Frontiers: The Interdisciplinary Journal of Study Abroad

Volume 37, Issue 1, pp. 116-135
DOI: 10.36366/frontiers.v37i1.989
www.frontiersjournal.org

Two Key Legal Issues for US Study Abroad in the EU: Definition and Student Mobility, Not Immigration!

Gian Franco Borio[1], Ana Marina Dorismond[2], Stephen Robinson[3]

Abstract in English

This article deals with two key legal issues for study abroad (SA) in Europe, namely (i) the lack of a comprehensive and legislative definition of SA, and (ii) the need to shift from the concept of non-EU *student immigration* to that of student mobility. Italy is the only EU Member State to recognise and define SA, with the other 26 EU states in a legal limbo of not having SA recognised by the domestic laws of the host country Case studies of these challenges are presented for Ireland, Italy, and Spain. This article also discusses student immigration rules, which have become a bureaucratic obstacle to SA in the EU The authors propose a new and specific "SA entry visa" at the EU level. This proposal helps shift the legal framework from one legalistic and grounded in immigration to one more fit-for-purpose, i.e., centring student mobility.

Abstract in Italian

Il presente articolo affronta due problematiche legali chiave nel tema dei viaggi studio all'estero: la mancanza di una definizione comprensiva e legislativa di SA (studio all'estero), e la necessità di passare dal concetto di immigrazione di studenti non europei a quello di mobilità degli stessi. L'Italia è attualmente l'unico Stato membro della UE a riconoscere e definire lo SA, lasciando gli altri 26 Stati membri in una sorta di limbo legale, in cui le istituzioni di SA non sono riconosciute dalle leggi in vigore nei paesi ospitanti. Studi di queste casistiche e le relative difficoltà, sono qui descritte per l'Italia, l'Irlanda e la Spagna. Il presente articolo illustra le leggi di immigrazione degli studenti, che sono

1 Studio Borio, Florence, Italy
2 Proyecto Oceano, Madrid, Spain
3 Champlain College, Dublin Campus, Ireland

Corresponding author: Gian Franco Borio, gfborio@dinonet.it

Date of Acceptance: November 11th, 2024

diventate un ostacolo burocratico per i viaggi studio in Europa. Gli autori suggeriscono l'introduzione di un nuovo "visto d'entrata" a livello europeo per studenti esteri. Tale proposta aiuterebbe a spostare la natura giuridica della questione, da una legale e fondata sull'immigrazione a una più adatta allo scopo, ovvero incentrata sulla mobilità degli studenti

Keywords
EU legislation; immigration; student mobility

1. Introduction

US Study Abroad (SA) in the European Union (EU) does not benefit from a comprehensive and coherent legal framework, either at the Union level or in the Member States' domestic legislation. On the other hand, the number of SA students coming from the US to Europe is impressive (Institute of International Education (IIE), 2023) (Figure 1) and so is the presence of foreign university-level institutions and providers in many of the EU Member States[1]. The overall consequent economic impact of this "industry" for the EU has not been fully studied, while it is easy to perceive its direct and indirect relevance for the national economies[2]. Given there are a number of legal issues that SA in the EU needs to face and somehow resolve on a daily basis, the lack of a consistent EU-wide legislation certainly does not help.

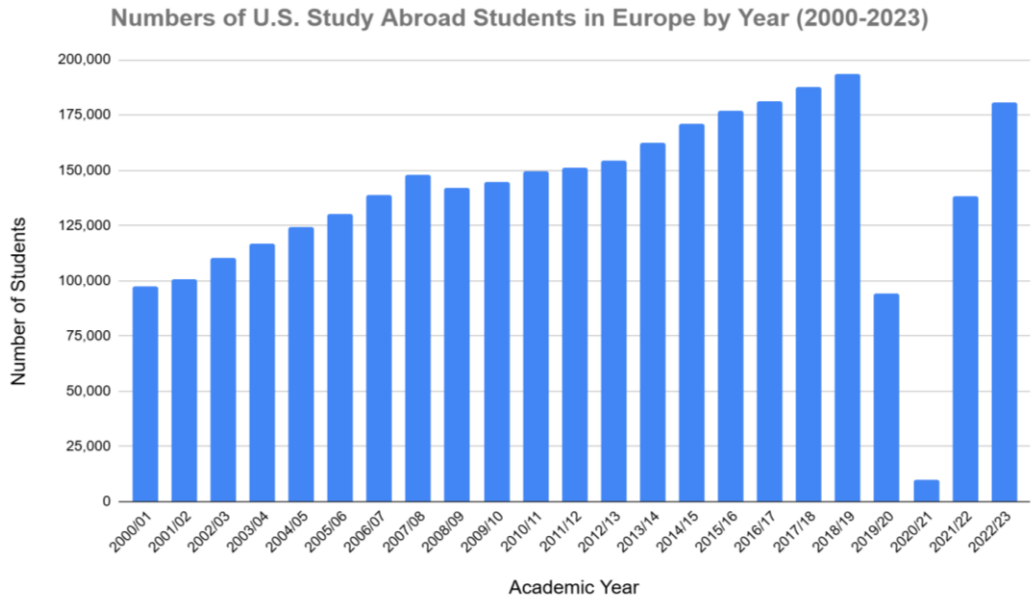
The purpose of this article is not to merely compile a list of such issues[3], but rather to identify and discuss the two most relevant and urgent issues, while providing a concrete solution for each to be brought to the attention of the competent EU and national legislators. Bringing to bear more than thirty years of professional assistance from the lead author to North American Programs primarily in Italy, as well as with a pan-European scope, we focus on two fundamental issues: 1) that of the "definition" of SA in Europe, both for its academic institutions and the people involved (students, faculty, staff), and propose the possibilities for embedding these definitions in EU-wide legislation; and 2) that of student mobility (i.e., study visas, permits of stay,

