

## CHAPTER 10 Subsidiarity, proportionality and Member State action

### *A Subsidiarity and proportionality of EU action*

#### *309 Subsidiarity as a principle regarding the use of competences*

The effects of subsidiarity as a meta-constitutional concept, impacting on the *conferral* of competences, are so strong in the field of education that subsidiarity as a principle affecting the *use* of conferred competences, tends to occupy less space.<sup>2302</sup> Subsidiarity has already been taken into account in the very definition of the EU's competences in the legal basis: competences are conferred, but there are no-go areas and harmonisation is precluded. Articles 165 and 166 TFEU thus 'breathe the air of subsidiarity', especially in the limits set on the conferral of competences to the Union.<sup>2303</sup> Moreover, for supporting competences the subsidiarity question is less pressing, because there is no preemption of national competence in the policy fields concerned. When the EU exercises its supporting competence in education, the Member States retain their competences. By contrast, when the EU exercises shared competences, Member States are vigilant about guarding subsidiarity, because by using these shared competences, the EU preempts the field and Member States can no longer act (Article 2(2) TFEU).<sup>2304</sup>

However, subsidiarity must be respected. Pursuant to the general provision in Article 5 TEU, the use of Union competences is governed by the principles of subsidiarity and proportionality. The third paragraph only excludes those areas from the scope of subsidiarity which are a matter of exclusive EU competence—and education is not one of them.

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2302 Lenaerts, 'Subsidiarity and Community competence in the field of education', 28.

2303 Ibid: 'fully breathe the air of subsidiarity'. Cp Schütze, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order', 183: not 'fully'; the limits in education such as the prohibition of harmonisation, may preclude EU action even if the objectives can be achieved better at Union level.

2304 See Commission, Better regulation toolbox, Tool 5, p 27 on subsidiarity: 'The point of departure is shared competence' (<[ec.europa.eu/info/better-regulation-toolbox\\_en](http://ec.europa.eu/info/better-regulation-toolbox_en)>).

310 *Substantive and procedural conditions*

What does compliance with the principle of subsidiarity require when conferred competences are used?

The substantive conditions are twofold: the objectives cannot be sufficiently achieved by the Member States at central, regional or local level (negative criterion) and can be better achieved at EU level (positive criterion).<sup>2305</sup> The institutions have developed guidelines for examining whether these conditions are fulfilled. In the 1992 Edinburgh conclusions, the European Council proposed that ‘the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States’ and/or that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.<sup>2306</sup> The 1997 Amsterdam Protocol on the application of the principles of subsidiarity and proportionality continued the attempt to make subsidiarity operational.<sup>2307</sup> At present, Protocol 2 on the application of the principles of subsidiarity and proportionality, annexed to the Lisbon Treaty, sets out guidelines for determining whether the conditions are met.<sup>2308</sup>

Procedural conditions, too, must be respected. A statement of reasons (Article 296(2) TFEU), qualitative and (as far as possible) quantitative indicators, and impact assessments make it possible to check compliance with the principles of subsidiarity and proportionality.<sup>2309</sup> At a political level,

2305 See analysis in Calliess, ‘EU-Vertrag (Lissabon) Art 5’, Rn 33–41; K Granat, ‘The Subsidiarity Principle in the EU Treaties’ in *The Principle of Subsidiarity and its Enforcement in the EU Legal Order: The Role of National Parliaments in the Early Warning System* (Hart 2018) 20. Much literature on subsidiarity (extensive list in Calliess, EU-Vertrag (Lissabon) Art 5); see i.a. A Estella, *The EU principle of subsidiarity and its critique* (2005 edn, Oxford University Press 2002); T Blanke, ‘The Principle of Subsidiarity in the Lisbon Treaty’ in N Bruun and others (eds), *The Lisbon Treaty and Social Europe* (Hart 2012); Edward, ‘Subsidiarity as a Legal Concept’; J Öberg, ‘Subsidiarity as a Limit to the Exercise of EU Competences’ (2017) 36 Yearbook of European Law 391.

2306 Edinburgh Presidency Conclusions (n 2080) 19.

2307 Protocol (No 30) on the application of the principles of subsidiarity and proportionality (Amsterdam, 2 October 1997); Case C-58/08 *Vodafone* ECLI:EU:C:2010:321, para 72.

2308 Case C-508/13 *Estonia v Parliament and Council* EU:C:2015:403, para 44; Case C 358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323, paras 111–113.

2309 Protocol (No 2) Art 5; Protocol (No 30) on the application of the principles of subsidiarity and proportionality (Amsterdam, 2 October 1997), para 4. See also Commission Staff Working Document ‘Better Regulation Guidelines’ SWD(2015) 111, and accompanying toolbox; Interinstitutional Agreement

national Parliaments review compliance in the pre-legislative phase (early warning system).<sup>2310</sup> At judicial level, in the case of litigation, the ECJ verifies whether the substantive conditions and the procedural safeguards have been met.<sup>2311</sup> While case law has been criticised for leaving wide discretion to the legislature and failing to examine issues of subsidiarity seriously, the EU legislature cannot merely assert, using a standard formula, that the principle of subsidiarity has been respected. The Court determines whether the EU legislature was entitled to consider, on the basis of a detailed statement of reasons, that the objective could be better achieved at EU level. In recent case law, the Court refers to specific evidence, to data and impact assessments, when reviewing compliance with the principles of subsidiarity and proportionality.<sup>2312</sup> In *Poland v Parliament and Council*, the impact assessment included 'sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level'.<sup>2313</sup>

### 311 *A dynamic concept*

Can the objective of quality education, in particular in respect of the European dimension in education and the encouragement of the participation by young people in democratic life in Europe, not be sufficiently achieved by the Member States (negative criterion) and can it be better achieved at EU level (positive criterion)? For Lenaerts in 1994, Member States' responsibility for teaching content, the organisation of education systems, and their cultural and linguistic diversity, acknowledged in the Treaty provision conferring competence on the EU, 'boils down to the introduction of

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between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making [2016] OJ L123/1; Commission Annual report 2018 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments COM(2019) 333 final.

2310 Granat, 'The Subsidiarity Principle in the EU Treaties'. See also Commission Communication 'The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking' COM(2018) 703 final.

2311 Protocol (No 2) Art 8. See Case C-58/08 *Vodafone* ECLI:EU:C:2010:321; Case C-176/09 *Luxembourg v Parliament and Council* ECLI:EU:C:2011:290; Case C 358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323; *Poland v Parliament and Council* Case C-128/17 ECLI:EU:C:2019:194; and early cases as Case C-84/94 *UK v Council* ECLI:EU:C:1996:431.

2312 E.g. Case C-547/14 *Philip Morris Brands and Others v UK* ECLI:EU:C:2016:325, paras 214–227.

2313 Case C 358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323, para 123 (on the Tobacco Products Directive).

an irrefutable presumption that they are better placed to deal with these policy matters'. He saw Community educational action as being confined to aspects 'which are manifestly cross-border and for which it would be difficult for each Member State to act efficiently on an individual basis'.<sup>2314</sup> I think that subsidiarity and proportionality should remain dynamic concepts, allowing EU cooperation to develop as new needs and expectations as to solidarity might arise.<sup>2315</sup> The 1992 Edinburgh conclusions already emphasised that subsidiarity is a dynamic concept to be applied in the light of the Treaty objectives: 'It allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.'<sup>2316</sup> In a Europe facing economic, financial and migration crises and a civic deficit, the best level for achieving objectives must be sought objectively without a priori presumptions.

EU action supporting the EU dimension of EDC can satisfy both the negative and positive criteria<sup>2317</sup> and would be consistent with existing legal instruments on education and the reasons they state for compliance with subsidiarity. In 2018, five national parliaments submitted opinions on

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- 2314 Lenaerts, 'Education in European Community Law after "Maastricht"', 41; also Lenaerts, 'Subsidiarity and Community competence in the field of education'. In the same vein: A Hingel, *Education Policies and European Governance*, Contribution to the Interservice Groups on European Governance (Commission, DG EAC, 2001), p 4: education is 'an ideal-type of a policy area for subsidiarity to play its full role', the most optimal level of decision-making being the (sub)national one 'where initiatives can be taken that are fully integrated while the nationally specific institutional set-ups as well as the historical and cultural heritage are respected'. Further H Ertl and D Phillips, 'Standardization in EU education and training policy: findings from a European research network' (2006) 42 *Comparative Education* 77, 78, observing that especially in the field of education, support for the principle of subsidiarity 'indicates that national and regional actors have been increasingly cautious in surrendering power to supranational bodies'.
- 2315 See C Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (Nomos 1996). See also Lenaerts and Van Nuffel, *European Union Law* (2011) 135; Pépin, *The History of European Cooperation in Education and Training* (2006) 146; O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* 186: 'which level of authority is more suitable to deal with a specific problem may ultimately depend on a political decision'.
- 2316 Edinburgh Presidency Conclusions (n 2080) 16; also Protocol (No 30) on the application of the principles of subsidiarity and proportionality (Amsterdam, 2 October 1997), para 3.
- 2317 Text to n 2305.

proposals of the Commission in the education field, i.e. on key competences for lifelong learning, digital skills and common values. Some parliaments insisted that the EU should not go further than adopting legally non-binding recommendations. They asked to carefully examine the European added value and the administrative burden which the proposals generated. The Commission reassured the national parliaments that the proposals were drafted with subsidiarity in mind, fully respected the Member States' powers in education, and that future materials for support would be developed in close cooperation with the Member States, as voluntary tools for learning.<sup>2318</sup>

### *312 Objectives insufficiently achieved by Member States*

Reports, academic research and case studies demonstrate in qualitative and quantitative terms that, in practice, the Treaty objectives of quality education, of the European dimension in education (*sensu stricto*, in particular with regard to the EU dimension of EDC), and of preparing young people for participation in democratic life in Europe, are not sufficiently achieved by Member States acting alone. Beyond rhetoric on citizenship education, figures and concrete examples reveal the specific shortcomings of Member States' action in the field. Fragmented EU learning in many Member States—or none at all—is reported by Eurydice and the International Civic and Citizenship Education Study, as mentioned in the Introduction to this work.<sup>2319</sup> The bEUcitizen project on barriers to EU citizenship concludes a

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2318 Commission Annual report 2018 on the application of the principles of subsidiarity and proportionality and on relations with national parliaments COM(2019) 333 final, Opinions of CZ, DE, PT, and RO on the Education Package (see fn 79).

