

PART ON COMPETENCES IN EDUCATION

MODULE - LAW ON EU, FEDERAL, REGIONAL, MUNICIPAL COMPETENCES IN EDUCATION (BELGIAN INTERNSHIP)¹

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Introduction and Learning objectives

In this chapter, the student will study and understand:

- the historical overview of competences of the EU in the field of education
- the main Treaty articles and secondary legislation on competences of the EU in the field of education including Article 17 and 18 TFEU, Article 45 TFEU, Regulation (EU) No 492/2011 of 5 April 2011 on freedom of movement for workers within the Union, Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
- the public service exception is not an obstacle for migrating professionals in education

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- the CJEU reasoning in the Case C-149/79 Commission v Belgium; Case C-147/86 Commission v Greece & Case C-328/90 Commission v Greece; Case C-473/93 Commission v Luxembourg
- the division of competences in education in some EU member states
- the division of competences in education in some other countries

Chapter 1: European Union Competences in Education

1. Introduction

History shaped the educational system of a country. While some countries have devolved education policymaking to regional authorities, others still have centralized education policymaking.²

Educational policy is also a politically sensitive area in the European Union. School curricula remain outside the reach of the EU policymakers. However, the EU is increasingly involved in setting targets for the member states³ while the Court of Justice of European Union (former European Court of Justice (ECJ) established in a series of cases the boundaries of education policymaking by the Member states. In Case C-73/08 Bressol⁴ the CJEU citing the previous case-law recalled that: whilst European Union law does not detract from the power of the Member States as regards the organisation of their education systems and of vocational training – pursuant to Articles 165(1) and 166(1) TFEU – the fact remains that, when exercising that power, Member States must comply with European Union law, in particular the provisions on the freedom to move and reside within the territory of the Member States.⁵ The rules of the Member States must comply with European Union law and, in particular, the principle of non-discrimination on grounds of nationality.

² EACEA, The structure of the European education systems 2015/16, Schematic diagrams, 2015, http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-EUR/ViewPublication-Start?PublicationKey=ECAL16001

This report provides an overview of the structure of 42 education systems in Europe for 2015/16 for the five education levels: early childhood education and care, primary and secondary education programmes, post-secondary non-tertiary programmes, and the main programmes offered at tertiary level.

³ McMahon, Education and Culture in European Community Law, European Community Law Series, No 8, (Athlone Press, 1995), Part I.

⁴ Case C-73/08, Bressol and Others, Chaverot and Others v. Gouvernement de la Communauté française, Judgment of the Court (Grand Chamber), 13 April 2010.

Following the significant increase found in the number of foreign, and especially French, students in certain university courses, the French Community adopted a decree introducing a restriction on the number of non-resident students who may enrol. Several students affected by this restriction brought proceedings before the competent courts, which referred the problem to the Belgian Constitutional Court. The latter put questions to the Court of Justice on the interpretation of the *principle of non-discrimination* on the ground of nationality (Article 18 of the TFEU) and of *the freedom of movement for citizens of the Union* (Article 21 of the TFEU), in conjunction with the *provisions on the mobility of students and trainees* (Articles 165 and 166 of the TFEU).

In its judgment the Court reminds that Article 21(1) TFEU provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

The case-law makes clear that every citizen of the Union may rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope *ratione materiae* of European Union law, those situations including the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States. In addition, it is apparent from that case-law that that prohibition [of discrimination] also covers situations concerning the conditions of access to vocational training, and that both higher education and university education constitute vocational training.

Summing up the Court finds that the legislation at issue creates a difference in treatment between resident and non-resident students. According to well-established case-law, such a difference in treatment constitutes indirect discrimination on the ground of nationality, which is prohibited by the Treaty, unless it is objectively justified.

⁵ Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-6849, paragraph 70, and Joined Cases C-11/06 and C-12/06 Morgan and Bucher [2007] ECR I-9161, paragraph 24

Original Community Competence in Education

The 1957 Treaty establishing the European Economic Community (or the Treaty of Rome) mentioned only vocational training, identifying it as an area of Community action in order to form the common agricultural policy, but did not mention education at all. Initially, the European Community did not possess any express powers in the sphere of education, apart from vocational education. The Community's original powers in the sphere of education existed only in so far as they advanced the Community's economic objectives.

Therefore, following the Treaty of Rome the Member States retained jurisdiction over general education subject only to the application of certain Community principles, the exercise of which became the means by which the Community expanded its powers in the education systems of the Member States prior to the coming into force of the Treaty of the European Union in 1992 (or the Maastricht Treaty).

Over time CJEU exercised the Community's competencies in the education-related sphere by application of a variety of the Community's legal principles in the common market including the principles of:

- freedom of movement,⁶
- non-discrimination,⁷
- the common vocational training policy.⁸

The CJEU interpreted and applied many of the above principles over many decades thereby expanding the Community's remit in education considerably.

However, it became clear in time that mobility of workers in the host Member State would not materialize unless the rights of migrant workers and their families to integration and broadly based social and cultural rights were not only expanded and vindicated by the CJEU but also provided for in binding legislation.

Also, the Treaty establishing the European Community (Nice consolidated version) provided for additional instruments to be elaborated by the EU agencies in order to support such a mobility. Thus, Article 40 EC (ex Art 49 EEC) envisages that the Council should adopt further measures which would facilitate the freedom of movement of workers along with existing rights under the freedom of movement for workers concept.

Therefore, Art 40 became the operative provision under which most of the secondary

⁶ Joined cases C-11/06 *Rhiannon Morgan v Bezirksregierung Köln* and C-12/06 *Iris Bucher v Landrat des Kreises Düren*, [2007], ECLI:EU:C:2010:181.