[1] Although no accurate count exists, the authors estimate that there are likely about 500 US programmes operating in Europe. This estimate comes from the membership of various country associations, in addition to the inclusion of known programmes in countries without associations.
[2] Studies and surveys on the economic impact of US study abroad in single countries have been performed in Ireland, Spain, the UK and Italy. Readers interested in finding out more can contact the respective national association of US SA institutions: asapireland.org (Ireland), apune.org (Spain), aasapuk.org (UK), and aacupi.org (Italy).
[3] Legal issues for SA in the EU would per se cover all aspects of such operations, and they cannot be dealt with in detail in a single contribution. To name some of them: internships, employment of local staff and faculty, secondment to the EU of US staff and faculty, international tax aspects, GDPR and now AI norms, US Federal legislation potentially applicable to SA programmes (Title IX, FERPA, ADA, Foreign Corrupt Practice Act, Title IV, Section 117, etc.), safety in workplaces, FATCA and anti-money laundering regulations, and many more!

multiple locations SA within the Union), which is often confused, and assigned to the heading of "immigration" from non-EU countries. Case studies from three different EU countries (Ireland, Italy, and Spain) will bring better understanding to specific legal and practical ramifications of the above issues.

FIGURE (1)

NUMBERS OF US STUDY ABROAD STUDENTS IN EUROPE BY ACADEMIC YEAR, 2000/01 TO 2021/02. DATA FROM IIE'S (2023) OPEN DOORS REPORT



2. Legal Definition of SA: Does It Exist in the EU?

Two pertinent definitions of education abroad (EA) and study abroad (SA) are offered by the Forum on Education Abroad, a 501(c) (3) non-profit organisation recognised by the US Department of Justice and the Federal Trade Commission as the Standards Development Organization for Education Abroad. The two definitions, differentiating EA from SA, need to be reviewed as first step. The Forum on Education Abroad (n.d.) defines EA as:

> education, including, but not limited to, enrollment in courses, experiential learning, internships, service learning, and other learning activities, which occurs outside the participant's home country, the country in which they are enrolled as a student, or the country in which they are employed as *personnel* (emphasis added)

Education abroad does not, in itself, result in a degree. SA, however, is perceived to be contained within the category of EA:

> (synonymous with, and preferred to, **Overseas Study** or **Foreign Study**) – A subtype of Education Abroad that results in progress toward an academic degree at a student's home institution. (Or may also be defined as a subtype of Off-Campus Study that takes place outside the country where the student's home institution is located.) This meaning

> has become standard among international educators in the US, and it excludes the pursuit of a full academic degree at a foreign institution. (In many other countries the term study abroad refers to, or at least includes, such study.) (The Forum on Education Abroad, n.d., bold in original)

Even though these two definitions are widely accepted by global SA stakeholders, they do not represent legal definitions in the proper sense. Namely, they do not have immediate, direct, and legally binding effects, unless expressly referenced in a private agreement or the like. Certainly, they do not have legislative or regulatory authority per se in the EU.

The European legislators (i.e., EU Parliament, Council and Commission) regulate entry and residence of non EU-nationals for the purposes of study and research, yet they have never addressed SA as such. The Council Directive (EU) 2016/801 (2016) of the European Parliament and of the Council of 11 May 2016 states the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. As it is customary, the Directive offers its own definitions of terms that become legally binding to the national legislators of the Member States and, as a consequence, anyone operating in such territories.

None of these terms fully identify SA in a comprehensive sense, including US SA students and institutions as we know them. However, they all make specific reference to institutions that are already recognised as such by one or more Member States according to their national legislation or practice; those in a legal position to ultimately grant a higher education qualification such as a degree or equivalent. In a word, the Directive gives explicit legal indications for regulating non-EU students (as well as researchers, trainees, school pupils, etc.) coming to EU universities and equivalent educational institutions, but not to any Study Abroad program established or managed or somehow linked to the US.

The wording of the 2016 Council Directive (EU) 2016/801 Directive (p. 30) appears very clear on all this, providing the following respectively in Articles 3, 11, and 13:

> ‘student’ means a third-country national who has been accepted by a higher education institution and is admitted to the territory of a Member State to pursue as a main activity a full-time course of study leading to a higher education qualification recognised by that Member State, including diplomas, certificates or doctoral degrees in a higher education institution, which may cover a preparatory course prior to such education, in accordance with national law, or compulsory training;

> ‘education establishment’ means a public or private secondary education establishment recognised by the Member State concerned or whose courses of study are recognised in accordance with national law or administrative practice on the basis of transparent criteria and which participates in a pupil exchange scheme or educational project for the purposes set out in this Directive;
>
> ‘higher education institution’ means any type of higher education institution recognised or considered as such in accordance with national law which, in accordance with national law or practice, offers recognised higher education degrees or other recognised tertiary level qualifications, whatever such establishments may be called, or any institution which, in accordance with national law or practice, offers vocational education or training at tertiary level[.]