2319 See text and reports above in § 3 ; Losito B and others, *Young People's Perceptions of Europe in a Time of Change: IEA International Civic and Citizenship Education Study- 2016 European Report* (2017) 13–14; Commission/EACEA/Eurydice, *Citizenship Education in Europe* (2012), 17 ff, 30, 32, 97 (in Germany, themes related to the European dimension were no longer included in the upper secondary level curriculum); Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017) 67. Also Commission, *Learning Europe at School* (DG for Education, Youth, Sport and Culture, ICF GHK, 2013); European Parliament Resolution of 12 April 2016 on Learning EU at school [2018] OJ C58/57; and Opinion of the European Economic and Social Committee on 'Education about the European Union' SOC/612 (21 March 2019), para 2.5. Further K Grimonprez, 'Beyond Rhetoric: Education for Democratic Citizenship in the European Union' in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019).

study of 7 Member States by stating that all countries share a very similar approach with regard to the European dimension of citizenship: ‘it is a highly neglected area within the national curriculum’.<sup>2320</sup> While some schools and teachers do excellent work, in general the quality of the EU dimension in citizenship education seems largely unsatisfactory.<sup>2321</sup> It is worth recalling that Member States do not even sufficiently achieve the EDC objectives of the Council of Europe in terms of national EDC, that is, quite apart from the EU dimension. The second review cycle of the Charter on EDC/HRE gives evidence of implementation gaps, and even of commitment gaps.<sup>2322</sup> Work at Council of Europe level is important, but does not suffice.

The Commission guidelines on ‘the necessity/relevance test’ ask, as a key part for the negative criterion, to qualify the ‘Union relevance’ of the ini-

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2320 WE Bakker and others, *The quest for a European civic culture: The EU and EU Citizenship in policies and practices of citizenship education in seven EU member states* (Utrecht University Repository 2017) 3, on the Netherlands, Croatia, France, Germany, Ireland, Spain and Hungary: ‘The focus is dominantly on the factual and theoretical knowledge on the EU and especially its institutions rather than the promotion of values and the training of skills needed to exercise EU citizenship rights and needed for development of active, participating EU citizens. Hence, European citizenship education within the member states seems to be in its infancy’.

2321 See also P Ferreira, C Albanesi and I Menezes, ‘European Identity and Citizenship in Textbooks/Educational Media’ (2018) 17 *Journal of Social Science Education* 2; and 5 country reports in this special issue, uncovering gaps and differences, i.a. Piedade and others, ‘Learning About the European Union in Times of Crisis: Portuguese Textbooks’ Normative Visions of European Citizenship’; Missira V, ‘Strengthening European citizenship education’ (2019) 18 *Journal of Social Science Education* (3: European Citizenship Education: Business as Usual or Time for Change?) 55. Earlier, in the same vein: Theiler, ‘The European union and the “European dimension” in schools: Theory and evidence’, 332 (‘Especially if contrasted against the fervour with which all the Member States continue to design their “civics”, history, and geography curricula as vehicles to advance their specifically national socialization agendas, the “European dimension” is still a negligible entity in the school curricula throughout the Union’); Walkenhorst, ‘Problems of Political Education in a Multi-level Polity: explaining Non-teaching of European Union Issues in German Secondary Schooling’; Keating, ‘Educating Europe’s citizens: moving from national to post-national models of educating for European citizenship’, 147; A Keating, *Education for Citizenship in Europe: European Policies, National Adaptations and Young People’s Attitudes* (Palgrave Macmillan 2014).

2322 See § 66 . Moreover, Member States cannot escape the negative criterion by referring to international cooperation. See Calliess, ‘EU-Vertrag (Lissabon) Art 5’, Rn 38.

tiative. The greater this relevance, the more likely it is that Member State action alone will be insufficient.<sup>2323</sup> Based on the analysis of the preceding chapters, the EU dimension of EDC can be said to have high Union relevance, as it concerns the very foundations of the EU, democracy and citizenship. The fact that some Member States are better at providing EU learning than others, does not detract from the legitimacy of the EU's use of its competence if the problem is widespread across the EU and not limited to a few Member States.<sup>2324</sup> In *Poland v European Parliament and Council*, the Court points out that the subsidiarity principle is not intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually. It only requires that the proposed action can, by reason of its scale or effects, be better achieved at EU level in view of the EU objectives set out in Article 3 TEU, and provisions specific to various areas.<sup>2325</sup> The Proposal for a new Erasmus Regulation refers to an Erasmus+ mid-term evaluation which demonstrated that 'single initiatives of education institutions or Member States, though deemed efficient and beneficial at national level, have insufficient scale and volume, and do not reach a European-wide effect'.<sup>2326</sup>

### 313 *Objectives better achieved by the EU*

EU action to support the EU dimension in EDC has clear benefits. Its added value is apparent when compared with the fragmented action of the Member States. Transnational aspects (the *European* dimension of education) and an efficiency comparison, including economies of scale, may indicate that the EU is better placed to act than local, regional or national actors.<sup>2327</sup> As an argument for added value, the Council refers in its 'Recommendation on promoting common values, inclusive education, and the European dimension of teaching' inter alia to a common understanding of the importance of common values and to facilitating the sharing of knowl-

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2323 Commission, Better regulation toolbox, Tool 5, p 27.

2324 Ibid. On this problem, Edward, 'Subsidiarity as a Legal Concept', 100; Granat, 'The Subsidiarity Principle in the EU Treaties', 21.

2325 Case C 358/14 *Poland v Parliament and Council* ECLI:EU:C:2016:323, para 119; earlier Case C-508/13 *Estonia v Parliament and Council* EU:C:2015:403, para 53.

2326 Commission Erasmus Proposal COM(2018) 367 final, explanatory memorandum 6–7; see also recital 57.

2327 See Calliess, 'EU-Vertrag (Lissabon) Art 5', Rn 41, on a comparison between the added value for integration and the loss of competence of Member States.

edge, expertise and good practice.<sup>2328</sup> These reasons would also be valid for EU action to promote EDC and its EU dimension. A common understanding of the EU dimension of EDC and the education of citizens in the values on which the EU is founded (‘Werteverbund’) are all the more important in a Union essentially based on mutual trust and are better supported at EU level.<sup>2329</sup> Even in the Council of Europe, the added value of action on EDC was justified by the advantages of using the same terminology and focusing on the same objectives.<sup>2330</sup> That argument holds true a fortiori in the EU. Given the interdependence of Member States’ democracies, an EDC framework at EU level with common terminology and common objectives adds value to the disparate actions at national, regional, local and school level. That action for the EU dimension adds value to action for EDC at Member State and at Council of Europe level is clear from the preceding chapters. Part three identified specific additional and significant content for an EU dimension to national EDC and advanced concrete arguments for the added value of EU action to promote this dimension in mainstream education. EU measures have clear benefits for quality education and for empowering EU citizens in particular where they support specific learning outcomes for the EU dimension. At present, Member State norms on citizenship education and EU learning are often limited to general declarations and statements of intention.<sup>2331</sup> The Erasmus Regulation refers to gains in quality, improved knowledge and understanding of the

2328 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1, see preamble and Proposal, explanatory memorandum 6. See further Commission Staff working document Accompanying the document proposal for a Council Recommendation on common values, inclusive education and the European dimension of teaching (2018), p 23 ff.

2329 See i.a. §§ 173 247, and text to n 1477.

2330 See i.a. in CoE Reference Framework of Competences for Democratic Culture, Vol 1: Context, concepts and model (2018), p 16, 21.

2331 Commission/EACEA/Eurydice, *Citizenship Education at School in Europe* (2017), and Annexes. See for *France*, ‘Loi n° 2013–595 du 8 juillet 2013 d’orientation et de programmation pour la refondation de l’école de la République’, Annexe ‘La programmation des moyens et les orientations de la refondation de l’école de la République’: ‘Promouvoir une plus grande ouverture sur l’Europe et le monde. L’école doit favoriser l’intégration des futurs citoyens français dans l’espace politique de l’Union européenne et rendre possible la mobilité professionnelle dans l’espace économique européen. C’est pourquoi la France promouvra les initiatives visant à développer un esprit européen et un sentiment d’appartenance partagé à la communauté politique que constitue l’Union européenne. (...) L’apprentissage des langues vivantes constitue un



EU, to positive attitudes towards the EU, and the development of a European identity.<sup>2332</sup>

If the EU legislature has the political will to support the EU dimension of EDC, it should have no difficulties in establishing that the conditions applying to the principle of subsidiarity are satisfied.