The Court finds that the condition laid down in German law subjecting the award of education grants to a requirement of continuation between studies pursued abroad and those pursued previously for at least one year in an establishment in Germany infringes the freedom of movement of Community citizens guaranteed by Article 18 of the EC Treaty

⁷Case 293/83 *Françoise Gravier v City of Liège*, [1985], ECLI:EU:C:1985:69.

The ECJ comes to the conclusion that the imposition on students who are nationals of other Member States, of a charge, a registration fee as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the [EEC] Treaty.

⁸ Cases C389/87 and 390/87 *Echternacht and Moritz v Netherlands Minister for Education and Science* [1989] ECR 723.

The Court finds that the equal treatment in the matter of education which the children of Community workers have under Article 12 of Regulation No 1612/68 extends to all forms of education, whether vocational or general, including university courses in economics and advanced vocational training at a technical college. Assistance granted to cover the costs of students' education and maintenance is to be regarded as a social advantage to which the children of Community workers are entitled under the same conditions as apply to the host country's own nationals.

legislation giving effect to the freedom of movement of workers under Art 39 TEC (ex Art 48 EEC) was brought about.

Among such secondary legislation are a number of important regulations, directives and decisions of the CJEU including **Council Regulation 1612/68**⁹ which further facilitated the free movement of migrant workers within the Community.

Council Regulation 1612/68 EEC (the Regulation) extended not only to rights referring:

- to entry and employment
- but also to provisions relating to 'other working conditions'.

It safeguards *both the migrant worker and his family from discrimination and referred to all categories of education.*

However, the Regulation did not make any express provision for those who travel to another Member State exclusively for study purposes.

The Regulation is divided into three Titles which are concerned with:

- (i) Eligibility for Employment (Arts 1-6);
- (ii) Employment and Equality of Treatment (Arts 7-9) and
- (iii) Worker's Families (Arts 10-12).

The first to benefit from the protection of the Regulation was the migrant worker himself/herself provided he or she was a Community national. Article 7(3) of the Regulation provided that workers, who are non-nationals, shall, under the same conditions as nationals, have access to training in vocational schools and retraining centers. Article 7(2) of the Regulation provided that the migrant worker should receive *'the same social and fiscal advantages'* as nationals.

Article 12 of the Regulation deals specifically with education and guarantees to the children of migrant workers in the host country equal access to its educational institutions on the same grounds as nationals provided they are residents.

Article 12 at para 1 provides: 'the children of a national of a Member State shall be admitted to the state's general educational, apprenticeship and vocational training courses under the same circumstances as the nationals of that state, if such children are residing in its territory.'

The case of *Matteucci v Communauté Française de Belgique*¹⁰ established that Art 7 of the Regulation must be read so as to ensure that a Member State which has mutually agreed bilaterally with another Member State to grant educational scholarships to the latter's nationals must accept in the definition of such nationals those Community citizens from other Member States even when the inter-state agreement pre-dates the EEC Treaty.

Council Regulation 1612/68 facilitated the Community expansion in education which was further progressed by **Council Directive 68/360/EEC**¹¹ and **Directive 2004/38/EC**¹² of 29 April 2004.

⁹ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

¹⁰ Case 235/87, *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, [1988], ECLI:EU:C:1988:460, para 23

¹¹ Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families

¹² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Directive 2004/38/EC (the Directive) amended Regulation 1612/68 and repealed nine existing Directives. The Directive provides that all citizens of the Union have the right to move and reside in the territory of another Member State as workers or students if they have sufficient resources not to become a burden on the social assistance system of the host Member State.

Although the Directive repealed and replaced Art 10 and 11 of Regulation 1612/68/EC, it did not repeal or amend Art 12 thereof, on the right of access to the educational system. Article 12(3) of the Regulation provides that the right of residence of a Union citizens' child who is enrolled at an educational establishment, for the purposes of study there, or of the parent who has actual custody of the child, is not affected by the death or departure of the Union citizen.

Further to Regulation 1612/68 the **Council Directive 77/486/EEC**¹³ was adopted on the education of migrant workers' children in 1977. This Directive, which *gives rise to the first binding Community policy obligation in education*, was an important step in the emergence of a Community policy in education.

The Directive makes provision for special educational support for the children of migrant workers in the Community. On transfer to the host Member State, such children are given a right to additional teaching to assist them in acquiring the language of the host country.

For its part, the host country, in accordance with its national circumstances and legal system, must adopt suitable measures to promote the teaching to such children of the language and culture of their state of origin.

In addition, this Directive became a basis for a variety of educational programmes which have made an important contribution to educational initiatives and to student and teacher mobility throughout the Community such as the Socrates and Leonardo Da Vinci programmes.

Furthermore, case law has clarified that dependant children of migrant workers now have a right to benefit from the educational provision of the host state on equal terms, subject to justified limitations, with dependant children of nationals.

While the rights of family members derive from the migrant worker, it is clear that the concept of social integration, explicit in *Echternacht* and *Moritz v Netherlands Minister for Education and Science*, *does not necessarily require that the relationship from which the rights flow amounts to permanent cohabitation*¹⁴. Thus, a member of the migrant worker's family, who is not a national of a Member State, has the derivative right to remain in and to move independently throughout the host state even when not residing permanently with the migrant worker.

Due to those secondary legislation migrant workers in the Community and their families had the right ab initio to the same social advantages as nationals of the host Member State *including education rights*.

In addition, as was stated above the CJEU interpreted provisions of the EEC Treaty and secondary EU law so as to create and expand mobility for migrant workers, their families and students throughout the Community.

¹³ Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers

¹⁴ Cases C-389/87 and 390/87 *Echternacht* and *Moritz v Netherlands Minister for Education and Science* [1989] ECR 723, paragraph 23

Maastricht Treaty 1992

With regard to education rights, the 1992 Treaty of Maastricht significantly expanded the scope of the Community's rights in education firstly, by introducing express powers for the Union in the sphere of education and secondly, by the establishment of the pivotal concept of European citizenship and guarantee the right of all Union citizens to move freely between the Member States subject to certain restrictions set down in the Treaty and in the legislation.