The lack of a legislative definition of SA at the EU level opens the door for each Member State to legally regulate (or not!) any foreign institutions offering SA programmes in their territory. Consequently it creates the potential for discrepancies if not real discrimination. In most cases, the inevitable conclusion allows national legislators as well as local regulatory agencies and ministries to privilege domestic-oriented institutions vs. international/foreign educational operators, by introducing direct or indirect restrictions and unnecessary bureaucratic obstacles. To illustrate how this gray area creates legal confusion, we will present two clear examples. Ireland is an EU Member State that seems to exclude SA by making sole reference to “Irish-accredited institutions” in its legislation. On the contrary, Italy is in a situation wherein national legislation has acknowledged the relevance of SA for the country having introduced a dedicated SA legal framework.

3. Ireland Case Study: Challenges Posed by a Lack of Legal Recognition

Ireland is a popular destination country for US study abroad students, ranking 6th globally in the 2018/19 year and hosting 11,777 students. The slow post-COVID recovery has meant that in the 2022/23 year Ireland welcomed 9,780 US students, ranking 5th globally as a host country for US study abroad students (IIE, 2023). However, unlike the intra-EU Erasmus exchange program, US study abroad in Ireland does not enjoy any specific legal standing. Many US programmes operate either fully within the Irish university system (i.e., direct enrolment, exchange, or facilitated by a 3rd party) in which the Irish university provides the academic programme and frequently offers housing and student support services, except a few cases where a US institution or a third-party provider handles the latter. Several programmes operate in a hybrid model, where academic delivery and accreditation are shared by the Irish and US institutions. Some form of legal standing or recognition is often obtained by the

association with the Irish institution. But several programmes in Ireland operate their own academics in which accreditation comes from the US home institution. The latter two programme models, either hybrid or especially those operating completely outside the Irish educational system are excluded from the category of 'Irish accredited' educational programs. By consequence completely independent study abroad providers act as businesses in Ireland, as opposed to educational institutions.

The more specific Irish accreditation process by Quality and Qualifications Ireland (QQI) requires that the study programme must be a local degree-granting institution aligned to the National Framework of Qualifications (QQI, 2021), as opposed to a programme simply conferring credit gained for portion of the degree (e.g., a semester or year). Irish accreditation is not an option for short-term study abroad programmes solely dependent on US degree granting institutions. Further, in recent years ramifications of this have come about with new, well-meaning laws that seemingly exclude many study abroad programs. Again, such laws are written to apply to 'Irish accredited institutions' and not foreign educational institutions operating within Ireland. Lacking legal recognition, many lawmakers do not realise that a distinct US study abroad sector exists in Ireland.

One example of this was in 2014, when Ireland announced the development of the International Education Mark, or IEM (QQI, 2024). The IEM was intended to establish confidence, both nationally and internationally, in the quality of the Irish education system. Early versions of the IEM indicated that student visas for periods of greater than 90 days would only be issued to students studying on IEM-listed programs. However, only full academic year or longer programmes leading to an Irish award (i.e., Irish accredited) were eligible on the IEM listing, thus formally excluding the independent US study abroad sector in Ireland. This led several Irish study abroad leaders (those who would soon found ASAPI - The Association of Study Abroad Providers in Ireland) to come together to write a letter to both QQI and the (then) Irish Naturalisation and Immigration Service (INIS, now Immigration Service Delivery or ISD). Their letter outlined the state of the sector and how the changes would impact the ability to provide study abroad programs. The Immigration Policy Division responded in a letter stating,

> these US semester programmes and the link with reputable US universities represent an important cultural exchange and also make a valuable contribution to the earnings of the Irish educational services sector. They are also well established and build on the long and mutually beneficial relationship between Ireland and the United States in immigration matters. I can assure you that the position in relation to these programmes is essentially unchanged and will be accommodated by special immigration arrangements for semester courses (Irish

> Naturalisation and Immigration Service, personal communication, 2014).

So while in effect the sector is given 'special' permission to operate outside of the established system, there is still no official recognition for further issues.

Lack of legal recognition can also affect co-curricular activities such as internships, as was the case in 2022, when several Irish Labour Party Senators proposed a bill to amend the National Minimum Wage Act of 2000 (Houses of the Oireachtas, 2022). This amendment intended to require internships, traineeships, and work experience exceeding 30 hours in any 28 day period to be remunerated at least to national minimum wage levels. An exception to this regulation can occur if

> the worker is undergoing a programme of education and training leading to an award recognised by the Qualifications and Quality Assurance Authority of Ireland, and work of that nature is prescribed by the education and training provider concerned for persons undertaking the programme of education and training concerned. (Houses of the Oireachtas, 2022).

As Ireland is a relatively small country with good access to lawmakers, ASAPI invited one of the proposing Senators to a meeting to discuss this proposed amendment. An outline of US study abroad in Ireland was presented, including how students have been involved in unpaid internships and how this legislation would impact them. The Senator was previously unaware of this sector operating in Ireland but was sympathetic to the case, inviting a second written submission that could possibly influence the final legislative amendment. That subsequent request was an alteration of the text to read "leading to an award recognised by the Qualifications and Quality Assurance Authority of Ireland, or a *recognised education and training body in another jurisdiction*" (Senator M. Sherlock, personal communication, 2024, emphasis added). Currently the Labour Party is not part of the Irish government, and thus it seems that the amendment is somewhat stalled, yet there does appear to be an EU-wide crackdown on unpaid internships looming (European Commission, 2023) where the core issue of legal recognition for the SA sector will likely reoccur.