### 314 *EU supporting measures respecting proportionality*

Pursuant to the principle of proportionality, the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. There is no sharp distinction between the principles of subsidiarity and proportionality, particularly in cases where the former principle permits *some* Union action and requires the 'to what extent' question to be addressed.<sup>2333</sup> The 1992 Edinburgh guidelines stated that, other things being equal, directives should be preferred to regulations and framework directives to detailed measures; where appropriate, non-binding measures such as recommendations should be preferred, and cooperation should be encouraged between Member States if this is sufficient to achieve the objectives.<sup>2334</sup> EU measures should leave as much scope as pos-

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moyen privilégié de cette ouverture.' (To encourage greater openness to Europe and the World. School must promote the integration of future French citizens in the political space of the European Union and make professional mobility a reality in the European economic area. That is why France will promote initiatives to encourage a shared sense of being European and belonging to the political community of the European Union (...) Learning modern languages is an excellent way of achieving this openness.) Mobility is encouraged too. School, together with the family, must provide moral and civic teaching which includes learning about the values and symbols of the Republic and the European Union, their institutions, the national anthem and its origins, and prepare students for their role as citizens. For *Germany*, see i.a. Beschluss der Kultusministerkonferenz vom 08.06.1978 i. d. F. vom 05.05.2008, Empfehlung der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland 'Europabildung in der Schule'.

2332 Commission Erasmus Proposal COM(2018) 367 final, 6–7, see also recital 57. On added value, see further Grimonprez, 'The European dimension in citizenship education: unused potential of article 165 TFEU', 18–21.

2333 Lenaerts, 'Subsidiarity and Community competence in the field of education', 3, 25; Granat, 'The Subsidiarity Principle in the EU Treaties', 23, 29 (sharp distinction in Edinburgh conclusions, while confusion in Protocol 2).

2334 Edinburgh Presidency Conclusions (n 2080) 21; Protocol (No 30) on the application of the principles of subsidiarity and proportionality (Amsterdam, 2 October 1997), para 6.

sible for national decision consistent with achieving the aim of the measure.<sup>2335</sup>

Which type of instruments do the Treaties envisage in the field of education? The EU can exercise its supporting competence in education in two ways. Firstly, incentive measures may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions (Article 165(4) first indent TFEU). Educational incentive measures are thus legislative acts (Article 289 TFEU). Secondly, recommendations can be adopted by the Council (Article 165(4) second indent TFEU).

Other options for promoting the EU dimension in EDC are measures adopted in a mixed form (combining an EU and an intergovernmental approach) and the creation of an EU Agency for Education for Democratic Citizenship. Finally, better reporting on EDC and its EU dimension in the Member States will help to identify gaps and prepare for future supporting action.

These options will now be explored.

### 315 *Binding incentive measures*

Binding incentive measures are the strongest form of action to support the EU dimension of EDC. The legal basis in Article 165(4) first indent TFEU has been used at regular intervals to adopt binding legislation to support quality education. It could equally be used to promote an EU dimension in EDC.

Contrary to common perception, EU education policy measures based on Articles 165–166 TFEU are not all just a matter of soft law.<sup>2336</sup>

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2335 Edinburgh Conclusions (ibid) 20; Commission, Better regulation toolbox, Tool 5, p 30.

2336 The Convention Working Group considered that supporting measures authorise the Union to adopt ‘recommendations, resolutions, guidelines, programmes, and other legally non-binding acts as well as legally binding decisions, to the extent specified’ in the Treaty. See European Convention, Working Group V ‘Complementary Competencies, Final Report’ (4 November 2002) CONV 375/1/02 REV 1, p.1. See also L Martin, *L’Union européenne et l’économie de l’éducation: émergence d’un système éducatif européen* (Larcier 2011) 169: proliferation of EU documents on education, no hierarchy, unclear, unarticulated; European Parliament Resolution of 4 September 2007 on institutional and legal implications of the use of ‘soft law’ instruments [2008] OJ C187E/75: ‘soft law’ (an “ambiguous and pernicious” notion that should not be used) does not provide full judicial protection’ (recitals A, D). The EU can

Although the word ‘incentive measures’ may give the opposite impression,<sup>2337</sup> incentive measures are binding when issued in the form of a regulation or decision (Article 288 TFEU). When they take the form of a recommendation they are not binding and their potential for the EU dimension in education is weaker (although recommendations are not without any legal effect<sup>2338</sup>). In EU education policy, incentive measures have mostly taken the form of decisions<sup>2339</sup> of the European Parliament and the Council establishing action programmes in education. Decision 819/95 established the Community action programme Socrates for the period 1995–1999, extended by Decision 253/2000 for the period 2000–2006.<sup>2340</sup> Decision 1720/2006 established an action programme in the field of lifelong learning for the period 2007–2013.<sup>2341</sup> The programme for the period 2014–2020 was adopted in the form of a regulation, the 2013 Erasmus+ Regulation.<sup>2342</sup>

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take legally binding measures in education policy, see further Ruffert, ‘AEUV Art 165’, Rn 23.

- 2337 Compare Theiler, ‘The European Union and the “European Dimension” in Schools’ (1999) 21 *Journal of European Integration* 307, 323.
- 2338 The principle of sincere cooperation requires national administrations and courts to interpret national and Union provisions ‘in a way which best corresponds to the aim of a recommendation’: Lenaerts and Van Nuffel, *European Union Law* 919. See Joined Cases C-317-320/08 *Alassini* ECLI:EU:C:2010:146, para 40, referring, i.a., to Case C-322/88 *Grimaldi* ECLI:EU:C:1989:646, paras 7, 16, and 18.
- 2339 Before the Lisbon Treaty, decisions as defined in Art 249 EC needed specific addressees. Decisions *sui generis* were adopted, with no addressee. The Lisbon Treaty allows for addressed or non-addressed decisions (Art 288 TFEU).
- 2340 Decision 819/95 of the European Parliament and of the Council of 14 March 1995 establishing the Community action programme ‘Socrates’ [1995] OJ L87/10; Decision 253/2000 of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education ‘Socrates’ [2000] OJ L28/1.
- 2341 Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56.
- 2342 Erasmus+ Regulation 288/2013. The Erasmus+ programme covers ‘education and training at all levels, in a lifelong learning perspective, including school education (Comenius), higher education (Erasmus), international higher education (Erasmus Mundus), vocational education and training (Leonardo da Vinci) and adult learning (Grundtvig)’ (Art 1(3)(a)). See also Commission Erasmus Proposal COM(2018) 367 final.

What is the effect of educational incentive measures adopted by the EU? Member States retain their basic competence in education, but they have to exercise it in compliance with EU law including incentive measures. Incentive measures increasingly include obligations for Member States, i.e. obligations to cooperate and even take action, where that is necessary to achieve the objectives (proportionality).<sup>2343</sup> The incentive measure mechanism provides for an EU incentive if certain conditions are satisfied. The key question is: who benefits from the incentive? If Member States are the beneficiaries of the incentive, they have no obligation. If EU incentives, such as funding or quality labels, are intended to benefit schools or learners directly, Member States may be obliged, firstly, to adapt their legislation so that beneficiaries can satisfy the conditions applying and, secondly, to take all other necessary implementing measures. An example is the 2013 Erasmus+ Regulation.<sup>2344</sup> This lays down obligations for the Member States in unambiguous ‘shall’ and ‘must’ terms. They shall take all appropriate measures to remove legal and administrative obstacles to the proper functioning of the Programme; they shall appoint national authorities to act on their behalf, who in turn shall designate national agencies. All have obligations.<sup>2345</sup>

Incentive measures in the form of a regulation or decision have an important legal impact as they are binding on all the bodies of the Member State.<sup>2346</sup> Pursuant to the principle of primacy of Union law, national courts must refrain from applying any national provision which would be

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2343 Lenaerts, ‘Education in European Community Law after “Maastricht”’, 31, 37–38; Field, *European Dimensions, Education, Training and the European Union*, 185. Cp before 1992: Shaw, ‘Education and the Law in the European Community’.

2344 Erasmus+ Regulation 1288/2013. In the same sense, Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, Art 6(2); also obligations in Decision 253/2000 of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education ‘Socrates’ [2000] OJ L28/1, Art 5. See further analysis in Grimonprez, ‘The European dimension in citizenship education: unused potential of article 165 TFEU’, 12.

2345 Arts 27 and 28. See further obligations in Erasmus+ Regulation 1288/2013, Arts 21–23, 31 and 37.

2346 If Member States do not implement them correctly in the period prescribed, individual actors can have the right to invoke them in court, to give the provisions ‘effet utile’.

likely to hinder their implementation.<sup>2347</sup> If the Commission considers that a Member State has failed to fulfil an obligation imposed by an incentive measure, it can bring the matter before the ECJ (Article 258 TFEU).<sup>2348</sup>

A closer look at the incentive measures adopted puts the 'no content' and 'no harmonisation' limits in Article 165 TFEU in perspective, as EU education policy increasingly affects curricula and has converging effects.<sup>2349</sup> The 1995 Socrates Decision included the Comenius programme for schools.<sup>2350</sup> To 'develop the European dimension in education at all levels so as to strengthen the spirit of European citizenship' and to

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2347 Case 249/85 *Albako* ECLI:EU:C:1987:245, para 17. Vertical, not horizontal direct effect: 80/06 *Carp* ECLI:EU:C:2007:327, para 22.

