

# Contents

<b>1 Introduction: An Interdisciplinary Analysis of the Mission of European Higher Education Institutions and Potential External Constraints</b> . . . . .	1
1.1 Introduction . . . . .	2
1.2 Examining EU Law Constraints on HEIs. . . . .	3
1.3 Historical and Theoretical Background . . . . .	5
1.3.1 The Original Non-economic Purpose of European HEIs. . . . .	6
1.3.2 The Republican University in the United States . . . . .	7
1.3.3 Gradual Commodification of European HEIs . . . . .	8
1.3.4 HEIs in the EU in the Context of European Integration Theory . . . . .	12
1.4 Conclusion . . . . .	15
References. . . . .	15
<b>2 The Position of Higher Education Institutions in EU Policy and Law</b> . . . . .	21
2.1 Introduction . . . . .	22
2.2 Locating HEIs in European Policy. . . . .	22
2.2.1 Supranational EU Policy on Education and Research and Development . . . . .	23
2.2.1.1 EU Education Policy . . . . .	24
2.2.1.2 Diploma Recognition . . . . .	25
2.2.1.3 EU Research and Development Policy. . . . .	26
2.2.1.4 Interim Conclusion on Supranational EU Policy. . . . .	27
2.2.2 EU Soft Law: The Lisbon/Europe 2020 Strategy. . . . .	28
2.2.3 The Bologna Process . . . . .	29
2.2.4 Interim Conclusion: The Location of HEIs in EU Policy . . . . .	30
2.3 Spill-over from Directly Applicable EU Law . . . . .	32
2.3.1 Union Citizenship. . . . .	33
2.3.1.1 Union Citizenship and HEIs. . . . .	33
2.3.1.2 The Infringement Procedures Against Austria and Belgium . . . . .	35

2.3.1.3	Interim Conclusion on Union Citizenship and HEIs . . . . .	37
2.3.2	The Free Movement Provisions . . . . .	38
2.3.3	The Competition Rules. . . . .	40
2.3.4	Public Procurement Law . . . . .	40
2.4	Conclusion . . . . .	42
	References . . . . .	43
<b>3</b>	<b>Higher Education Institutions and EU Competition Law. . . . .</b>	<b>47</b>
3.1	Introduction . . . . .	48
3.2	Application of EU Competition Law on HEIs?—The Notions of ‘Undertaking’ and ‘SGEIs’ . . . . .	49
3.2.1	The Notion of ‘Undertaking’ . . . . .	50
3.2.2	Anti-competitive Regulation of Markets by Member States . . . . .	52
3.2.3	SGEIs . . . . .	54
3.2.3.1	Terminology . . . . .	54
3.2.3.2	The Development of SGEIs . . . . .	56
3.2.3.3	The Application of Article 106(2) TFEU . . . . .	56
3.2.3.4	Interim Conclusion on SGEIs . . . . .	59
3.2.4	HEIs . . . . .	59
3.2.4.1	Higher Education . . . . .	61
3.2.4.2	Research . . . . .	63
3.2.4.3	Interim Conclusion on HEIs. . . . .	67
3.2.5	Interim Conclusion . . . . .	68
3.3	Consequences Resulting from the Application of EU Competition Law on HEIs . . . . .	69
3.3.1	Market Definition . . . . .	70
3.3.2	Article 101 TFEU . . . . .	73
3.3.2.1	Price Fixing . . . . .	76
3.3.2.2	Market Foreclosure or Disturbance . . . . .	81
3.3.2.3	Market Division . . . . .	83
3.3.2.4	Research Co-operation . . . . .	85
3.3.2.5	Limiting Markets . . . . .	86
3.3.3	Article 102 TFEU . . . . .	86
3.3.3.1	Exploitative Abuses . . . . .	88
3.3.3.2	Exclusionary Abuses . . . . .	90
3.3.4	Mergers . . . . .	92
3.3.5	State Aid Law . . . . .	94
3.3.5.1	Hidden Aid . . . . .	100
3.3.5.2	Public Funding of Higher Education and Research . . . . .	103
3.3.5.3	Aid Through Knowledge Transfer . . . . .	106
3.3.6	Interim Conclusion . . . . .	108