4. Italy Case Study: Dedicated Legislation for US SA

Italy is the top destination for US SA (IIE, 2024), and it represents a unique case where national legislation has expressly acknowledged the cultural, educational, and economic relevance of foreign SA programmes for the country. On January 14, 1999, Act n. 4 of the Italian Parliament was enacted:

its art. 2 (the "Barile Law"[4]) regulating foreign SA institutions having established a permanent educational presence in the Country and thereby affording them a precise and stable legal framework in which they may operate. An unofficial English version can be found on page 111 of AACUPI (2008).

The legal definition for a branch of university programme or "filiazioni" gave rise to an entirely new word in Italian legal language underscoring this important conceptual shift: "… branches in Italy of universities and institutions of higher learning at the university level located in the territory of foreign States and legally recognised there as non-profit entities…" (AACUPI, 2008, p. 111). The subsequent specific non-profit regime for all tax purposes applied to such "branches" provides that:

> a) their purpose and activities are off-campus study in Italy of subjects which are part of instruction or research programs at the respective universities or institutions of higher learning; [and]
>
> b) said instruction be offered only to students duly enrolled in the respective universities or institutions of higher learning.

The foreign educational institution must formally apply for the related "authorization" to the Ministries of University, Foreign Affairs and Home Affairs, providing a number of legal documents and information. The one-time registration can cost the institution up to 20,000 US dollars. Such authorization is deemed as granted after 90 days from filing if no objection or denial is issued by any of the above Ministries. It is estimated that about 150 foreign academic institutions have taken advantage of the Barile Law regime, primarily from the US but also from Canada, Australia, and the UK.

Over the years, the Barile Law has broadened its application by the Italian authorities to include the so-called "indirect" presence of foreign educational institutions in Italy. These include foreign universities without an independent study centre or personnel on the Peninsula, but who continue to send their students on a stable, i.e., recurring, basis to Barile-law authorised institutions (third-party local providers, schools or academies, as well as others). More importantly, the Barile Law has become the legal basis for additional legislative pieces that have been introduced by the Italian Parliament from time to time. This is a favourable legal environment for foreign SA in Italy overall and its main examples are the dedicated flexible rules on faculty fixed-term employment contracts[5] (art. 23.3 of Legislative

[4] The Law is named after Prof. Paolo Barile, distinguished scholar and professor of Constitutional Law at the Florence University of Law, who helped AACUPI in drafting the initial bill and to have it passed by the Italian Parliament.

[5] The Barile Law was key for subsequent legislation, and in one case allows for fixed-term employment contracts of up to three years in length, as opposed to the usual one-year contracts

Decree 81/2015, and art. 24.1 of Law Decree 48/2023), and the unique derogation to domestic immigrations rules for non-EU students stays up to 150 days (art. 38-bis of Legislative Decree 286/1998)[6]. In all such norms, the legislator has made a specific and explicit reference to the "filiazioni" as per the Barile Law, allowing a subsequent crystal-clear interpretation and implementation of the new rules. One conclusion to be drawn is that in Italy a dedicated SA legal framework has been created (and it works!).

5. US Study Abroad Does Not Equal Erasmus

Further complicating common legal understanding of institutionalised mobility frameworks, US SA players frequently mistake EU Erasmus, Erasmus Mundus and Erasmus+ (European Commission, 2024a) as something equivalent to SA, therefore looking at EU regulatory frameworks as possible guidance on a variety of legal issues. Indeed, certain contact points and similarities do exist between the two. Both deal with University-level students "going abroad" for a limited, normally predetermined period of time to attend courses at an educational institution recognised or at least accepted by their home campus, and which allow them to gain academic credits valid for their study path at their home campus. However, the Erasmus scope of application was and still is intended for students enrolled with EU Universities, who over the last nearly 40 years have been able to benefit from a unique educational and personal experience in another EU Member State, and now, may even do so outside the EU.

Drawing a more compelling comparison, there are a myriad of bilateral or multilateral collaboration and exchange agreements, MoUs, or similar contractual arrangements between US universities and colleges and EU Universities, leading to important study programmes on both sides of the Atlantic. Such programmes allow respective students to spend a semester or more at the partner educational institution while mutually recognizing academics such as assessment and completed coursework. In these cases we see a much closer scenario to US SA than that of Erasmus. Nevertheless, these exchange programmes still operate in a gray area in the EU without any basic and dedicated legal environment.

6. EUASA's Proposed Definitions

Some years ago, in an effort to provide the EU Parliament and Commission with a concrete basis to include SA in a future restatement of

in the Italian system. This allows for greater flexibility and a longer period over which to evaluate the candidate.

[6] Art. 38-bis of the Italian Consolidated Immigration Act is now more known in Italy as "the Borio Law", as the lead author personally had the honour and the onus of writing the initial bill that the Italian Parliament has then passed in December 2020.