2348 Thus, although the educational autonomy of Member States is respected, this form of EU action potentially has far-reaching effects (in addition to the huge practical impact of financial incentives). See Lenaerts, 'Education in European Community Law after "Maastricht"', 15, 38; J Lonbay, 'Reflections on education and culture in EC law' in R Craufurd Smith (ed), *Culture and European Union law* (Oxford University Press 2004) 243, 250.

2349 It must be noted that a mere practice of EU institutions cannot derogate from the rules laid down in the Treaty and create precedents with regard to legal bases and competences conferred on the EU: see Case 68/86 *UK v Council* ECLI:EU:C:1988:85, para 24. A broader perspective relates to the context where EU measures taken on other legal bases may also impact on national educational content. A prime example is mutual recognition of diplomas (Art 53 TFEU), e.g. for medical and paramedical diplomas, coupled with the coordination of study curricula, and later Directive 2005/36 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22, with minimum harmonisation: see Lenaerts and Van Nuffel, *European Union Law* 260–265. Measures in other areas, such as culture, health, consumer protection, research and technological development or environment (Arts 167–169, 179 and 191 TFEU) can also influence school curricula and even have harmonising effects in accordance with case law (Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising')* ECLI:EU:C:2000:544, paras 77–78). Outside the EU, the intergovernmental Bologna process produced 'harmonisation by stealth': Garben, *EU Higher education law. The Bologna Process and harmonization by stealth*.

2350 Decision 819/95 of the European Parliament and of the Council of 14 March 1995 establishing the Community action programme 'Socrates' [1995] OJ L87/10. It included also the controversial *Lingua* programme. The 1989 *Lingua* Decision (Council Decision 89/489/EEC of 28 July 1989 establishing an action programme to promote foreign language competence in the European Community (*Lingua*) [1989] OJ L239/24) had been strongly opposed by the UK, who claimed that language teaching in secondary schools was outside the scope of the powers of the Community and confined *Lingua* to post-compul-

improve the knowledge of languages, the Parliament and the Council encouraged school partnerships developing ‘subjects of European interest’.<sup>2351</sup> The 2000 Socrates Decision supported action to advance ‘knowledge, skills and competences likely to foster active citizenship and employability’, also awarding financial assistance for ‘the development of curricula, courses, modules or teaching material in the context of reinforcing the European dimension of school education’.<sup>2352</sup> In the 2006 Lifelong Learning Decision, the Erasmus programme—encouraging mobility<sup>2353</sup>—inevitably brought changes in study curricula and the organisation of higher education, ‘causing “convergence”, if not “harmonisation”’.<sup>2354</sup> Within the overall objectives of the Decision and specifically of the Comenius programme, reference was made to developing a sense of European citizenship, skills for active citizenship, knowledge, and understanding of the diversity of European cultures, and of values such as human rights, democracy, and tolerance (undoubtedly aspects of the EU dimension of EDC), confirming the potential of the legal basis.<sup>2355</sup> Key activities in the transversal programme supported ‘developing new language learning materials’ and courses and ‘innovative ICT-based content’.<sup>2356</sup> The 2013

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sory education. After the 1992 Maastricht Treaty provided a new legal basis in Art 126 EC, the European Parliament and the Council incorporated the programme into the 1995 Socrates Decision.

- 2351 Decision 819/95 of the European Parliament and of the Council of 14 March 1995 establishing the Community action programme ‘Socrates’ [1995] OJ L87/10, Annex, Chapter II, Action 1; see also Art 3(a).
- 2352 Decision 253/2000 of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education ‘Socrates’ [2000] OJ L28/1, Art 1, Action 1, 2(d).
- 2353 Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, Art 22.
- 2354 Shaw, ‘From the Margins to the Centre: Education and Training Law and Policy’, 555. See also J Pertek, ‘Le processus de Bologne et l’action de la Communauté en matière d’éducation’ [2005] *Law & European affairs* 51; LS Terry, ‘The Bologna Process and Its Impact in Europe: It’s So Much More than Degree Changes’ (2008) 41 *Vanderbilt Journal of Transnational Law* 107.
- 2355 Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, Art 1(a)(d)(i); Art 17(1). Yet, insufficiently operationalised.
- 2356 *Ibid*, See i.a. Arts 33(2) and 33(3). For earlier action with curriculum implications, see e.g. Decision 2318/2003 of the European Parliament and of the

Erasmus+ Regulation supports curriculum development, e.g. in partnerships in the form of knowledge and skills alliances.<sup>2357</sup>

Applied to the EU dimension in EDC, the potential of Article 165 TFEU emerges clearly. Article 165 TFEU provides a legal basis for the EU to issue binding legislation to promote an EU dimension in EDC.<sup>2358</sup> Regulations or decisions can establish incentives for schools or learners, e.g. quality labels or funding, and oblige Member States to adapt their legislation to allow implementation. They should go no further than necessary and leave as much scope as possible to the Member States' national systems of citizenship education. In the Recommendation on promoting common values, inclusive education, and the European dimension of teaching, the Council declares that its content 'is without prejudice to existing national initiatives in these fields, notably in national civic education'.<sup>2359</sup>

### *316 Recommendations*

Incentive measures can also take the form of recommendations. Recommendations of the Parliament and the Council containing incentives (based on Article 165(4) first indent TFEU) are to be distinguished from recommendations of the Council (based on Article 165(4) second indent), where neither the European Parliament nor the Economic and Social Committee or the Committee of the Regions are involved.<sup>2360</sup> Several

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Council of 5 December 2003 adopting a multiannual programme (2004 to 2006) for the effective integration of information and communication technologies (ICT) in education and training systems in Europe (eLearning Programme) [2003] OJ L345/9.

2357 Erasmus+ Regulation 1288/2013, Art 8(1)b.

2358 I thus disagree with Theiler, 'The European union and the "European dimension" in schools: Theory and evidence', 323 and 325, for whom the Maastricht Treaty did 'not strengthen the Commission's and the EP's ability promote the "European dimension" in national school curricula in a significant way', arguing that it 'does not figure among the areas which the Treaty lists as subject to potential Union involvement', and even if this list were only illustrative, Community action 'could at the most be of a "soft" and non-binding type'. Neither do I agree with Lonbay, 'Reflections on education and culture in EC law' 273: 'the EC itself not being allowed to take ... action'.

2359 Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1, recital 19. Each Member State can decide on its approach in the implementing measures.

2360 E.g. Council Recommendation of 28 June 2011 on policies to reduce early school leaving [2011] OJ C191/1; Council Recommendation of 28 June 2011 'Youth on the move' — promoting the learning mobility of young people

recently adopted measures take the latter form.<sup>2361</sup> Remarkably, the Recommendation on key competences for lifelong learning adopted in 2006 by the European Parliament and the Council (ordinary legislative procedure) was replaced in 2018 by a Recommendation on key competences adopted solely by the Council.<sup>2362</sup>

Recommendations are appropriate instruments for supporting the EU dimension of EDC. Preferably adopted by the European Parliament and the Council (for increased legitimacy), or else by the Council alone, a recommendation promoting EDC and its EU dimension in Member States, would contribute to empowering EU citizens to exercise their democratic rights and responsibilities, to value diversity and to effectively participate in democratic life in Europe.

### 317 *Respect of the no-content limit: learning outcomes*

On the basis of Article 165 TFEU, the EU can use its ‘competence’ to support quality education, while fully respecting the ‘responsibility’ of Member States for the content of teaching.<sup>2363</sup>

If the curriculum is defined as ‘a plan for learning in the form of the description of *learning outcomes*, of *learning content* and of *learning processes* for a specified period of study’,<sup>2364</sup> the EU can recommend EDC and its EU dimension in the *learning outcomes*, yet leave the learning content to Member States, respecting the responsibility of Member States for the content of teaching. The paradigm in the field of education has shifted from inputs based on a static conception of curricular content to dynamically achieved

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[2011] C199/1; Council Recommendation on the validation of non-formal and informal learning [2012] OJ C398/1.

2361 Council Recommendation of 19 December 2016 on Upskilling Pathways: New Opportunities for Adults [2016] OJ C484/1; Council Recommendation of 20 November 2017 on tracking graduates [2017] OJ C423/1; Council Recommendation of 22 May 2017 on the European Qualifications Framework for lifelong learning and repealing the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2017] OJ C189/15; Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1; Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1.

2362 Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1.

2363 Competence and responsibility are not necessarily synonyms. For reflection, compare their use in Art 165(1) and Art 88(3) or Art 207(4)(b) TFEU.

