The European Union and Dutch higher education: law and policy

Introduction

The way in which European education law has been viewed in the Netherlands since the first rulings of the European Court of Justice can be characterised by a statement made by Crijns at the end of the eighties:

“The Minister of Education and Science need to fear not so much EC legislators as Community judges, who often have unpleasant surprises in store for national policy-makers.”

The words ‘fear’ and ‘unpleasant’ are indicative of a way of thinking which is still current, in which Europe is seen as a threat. This way of thinking is also encountered in other Member States.

Judges are viewed as an unpredictable factor (the ‘surprises’). Influence is wielded not just by European judges but above all by the national courts, which have their own responsibility in enforcing European law. This will be illustrated below with a specific Dutch example.

The direction of educational co-operation has not become any more predictable for the Member States since ‘Maastricht’, and judicial ‘surprises’ remain possible. The Treaty on European Union is a political compromise, and that certainly applies in the field of education, resulting in vague and complex Treaty articles which leave a great deal of scope for interpretation (cf. Articles 126 and 127 of the Treaty on European Union).

In view of this background it is useful to examine the question of why and when European instruments in the educational field are legally binding. The answer to this question, if it is correct, will provide some clarification on the ‘surprises’ in store from the judges.

In describing the impact of law on the national legislative system, a broad distinction can be made between European regulations with a direct effect and the normative impact of European policy. An interaction takes place between the two.

Community law which has direct effect can be invoked by individual people before the national courts. This is particularly applicable for matters concerned with economic integration. It mostly involves the prohibition of discrimination in relation to the free movement of workers, services or freedom of establishment.

More subtle normalisation originates in European educational policy. The norms in the action programmes, for example, are intentionally kept more vague; innumerable reservations have been made. The norms here usually cannot be invoked before the courts. We are in the midst of the discussion on powers in European education policy: must education remain a national policy area and is the Community only allowed to do what can be tackled better at a supranational level (subsidiarity)? It has been pointed out by De Groof that the discussion on powers is characterised by ambiguity: on the one hand it is oriented towards minimising the powers of the Union while on the other responsibilities are being imposed on this same Union which touch on the core of national education policy.

The legal framework with regard to European co-operation in education is complex and it is - in my view too readily -
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assumed that European policy cannot have any legally binding consequences. A 'tour d’horizon' with regard to legal instruments is therefore needed. This will then be illustrated by a few practical examples relating to the Dutch situation, after which some concluding remarks will be made.

A closer look at European legal instruments in the field of education

Article 3 p of the Treaty on European Union provides for action by the Community which makes 'a contribution towards education and training of quality'. This objective is elaborated in Articles 126 (education) and 127 (vocational training) of the Treaty on European Union. We encounter specific elaboration of Community activities in the second paragraph of these articles.

With regard to the instruments of the Council in European educational co-operation, mention is made of 'measures' and 'incentive measures' (Articles 126 (4) and 127 (4) of the Treaty on European Union). The Treaty revisers have, I presume, intentionally not opted for clarity, because specific and binding legal instruments were opted for then such as 'Directives', 'Regulations' or 'Decisions' (Article 189 of the Treaty of Rome).

The position in the case of non-specific legal acts is generally such that norms often arise which do not have any legal force in the formal sense, as a result of problems with the legal basis or because of judicial enforceability. However, being binding is not the only relevant criterion. A legal act may have a consequence because it plays a role in the interpretation of provisions which are compulsory. The latter also applies to what are known as framework decisions. These are acts of the Council with a mixed Community and inter-governmental character. This relates to matters where the Member States doubt whether a power exists or where the intention is to indicate that no powers exist. Extensive use has been made of this specifically in the field of education.

All large action programmes of the Council which do not take the form of a particular legal instrument are taken as what are known as decisions sui generis. A decision sui generis has a legal basis in the Treaty of Rome and has come about according to the decision-making procedure indicated. The legal force of such a decision consists of a duty to co-operate: as soon as an individual addressee of the programme, a university or student, takes part, national policy and law should be adapted. Participation in such programmes is promoted by financial incentives from the European Community. A duty to co-operate of this kind may have consequences which can be invoked before national courts.