Council Directive (EU) 2016/801 (2016), the European Association of Study Abroad (EUASA) discussed a possible legislative proposal, specifically intended to extend the conditions of entry and residence of third-country nationals for the purposes of study and research at a recognised SA institution in the EU.[7] Focus was concentrated on the notions of "study abroad institution", "student" and "researcher", for which definitions were envisaged, as follows:

> 'study abroad institution' means an educational establishment recognized by the host Member State to operate one or more university and/or academic-level courses intended for the students enrolled with a third-country university-level academic institution and that allow students from such third-country university-level academic institution to gain academic credits valid for their home academic course of studies, leading to a higher education qualification in that third-country, not necessarily recognized by the Member State, including diplomas, certificates or doctoral degrees as may be granted by that third-country university-level academic institution;
>
> 'student' means a third-country national of a third-country university-level academic institution who is admitted to one or more study abroad programs within the Union at one or more study abroad institutions for a period of time not exceeding one year;
>
> 'researcher' means a third-country national holding appropriate higher education qualification, which gives access to doctoral programs, who has been selected by a third-country university-level academic institution to conduct a research project within the Union at one or more study abroad institutions for a period of time not exceeding one year.

At the time there was scant debate over such definitions among the then EUASA members. Unfortunately, when in January 2020 time had come to approach the EU authorities and thus start a concrete conversation on this proposal, the COVID-19 pandemic suspended the effort. The above proposed definitions remain and can still represent a valid starting point to effectively discuss the basis for a comprehensive legal framework for SA and achieve, during the 2024-2029 EU legislature, the long-awaited EU regulatory environment for the SA sector.

7. Student Mobility to and Within the EU

Every US student who wishes to spend a period of study in the EU for more than 90 days needs to secure the "D" study visa to legitimately enter the territory of the host country where the SA programme operates. After doing so, and in order to legally remain on the territory for the whole duration of the

[7] This informal draft Directive has never been published. Please contact the corresponding author for any additional information.

study period, there may be additional local, i.e., domestic, regulations which in turn impose extra administrative obligations (European Union, 1985). The legal ramifications of such a regime may result in a very complex system, especially when combined with the need of taking an internship programme during the study period (de Lange, 2015). SA offices of the home institution must initiate early contact with the competent Consulate(s) in the US to agree to a mutually acceptable concrete procedure. Unfortunately, delays and insufficient or complete lack of communication often occur, and administrative procedures are also costly and increase complexity for individual applicants. Lastly, once settled in the host country, local bureaucracies may prove to be exhausting and apparently senseless. Among the worst cases arise whenever students need to move from one EU country to another, in order to pursue coursework with the same SA programme or a different provider.

The underlying legal rationale for such an unsatisfactory system is that SA students do not benefit from dedicated entry and stay rules. Despite obvious differences, these students are basically considered as, or very close to an, "immigrant" status in the EU[8]. The sole objective fact that they come and stay for a predetermined period of time, and for a transparent purpose (studying, not for moving on a potentially undefined period) should lead to differentiated norms and procedures. Again, they are unlike EU students on Erasmus student mobility schemes who simply come to benefit from a more flexible and tailored "mobility" system. Two case studies from two EU Member States can explain, in concrete terms, the ensuing complications that discourage or complicate SA for US students. The first is at the Spanish Consulates in the US and the second with the immigration domestic authorities in Italy.

8. SA Student Immigration to Spain: Between Progress and Chaos

In the case of Spain, legislation regarding non-European higher education students (degrees, master's, etc.) is in constant evolution, especially since 2018, while remaining within the legislative framework imposed by European Directives. These regulations have undergone various changes, many of them positive in attempting to encourage the entry of foreign student talent into Spain. Although, we shall see that sometimes they have had the opposite effect. In fact, in the last few years, there have been such tremendous, chaotic changes in the criteria for interpreting the current regulations, they even border on legal uncertainty. This, together with the great heterogeneity of requirements determined by Spanish Consulates in different countries, has

[8] For the definition of immigrants according to the very same EU Commission, please see the relevant glossary of the European Migration Network.

served as a significant deterrent or complication to US students in particular when aiming to study abroad in Spain.

Specifically in the United States, various internal operational problems in Spanish Consulates (such as labour strikes due to excessive workload or for improved salary conditions for officials) have caused (and still cause) delays in visa appointments resulting in several months of waiting time. This has made visas virtually impossible or at least very difficult to obtain for many American students. An additional problem is the aforementioned discrepancy in criteria among different Spanish Consulates in the US regarding the requirements for obtaining a student visa. These significant, deterrent effects led to a loss of (approximately) 10% of American students choosing Spain as their study destination between 2021 to 2023 (Asociación de Programas Universitarios Norteamericanos En España (APUNE, personal communication, 2024).

Fortunately, the change in Spanish *de jure* immigration laws since 2018/2019, which allowed students to first enter Spain on tourist visas, provided relief and a solution. No longer did students depend on the Consulate for visa processing prior to arrival (which, when processed in Spain, is referred to as "study stay"). Thus, Spain has mitigated the negative impact previously caused by the administrative chaos in its US consulates. In fact, between 2021 and 2023, Spain was the third most chosen destination by US students, after Italy and the United Kingdom, according to official data provided by the US Embassy/Consulate in Spain and Andorra as well as the Institute for International Education (2024). Furthermore, ICEX (2022) indicates, Spain maintains a desirable top position as a destination for American students' academic and language studies. In fact, the Instituto Cervantes (2021) reports that by 2060, the United States will be the second largest Spanish-speaking country in the world after Mexico.