2364 Text to n 2073.



learning outcomes and (educational) competences, defined as ‘a combination of knowledge, skills and attitudes appropriate to the context’.<sup>2365</sup> The approach based on educational competences can be seen to be compatible with the ‘no content’ and ‘no harmonisation’ limits of the Treaty. In the 2018 Recommendation on key competences for lifelong learning the Council defines eight key competences but leaves the means of achieving them to the Member States (a wide variety of learning approaches and environments can be used to support their development<sup>2366</sup>). In order to overcome difficulties in the implementation, the Commission observed that ‘translating key competences into learning outcomes is a major step’, which ‘can be done at different levels, by policy makers, but also teachers and learners within their individual education systems, institutions and programmes of learning’.<sup>2367</sup>

Admittedly, EU education policy recommendations have the capacity to influence the content of teaching.<sup>2368</sup> Although the words ‘curriculum’ and ‘content’ were not mentioned in the 2006 Recommendation on key

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- 2365 Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning [2006] OJ L394/10 (Annex: Key Competencies for Lifelong Learning- A European Reference Framework). See also Erasmus+ Regulation 1288/2013, Art 2(19); Commission staff working document, Assessment of Key Competences in initial education and training: Policy Guidance Accompanying the document Communication from the Commission Rethinking Education: Investing in skills for better socio-economic outcomes SWD(2012) 371 final.
- 2366 Council Recommendation of 22 May 2018 on key competences for lifelong learning [2018] OJ C189/1, p 12.
- 2367 Commission Staff working document Accompanying the document Proposal for a Council Recommendation on Key Competences for LifeLong Learning SWD(2018) 14 final, 64 (‘Policy makers can ensure that these learning outcomes are consistently specified across curricula, syllabi, specifications, standards or similar framework documents’).
- 2368 In several recommendations ‘learning plans’ and elements of the European dimension in education (e.g. intercultural awareness) appear as preparation for learning mobility and it is suggested that they should be included in the curriculum, e.g. Recommendation of the European Parliament and of the Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility [2006] OJ L394/5, recitals 1 and 2, and Annex on learning plans; Council Recommendation of 28 June 2011 ‘Youth on the move’ — promoting the learning mobility of young people [2011] C199/1, point 3 and 4; Recommendation of the European Parliament and of the Council of 10 July 2001 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers [2001] OJ L215/30, at 11(b).

competences, in practice the competences approach had a significant impact on curricula and content.<sup>2369</sup> Key competences are expressed in terms of indicators and benchmarks, where the pressure of publicity and the comparison of Member States' performances may have convergent effects.<sup>2370</sup> But I agree with Lonbay that creating 'convergence through commonly accepted outcomes is not at all the same as creating a rigid, Europe-wide curriculum'.<sup>2371</sup> Recommended learning outcomes should not be equated with forbidden content of teaching, nor as harmonisation, insofar as their implementation and the ways of achieving them are left to the educational freedom of the Member States. Learning outcomes leave room for differences in the precise content of teaching as Member States absorb them into the richness of national educational systems and cultures. The Member States also retain freedom as to learning processes, educational activities, choice of textbooks and methods, grouping of pupils, curricular or cross-curricular courses, distribution of annual taught time between subjects, methods of assessment, etc.

318 *An EU Reference Framework on Education for Democratic Citizenship and the EU Dimension*

On the legal basis of Article 165 TFEU and respecting the principles of subsidiarity and proportionality, a recommendation could be adopted on EDC and its EU dimension in order to elaborate on the components of the citizenship competence (key competence for lifelong learning) and to formulate learning outcomes for school education in a Reference Framework on Education for Democratic Citizenship and the EU Dimension. Inspiration could be drawn, for instance, from the Reference Framework for Lan-

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2369 G Halász and A Michel, 'Key Competences in Europe: interpretation, policy formulation and implementation' (2011) 46 *European Journal of Education* 289; A Kleibrink, 'The EU as a Norm Entrepreneur: the case of lifelong learning' (2011) 46 *European Journal of Education* 70. See also Commission staff working document, *Assessment of Key Competences in initial education and training: Policy Guidance Accompanying the document Communication from the Commission Rethinking Education: Investing in skills for better socio-economic outcomes SWD(2012) 371 final*, p 6; Commission/EACEA/Eurydice, *Citizenship Education in Europe* (2012), p 17.

2370 See Council Conclusions on increasing the level of basic skills in the context of European cooperation on schools for the 21st century [2010] C323/04.

2371 Lonbay, 'Reflections on education and culture in EC law' 256.

guages<sup>2372</sup> or the Reference Framework for Competences for Democratic Culture<sup>2373</sup> of the Council of Europe. Learning outcomes could relate to the EDC components and their EU dimension as analysed in Part three, including the understanding of EU foundational values, objectives and principles, EU rights and obligations, and critical thinking.<sup>2374</sup> Member States would be encouraged to link their learning outcomes to the Reference Framework when determining content of teaching in national curricula. The Framework could be developed independently in cooperation with by (higher) education institutions (to avoid suspicion of Europropaganda by EU institutions).<sup>2375</sup> The projects supported in various actions, such as the ‘Learning EU@school’ projects under the Jean Monnet programme, and the outcomes they deliver, could be coordinated in harmony with this proposed Framework.<sup>2376</sup> At present, outcomes for EU learning at school and didactic materials are fragmented, scattered across many different websites, and teachers and pupils have no common database with which they can work throughout the learning process. Ideally, the Reference Framework would refer to a school-friendly version of selected provisions of the Treaties and CFR.<sup>2377</sup>

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2372 The Common European Framework of Reference for Languages (see § 103 ), see i.a. appendix 1, B(4), ‘a reference tool for the development and implementation of coherent and transparent language education policies’, inviting member states to ‘ensure that language instruction is fully integrated within the core of the educational aims’; ‘The CEFR is intended to provide a shared basis for reflection and communication among the different partners in the field, including those involved in teacher education and in the elaboration of language syllabuses, curriculum guidelines, textbooks, examinations, etc., across the member states of the Council of Europe’.

2373 See § 38 .

2374 See also proposal to define a set of learning outcomes: Opinion of the European Economic and Social Committee on 'Education about the European Union' SOC/612 (21 March 2019), para 1.5.

2375 A common Reference Framework could be the answer to Commissioner Figel’s emphasis on the importance of clear views on how to integrate the European dimension in school curricula and how to provide schools with both the material and the opportunities to learn about Europe in practice ([2006] OJ C306E/100). See also Opinion of the European Economic and Social Committee, Reconciling the national and European dimensions of communicating Europe [2009] OJ C27/152, point 3.4.

2376 See text to n 2259. Deserving much wider support.

2377 As proposed in § 175 . See further renewed action in Opinion of the European Economic and Social Committee on ‘Teaching Europe — developing a toolkit for schools’ [2019] OJ C 353/52.

Binding incentive measures could complement an EU recommendation on EDC and its EU dimension in order to encourage the inclusion of a high-quality EU dimension in key competences with financial and non-financial incentives (EU labels of excellence).<sup>2378</sup>

Upstream, Article 165(2) first indent TFEU is a basis for the sound development of the European dimension in teacher training (a prerequisite for the EU dimension in school education). ‘EU schoolteachers’ could be trained at Jean Monnet higher education institutions (teacher training with an EU label of excellency).<sup>2379</sup>

Existing programmes, such as the European Parliament Ambassador School Programme (EPAS), could be developed further and more widely implemented. EPAS is intended to promote the European dimension in school education and leads to the award of the ‘Ambassador School’ certificate.<sup>2380</sup>

A recommendation and incentive measures on EDC and its EU dimension would be consistent with other EU instruments in education policy and a major contribution to the realisation of the European Education Area (EEA).<sup>2381</sup>

### 319 *Mixed instruments*

As an *ad hoc* solution for action to promote the EU dimension of EDC, mixed instruments must be mentioned. Examples are ‘conclusions of the Council and of the representatives of the Governments of the Member

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2378 Mechanism set out in § 315 . Analogy to Erasmus+ Regulation 1288/2013, Art 10. See the support for EU learning@school projects.

2379 More recommendations in A. Dunne, D. Ulicna and S. Oberheidt, *Learning Europe at School* (DG EAC, Final report, submitted by ICF GHK, 2013); and B. Hoskins and D. Kerr, *Final Study Summary and Policy Recommendations: Participatory Citizenship in the European Union* (Report 4) (Institute of Education, University of London, commissioned by the European Commission, Europe for Citizens Programme, 2012).

2380 Launched in 2016, aiming to increase the turnout of young voters in the 2019 European Parliament elections.

2381 Consistent i.a. with Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching [2018] OJ C195/1. See further Council Conclusions on moving towards a vision of a European Education Area [2018] OJ C195/7. See also European Parliament Resolution of 12 December 2017 on the EU Citizenship Report 2017: Strengthening Citizens’ Rights in a Union of Democratic Change (2017/2069(INI)), para 32.

States, meeting within the Council<sup>2382</sup> or the Paris Declaration of the Education Ministers and the Commissioner for Education, Culture, Youth and Sport.<sup>2383</sup> Here EU action is combined with an intergovernmental

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2382 Before competences were conferred in education, see i.a. Resolution of the Council and of the Ministers of Education, meeting within the Council, of 9 February 1976 comprising an action programme in the field of Education [1976] OJ C38/1; Conclusions of the Council and the Ministers for Education meeting within the Council of 3 June 1985 on improving the treatment of the European dimension in education; Resolution of the Council and of the Ministers for Education, meeting within the Council, of 3 June 1985 containing an action programme on equal opportunities for girls and boys in education [1985] OJ C166/1; Resolution of the Council and of the Ministers of Education meeting within the Council of 23 November 1988 concerning health education in schools. Even after the Treaty conferred competences in education: Conclusions of the Council and of the Ministers for Education meeting within the Council of 11 June 1993 on furthering an open European space for cooperation within higher education [1993] OJ C186/1; Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council, on implementing the common objectives for participation by and information for young people in view of promoting their active European citizenship [2006] OJ C297/6; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 15 November 2007, on improving the quality of teacher education [2007] OJ C300/7; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 21 November 2008 on preparing young people for the 21st century: an agenda for European cooperation on schools [2008] OJ C319/20; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 26 November 2009 on developing the role of education in a fully-functioning knowledge triangle [2009] OJ C302/3; Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 24 February 2016 on promoting socio-economic development and inclusiveness in the EU through education: the contribution of education and training to the European Semester 2016 [2016] OJ C105/1; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the role of the youth sector in an integrated and cross-sectoral approach to preventing and combating violent radicalisation of young people [2016] OJ C213/1; Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on Inclusion in Diversity to achieve a High Quality Education For All - Council Conclusions (17 February 2017).

