Juridification of higher education governance in Europe: the case of the ESG

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Outline

1. Research questions
2. The role of law and legal thinking in the Bologna process
3. The case of the legal implementation of the ESG
4. Presentation of the initial findings of the analysis
5. Case study: ENQA membership review as a vehicle for juridification
6. What's next? The role of law in the evolution of the EHEA

Research questions

Topic: Domestic legal effects of Bologna policies and instruments

Focus: Legal implementation of the Standards and Guidelines for Quality Assurance in the European Higher Education Area (ESG), 2005, 2015

Research questions:

- What is the normative status of the ESG in national legislation?
- What are the domestic legal effects of transnational QA compliance mechanisms?
- What do these two sides of the coin tell us about the role of law and legal thinking in the Bologna process?
- What is the role of legal obligation in the future of the EHEA?

Law and the Bologna Process I: questions of legal obligation and compliance

- EHEA: soft political platform without legally binding effects?
- Presence of elements of juridicity (cf. Ravinet 2008, Garben 2010)
  - References to the EU constitutional framework (knowledge society, economic integration)
  - Ministerial communiqués and declarations: technically not legally binding (not enforceable), but in practice acquire quasi-legal status
  - Progressive formalization of review procedures following techniques similar to those used in the EU Open Method of Coordination
  - Cognitive elements: perceptions of legal effects and obligation („bindingness")

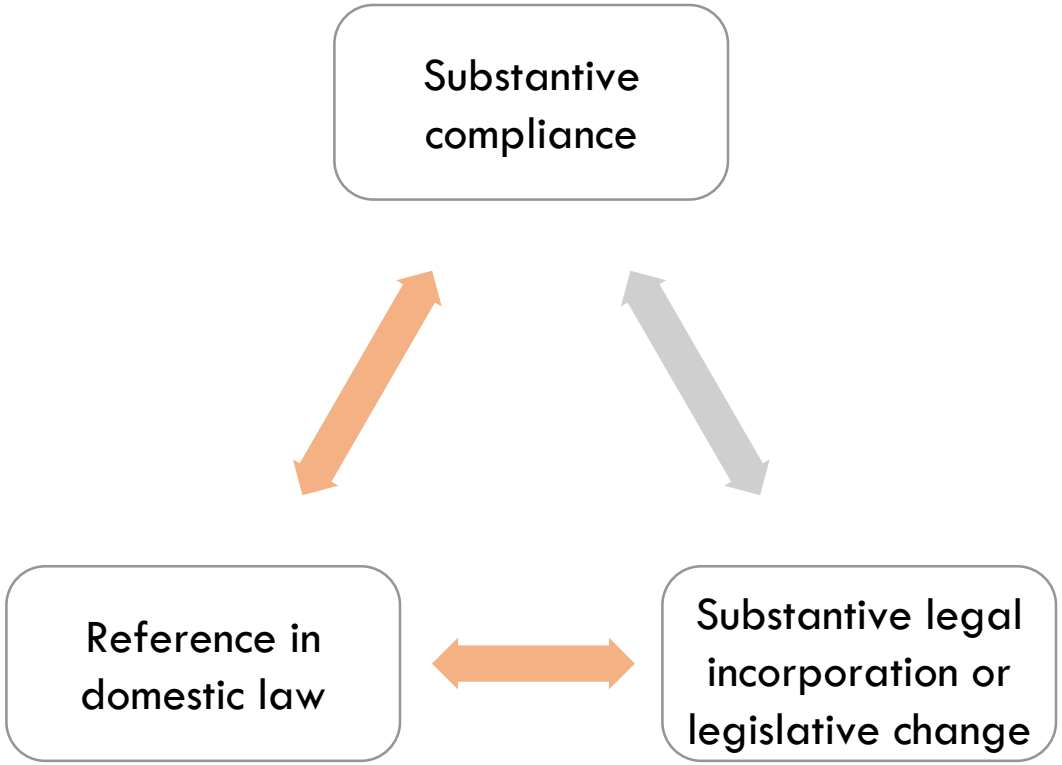
Law and the Bologna Process II: interaction between EU law and the Bologna framework

- Formal legal systems
  - EU constitutional framework: boundaries of extra-legal cooperation?
  - International treaty: Lisbon Recognition Convention
- Recent developments linked to QA:
  - Shift from macro-level structural reforms to qualitative aspects (e.g., student-centred teaching and learning)
  - Establishment of transnational QA agencies: compliance mechanisms
- Non-formal tools of compliance engendering legal thinking
  - Standards and guidelines – responsibility of implementation falls on institutions and agencies
  - Search for new forms of measurement of progress: substantial compliance becomes more important