However, the most recent legislation and its practical applications since mid-2023 have further complicated the issue, especially leading to concern regarding students' length of stay (i.e., the 90-day limit) in Spain. Before explaining this concern, it is worth summarising three relevant items of the (complex) Spanish legislation on this matter, which covers norms on possible internships and job placements for non-EU students.

The first item of legislation is the Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*). This law outlines the rights and freedoms granted to foreigners residing in Spain, emphasizing their social integration. It establishes that foreigners are entitled to most of the same rights as Spanish citizens, except for certain political rights and obligations related to citizenship

and national defence. The second item of legislation is the Royal Decree 557/2011, of April 20, which approves the Regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, following its reform by Organic Law 2/2009 (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*). This decree implements the regulations for Organic Law 4/2000, detailing procedures and conditions for foreigners' entry, stay, and integration into Spanish society. It includes provisions for various situations affecting foreigners, such as residency for exceptional circumstances and protections for victims of trafficking. The third item of relevant Spanish legislation is SEM 1/2023 Instructions on authorisations for stays for studies (*Instrucciones SEM 1/2023 sobre autorizaciones de estancias por estudios*). Issued by the General Directorate of Migrations, these instructions provide guidelines for authorizing stays for educational purposes in Spain. They cover aspects like eligible studies, application procedures, work authorization during studies, and mobility within EU member states. The instructions aim to facilitate international student mobility and ensure compliance with immigration regulations.

By these legislative items, Spanish law states that only those foreign students going to pursue official studies (i.e., with Spanish universities or recognised institutions, excluding private studies) can obtain their study visa while already in Spain (the term used is "study stay"). Indeed, the requirement for all other non-EU students, including those studying on non-official programmes such as US-operated study centres, is to obtain a Spanish Consulate study visa granted in their country of origin. Although this rule is applied with greater or lesser flexibility at different visa-issuing consulates, it is nonetheless active. The greater consequences of this modification will be assessed by the end of 2024.

Another notable change has to do with selective interpretative criteria of this current legislation that eliminates Spanish student visa eligibility for all non-official higher education programs. This change has completely disrupted the operation of such centres (including Master's centres created by universities themselves). In 2023, when this surprising change in legal criteria was implemented in Spain, it led to the collapse or serious economic losses of many Master's centres that had been offering their own (unofficial) degrees for decades, and the denial of thousands of visas that had already been requested. After numerous complaints and claims throughout the country from hundreds of affected universities and Master's centres, companies, and students, authorities finally rectified some aspects of the new interpretative criterion. Today, visas are granted to pursue both official and non-official higher

education, although only official ones offer a series of rights, such as working during studies. It is worth noting that this was not a change in the published regulations themselves, but rather in the internal or *de facto* criteria of its application. Previously more tolerant, it is now seemingly much more strict while still somewhat confusing in that it allows broad regulatory interpretation; those that may or may not benefit from the published rule.

In summary, from the beginning of 2024, a non-EU student coming to Spain to pursue official higher education can study, while also undertaking curricular internships up to 40 hours per week, extracurricular internships up to a maximum of 20 hours per week related to the subject of their studies, and up to 30 hours per week of work in a field other than the subject of their studies. These activities are granted legal status solely under the umbrella of their student visa, in other words, without having to apply for an internship permit or a work permit. On the other hand, a non-EU student coming to Spain for study abroad programmes (qualified as private higher education), in addition to studying, has the same rights as in the case of attending higher official studies, except for working up to 30 hours during studies (which remains exclusive for official higher studies).

In these ways Spain demonstrates its desire to attract and encourage foreign talents while protecting its own students, scholarship holders, and future Spanish employees. This Member State is fighting for a delicate balance, one that depends on the slow and heterogeneous consular activity and international migratory flows which may render this balance quite difficult, if not impossible.

9. SA Student Immigration to Italy: The End of a Nightmare

For many years, non-EU students coming to Italy for a SA programme whose duration exceeded 90 days have had to comply with different but intertwined legal obligations, in regard to their lawful entry to and stay in the country. These obligations include securing (i) the usual D study visa prior to arrival, to comply with the Schengen rules, and (ii) the Italian permit of stay, *Permesso di Soggiorno*, after arrival, just like any other immigrant wishing to remain on Italian soil for working, family or other reasons, to comply with the Immigration Consolidated Act[9]. Although this visa process has never been as volatile as the US Spanish Consulate case stated above, from time to time some complaints have been raised by the SA offices of the US institutions. This was mainly due to lack of communication from the Consulates and delays in

[9] This being Legislative Decree No. 286 of 25 July 1998, with all its subsequent amendments; the most recent version of it can be found on the website of the Normattiva, official gazette of the Italian Republic.

processing the visa applications. Since 2006, the real issue for students and their local SA programmes has been to secure the Italian permit to stay in a timely way.