2383 EU Education Ministers and the Commissioner for Education, Culture, Youth and Sport, Paris Declaration on Promoting citizenship and the common values of freedom, tolerance and non-discrimination through education (17 March 2015).

approach. These instruments (partly) fall outside the scope of Article 165 TFEU.<sup>2384</sup>

Adopting a mixed instrument on the EU dimension of EDC would certainly respect Member State competences in education. However, there may be hesitation—and rightly so—in the light of the warning of the European Parliament that ‘soft law cannot be a substitute for legal acts and instruments, which are available to ensure the continuity of the legislative process, especially in the field of culture and education’.<sup>2385</sup>

An alternative way of respecting Member State competences in education therefore deserves special attention: the creation of an EU Agency.

### 320 *An EU Agency for Education for Democratic Citizenship*

Inspiration for EU action—while respecting Member State competences in education and the principle of subsidiarity—might be drawn from Germany, where measures are adopted at federal level, while still respecting the education competences of the *Länder*. The *Bundeszentrale für politische Bildung* (Federal Agency for Civic Education) supports citizenship education in the *Länder* in cooperation with independent *Landeszentralen*. It is ‘a federal public authority providing citizenship education and information on political issues to all people in Germany’.<sup>2386</sup> Originally, the Federal Centre for Homeland Service (1952) had the task of consolidating and spreading the democratic and European ideas among the German people<sup>2387</sup> (to erase the effects of Nazi-education). At present, the *Bundeszentrale für politische Bildung* has the task of promoting understanding of political issues through measures of political education, of strengthening demo-

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2384 Resolution of the Council and the Representatives of the Governments of the Member States meeting within the Council on a framework for European cooperation in the youth field: The European Union Youth Strategy 2019–2027 [2018] OJ C 456/1. This instrument fosters youth participation in democratic life ‘in line with’ Article 165 TFEU and aims to ‘Introduce and increase education about Europe and the EU in formal and non-formal settings’ (Annex 3 European Youth Goals).

2385 European Parliament Resolution of 4 September 2007 on institutional and legal implications of the use of ‘soft law’ instruments [2008] OJ C187E/75, para 2, see also recital X.

2386 See n 497. On 26 May 1997 the Directors of the Federal and Regional Agencies for Civic Education submitted a public declaration entitled ‘Demokratie braucht politische Bildung’ (Democracy calls for political education), the Munich Manifesto.

2387 Erlaß über die Errichtung der Bundeszentrale für Heimatdienst, 25. November 1952, § 2.

cratic awareness, and of strengthening the readiness to political cooperation.<sup>2388</sup> A Board of trustees (22 members of the German *Bundestag*) monitors the politically balanced attitude and political effectiveness of the work of the *Bundeszentrale*. The *Bundeszentrale* has to maintain close links with the highest *Länder* authorities in all matters affecting their competences.<sup>2389</sup> The key activities of the *Bundeszentrale* include: the development of a wide variety of materials and instruments to support professionals in the field of citizenship education; providing them with training sessions and materials on teaching methods; providing teaching materials on complex issues adapted to different age groups and different learning environments (explained in simple terms and not contaminated by party politics); supporting social media activities; and providing funding for citizenship education to partners, with the task of making 'sure that citizenship education is provided on a local level in every region throughout the country'.<sup>2390</sup> The key activities of this German Federal Agency are inspired by respect of the German *Grundgesetz*.<sup>2391</sup>

In like vein, an EU agency could engage in comparable activities in respect of EU primary law in conjunction with national constitutions. It could provide information and develop educational materials for EDC and its EU dimension, while respecting EU and Member State competences. The Council of Europe has produced valuable materials (mainly in English or French) for implementing EDC in 47 member states (inter alia, in Turkey, Russia, or Azerbaijan). These materials are not sufficient for the EU Member States. An EU Agency could adapt materials to the specific EU

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2388 Erlass über die Bundeszentrale für politische Bildung (BpB), 24. Januar 2001, § 2. See also T Krüger, 'Brauchen wir eine "Europäische Zentrale für politische Bildung"? Ich meine ja!' (2014) 144 Kulturpolitische Mitteilungen Kulturpolitik & Planung.

2389 Ibid, § 6 'Die politisch ausgewogene Haltung und die politische Wirksamkeit der Arbeit der Bundeszentrale werden von einem aus 22 Mitgliedern des Deutschen Bundestages bestehenden Kuratorium kontrolliert'; § 7 'Die Bundeszentrale hält in allen Angelegenheiten, welche die Zuständigkeit der Länder berühren, enge Verbindungen zu den obersten Landesbehörden.'

2390 <[www.bpb.de/die-bpb/138867/key-activities](http://www.bpb.de/die-bpb/138867/key-activities)>.

2391 See n 506. Also T Krüger, *Politische Bildung—notwendiger denn je* (27.5.2019) *Jahresgespräch Politische Bildung* (2019), <[www.bpb.de/presse/291890/politische-bildung-notwendiger-denn-je](http://www.bpb.de/presse/291890/politische-bildung-notwendiger-denn-je)> ('die politische Bildung selbst—innerhalb eines inklusiven Gemeinwesens ...arbeitet an und auf Basis von einem "common ground": dem Grundgesetz').

context and make them available in all 24 EU languages.<sup>2392</sup> The Agency could offer training to citizenship education professionals from the Member States and provide funding for the development of the EU dimension of EDC to its partners, with the task of ensuring that that is provided in every Member State and region throughout the EU (including to static citizens). The European Parliament could monitor the activities of the Agency as to political correctness and effectiveness. The EU Agency would maintain close links with the highest educational authorities of the Member States, fully respecting their competences in education. The work of the Agency would be consistent with and support the decisions of the Ministers of Education of the EU, just as the activities of the *Bundeszentrale* respect the guidance given by the German Standing Conference of the Ministers of Education and Cultural Affairs. This Standing Conference has adopted resolutions recommending education for democracy and human rights education, as well as recommending the European dimension in education.<sup>2393</sup>

### 321 Reporting on the EU dimension of EDC

Finally, EU measures could at least provide for better reporting on EDC and its EU dimension in Member States, even if assessment is difficult.<sup>2394</sup>

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2392 The existing Education, Audiovisual and Culture Executive Agency (EACEA) is an executive agency entrusted with the implementation of programmes as Erasmus+, Creative Europe, etc. It mainly manages funding. See Commission Implementing Decision of 18 December 2013 establishing the ‘Education, Audiovisual and Culture Executive Agency’ and repealing Decision 2009/336 [2013] OJ L343/46. Cp the idea of a centralised platform with learning and teaching materials in Opinion of the European Economic and Social Committee on ‘Education about the European Union’ SOC/612 (21 March 2019), paras 1.13, 4.4; Opinion of the European Economic and Social Committee on ‘Teaching Europe — developing a toolkit for schools’ [2019] OJ C 353/52, para 5.1.

2393 See text to n 504 ff. The 1978 Recommendation ‘Europe in the classroom’ (*Europa im Unterricht*) was amended in 1990 and updated in 2008 (*Europabil- dung in der Schule*); it recommends ‘upholding the test criterion “European dimension in classroom teaching” when approving teaching and learning materials’ (see <eacea.ec.europa.eu/national-policies/eurydice/content/other-di- mensions-internationalisation-early-childhood-and-school-education-25\_en>).

2394 The review cycles of the Charter on EDC/HRE concern EDC in general (no EU dimension). See §§ 62 66 and text to n 478. On the necessity of up-to-date studies mapping teaching about the EU, see Opinion of the European Economic and Social Committee on ‘Education about the European Union’ SOC/612 (21 March 2019), para 1.11.



Citizenship education continues to be an area characterised by gaps between policy and practice, between the curriculum as designed and the curriculum as implemented.<sup>2395</sup> In the face of the economic crisis, EU objectives in education have been pursued with targeted action, comprehensive strategies, due dates, and periodic reporting on progress.<sup>2396</sup> EU institutions have called for the modernisation of curricula to achieve the headline targets in education, aiming at an advanced knowledge-based economy, as a key to growth.<sup>2397</sup> These tools and endeavours could be envisaged with regard to the EU civic gap as well. Unfortunately, where reporting on the European dimension in education is concerned, there has been a step back.<sup>2398</sup> For years, the Member States were asked to report on their implementation of the European dimension in education in chapter 11 of the Eurydice Database, facilitating a comparative study.<sup>2399</sup> On the present Eurydice website, this chapter has been replaced by chapter 13 'Mobility and Internationalisation'.<sup>2400</sup> While some Member States (such as Germany) continue to report on the European dimension in education,

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2395 Losito B and others, *Young People's Perceptions of Europe in a Time of Change: IEA International Civic and Citizenship Education Study- 2016 European Report* (2017), 13–14.

2396 See, e.g., Council Recommendation of 28 June 2011 on policies to reduce early school leaving [2011] OJ C191/1; or the EU benchmark for language teaching (Commission staff working document, *Language competences for employability, mobility and growth Accompanying the document Communication From the Commission Rethinking Education: Investing in skills for better socio-economic outcomes SWD(2010) 372 final*).