Law and the Bologna Process III: dynamics of hard and soft law

- ***Judicialization***: a dynamic process of political construction in which judicial authority exerts influence over the normative structure of a given (policy) community (Stone Sweet 1999)
- ***Juridification***: "the spread of legal discourse and procedures into social and political spheres where it was previously excluded or was minimal" (Ginsburg 2008)
- ***Legalization***: defined by the parameters of *obligation*, *precision* and *delegation*
- ***Hybridity*** (of hard and soft law): recognition of legal effects of soft law by judicial or legislative bodies (Hervey 2010; Stefan 2012; Vaughan 2015)
- ***Cognitive judicialization***: legal framing and creation of sense of obligation through administrative means (Bilchner and Molander 2008; Vifell and Sjögren 2014)

ESG and legal implementation: the puzzle



The data: Legal incorporation of the ESG in national legislation in the EU-28

- Source of the data: national legal databases, legal acts in the field of higher education
- Cross-checking with Bologna stocktaking reports, EUA and ENQA reports on the status of implementation
- Why EU-28?

Preliminary findings I

- In total, 19 EU members (68%) have incorporated references to the European quality assurance system in their national legislation on higher education
- 9 countries (32%) mention the ESG explicitly in the text of the law
- 10 (35.7%) refer broadly to European guidelines, principles or criteria

  "common principles and guidelines of the European Higher Education Area" (Greece) or "respecting European standards and guidelines as well as international practice in the field of quality assurance in science and higher education" (Croatia)

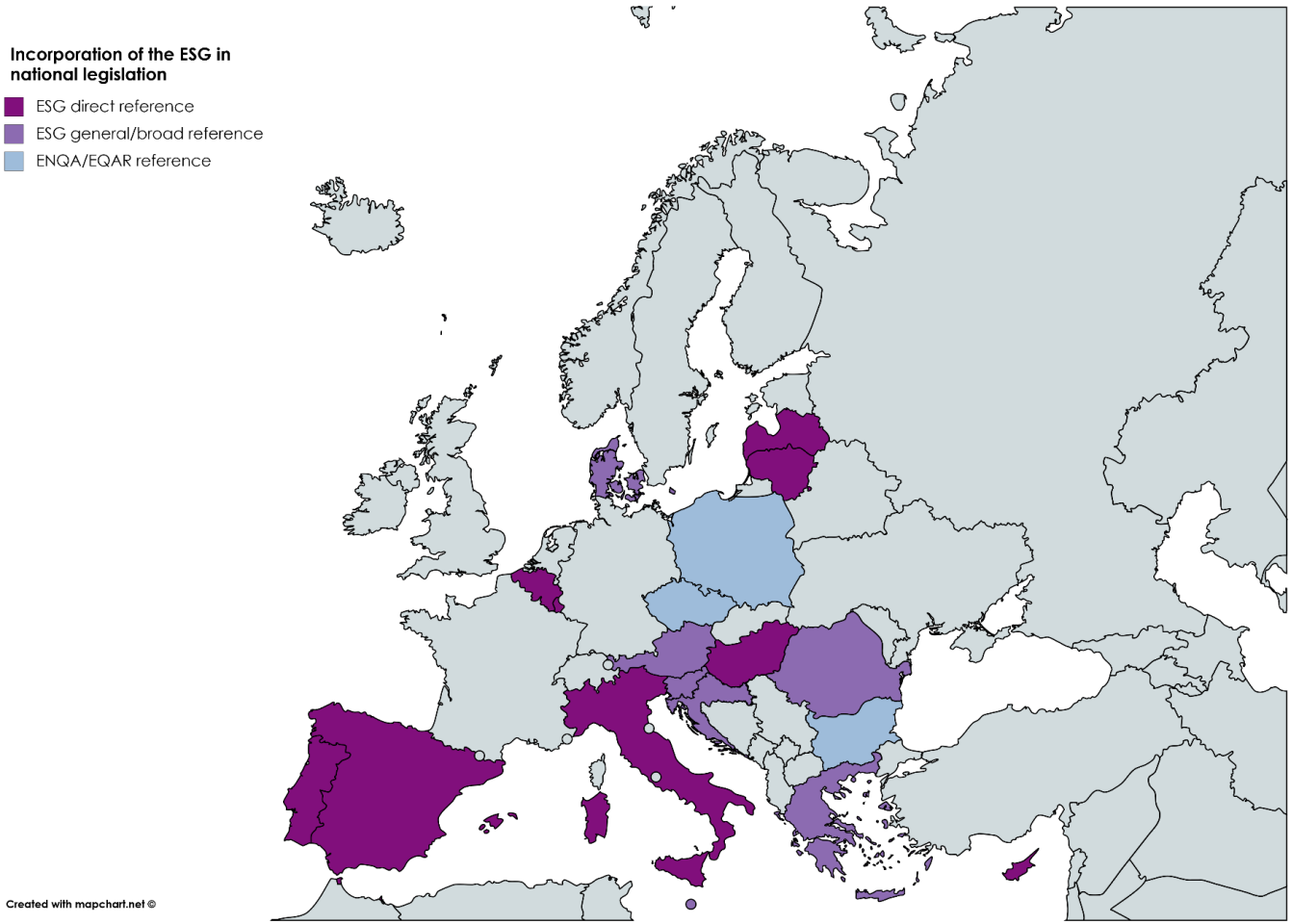
- Examples for different perceptions of obligation:
  - Linking ESG to the European Commission (Spain, earlier version of the law)
  - Linking ESG to ENQA (Cyprus)
  - Linking ESG to ministerial agreement (Italy)
  - Listing ESG under the label of "International Legal Acts" on the agency website (Lithuania)