The permit of stay was a multiple-step procedure that led to absurd levels of bureaucracy. First the applicant had to file a complex and abstruse "Postal Kit" and find a local Post Office for its processing where students often ended up in long lines leading to pursuant misunderstandings with the Post Office personnel. Then the Postal Office automated system was to set an appointment with the local Police authority on a random basis. In the very first days of this procedure, appointments were improbably scheduled on holidays such as December 25, January 1, and on other national holidays in Italy. Notwithstanding, it was at this next appointment that students had to be fingerprinted, only to find that the related machine was rarely available. A second appointment to collect the applicant's biometric data was then to be scheduled. The third and final appointment would have been to deliver the desired stay permit, only to find that in the meantime, so much time had elapsed that most students had completed their study stay; having left Italy altogether. What is more, the overall cost of the whole process was approximately 118 euros per application. Clearly this waste of time and personnel resources was not functional, nor was the frequently failed outcome. It was widely admitted that a number of US SA programmes reduced the length of their courses in Italy to less than 90 days precisely to avoid this nightmare! The competent Italian administrative authorities were sympathetic with students finding themselves in this bureaucratic maze, but they could do nothing to alleviate their situation. Legislative amendment of the applicable law alone could have changed the scenario.

At long last, in 2020 such an amendment came to pass, yet not without persistent advocacy efforts. The Italian Government and Parliament approved an addition to the existing immigration regulations, this now being art. 38-bis of the Immigration Consolidated Act[10].

In a nutshell, the permit of stay is now replaced by a much simpler "declaration of presence"[11], provided that (i) students belong to a SA Institution that has duly complied with the Barile Law requirements (see Section 4 above); and (ii) their stay in Italy does not exceed 150 days (this covers the vast majority of US SA Programs in Italy). Such a simplification was made possible thanks to the clear and unambiguous reference to the Barile Law institutions, which

[10] More specifically, Art. 38-bis was introduced by Art. 1, section 1, letter i-bis) of Law Decree 21 October 2020, n. 130, then converted into final law by Act 18 December 2020, n. 173.

[11] This will have to be accompanied by a "declaration of guarantee" issued by the hosting SA Institution, by which such Institution pledges to immediately inform the local Police authority should the personal situation of the student change, for whatever reason (early departure, change of local place of domicile, etc.).

allowed the Italian legislator to employ the exact parameters of application of the new law, thus preventing abuses and misuse. Needless to say that the new regime has given an additional boost to the popularity of Italy as a venue for SA programmes. Subsequently, student enrolment has increased and more and more programmes are now able to offer a full semester-long educational experience in the land of Dante.

10. The EUASA Student "Mobility" Envisaged Proposal

These three case studies have proven that the time has come for a definitive shift of EU norms on SA students, whose "motto" could be: "From Student Immigration to Student Mobility." Our demonstration shows how the "Immigration" approach is inaccurately attributed to third-country students wishing to spend a limited period of credit-bearing study in the EU; one that ultimately contributes to their home academic curriculum. In a globalised and interconnected world, the EU would do well to take initiative by introducing specific harmonised rules which can acknowledge the unique status of these students, providing for their smooth and flexible mobility within the territory of the Union. Several indicators point to the enormous academic, cultural, social, and economic advantages at stake, even though they remain difficult to quantify at this stage. When legal frameworks were introduced in Italy and Spain, sizable benefits were reaped for all hosting countries, home institutions, local players as well as students themselves.

EUASA members have discussed at length which concrete and reasonable solutions could be proposed that combine the undisputed needs for security and consequent border controls on one hand, with those creating a more favourable and amicable mobility environment for SA students (and in an even longer prospective, faculty and staff) on the other. While no definitive proposal has been formalised, there seems to be consolidated consent to introduce a dedicated type of visa for SA students as per EUASA's definition envisaged in Section 6 above.

In a nutshell, this new "D1" visa is easy to denominate, for example as a "SA study entry visa." As such, it would:

- Have a duration between three and 12 months maximum,
- Be also the "stay" permit document in the country whose Consulate has issued the visa, with no additional domestic obligation other than a simple notice or communication to the local Police authority, by electronic means and with a concurrent confirmation notice by the hosting SA institution;
- Allow free mobility to the holder within the whole Schengen Area during its period of validity, with no bureaucratic obligation in any other Schengen

country other than a simple notice or communication to the local Police authority;

- Be issued by the competent Consulate upon submission of appropriate documentation, according to a common list for all Schengen countries, leaving no room for differences or local variations left to the discretion of single Consulates. Required documents would include proof of (i) academic enrolment with the relevant SA program, (ii) adequate financial resources and insurance coverage, (iii) appropriate housing arrangements;
- Benefit from the progressive digitalization of the visa process (23), as "D1" visa applications would preferably be collected and submitted by the home University or College in the US and delivered in batch to the competent Consulate by electronic means; Consulates would, of course, retain the right to request personal appearance of single students for effective and serious security reasons.

Appropriate coordination and implementation would be necessary using parallel norms on entry to the territory of the Union that would presumably enter into force in 2025. One example is the new ETIAS pre-registration system (European Union, 2024) and the EES automated IT system for registering travellers from third-countries (European Commission, 2024b). It goes without saying that the above preliminary "idea" needs refining and, most of all, careful discussion at all EU levels. We strongly suggest here that such a proposal is a sound starting point for serious and concrete discussion on this delicate, but now crucial matter for the continued growth of US SA in Europe.