2397 I.e. reducing the proportion of early school leavers to less than 10% and increasing the proportion of 30–34 year olds having completed tertiary or equivalent education to at least 40%: Council Conclusions on the role of education and training in the implementation of the 'Europe 2020' strategy [2011] C70/1 ("Stresses", II at paras 6–7; "Considers" at para.4). See also European Parliament Resolution of 2 April 2009 on Better Schools: an agenda for European cooperation [2010] OJ C137E/43; Council Conclusions on increasing the level of basic skills in the context of European cooperation on schools for the 21st century [2010] C323/04; and especially Commission Communication 'Rethinking Education: Investing in skills for better socio-economic outcomes' COM(2012) 669 final, e.g. p 6, 11.

2398 Cp the international obligation of States (ICESCR) not to adopt deliberately retrogressive measures (n 2162).

2399 European Parliament, *The European Dimension in Secondary Education in Europe* (EDUC 11–2003), p 4, especially since 2002. Asking to report specifically on teaching about the European Union underscored its importance.

2400 <[eacea.ec.europa.eu/national-policies/eurydice/national-description\\_en](http://eacea.ec.europa.eu/national-policies/eurydice/national-description_en)> (i.a. taking together 'the European, global and intercultural dimension in curricu-

others do not or scarcely do (such as Flanders, Belgium). The ‘European, global and intercultural dimension in the curriculum’ have been combined in one subject. Furthermore, a ‘mobility score board’ on the Eurydice website reveals the focus.

In the 1992 Maastricht Treaty, EU citizenship and the ‘European dimension in education’ were introduced together.<sup>2401</sup> As shown in Part three, the impact of EU citizenship has been consolidated in the case law of the ECJ. But the European dimension in education (*sensu stricto*) seems to be lagging far behind. While ‘the European dimension in education’—Treaty concept—appeared in EU legislation containing action programmes in education for many years,<sup>2402</sup> the 2013 Erasmus+ Regulation aims to enhance ‘the international dimension of education’ (and only refers to a ‘European dimension in sport’).<sup>2403</sup> It is needless to explain that the European and the international dimension are very different concepts. In its Opinion, the Committee of the Regions rightly stressed the major challenge that ‘the programme should strengthen EU citizenship by emphasising the European dimension’.<sup>2404</sup>

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lum development’). See also Commission/EACEA/Eurydice E, Structural Indicators for Monitoring Education and Training Systems in Europe—2018. Eurydice Background Report (measuring of early childhood education, basic skills, early school leaving, higher education, employability, and mobility; no measuring of citizenship education).

2401 Now Arts 20 and 165 TFEU.

2402 The expression ‘the European dimension in education’ was central in the Decision 253/2000 of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education ‘Socrates’ [2000] OJ L28/1, Arts 1(3) and 2(a), recital 1, and Annex: ‘Comenius seeks to enhance the quality and reinforce the European dimension of school education, in particular by encouraging transnational cooperation between schools and contributing to improved professional development of staff directly involved in the school education sector, and to promote the learning of languages and intercultural awareness’. See also Decision 1720/2006 of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning [2006] OJ L327/45; amended by Decision 1357/2008 [2008] OJ L350/56, recital 1.

2403 Erasmus+ Regulation 1288/2013, Art 5 1(d), and recital 8. Only a ‘European dimension’ in sport: Art 4(e). The 2018 Proposal for the Erasmus programme does not mention the European dimension in education either.

2404 Opinion of the Committee of the Regions of 3 and 4 May 2012 on ‘Erasmus for All’ [2012] OJ C225/200, p.3, para.13.

322 *Unused potential*

Article 165 TFEU provides an adequate legal basis for the EU to promote the EU dimension of EDC, especially with regard to achieving the Treaty objectives of quality education, the European dimension in education, and the participation of young people in democratic life in Europe (respect for the principle of conferral and seen in the light of subsidiarity as a meta-constitutional concept). The EU can exercise that competence and do so without going further than needed (respect for the principles of subsidiarity in the strict sense and proportionality). At present, the potential of Article 165 TFEU is not being fully used.<sup>2405</sup> If the Commission wants to make good use of the unexhausted potential of the Lisbon Treaty (sixth scenario for the future of Europe<sup>2406</sup>), then education is one of the areas available for action to build a more democratic and value-based Union close to its citizens. In addition to binding incentive measures and recommendations on the legal basis of Article 165 TFEU, action could take the form of mixed instruments, the creation of an EU Agency for Education for Democratic Citizenship, and better reporting on the state of play in the Member States.

B *Member State action*323 *National competence, but exercised in compliance with EU law*

While the EU has a supporting competence in education, the main competence and responsibility for providing an EU dimension in EDC lies with the Member States. The so-called killer phrase in European citizenship education networks, ‘Your work is incredibly important, but education is subject to national policies’,<sup>2407</sup> is a correct reading of Article 4(1) TEU in conjunction with Article 165 TFEU. Competences not transferred to the Union do indeed remain with the Member States. However, when Member States use their competences in particular fields (such as personal names, taxes, nationality, and also education), they must still respect EU law. The ECJ recalls that ‘whilst European Union law does not detract from the power of the Member States as regards the organisation of their

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2405 Grimonprez, ‘The European dimension in citizenship education: unused potential of article 165 TFEU’.

2406 Calliess, ‘Bausteine einer erneuerten Europäischen Union- Auf der Suche nach dem europäischen Weg; Überlegungen im Lichte des Weißbuchs der Europäischen Kommission zur Zukunft Europas’, 5.

2407 Text to n 83.

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<sup>2408</sup> Respect for EU law limits the discretion of Member States in the use of their education competences. This will be illustrated by EU educational rights in crossborder situations. Moreover, in a human rights-based approach to education, fundamental rights must be respected.

### 324 EU educational rights in crossborder situations

Because of the need to comply with EU law, a whole range of educational rights have developed in crossborder situations, which fall within the scope of the Treaties. Some of them were first addressed in ECJ case law and were later incorporated and specified in secondary legislation.

When exercising their competences in education, Member States must comply with the principle of free movement of workers (Article 45 TFEU). Articles 165 and 166 TFEU have no impact on the EU's express and implied powers concerning the internal market.<sup>2409</sup> Free movement of workers has to be guaranteed in compliance with the principles of liberty and dignity and respect for the right to family life. Seeking to ensure the best possible conditions for the integration of the migrant worker's family in the society of the host Member State, the ECJ has recognised several educational rights (rights to education and rights linked with education).<sup>2410</sup> The right of freedom of establishment (Article 49 TFEU) and the right

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2408 I.a. Case C-73/08 *Bressol, Chaverot and Others* ECLI:EU:C:2010:181, para 28–29; Case C-281/06 *Jundt* ECLI:EU:C:2007:816, para 84–87; Case C-76/05 *Schwarz* ECLI:EU:C:2007:492, para 70. See also Ruffert, 'AEUV Art 165', Rn 2: (tr) The heart of the problem is that education policy affects too many other policy areas and, above all, fundamental freedoms, so that in its own right the Title on Education can only address partial aspects and thus cannot comprehensively limit the influence of EU law.

2409 Lenaerts, 'Education in European Community Law after "Maastricht"', 40, referring to Art 6(2) and art 49 EC; the *acquis communautaire* continues to exist in full in this area. On the *Casagrande* heritage, see Shaw, 'From the Margins to the Centre: Education and Training Law and Policy' 573. See also S Garben, 'The Bologna Process: From a European Law Perspective' (2010) 16 ELJ 186, arguing that there would have been legal competence to enact the content of the Bologna Declaration as a Community measure related to the internal market.

2410 Educational rights for workers flow from Art 45 TFEU and secondary legislation such as Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2, and Regulation 492/2011 of the European Parliament and of the Council of 5

to provide services (Article 56 TFEU), too, have limited Member States' educational autonomy,<sup>2411</sup> as has (beyond the internal market) free movement of citizens<sup>2412</sup> and the principle of non-discrimination on the grounds of nationality<sup>2413</sup>.

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April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1, construed generously by the ECJ on the basis of a teleological interpretation; see objectives in preambles. Human dignity and the right to family life imply that the worker cannot be separated from his family. See i.a. Case C-308/89 *di Leo* ECLI:EU:C:1990:400, para 13; Case C-413/99 *Baumbast* ECLI:EU:C:2002:493, para 50; Case C-337/07 *Ibrahim* ECLI:EU:C:2008:744, para 59; Case C-480/08 *Teixeira* ECLI:EU:C:2010:83, paras 61, 70; Case C-45/12 *Hadj* ECLI:EU:C:2013:390, para 44. For educational rights such as rights of equal access to education in the host Member State, or under conditions not restricting free movement; for derived residence rights for child and primary carer, etc., see Case 197/86 *Brown* ECLI:EU:C:1988:323; Case C-379/87 *Groener* ECLI:EU:C:1989:599; Case C-7/94 *Gaal* ECLI:EU:C:1995:11; Case C-281/98 *Angonese* ECLI:EU:C:2000:296; Case C-109/04 *Kranemann* ECLI:EU:C:2005:187; Case C-258/04 *Ioannidis* ECLI:EU:C:2005:559; Case C-529/11 *Alarape* ECLI:EU:C:2013:290; Case C-542/09 *Commission v the Netherlands* ECLI:EU:C:2012:346; Case C-317/14 *Commission v Belgium* ECLI:EU:C:2015:63.