Therefore, effectively that meant that EU nationals, who are citizens of the Union, should not be discriminated by the Member States with regard to access to any course of education.

Additionally, the Maastricht Treaty directly provided for necessity to encourage cooperation between Member States in the field of education and vocational trainings by supporting and supplementing actions of Member States, but at the same time the Treaty acknowledges the Member States entitlement for the content and the organization of education systems.¹⁵

Therefore, while the Member States remained responsible for the content, substance and organisation of their education system, they must discharge this responsibility in accordance with Community law.

In addition, the Treaty expressly excluded from the Community competence any measures aimed at any harmonization of the laws and regulations of the Member States, providing the Community only with the right to adopt *recommendations*¹⁶.

These Treaty provisions have been interpreted by the CJEU as extending to the rights of free movement and non-discrimination across the Community because of the individual's status as citizens regardless of whether they are 'economically active'. Despite the constraints under which Community law operates in education, the jurisdiction of the CJEU can reach all spheres of national legislation if the Court finds a national decision to be in conflict with the Treaties.

Lisbon Treaty 2007 (TFEU and Charter)

The Treaty of the European Union (TEU) and the Treaty establishing the European Community (TEC) have been amended without replacing them.

The Treaty establishing the European Community (TEC) was renamed the Treaty on the Functioning of the European Union (TFEU) after the 2007 Lisbon Treaty entered into force on the 1 December 2009.

The Lisbon Treaty once again secured the freedom of movement for workers and forbidden any discrimination, subject to justified limitations.¹⁷

Also, the Lisbon Treaty provided for a new category of the European Union competences, so-called "supporting competences"¹⁸ under the heading "supporting, coordinating or complementing action".

With regard to education Article 6 TFEU provides:

¹⁵ See Article 126, 127 TEC, Article 117, 118 the 1992 Treaty (Consolidated version)

¹⁶ See 127 TEC

¹⁷ See Article 45 TFEU

¹⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020>

“The union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such actions at European level shall be ...*(e) education, vocational training, youth and sport.*”

Stressing that the Union shall contribute to development of quality education and implementation of common vocational training policy, the Lisbon Treaty reflects the approach provided for in the Treaty of Maastricht, i.e. the process of “*harmonization of the laws and regulations of the Member States*” *does not apply to education*¹⁹ and culture spheres.

In other words, under the Lisbon Treaty legal acts of the EU may not entail harmonization of national laws in education and this was and remains a sensitive political issue, but rather support and coordinate Member States in the area of education. Nevertheless, the EU shall have the right to get involved in many spheres of education through various initiatives, including recommendations²⁰, and these initiatives are frequently referred to as “soft law”.

In addition, it is worth noting that with the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union (the Charter) became legally binding on the EU institutions and Member States.

The Charter also guarantees to everyone right to education and to access to vocational and continuing training.²¹

Chapter 2 – The ‘Public Service Exception’ and Education

Introduction

There are some limitations to the scope of Article 45 TFEU in regard to public security, public policy and public health grounds and as regards certain employment in the public service of the host Member State.

With regard to freedom of movement, Article 45 (2) TFEU provides for the 'abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

This provision expanded on the basic Community tenet, enshrined in Article 18 TFEU (ex Article 12 TEC) of non-discrimination within the jurisdiction of the EC Treaty: 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment'.

However, these provisions of this Article shall not apply to employment in the public service according to Article 45 (4) TFEU.

Naturally, the question aroused how to interpret the “*public service*” exception category.

The economic rationale for the restrictive interpretation of the exception is not hard to divine. The broader the reach of the exception, the narrower is the ambit of the principle in Article 45 TFEU.

If the exception were to be liberally interpreted, then there would be a significant diminution in the range of employment relationships where workers could rely on equality guarantees.

¹⁹ See Article 165 (ex Article 149 TEC)

²⁰ See Article 166 (ex Article 150 TEC)

²¹ See Article 14 of the Charter

This was of particular concern, given the breadth of the conception of public service traditionally applied within some Member States.

Initially some Member States, particularly those in which teachers have achieved the status of civil servants, still applied a condition of nationality in regard to teaching and other posts in state schools. The Commission challenged this practice in a number of these countries.

Deference to national conceptions of public service would moreover necessarily lead to inequalities between Member States.

These twin concerns were reflected in the case law, where the CJEU voiced concern that an institutional reading of the exception that was tied to national conceptions of public service would remove a considerable number of posts from the ambit of the Treaty and create inequalities between Member States depending on the different ways in which the state and economic life were organized.²²

The institutional test advocated by certain Member States, whereby the criterion for application of the public service exception was the institution within which the worker was employed, rather than the nature of the work itself, embodied a view as to when it was legitimate for the Member States to require nationality as a condition for employment. It was underpinned by the idea that 'the legitimate interests of the State can best be served and protected by the recruitment of the State's own nationals to perform certain tasks on its behalf'.²³ It reflected a deep rooted conviction 'that the public service is an area in which the State should exercise full sovereignty'.²⁴

The CJEU rejected such a concept advocated by Member States and applied a different approach that would be described below.

It is also worth noticing that the CJEU has accorded an interpretation to the equal treatment and non-discrimination on grounds of nationality when framing the concept of "public service exception", inter alia in education.

Applying the non-discrimination principle, i.e. Article 18 TFEU, CJEU in its case-law²⁵ also stressed the importance of equal treatment through an expansive reading of *indirect discrimination* on grounds of nationality, holding that a condition of eligibility for a benefit which is more easily satisfied by national than by non-national workers is likely to fall foul of the Treaty.