That which cannot be attained by regulation is partly accomplished using contracts/public-law agreements between the Commission and educational institutions. It is remarkable that this form of influencing of national education receives virtually no political and scientific attention, despite the fact that the consequences for national education may be huge. In my opinion the limit on what may be regulated is determined by the legal instruments (usually decisions sui generis) within which these contracts are concluded.

European co-operation in education in practice: some examples from the Dutch context

A policy has been conducted in the Netherlands since the mid-eighties which is based on great autonomy for institutions of higher education. The autonomy of the institution of higher education in the Netherlands is also great in comparison with other countries. The role of central government is limited to creating the general framework conditions. Higher education in this approach is controlled in a dialogue with the institutions on the basis of a two-yearly Higher Education and Research Plan (Hoger Onderwijs en Onderzoeksplan - HOOP).

The observation on autonomy for the institutions is important for the working-through of European law and policy. It is generally still considered at the European
level that the Member States have complete power over their own institutions. However, the danger of the autonomy of educational institutions being steamrollered is often concealed in the discussion on powers which is conducted at Member State level.

The autonomy of the institutions is obviously also of direct significance with regard to the freedom to conclude public-law agreements with the Commission. The freedom of will of contracting parties as a result of the relatively great autonomy of the Dutch educational institutions is of great importance here. A good exchange of information should take place between central government and institutions of higher education on European co-operation and the ensuing obligations. This is all the more true because in the event of failure to comply with European obligations it is central government which can be addressed by the Commission and where appropriate will be ruled against by the Court of Justice.

Impact of European law and policy on Dutch higher education: some examples

A specific Dutch example of what the 'duty to co-operate' entails and application of this duty by the national courts is the Van Ingen Scholten case.

This case concerned a problem which arose with regard to financial aid for students and the ERASMUS programme. The Dutch system of financial aid for students offers students entitlement to a basic grant and a public transport card (OV card), a possible supplementary grant - depending on the parents' income - and a possible interest-bearing loan which is tied to a maximum.

Van Ingen Scholten was a student of English who studied for six months in Newcastle (UK) under the Erasmus programme. The question arose with regard to the Dutch OV card as to whether this had to be compensated for on the basis of the ERASMUS decision now that Van Ingen Scholten could no longer make use of it.

The Ministry of Education and Science felt that no duty to pay compensation existed, even on the basis of a special provision in the Dutch Financial Aid for Students Act in which administrative powers with freedom of policy is laid down.

The national Financial Aid for Students Appeal Board (College van Beroep Studiefinanciering) to which the dispute was submitted, thought differently. In a judicial review, the Board looked at the question of whether the national administration had correctly applied the freedom of policy given in the Dutch Financial Aid for Students Act according to European law (the principle of Community allegiance and the ERASMUS decision) and came to the conclusion that it had not done so. The ruling was partly based on the fact that in Dutch administrative practice the annual OV card was clearly regarded as being part of the grant and that the financial compensation for the mobility costs was not sufficient. There is no higher appeal against this decision of the national court (the Board). The consequences of this decision from the financial point of view were massive for the Dutch state. A sum of around NLG 5 million - over 2 million ECU - is involved in the potential claims for refunds to be submitted by ERASMUS students.

The duties ensuing from European-Dutch co-operation are also found to be relevant with regard to national internationalisation policy. Participation in European action programmes is propagated by the Dutch government as part of internationalisation policy. However, the margins for a Member State conducting its own national internationalisation policy are becoming narrower as EC policy yields more rewards. It should even be ensured that the internationalisation policy does not conflict with obligations entered into in the European context. This question arises, for example, in an encouragement of the Dutch government to direct internationalisation efforts in particular towards co-operation with non-EU countries.\(^2\) One of the important arguments for this policy is that higher fees can be charged for students from outside the Union than for a Member State’s own students, something which is prohibited in relation to students from within the Community.