It should be noted that any proposed legislation would be general and not be specific to or Favor US study abroad. This could open up the legislation to use from other non-US and non-EU institutions wishing to set up operations in Europe, which may come with additional risks from non-legitimate operators. Formalizing non-EU institutional participation in law also runs the risk that EU educational institutions become more aware of the US SA sector, and they may want to act to protect their market; that is to send US SA students to EU institutions, and not US operated study centres.

11. Summary and Conclusions

With the exception of Italy, the legal limbo experienced by US study abroad in the EU has caused significant issues on many fronts, notably a lack of legally defined recognition from host countries and the European Union itself. This serious oversight has resulted in an opaque regulatory environment where national laws are passed that fail to take into account this vibrant and economically productive sector, and complications related to visa issuance by the host country increase.

This paper detailed critical legal issues with case studies from Ireland, Italy, and Spain, and proposes that a special 'student mobility' recognition be given to US study abroad within the EU. By removing the rigid 'immigration' regulations, and recognizing the sector as a vehicle for temporary 'student mobility' within the EU, it could allow American students smoother and more equitable access to European programs.

References

AACUPI. (2008). Thirty Years of History, Activities and Impact of North American College and University Programs in Italy. A publication of the Association of American College and University Programs in Italy, Prebys, P., editor, 191 pages. https://aacupi.files.wordpress.com/2017/09/30th_aacupi_eng3.pdf

Council Directive (EU) 2016/801. (2016). On the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) https://eur-lex.europa.eu/eli/dir/2016/801/oj

De Lange, T. (2015). Third-Country National Students and Trainees in the EU: Caught between Learning and Work. *International Journal of Comparative Labour Law and Industrial Relations, 31*(4), 453–472.

European Commission. (2023). MEPs call for new rules to avoid the exploitation of trainees across the EU. https://www.europarl.europa.eu/news/en/press-room/20230609IPR96206/meps-call-for-new-rules-to-avoid-the-exploitation-of-trainees-across-the-eu

European Commission. (2024a). Erasmus+: EU programme for education, training, youth and sport. https://erasmus-plus.ec.europa.eu/

European Commission. (2024b). Entry / Exit System (EES). https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/smart-borders/entry-exit-system_en

European Union. (1985). Convention implementing the Schengen Agreement of 14 June 1985. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42000A0922%2802%29

European Union. (2024). New requirements to travel to Europe: ETIAS. https://travel-europe.europa.eu/etias_en

Forum on Education Abroad. (n.d.). Glossary of Terms Relating to the Field of Education Abroad. https://www.forumea.org/glossary.html. Accessed March 18, 2024.

Houses of the Oireachtas. (2022). National Minimum Wage (Payment of Interns) Bill 2022 Amendment. https://data.oireachtas.ie/ie/oireachtas/bill/2022/57/eng/initiated/b5722s.pdf

ICEX. (2022). España es el país del mundo al que más estadounidenses viajan para estudiar. https://www.icex.es/es/quienes-somos/sala-de-prensa/sala-de-prensa/detalle.espana-es-el-pais-del-mundo-al-que-mas-estadounidenses-viajan-para-estudiar.news000202205

IIE. (2023). *Open Doors*. Institute of International Education. https://www.iie.org/research-initiatives/open-doors/

IIE. (2024). *Open Doors*. Institute of International Education. https://www.iie.org/research-initiatives/open-doors/

Instituto Cervantes. (2021). El Español: Una Lengua Viva. Informe 2021. https://cvc.cervantes.es/lengua/espanol_lengua_viva/pdf/espanol_lengua_viva_2021.pdf

QQI. (2021). National Framework of Qualifications. Quality and Qualifications Ireland. https://www.qqi.ie/what-we-do/the-qualifications-system/national-framework-of-qualifications

QQI. (2024). What is the International Education Mark? Quality and Qualifications Ireland. https://www.qqi.ie/what-we-do/quality-assurance-of-education-and-training/what-is-the-international-education-mark

Author Biography

Gian Franco Borio is an attorney at law and former CPA, Legal Counsel to the Association of American College and University Programs in Italy and to the European Association of Study Abroad (EUASA). He graduated with cum laude at the Law School of the Università degli Studi di Firenze (Florence), continued his graduate studies at SAIS of Johns Hopkins University in D.C., at the London City Poly, in Germany and in France. He served as Technical Counsel at the Italian Federation of EUCPAs (FEE) to the European Commission on Corporate Law, Tax Law, SMEs. He is a member of the Florence Bar, professional association of lawyers in Italy.

Ana Marina Dorismond is a Spanish lawyer, with a specialism in immigration, corporate and labour law. She is a graduate in Law from the CEU San Pablo University in Madrid; Master in Business Legal Advice from the IE of Madrid, Master in Labor Law from the CEF of Madrid, and specialist in Immigration Law from the Madrid Bar Association. She runs a leading firm in Immigration Law called Proyecto Océano, immigration lawyers, based in Madrid with associated offices in Brazil, Canada, Colombia, México, Portugal, Spain, Venezuela, the UK, and the US.

Dr. Stephen Robinson is Director and Professor with Champlain College's campus in Dublin, Ireland. Stephen is an environmental geoscientist with a PhD from McGill University in Montréal, Canada, and he previously held the Chapin Chair in Geology at St. Lawrence University in Canton, NY. He advocates for the perspectives of on-site study abroad staff in Europe, and for climate action in international education. He is the Chair of EUASA and board member of ASAPI.