The CJEU ruled that proof of indirect discrimination does not require the applicant to prove that a national measure in practice affected a higher proportion of foreign workers, but merely that the measure was '*intrinsically liable to affect migrant workers more than nationals*'.²⁶ This will be so where benefits are made conditional, in law or fact, on residency or place of origin requirements that can more easily be satisfied by nationals as opposed to non-nationals.²⁷

²² Case 149/79 *Commission v Belgium* [1980] ECR 3881.

²³ D O'Keefe, 'Judicial Interpretation of the Public Service Exception to the Free Movement of Workers: in D Curtin and D O'Keefe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths, 1992) 105.

²⁴ Case 307/84 *Commission v France* [1986] ECR 1725, 1727, AG Mancini.

²⁵ Case 167/73 *Commission v French Republic* [1974] ECR 359; Case C-185/96 *Commission v Hellenic Republic* [1998] ECR I-6601; Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-94/08 *Commission v Spain* [2008] ECR I-160; Case C-460/08 *Commission v Greece*, 10 December 2009.

²⁶ Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617; Case C-278/94 *Commission v Belgium* [1996] ECR I-4307; Case C-276/07 *Nancy Delay v Università degli studi di Firenze, Istituto nazionale della previdenza sociale (INPS)* [2008] ECR I-3635.

²⁷ Case 15/69 *Würrtembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola* [1970] ECR 363; Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case C-419/92 *Scholze v Università di Cagliari* [1994]

Case C-149/79 Commission v Belgium²⁸

In Sotgiu case²⁹ the CJEU stated that it was for the CJEU to define the meaning of the public service exception.

It would thereby *not be bound by national definitions of public service* since 'these legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law'.³⁰ The Member States *could not* therefore *deem a particular post to be 'in the public service' by the name or designation given to that post, or by the fact that its terms were regulated by public law.*

The Member States however were not accepting the CJEU interpretive monopoly over the meaning of public service, neither did they accept that national conceptions of public service would not control or strongly influence the interpretation of Article 45(4). It reflected a deep rooted conviction 'that the public service is an area in which the State should exercise full sovereignty'.³¹

In Commission v Belgium³² Belgian nationality was required as a condition of entry for posts with Belgian local authorities and public undertakings, regardless of the nature of the duties to be performed, including unskilled railway workers, hospital nurses, and night-watchmen.

Belgium argued that Article 45(4), by way of contrast to Article 51 TFEU, embodied an institutional test, such that the criterion for application of the exception was the institution within which the worker was employed, rather than the nature of the work itself.

Belgium argued more over that when the Treaties were drafted there was no EU concept of the objectives and scope of public authorities and that the Member States' governments had wished the conditions of entry to public office to remain their preserve.

The CJEU was unmoved by this argument.

The fact that nationality was a necessary condition for entry to any post in the public service of a Member State and that this condition had constitutional status in certain states was not determinative. The need for the 'unity and efficacy' of EU law meant that the interpretation of concepts such as employment in the public service could not be left to the discretion of Member States, even if the state's rules were of a constitutional nature.³³

The CJEU held rather that the exception *removed* from the ambit of Article 45 a series of ***posts which involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities.*** These posts 'presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality'.³⁴

ECR I-505; Case C-15/96 Kalliope SchOning-Kougebetopoulou v Freie und Hansestadt Hamburg [1998] ECR I-47; Case C-187/96 Commission v Hellenic Republic [1998] ECR I-1095; Case 35/97 Commission v Belgium [1998] ECR I-5325; Case C-355/98 Commission v Belgium [2000] ECRI-1221; Case C-87/99 Zurstrassen v Administration des Contributions Directes [2000] ECR I-3337; Case C-369/07 Commission v Germany [2009] ECRI-7811.

²⁸ Case 149/79 Commission v Belgium [1980] ECR 3881.

²⁹ Case 152/73 Sotgiu (n 11) [5].

³⁰ Ibid [5].

³¹ Case 307/84 Commission v France [1986] ECR 1725,1727, AG Mancini.

³² Case 149/79 Commission v Belgium [1980] ECR 3881.

³³ Ibid [18]-[19]; Case C-473/93 Commission v Luxembourg [1996] ECRI-3207, [38].

³⁴ Ibid [10].

The CJEU's *key criterion* was that the exception applied to posts that required a specific bond of allegiance and mutuality of rights and duties between state and employee. Such posts had to involve participation in the exercise of powers conferred by public law, and should entail duties designed to safeguard the general interests of the state.³⁵ These requirements are best regarded as cumulative.³⁶

In a subsequent ruling the CJEU found that the majority of the posts did not satisfy these criteria.³⁷

The Court has reaffirmed its approach in later cases.³⁸ It has emphasized the *need for the Member State seeking to rely on the exception to proffer specific arguments as to why the task undertaken relates to the exercise of powers conferred by public law and is concerned with safeguarding the general interests of the state*. To extend the public service exception to posts that did not involve any association with tasks belonging to the public service properly so called, 'would be to remove a considerable number of posts from the ambit of the principles set out in the Treaty and to create inequalities between Member States according to the different ways in which the State and certain sectors of economic life are organized'.³⁹ It was not therefore open to a Member State to bring activities of an economic or social nature within the exception simply by including them in the scope of the public law of the state, and taking responsibility for their performance.

The CJEU's rejection of the institutional test and its adherence to a functional criterion challenged the prevalent Member State view. The functional test was premised on the assumption that this would only be so where the character of the post required the reciprocal bond of allegiance which is said to be characteristic of nationality.