3.4	Conclusion .....	109
	References .....	110
<b>4</b>	<b>The Structure of Research Funding in Germany, the Netherlands and England (UK)</b> .....	<b>115</b>
4.1	Introduction .....	116
4.2	England (UK) .....	119
4.2.1	General Overview .....	120
4.2.1.1	Public Research .....	120
4.2.1.2	Non-public Research .....	122
4.2.2	Research in Public HEIs .....	123
4.2.2.1	Research as a Statutory Task of HEIs .....	123
4.2.2.2	Public Research Funding .....	125
4.2.2.3	Non-state Funding .....	128
4.2.2.4	Full Costing .....	130
4.2.3	Interim Conclusion on England .....	131
4.3	The Netherlands .....	132
4.3.1	General Overview .....	132
4.3.1.1	Public Research .....	133
4.3.1.2	Non-public Research .....	135
4.3.2	Research in Public HEIs .....	136
4.3.2.1	Research as a Statutory Task of HEIs .....	137
4.3.2.2	Public Research Funding .....	137
4.3.2.3	Non-state Funding .....	140
4.3.2.4	Full Costing .....	141
4.3.3	Interim Conclusion on the Netherlands .....	142
4.4	Germany .....	143
4.4.1	General Overview .....	144
4.4.1.1	Public Research .....	144
4.4.1.2	Non-public Research .....	147
4.4.2	Research in Public HEIs .....	148
4.4.2.1	Research as a Statutory Task of HEIs .....	148
4.4.2.2	Public Research Funding .....	149
4.4.2.3	Non-state Funding .....	152
4.4.2.4	Full Costing .....	154
4.4.3	Interim Conclusion on Germany .....	155
4.5	HEI Research in the Three Countries and EU Competition Law .....	156
4.5.1	Potential Tensions with Competition Law .....	157
4.5.2	Exemptions .....	161
4.6	Conclusion .....	161
	References .....	163
<b>5</b>	<b>Empirical Study</b> .....	<b>169</b>
5.1	Introduction .....	171
5.2	Methodology .....	172

5.2.1	Strategic Sampling .....	172
5.2.2	Interviews .....	174
	5.2.2.1 Interview Guide .....	174
	5.2.2.2 Access and Interview Situation .....	178
5.2.3	Ethics .....	180
5.2.4	Data Analysis .....	180
5.2.5	Interim Conclusion .....	181
5.3	England .....	182
	5.3.1 Awareness of Competition Law .....	184
	5.3.2 Economic Activity .....	184
	5.3.3 Full Costing .....	187
	5.3.4 Market Foreclosure .....	189
	5.3.5 Refusal to Enter into Contractual Relations and Preferred Partners .....	189
	5.3.6 Economically Unjustified or Discriminatory Contract Conditions .....	190
	5.3.7 Anti-competitive Use of IPRs .....	191
	5.3.8 Anti-competitive Research Co-operation .....	193
	5.3.9 Market Division .....	194
	5.3.10 Limiting Markets .....	195
	5.3.11 Commissioning of Research .....	195
	5.3.12 State Aid Through Staff Knowledge .....	196
	5.3.13 Exemptions .....	197
	5.3.14 SGEIs .....	199
	5.3.15 Interim Conclusion .....	200
5.4	The Netherlands .....	201
	5.4.1 Awareness of Competition Law .....	203
	5.4.2 Economic Activity .....	203
	5.4.3 Full Costing .....	206
	5.4.4 Market Foreclosure .....	208
	5.4.5 Refusal to Enter into Contractual Relations and Preferred Partners .....	208
	5.4.6 Economically Unjustified or Discriminatory Contract Conditions .....	209
	5.4.7 Anti-competitive Use of IPRs .....	210
	5.4.8 Anti-competitive Research Co-operation .....	211
	5.4.9 Market Division .....	211
	5.4.10 Limiting Markets .....	214
	5.4.11 Commissioning of Research .....	214
	5.4.12 State Aid Through Staff Knowledge .....	214
	5.4.13 Exemptions .....	215
	5.4.14 SGEIs .....	216
	5.4.15 Interim Conclusion .....	217

5.5	Germany	218
5.5.1	Awareness of Competition Law	220
5.5.2	Economic Activity	220
5.5.3	Full Costing	223
5.5.4	Market Foreclosure	224
5.5.5	Refusal to Enter into Contractual Relations and Preferred Partners	225
5.5.6	Economically Unjustified or Discriminatory Contract Conditions	226
5.5.7	Anti-competitive Use of IPRs	227
5.5.8	Anti-competitive Research Co-operation	228
5.5.9	Market Division	228
5.5.10	Limiting Markets	229
5.5.11	Commissioning of Research	229
5.5.12	State Aid Through Staff Knowledge	230
5.5.13	Exemptions	231
5.5.14	SGEIs	232
5.5.15	Interim Conclusion	232
5.6	Conclusion	234
	References	236
<b>6</b>	<b>Conclusion: Higher Education Institutions in the EU Between Competition and Public Service</b>	239
6.1	Introduction	240
6.2	European HEIs and EU Law	241
6.3	Competition Law Constraints on Research in Germany, the Netherlands and England	244
6.4	Constraints Faced by the HEI Sector	250
6.5	Tentative Alignment of Research Policy and State Aid Law as a Way Forward?	255
6.6	Towards an EU Level HEI Policy Beyond Economic Integration	258
6.7	Final Conclusion	263
	References	264
	<b>Annex: Interview Questions</b>	267
	<b>Index</b>	271