragmentation that exists between *de facto* professional recognition and academic recognition by accumulation cannot be remedied upon implementation. Should a Member State seek out to make the transition between professional and academic recognition more gradual this would entail the creation of additional legislation. This is a highly unlikely situation, as its system for the recognition of qualifications would become substantially different from that of other Member States, thus inhibiting recognition. Furthermore, it should not be forgotten that the differentiation between professional and academic recognition comes from the Member States wanting to keep control over their education policies. The professional/academic divide and lack of coherence among the recognition mechanisms' implementations persists. It remains to be seen whether this has its effects in practice.

Three organizations have been appointed under the four mechanisms studied in this Thesis. The NCP-NLQF, NVAO, and Nuffic play an important role in providing information, keeping instruments up-to-date, and realizing recognition. The NCP-NLQF and the NVAO can be seen as similar-type organizations, as they are both concerned with implementing the corresponding international Qualifications Framework of the EQF and the EHEA. Next, Nuffic plays an important role in the recognition process under the 2005 Directive and the LRC. Therefore, Nuffic brings together and effectuates legislation concerning both Union professional recognition, and the Council of Europe and Unesco academic recognition. Nuffic somewhat bridges the gap between professional and academic recognition in the Netherlands. These three organizations are very well capable of realizing recognition for the mechanisms studied in the Thesis. In practice, it will be the case that one way or another, be it immediately or through additional measures, recognition can be achieved. In the end, the issue is not so much whether recognition is actually granted, but whether it could be granted in a simpler and more efficient manner.

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<sup>323</sup> See Article 21 Directive 2005/36/EC for an overview of the professions granted automatic recognition.

The recognition of qualifications as it now stands for the four mechanisms studied and their implementations is fairly complicated. It is here that the limitations of this Thesis need to be considered. This Thesis has discussed only the four most important recognition mechanisms applicable in the Member States. It has only looked at the implementation of these mechanisms and the national recognition cooperation initiatives of one Member State. The implementation and execution of the mechanisms most likely varies considerably per Member State due to differing perceptions and strategies regarding the Bologna Process.<sup>324</sup> Furthermore, other Member States are also highly likely to be part of cooperation projects for recognition as the Netherlands is in the Benelux.

Adding to this, there are numerous initiatives for ameliorating recognition initiated by different actors. An example is the European Area of Recognition developed under the Life-Long Learning Programme of DG Education. The EAR initiative has developed a manual aimed at tackling the difference in recognition practice and builds on the creation of the ENIC/NARIC Networks, the LRC, and the Bologna Process.<sup>325</sup> This attests to the EU continuing to work in the area of academic recognition. Similarly, the countries of the Bologna Process have recently adopted the Yerevan Communiqué. One of the goals they set themselves is to realize automatic recognition of qualifications throughout the EHEA by 2020.<sup>326</sup> Such goals have to be realized by enhancing the quality and relevance of learning and teaching, making systems more inclusive, and by implementing structural reforms.<sup>327</sup> However, the Yerevan Communiqué also sets the fostering of the employability of graduates throughout their working lives as a 'major goal of the EHEA'.<sup>328</sup>

Even when looking at just these two initiatives it becomes clear that the EU and Bologna Process continue to operate in a relatively separate way. Although the Bologna Follow Up Group has been strongly involved in the creation of the EAR Manual,<sup>329</sup> and the Commission is one of the EHEA parties, this budding relation is not enough as it continues to be limited in effect by being restricted to cooperation on soft law. Furthermore, Chapter Three has shown that the Commission has conflicting views when it comes to its own policy regarding higher education. As of now, the EU and the Bologna Process continue to blur the line between *de facto* professional recognition and academic recognition by accumulation mostly in parallel, and not enough together.

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<sup>324</sup> A. Veiga and A. Amaral, 12 *Tertiary Education and Management* 4 (2006), p. 289.

<sup>325</sup> Nuffic, European Area of Recognition Manual: Practical guidelines for fair recognition of qualifications, European Commission DG Education and Culture, p. 8-9.

<sup>326</sup> Yerevan Communiqué, EHEA Ministerial Conference Yerevan 2015, p. 1.

<sup>327</sup> Ibid, pp. 2-3.

<sup>328</sup> Ibid, p. 2.

<sup>329</sup> Nuffic, European Area of Recognition Manual: Practical guidelines for fair recognition of qualifications, European Commission DG Education and Culture, p. 7.

All in all, the recognition of qualifications is characterized by pluriformity and intricacy. At the national level, recognition is not necessarily lost in translation. The original manuscript and its translations are simply complicated. Before implementation the recognition mechanisms failed to create coherence across the board, which they continue to do upon implementation in the Netherlands. This because of the fact that the only link connecting the Dutch Laws and Frameworks together is that of Article 7.6 of the Law on Higher Education and Scientific Research. Organizations like the NCP-NLQF, NVAO and Nuffic somewhat remedy the professional/academic divide. However, coherence at the national level can only be truly ensured after coherence has been achieved in recognition mechanisms at the international level. In the EU, this can best be achieved by the actors in the Union and in the Bologna Process cooperating ever closer.