This test denied by its very nature that all posts in the public service as traditionally conceived by Member States should necessarily be reserved to nationals of that state. It required Member States to think the unthinkable, that it might well be the case that, for example, *the best qualified applicant for a job as an economist in the public service might be a national from another Member State* and that where the post did not require the reciprocal bond of allegiance that characterized nationality the applicant should be able to put forward his or her credentials for the job on an equal footing with nationals from the state in which employment was sought.

The struggles over the ambit of the public service exception therefore cast into sharp relief the extent to which Union conceptions of equal treatment would force Member States to reconsider the reserved domain where nationality could still be a condition for employment.

Case C-147/86 Commission v Greece & Case C-328/90 Commission v Greece

Whether these limitations applied to private schools was a matter for another day. Greek legislation regulated private schools and private lessons at home so that non-Greek persons were excluded from authorisation. When this legislation was first challenged by the Commission, the CJEU held that to establish a private school or teach in one, or to give private lessons at home, was unconnected with the exercise of official authority.⁴⁰

³⁵ See also the Commission's view on the type of posts that would qualify for the public service exception, [1988] OJ C72/2.

³⁶ Case 66/85 Lawrie-Blum (n 25) [27]; Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, [18], AG Leger. There are however formulations that cast the conditions in the alternative, Case 225/85 Commission v Italy [1987] ECR 2625. [10].

³⁷ Case 149/79 Commission v Belgium II [1982] ECR 1845.

³⁸ Case 225/85 Commission v Italy (n 44); Case 66/85 Lawrie-Blum (n 25) [28]; Case 33/88 Allue and Coonan v Università degli Studi di Venezia [1989] ECR 1591; Case C-213/90 ASTI v Chambre des Employés Privés [1991] ECR I-3507; Case C-4/91 Bleis v Ministère de l'Éducation Nationale [1991] ECR I-5627.

³⁹ Case 149/79 Commission v Belgium (n 39) [18]-[19]; Case C-473/93 Commission v Luxembourg [1996] ECR I-3207, [11].

⁴⁰ Case C-147/86 EC Commission v Greece [1988] ECR 1637.

Consequently the Court ruled that by prohibiting non-nationals from setting up *frontistiria* (coaching establishments)⁴¹ and from giving private lessons at home, Greece had breached the freedom to establish principles. The Court further held that by prohibiting or restricting access for nationals of other Member States working in Greece, and their families, to the posts of director or teacher in *frontistiria* and in private music and dancing schools, Greece had failed to fulfil its Treaty obligations under Art. 45 TFEU (former Art 48 EC). When no legislative steps were taken to comply with the Court's judgment, Greece was once again before the CJEU which confirmed its earlier decision.⁴²

Case C-473/93 Commission v Luxembourg

The importance of the economic dimension to the CJEU's case law consists of bringing the quantitatively large sector of employment under the Union equal treatment provisions. The preservation of national identity may well be a legitimate national aim, but that interest could be safeguarded by other means and did not justify the general exclusion of foreign nationals from the public service.⁴³

The Commission took a case against the Grand Duchy of Luxembourg⁴⁴ for failing to fulfill its obligations under Community law in this respect.

As regards posts in public sectors, including, inter alia, education, Luxembourg submitted that only nationals can be depended on to show the special degree of integrity and trustworthiness which must be capable of being required of civil servants and public employees.

The CJEU rejected the institutional reading of the public service exception of the Member States.⁴⁵ An institutional reading of the public service exception would have established the legitimacy of a nationality requirement as a condition of employment in the public sector, detrimental to the advancement of the free movement of workers principle in Europe.

With reference to education, the Luxembourg government submitted that teachers must be Luxembourg nationals in order to transmit traditional values and that, in view of the size of the country and its specific demographic situation, the nationality requirement was an essential condition for preserving Luxembourg's national identity. Luxembourg argued that its identity could not be preserved if the majority of its teachers were from other Member States. With regard to primary and secondary school teachers, it pointed out that these teachers perform non-commercial functions which actually entail safeguarding the general interests of the State.

The CJEU stated that in a sector such as education, the exclusion of nationals from all the posts in this sector cannot be justified by considerations referring to the preservation of national identity. *This legitimate interest, the Court clarified, could still be effectively safeguarded otherwise than by a general exclusion.* Furthermore, the Court reminded Luxembourg that nationals of other Member States, in common with nationals of the host Member State, must fulfill all the conditions for recruitment, training, experience and language knowledge in common with its nationals.

⁴¹ These institutions supplement the normal curricula at the three levels of education.

⁴² Case C-328/90 *Commission v Greece* [1992] ECR I-425.

⁴³ Case C-473/93 *Commission v Luxembourg*

⁴⁴ Case C-101194 *Commission v Duchy of Luxembourg*.

⁴⁵ Certain Member States however, kept their culture whereby public servants are commonly recruited from those who have followed a certain pattern of education within that system. This of course created de facto barriers for those competing from other member states.

In addition, the Court referred to the well settled law in this sphere⁴⁶ which held that the concept of public service within the meaning of Article 45(4) TFEU (former Art 48(4) EEC, and later Art 39(4) TEC), requires uniform interpretation and application throughout the Community.

These findings, it ruled, cannot be shaken by considerations relating to the **preservation of national identity in a demographic situation such as that prevailing in Luxembourg**. Finally, the Court declared that Luxembourg, by maintaining a nationality requirement for migrant workers as regard access to civil servant or public employee posts such as teaching posts, had failed to fulfill its obligations under Article 45 TFEU (former Art 48 EEC and Art 39 TEC) and Regulation 492/2011(former Arts 1 and 7 of Council Regulation (EEC) 1612/68) on freedom of movement for workers in the Community.

Chapter 3 - Competences in Education in Some EU Member States

3.1. Competences in education in the Flemish Community of Belgium

The Flemish Community

Since 1989, the Flemish Community has been in charge of matters of education and is therefore responsible for the administration of education in its language area.