Preliminary findings II

	ENQA membership status of accreditation agency	ESG direct reference in legal act	ENQA/ EQAR reference in legal act	European QA guidelines broad reference
Austria	Member		■	■
Belgium (Flanders)	Member	■		
Belgium (Wallonia)	Member		■	
Bulgaria	Member		■	
Croatia	Member		■	■
Cyprus	Affiliate	■	■	
Czech Republic	Affiliate		■	
Denmark	Member		■	■
Estonia	Member			
Finland	Member			
France	Member			
Germany	Member			
Greece	Member			■
Hungary	Member	■	■	
Ireland	Member			

	ENQA membership status of accreditation agency	ESG direct reference in legal act	ENQA/ EQAR reference in legal act	European QA guidelines broad reference
Italy	Affiliate	■		
Latvia	Affiliate	■	■	
Lithuania	Member	■	■	■
Luxembourg	No national agency	■		
Malta	Affiliate			■
Netherlands	Member			
Poland	Member		■	
Portugal	Member	■		
Romania	Member		■	■
Slovakia	Affiliate			
Slovenia	Member			■
Spain	Member	■	■	■
Sweden	Affiliate			
United Kingdom	Member			

Preliminary findings III



Preliminary findings IV

	Comprehensive QA system + full compliance	Comprehensive QA system + partial compliance	Partial QA system + partial compliance OR comprehensive system + no evaluation	QA system in p + no evaluation
ESG direct reference	Belgium (Flanders), Lithuania, Luxembourg, Portugal, Spain		Cyprus, Italy, Latvia	Hungary
ESG general reference	Austria, Croatia, Denmark, Romania		Malta, Slovenia	Greece
ENQA/EQAR reference	Belgium (Wallonia), Poland	Czech Republic	Bulgaria	
no formal reference	Estonia, Finland, France, Germany, Ireland, Netherlands, United Kingdom		Sweden	Slovakia

Cross-tabulation: legal vs substantial implementation (Scorecard no. 7 (stage of development of external quality assurance system – Bologna implementation report 2015)

Case study: ENQA Membership review of the Hungarian Accreditation Agency (HAC)

- ENQA membership criteria: compliance with ESG (grew stricter over time)
- 2011, change in the HE law in Hungary – curtailing the independence of the HAC
- Change in status: full member under review
- Consequence: amendment of the law, explicitly stating the independent status of the agency, inclusion of reference to ESG
- 2015: second round of external evaluation found HAC in compliance and re-admitted as full member
- Formalization of the ESG in the accreditation practice of the HAC – self-assessment questionnaire

Elements of judicialization in the ENQA membership review process

- Third-party settlement of disputes between the government and the agency through intensive mediation
- Formalization and legal framing of administrative procedures:
  - Reporting on compliance
  - Interpreting domestic legal acts in the light of ESG provisions
- Effects of naming and shaming:
  - Provocative question – what prompts legislative change? What is the role of the agency's formal procedure in the process?

What's next? Conclusions and an outlook on future trends

- Juridification in the EHEA as a two-way street:
  - perceptions of legality and obligation by MS
  - exercise of agency power over compliance

Factors to be considered in the future development of the Bologna Process

- Legal thinking still very influential when it comes to implementation
- New goals of the EHEA – interaction with existing international legal systems and rules
- Potential contradictions of substance and form: ESG as guidance versus compliance tool

Thank you for your attention!

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