## **Conclusion**

This Thesis has shown that the recognition of qualifications has numerous dimensions. First of all, there is the basic distinction between professional and academic recognition. Next, several regional and international organizations, along with individual States have created the recognition mechanisms. Thirdly, States create bi- or multilateral instruments for recognition alongside or as a part of the broader mechanisms. Finally, the mechanisms discussed in this Thesis have all required implementing in national legal orders. This Thesis has discussed the four most important recognition mechanisms applicable in the EU and its Member States, thereby only presenting some elements of the vast area of the recognition of qualifications.

The pluriformity and intricacy of the recognition of qualifications as realized by the four recognition mechanisms stem from differing Union competences. This difference has led the areas of professional and academic recognition to develop separately through different organizations and at different speeds. Consequently, the recognition mechanisms lack coherence. This fragmentation is subsequently mirrored at the national level. Although the organizations implementing the recognition mechanisms play a prominent role in achieving recognition, the intricate and pluriform nature of the recognition of qualifications coming from the professional/academic competence divide leaves questions as to whether recognition could not be attained in a simpler, more efficient manner.

All in all, the recognition of qualifications is an area in need of simplification and clarification. However, the large number of States, organizations, institutions, cultures, and individuals concerned makes a quick fix impossible. Instead, long-term solutions gradually improving recognition are more likely to be successful. The lack of coherence stemming

from the professional/academic competence divide needs to be remedied to benefit recognition. First of all, simplification is to be achieved by ameliorating and building on existing recognition mechanisms as opposed to introducing new initiatives, which will only lead to increased disparity. Clarification should be achieved by, first of all, resolving the fragmentation existing within the European Commission. Only then can the institution assume a leading role in remedying the professional/academic recognition divide existing between the Union and the Bologna Process, which is essential to improving the coherence of the recognition mechanisms. Although crucial initial steps have been taken to achieve this goal, this trend will have to gain momentum for the recognition of qualifications to be on its way to efficiently enhancing the mobility of workers and students throughout the EU.

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## Annex I – Glossary of Core Terms and Abbreviations

### 1.1 Core Terms

Academic recognition: one of the two types of recognition used to recognize qualifications giving access to education. Consists of the two subtypes of academic recognition by substitution and by accumulation.

- Academic recognition by substitution: academic qualifications are recognized of an individual who goes abroad to study for a certain period within his or her course of study in the home State. The ERASMUS programme is an initiative for academic recognition by substitution.
- Academic recognition by accumulation: academic qualifications are recognized of an individual having completed one course of study and wishing to be granted access to a subsequent course of study. The Lisbon Recognition Convention and Bologna Process are initiatives for academic recognition by accumulation.

Professional recognition: one of the two types of recognition used to recognize qualifications giving access to the labour market. Consists of the two subtypes of *de facto* and *de jure* professional recognition.

- De facto professional recognition: professional qualifications are recognized for the purpose of an individual wanting to pursue an unregulated profession in another Member State. The free movement Articles in the Treaties grant access to such professions.
- De jure professional recognition: professional qualifications are recognized for the purpose of an individual wanting to pursue a regulated profession in another Member State. Directive 2005/36/EC regulates access to such professions.

Recognition mechanisms: term used throughout this Thesis to refer to the legal texts and documents observed. In particular they concern Directive 2005/36/EC, the European Qualifications Framework for lifelong learning, the Lisbon Recognition Convention, and the Bologna Process.

### 1.2 Abbreviations

DGs: Directorates General of the European Commission. The DGs are discussed in Chapter Three.

ECTS: European Credit Transfer System. The ECTS is discussed in Section 2.3, Chapter Three and Section 5.2.

EHEA: European Higher Education Area created under the Bologna Process. The Bologna Process and EHEA are discussed in Sections 2.3 and 5.2.

- NQF: national qualifications framework. The term is predominantly used throughout the Thesis to describe the Dutch National Qualifications Framework created in connection to the EHEA Qualifications Framework. The NQF is discussed in Section 5.2.

ENIC: European Network of National Information Centres on academic mobility and recognition created with the Lisbon Recognition Convention. The ENIC Network is discussed in Section 5.3.

EQF: European Qualifications Framework for lifelong learning created under the Union framework. The instrument is discussed in Sections 2.1.3 and 5.1.2.

- NLQF: Dutch Qualifications Framework created to link the levels in the Dutch education system to those of the EQF. The instrument is discussed in Section 5.1.2.

LRC: Lisbon Recognition Convention. Term commonly used to describe the Convention on the Recognition of Qualifications concerning Higher Education in the European Region discussed in Sections 2.2 and 5.3.

NVAO: *Nederlandse en Vlaamse Accreditatie Organisatie* – the Dutch-Flemish Accreditation Organization. This organization is discussed in Chapter Four.

NARIC: National Academic Recognition Information Centres created by the European Commission. The NARIC Network is discussed in Section 5.3.

## Annex II – Flowchart of the Recognition of Qualifications as presented in the Thesis