Belgium revised its constitution in 1988 and later 1994. In the 1994 constitution almost all responsibilities in education are transferred to the Communities of Belgium (art. 127 § 1.2).

Three competences remained a federal matter:

- the determination of the beginning and the end of compulsory education,
- the subdivision into different levels of education and the minimum requirements for the issuing of diplomas,
- the regulation of retirement for employees in the educational system. The pension system is part of the national security system which is still funded by a national system based on solidarity between the Communities and Regions

Also language supervision in the schools in Brussels and the peripheral area and language boundary municipalities and the funding of foreign university students remains a federal competence. In addition, the regulation of access to certain professions, employee statuses that apply to on-the-job learning and paid educational leave remain federal competences.

Truancy policy and monitoring school attendance requires a cooperation between the Communities and the Federal Government as justice is a federal competence.

Instruction in each community is provided in the language of the community in question.

Flemish Ministry of Education and Training and the Flemish education administration

In Flanders the Ministry of Education and Training is responsible for all stages of education and training starting from pre-primary education.

The Policy domain Education and Training (www.ond.vlaanderen.be) comprises the Flemish Minister for Education and the Flemish education administration.⁴⁷

⁴⁶ Case C-152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case C-149/79 *Commission v Belgium* [1980] ECR 3881.

⁴⁷ The Flemish education administration consists of the DOV and 6 autonomous organisations: the DOV, Department of Education and Training, (1) AgODi Agency for Educational Services (elementary, secondary, part-time artistic education, pupil guidance centres, inspectorate and guidance), (2) AHOVOS, Agency for Higher

Educational Networks

Freedom of education is a constitutional right. It comprises the freedom to provide education. Every (legal) person has the right to organise education and establish schools. The government has the duty to organise non-denominational education. It also guarantees the freedom of school choice for the parents.

Education is organised through three so-called educational networks:

- GO! Education: the official education organised by the Flemish Community (officieel gemeenschapsonderwijs). The constitution includes for GO! Education the obligation to be neutral.
- Fully state subsidized public education (officieel gesubsidieerd onderwijs) comprises schools run by the municipal or provincial authorities.
- Fully state subsidized private education (vrij onderwijs) is organised by a private person or organization, to a great extent denominational catholic schools. There are some so-called alternative Freinet, Montessori or Steiner schools.

Home schooling

Education in Belgium is compulsory from 6 until 18 but does not include the duty to attend school. Parents can choose (individual⁴⁸ or collective⁴⁹) home schooling for their children.

Home education is financed by the persons who exercise parental authority or who have legal or factual custody of the underage . The person(s) responsible must submit a declaration of home education to the unit Supervision of Compulsory Education of the Agency for Educational Services.

Under home education, the child has to participate in the exams organised by the Examination Board of the Flemish Community at certain points in time (see also 2.4. Organisation of private education). In case a child is not registered in time or does not succeed in the exams of the examination board after a maximum of two attempts (s)he must be enrolled in a recognised school

Schools and School Autonomy

School boards can exercise responsibility over one or more schools. They can freely decide (in consultation with the network they belong to) on their teaching methods, philosophical or religious ethos, curricula, timetables, staff appointments.

The government however sets the conditions for the recognition of a school and for granting state funding.

Vocational training and entrepreneurial training facilities

The VDAB (Flemish Public Employment and Vocational Training Service) organises vocational training for jobseekers and the employed.

The Flemish Agency for Entrepreneurial Training - SYNTRA Flanders is responsible for training self-employed and SMEs through its SYNTRA training programme network.

State Audit Office

The State Audit Office is in charge of the external control on all budgetary, accounting and

Education, Adult Education and Study Allowances; (3) AOC, Agency for Communication on Education, in charge of external communication; (4) AKOV, Agency for Quality Assurance in Education and Training (and VDAB and SYNTRA), (5) AGIO, the Agency for School Infrastructure, an internal autonomous government agency (IVA); (6) the VLOR (<http://www.vlor.be>), Flemish Education Council which functions as a strategic advisory council.

⁴⁸ A parent teaching his/her own children or appointing a private tutor.

⁴⁹ Parents can send their children to a private school or organise home teaching for the children together with other parents.

financial transactions by the federal State, the Communities, the Regions, their public institutions and the provinces.

All reports (with an English and French synopsis) can be found and downloaded from: <http://www.rekenhof.be/NL/>

Council of State

Each draft of educational decree is submitted to the Council of State for legal advice.

The Council of State consists of two divisions:

- The Legislative division which is the legal adviser to legislative assembly and the governments. It issues legal advice on the various drafts of law texts and texts of ordinances the assembly and governments present to the Council. These advices on bills, drafts of decrees or orders are added to the explanatory memorandum of the draft when they are presented to a parliamentary meeting. So, they are published in the parliamentary documents of the meetings in question and can also be consulted there.
- The Administrative Law Division is the highest administrative court of the country. It mainly takes cognizance of petitions for suspension and nullity of administrative legal acts and appeals in cassation against decisions from administrative courts.

<http://www.raadvanstate.be/>

Constitutional Court

The Constitutional Court is a 12-judge court which ensures that the Belgian legislators adhere to Belgium's Constitution. It has the power to quash and suspend laws, decrees and orders. Because of its specific task, the Constitutional Court is not connected to either the legislative, the executive or the judicial powers. <http://www.arbitrage.be/>

3.2. Competences in education in Poland

The Polish model of education has also been based on the principle of a relatively high degree of decentralisation of the management of the education system. When the School Education Act of 7 September 1991 came into force on 25 October 1991, most of the educational tasks at the pre-school up to upper secondary school levels were gradually handed over to local authorities at the commune (gmina) or district (powiat) level.