\(^2\) cf. HOOP 1996.
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Dutch developments which are significant for European educational co-operation: some examples

Nor is it difficult to find the reverse situation in which Dutch policy influences European policy. For example, it is to be expected that the new system of financial aid for students applicable with effect from 1 September 1996 will have a negative impact on student mobility. In the new Dutch system of financial aid for students, students are allocated their basic grant and any supplementary grant in the form of a conditional interest-bearing loan: the performance loan. The loan is only converted into a grant if a strict standard is complied with.

This “performance grant system” is not an encouragement to study abroad, because it is not an exaggeration to say that some risk of a delay in studies is run as a result of studying abroad. Delay in study in the new system may possibly lead to an interest-bearing loan and the danger of missing out on the whole grant and being left with a heavy interest-bearing debt from one’s studies. A decline in interest in mobility programmes can already be observed.

Another example of the connection between Dutch and European policy is that the new system of student grants makes special demands on the ‘studyable’ nature of the programme. It is not right and proper to saddle the student with an interest-bearing loan if the programme cannot be completed. Extra finance is therefore made available to the institutions in the Netherlands to make the programmes ‘studyable’. However, the requirement of ‘studyability’ of programmes must also be viewed at the European level. In brief, European student mobility must no longer result in any delay. The language aspect for example will play an important role in the European context in ‘studyability’. A lack of coherence between European and Dutch policy without doubt leads to disputes here with regard to financial aid for students.

Concluding remarks

The discussion on European co-operation in education is dominated by the distribution of powers between the Member States and the Community. This overlooks the fact that the institutions of higher education, and this certainly applies to the Dutch institutions, themselves have a large degree of autonomy. It is at the level of the institutions that the obligations arise to which central government is bound. Tension then quickly develops between central government and the institution level. The consequence may be an adverse effect on the autonomy of the institutions of higher education. That would be a shame, because a large part of the success of European co-operation in education was attained at institution level.

Viewed from the perspective of national government, the consequences of the ‘duty to co-operate’ from European integration are difficult to predict. The legal basis of the duty is even difficult for specialists to understand. This reinforces the sense of a European threat. However, the binding nature of European education law ought not to be the domain of a few lawyers but should be made comprehensible to every lawyer, policy-maker and not least the ordinary citizen.

The description given above with regard to developments in Dutch financial aid to students is in my opinion the most important factor determining the success of the European programmes for Higher Education in the future for the Netherlands. It is regrettable to have to note that the situation does not look promising. In the new Dutch system of financial aid for students a grant (donation) is available for the duration of the course. A number of years ago that was still the case for the duration of the course plus two years. In those two years students could allow themselves an ‘excursion’ abroad. A delay in studies nowadays leads directly to interest-bearing debt or an extension to interest-bearing debt. Compared with the last ten years, Dutch students borrow more, have greater debts and work more alongside their studies. In view of this situation, it is understandable that students will be less inclined to plunge into a foreign adventure for which a very high price soon has to be paid.

Prof. Dr. J. de Groof, Enkele notities omtrent het art. 126 en 127 van het Verdrag van Maastricht - Mogelijkheden en beperkingen voor het Europees onderwijsbeleid [Some notes on Articles 126 and 127 of the Treaty of Maastricht - Opportunities and limitations for European education policy], in: Europees Onderwijssamenwerking, Bestuurlijke, juridische en politieke mogelijkheden en beperkingen, [European Education Co-operation, Administrative, legal and political opportunities and limitations] Asser Round Table Session, August 1996.


Dr. F.J.H. Mertens, Pyramides of the platte vlak: over de beweeglijkheid van staten en organisaties, [Pyramids or the plane surface: on the mobility of states and organisations] in: Europees Onderwijssamenwerking, Bestuurlijke, juridische en politieke mogelijkheden en beperkingen, [European Education Co-operation, Administrative, legal and political opportunities and limitations] Asser Round Table Session, August 1996.

College van Beroep Studiefinanciering [Financial Aid for Students Board of Appeal], no. WSF 30412893, Van Ingen Scholten vs. Informatiebeheer Gruep. See also notes on this case of R.H. van Ooik, SEW, April 1995, pp. 292 - 298.

Ad Hofstede, Studiefinanciering nekt mobiliteit [Financial aid for students wrecks mobility], transfer, 3/10, June 1996, pp. 10-11.