This has been combined with the growth of the non-public school education sector which has very extensive autonomy, while benefitting from public funding.

Minister of National Education

The responsibility for the educational policy rests with the Minister of National Education. A few ministers can administer public schools and other educational institutions (further details at the end of the chapter on administration and governance at national level).

As a result of the state administration reform and the education reform, only the national educational policy is developed and implemented centrally, while the management of education and the administration of schools and other educational institutions is decentralised.

The responsibility for the administration of nursery schools (przedszkole) and primary schools (szkoła podstawowa), and lower secondary schools (gimnazjum) since 1999/2000, has been delegated to the commune (gmina).

The management of schools above the lower-secondary level, art schools and special schools has been delegated to districts (powiat) as their statutory responsibility.

The self-governing provinces (województwo) administer only schools operating at regional and supra-regional level.

The responsibility for pedagogical supervision rests with the heads of the regional education

authorities (kurator oświaty) in 16 provinces.

Administration at district level

District level in Poland is the level between the province and commune levels.

District authorities are responsible for administering the following types of schools: public special primary schools, public special lower secondary schools, and schools above the lower secondary level, including those with integration classes, sports schools, schools for sport championship and institutions, except for those operating at regional and supra-regional levels. As explained above, the responsibilities of the district authorities do not include pedagogical supervision which is exercised by the head of the regional education authorities (REA) (kurator oświaty). However, the relevant bodies at the district level (in particular, the board and head of a district) have various powers related to appointments for management positions in schools, the organisation of competitions for this purpose, and the adoption of local regulations on matters concerning schools and teachers.

As part of their responsibilities, districts may establish and administer public initial and in-service teacher training institutions and educational resources centres, thus extending the rather limited network of such institutions at regional level.

Administration at commune level

The commune level in Poland is the lowest level in administrative division.

The commune is responsible for establishing and administering: public nursery schools, including those with integration classes, and special nursery schools, primary schools and lower secondary schools, including those with integration classes (except for special primary and lower secondary schools, art schools, and schools at prisons, youth detention centres and hostels for underage young people). Pedagogical supervision over these types of institutions is the responsibility of the head of the REA. Like districts, communes are responsible for establishment and administration of public initial and in-service teacher training institutions and educational resources centers.

Educational institutions, administration, management – administration and governance at school and institutional level

A high degree of autonomy of schools and higher education institutions (HEIs) (also in the public sector) is guaranteed by law.

Schools and other educational institutions may be public or non-public. A non-public school may be granted the public-school status under some requirements.

Both categories of schools are subject to state supervision with regard to the quality of activities and their compliance with national legislation, though supervision is more extensive in the case of public schools than non-public schools.

The main differences between public and non-public schools are that the former provide free-of-charge education and ensure open access, and open access concerns, in particular, primary and lower secondary schools. Granting the public-school status to a non-public school implies that the outcomes of the education process are recognized and students may automatically move on to other public schools or non-public schools with the same status. Primary and lower secondary schools may be administered only as public schools or non-public schools with the public-school status.

The responsibility for managing a school or institution in the Polish school education system rests with the head of a school/institution as a single-person authority. However, heads are supported in their management tasks by other persons and bodies, for example, teachers'

council a collegial body of the school with extensive decision-making and advisory powers. Public schools also have so-called social participation bodies, composed only or partly of beneficiaries of education services (parents and /students): the school council (the council of an institution), the parents' council and the pupil / student self-government.

3.3. Competences in education in Lithuania

The Lithuanian education system is decentralized.

The Ministry of Education and Science and the Administration of the Ministry of Education

In Lithuania, the Ministry of Education and Science is an institution of the Lithuanian executive power that formulates and implements the national policy on education and research and higher education studies. Being in charge of education, research and higher education management, the Minister of Education and Science is accountable to the Seimas and President and directly subordinate to the Prime Minister.

Public Education Self-governing Institutions

The broader public and stakeholders are involved in shaping the educational policy and making educational decisions through a number of public education self-governing institutions.⁵⁰

Administration and Governance of Education at the Municipal Level

The right to self-government is implemented through the Municipal Council. The Municipal Council is organized and supervised by the Administrator.

Each municipal administration has a department (departments) responsible for the activities of educational institutions in a particular municipality.

The powers of municipal institutions in the field of education are the following: implementation of the national education policy in the municipality, approval of the municipal strategic plan of education and annual education action programmes, analyzing the state of education and ensure the implementation of the state education policy, founding, reorganizing and liquidating education departments of the municipal administration, designing schools network, creating conditions to ensure compulsory education to children, ensuring free public conveyance of students, living in rural areas, from and to school, arranging provision certain educational institutions with meals, administrating the process of provision students of private and public schools within the municipal territory with free meals, founding schools and institutions providing assistance to students, teachers and schools (pedagogical psychological services, centers for teachers' education), etc.

Schools and Educational institutions

The administration and governance of education provided by schools and other educational institutions level is regulated by the Law on Education (2011).

The founder of a school ensures implementation of the State education policy and education laws, and its functioning and management.

The Seimas, the Government, Municipal Councils or persons that have signed an agreement on setting up a school may delegate part of the school founder's functions to be performed by some other institution.

⁵⁰ The Lithuanian Education Council; The General Education Council; The Lithuanian Vocational Training Council; The Council of Higher Education; The Lithuanian Council of Non-Formal Adult Education.

Chapter 4 - Competences in Education in Some Other Countries

4.1. Competences in education in Belarus⁵¹

Education in Belarus is placed under the control of State organs: President of the Republic of Belarus, the National Assembly (Parliament) and the Council of Ministers; the Ministry of Education (with its subordinate institutions and organizations), and local government bodies. The management of the education system in Belarus is the responsibility of the State and society.

The Council of Ministers functions in the educational sphere are the following: to define the requirements of the State in respect of education and to establish procedures for monitoring the manner in which these requirements are met; to approve model decisions concerning educational institutions and organizations and to define procedures for their establishment, reorganization and closure; to approve model documents relating to education and the procedure for their issuance; to define procedures for funding educational institutions and organizations, for paying staff salaries, and standards and procedures for the provision of social security to , students and teaching staff.

The Ministry of Education: implements State policy and conducts State monitoring within the educational field; approves standard curricula and other requirements in respect of general secondary education and special schools; organizes the preparation and publishing of textbooks, teaching aids and methodological materials; defines standards for funding educational establishments and providing them with material and technical supplies, subject to budget appropriations and resource availability; establishes, reorganizes and closes State-managed educational establishments and institutions and registers their status; takes decisions on matters relating to extra-mural education in higher education establishments and specialized secondary schools; supervises the methods and co-ordinates the activities of all educational establishments and educational organizations in the territory of the Republic; controls and coordinates the field of higher education and is responsible for strategic planning; participates in the development of state policy with regard to standards and quality of education; forecasts national needs for specialists at all levels and fields of training; initiates international co-operation and organizes the licensing and accreditation of higher education institutions; approves the statutory documents of all higher education institutions (public as well as private).

Local (Regional) Councils and their executive organs: ensure the development of education, taking into account the national particularities of the region and its social and economic development prospects, and define requirements in respect of the level and structure of the training of teachers and specialists; establish, reorganize and close down schools and other educational institutions in accordance with established procedures, and register their status.

The Inspection for Educational Establishments is at the core of the national system of quality assurance. The Inspection is independent from the Ministry and educational establishments but it is subordinated to the Council of Ministers. It organizes attestation and accreditation procedures of the educational establishment. The evaluation and analysis are under the responsibility of independent evaluators who are recruited by the Inspection from the best specialist from universities, research institutes, etc. The evaluators are part of expert commissions but every evaluator acts separately. The Inspection formally revises the reports of the evaluators and takes the final decision.

⁵¹ http://www.ibe.unesco.org/fileadmin/user_upload/Publications/WDE/2010/pdf-versions/Belarus.pdf

The Republic's Council of HEI Rectors is a self-governing public body that manages and coordinates education and research activities at institutional level. The decision to organize the Republic's Council rests with the President of the Republic of Belarus. The Rectors' Council may adopt recommendations within its area of competence.

4.2. Competences in education in the Russian Federation

Federal Law №273 on education (2012) provides the core legal framework for the Russian education system.

The Federal Ministry of Education is the executive body responsible for the formulation and implementation of education policies at all levels. Under its purview is the *Federal Education and Science Supervision Agency*, which is tasked with the supervision and quality control of education institutions.

Regional Ministries of Education are responsible for policy implementation at the local level.

General education in Russia comprises pre-school education, elementary education, lower-secondary, and upper-secondary education. The course of study takes 11 years in a 4+5+2 sequence. Four years of elementary education are followed by five years of lower-secondary education, which are followed by two years of upper secondary schooling. In addition to general academic programs, students can enroll in vocational-technical programs of varying lengths at the upper-secondary level (discussed further below). 11-years education has become compulsory since 2007 (previously 9-years education was compulsory).

Access to general education is a guaranteed right of every Russian citizen, according to article 43 of the Constitution. Schooling is provided free of charge at public schools; private schools are also available, although in limited quantity⁵².

4.3. Competences in education in Albania

The education system and the right to education is based on and defined by the Main Constitutional Provisions, which proclaim that education is a national priority. Eight years schools education is compulsory.

According to the Main Constitutional Provisions, Government and Parliament Authorities determine educational policy. They formulate and pass laws and other regulations and execute other competency in the field of education envisaged by law.

The State Administration's activities on education at the level of the country are executed by the Ministry of Education and Science. The competences of the Ministry of Education and Science includes: the implementation of laws and other regulations approved by the Parliament and the Government; adopting decisions on legal matters, management and professional supervision, passing of statutes, curricula and other documents; developing and education sphere, financing education sphere etc.

Along with the Ministry of Education and Science, the Government executes the tasks of the State Administration. They determine the network of primary and secondary schools, decide on the establishment of post-secondary schools and universities, elaborate the higher education financing standards and handle development requirements in the field of education.

The municipalities, as forms of local government, within its territory execute some specific competencies in the sphere of education, including cooperation with educational establishments.

⁵² Private schools in Russia compose about 1 percent of all 42,600 existing schools as of 2015.

The *school managing bodies* and their competence are defined by the laws on pre-university education. These are the school board and the school principal, as well as professional body, i.e. Teachers' council.

The school board adopts the report on work, makes decisions on school activities, on investments, announces open competitions to fill the position of school teachers, gives opinions on candidates for teachers and school principal.

The school principal manages and supervises the school, makes proposals concerning the employment and dismissing of the teaching staff and is responsible for the realization of the curriculum and school work legality. The Education Local Authorities are authorized to appoint principal.

The Teachers' Council includes all teaching staff. It proposes curriculum and monitors its realization, brings special programmes for some types of in-service teacher training as well as programmes for work with gifted students, programmes for development and research, i.e. in order to improve the teaching process.

The Law on Higher Education regulates the activities of universities, however the details on overall organization and activities of the university are set out in the universities statutes.

The university has *managing and professional bodies*.

The *university rector* manages the university, while the *top managing body of the university* is the *University Senate*. The University Senate consists of the university representatives. Its competence includes: passing of the university statute, adopting the curricula and financial plan, studying the reports on work and business activities, giving consent to the statutes of faculties, proposing the students' enrolment plan to the government, making decisions on awarding an honorary doctorate, making decisions on founding the university establishments, promotion of students' standard activities, etc.