2411 Both in requiring no discrimination and no hindrance. See Case C-337/97 *Meeusen* ECLI:EU:C:1999:284, paras 27–30; Case C-523/12 *Dirextra Alta Formazione* ECLI:EU:C:2013:831, paras 21–3, 26–9; Case C-76/05 *Schwarz* ECLI:EU:C:2007:492, paras 66–7. The situation of pupils, teachers and schools falls within the scope of the Treaties via the freedom of services provisions when education is seen as a 'service' within the meaning of the Treaty (private financing of a school and the intention to make an economic profit) and occurs crossborder. See Case C-109/92 *Wirth* ECLI:EU:C:1993:916, para 17; Case C-76/05 *Schwarz* ECLI:EU:C:2007:492, para 47. The distinction between publicly or privately funded education can be criticised; see Garben, *EU Higher education law. The Bologna Process and harmonization by stealth*, 106; also Dougan, 'Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?'

2412 Case C-359/13 *Martens* ECLI:EU:C:2015:118, para 23; 'although the Member States are competent, under Article 165(1) TFEU, as regards the content of teaching and the organisation of their respective education systems, they must exercise that competence in compliance with EU law and, in particular, in compliance with the Treaty provisions on the freedom to move and reside within the territory of the Member States, as conferred by Article 21(1) TFEU on every citizen of the Union'; repeated in Case C-679/16 *A* ECLI:EU:C:2018:601, para 58. See also Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* ECLI:EU:C:2007:626, para 24; Case C-275/12 *Elrick* ECLI:EU:C:2013:684, para 21; Joined Cases C-523/11 and C-585/11 *Prinz* ECLI:EU:C:2013:524, para 26.

I am returning here briefly to the case law on free movement and educational rights in crossborder situations, not to downplay the relevance—argued above—of the EU dimension for static citizens, but to make two observations concerning the exercise of Member State competence in education.

The first observation is that in applying free movement rules to education contexts, the ECJ refused to apply the exception relating to the public service or the exercise of official authority. The *Commission v Greece* case is of interest in the context of citizenship education.<sup>2414</sup>

According to the Commission, Greek legislation makes it impossible for nationals of other Member States to set up certain educational establishments and to give private lessons at home, and thus infringes free movement rules. The Greek Government invokes the exception to freedom of establishment for activities connected with the exercise of official authority in the State: ‘it is for each Member State to define which activities in the State are connected with the exercise of official authority. That is the case as regards teaching activities in Greece, in view of the fact that, under the Greek Constitution, the provision of instruction is a fundamental duty of the State designed to ensure in particular the moral and spiritual education of its citizens and the development of their national consciousness, and that private individuals who carry on such activities do so in their capacity as repositories of official authority’.<sup>2415</sup> The ECJ emphasises that as a derogation from a fundamental freedom, the exception based on the exercise of official authority ‘must be interpreted in a manner which limits its scope to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect’, to be appraised separately in respect of each Member State.<sup>2416</sup> The ECJ wants to prevent the effectiveness of the Treaty provisions on freedom of establishment being undermined by unilateral measures adopted by the Member States:

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2413 Linking Arts 18 and 21 TFEU, D’Hoop (n 1393); also *Gravier* and other case law (§ 193).

2414 Case 147/86 *Commission v Greece* ECLI:EU:C:1988:150.

2415 Para 6. See actual Greek constitution on aims of citizenship education in Art 16(2): ‘Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens’.

2416 Paras 7–8.

‘Although it is for each Member State to determine the role of, and the responsibilities attaching to, official authority with regard to instruction, it cannot be accepted that the mere fact that a private individual sets up a school such as a ‘frontistirion’ or a vocational training school, or gives private lessons at home, is connected with the exercise of official authority within the meaning of Article 55 of the Treaty.’ Supervision by official authorities suffices to guarantee the protection of the interests entrusted to the State.<sup>2417</sup> The ECJ concludes that Greece has failed to fulfil its obligations under (now) Articles 49 and 56 TFEU.<sup>2418</sup>

In other cases, too, Member States have not been able to justify failure to comply with EU law in the education field by arguing that education concerns ‘the general interest of the State’.<sup>2419</sup>

A second observation is the importance of the proportionality principle in case law for reconciling Member State prerogatives in education with EU rights and objectives. In *Bressol*, as explained in Part three, the ECJ found that the right of equal access to higher education cannot be limited by a requirement of local residence unless justified with specific evidence.<sup>2420</sup> The ECJ applied the proportionality principle in order to respect sensitive concerns of the Member States, yet at the same time to uphold the relevant EU principles.<sup>2421</sup> Shortly before the Lisbon Treaty was signed, Austria insisted on appending to the Treaty a special protocol allowing for a limitation on the number of non-national students who can be admitted to its universities. The Commission finally ‘raised the white flag’ and suspended its action against Austria for five years.<sup>2422</sup> Garben observes that Member States put mobility in education high on the European agenda yet face numerous problems in practice and are not very eager to implement

2417 Paras 8–10.

2418 Para 18.

2419 For workers, Case 66/85 *Lawrie-Blum* ECLI:EU:C:1986:284, paras 24–7 (because of her British nationality, Lawrie-Blum was refused access to a German education which prepared future teachers). In the same sense: Case C-290/94 *Commission v Greece* ECLI:EU:C:1996:265, para 37. For services, see Case C-281/06 *Jundt* ECLI:EU:C:2007:816, para 37.

2420 *Bressol*, see text to n 1385.

2421 Garben, ‘Case C-73/08, Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française, Judgment of the Court (Grand Chamber) of 13 April 2010’, 1510; in *Bressol*, ‘the Court was stuck between a rock and a hard place’; ‘The Court chose the middle way, exploiting the proportionality test to the fullest’.

2422 Analysis of this education saga in *ibid*, 1497–1498: the aftermath of the 2004 and 2005 *Commission v Belgium* and *Commission v Austria* cases.

it. Their ‘political high-talk’ on mobility in education sometimes ‘feels like empty rhetoric’; ‘Member States all too often want to have their cake and eat it too’.<sup>2423</sup> Garben discerns a lack of solidarity between Member States and a lack of commitment to their own policy objectives, but recognises the dangers of (excessive) Court driven integration.

If even mobility, which figures in the text of Article 165 TFEU (para 2, second indent) leads to tensions, the EU dimension of EDC, which is not specifically mentioned in the text of that provision, will a fortiori require caution.

The proportionality test has been decisive in other cases too. The ECJ accepts ‘quality education’ as an objective justifying restrictive measures, but only if the measure is suitable and does not go beyond what is necessary to achieve the objective. Quality education is not defined by the ECJ; concrete answers in this respect have to come from the referring court.<sup>2424</sup>

### 325 *The right to vote and possible limitations*

Voting rights for the European Parliament have effects on the relationship of static citizens with their own Member State. When determining who was entitled to vote in the elections for the European Parliament, France had to respect the conditions of Article 52(1) CFR (*Delvigne*). It seems natural to expect that, when organising education, Member States will include an EU dimension in national EDC to ensure effective participation in the electoral processes at EU level. The question arises as to whether Member State law on national EDC which fails to include an EU dimension, or—an extreme hypothesis to sharpen the reasoning—with a hostile,

2423 Ibid, 1494, 1509.

2424 In *Neri*, *Lyyski*, and *Bressol*, the ECJ left the application of the proportionality test to the referring court (Case C-153/02 *Neri* ECLI:EU:C:2003:614; Case C-40/05 *Lyyski* ECLI:EU:C:2007:10; *Bressol* (n 1385)). In *Dirextra*, however, the ECJ found that the freedom to provide services was restricted by Italian legislation and accepted the justification based on quality education as proportional (see paras 21–3, 26–9). In *Neri* the ECJ held that an Italian administrative practice constituted a restriction on the freedom of establishment as it was likely to deter students from attending these courses organised in Italy at a secondary establishment (certain degrees awarded by an UK university were not recognised when part of the studies had been completed in Italy at a secondary establishment of the UK university). Italy tried to justify this restriction by ‘the need to ensure high standards of university education’ and its attachment to a view of university education as ‘a matter of “public interest”, expressing as it does the cultural and historical values of the State’. The ECJ accepted quality education as an objective justifying a restrictive measure but the measure had to be proportional.



anti-EU dimension, can be considered to be a limitation of the right to vote for the European Parliament. If it is a limitation, it has to satisfy the conditions in Article 52(1) CFR, i.a. it must respect the essence of the right to vote. From a formal perspective, the absence of an EU dimension or even the inclusion of an anti-EU dimension in EDC does not prevent citizens from voting for the European Parliament. They can still be informed through the media or by EU information campaigns as part of the process of lifelong learning. Yet, from a substantive perspective, the right to vote may in certain circumstances be deprived of its core content where education fails. Will citizens exercise their right to vote for the European Parliament if teachers have told them previously at school (as happened to my youngest daughter) that the EU is not democratic ‘at all’ and that the European Parliament ‘has no say’?<sup>2425</sup> And if they do, will they grasp the institutional significance of the electoral process they are participating in? Institutional efforts to engage with citizens in public debates on EU issues may be in vain if EDC at school is flawed and as a result citizens lack motivation. At the same time, EDC needs to include critical thinking. The role of the European Parliament is indeed limited to a certain extent, e.g. vis-à-vis the Troika or with regard to measures to tackle economic and financial crises. There may be a thin line between absorbing EU knowledge, exercising critical thinking, and listening to the unnuanced opinions of teachers. To what extent are teachers entitled to exercise their right to freedom of expression in the classroom?<sup>2426</sup>

### 326 *Freedom rights and EDC*

A human rights-based approach to EDC, which is situated at the intersection of the right to education and political participation rights, may be the right incentive for both the Member States and the EU to make use of their competences to establish and support the EU dimension of EDC. It

2425 Class of 18-year old pupils (teacher: ‘Les membres du Parlement européen sont des guignoles qui sont payés pour ne rien faire’: The Members of the European Parliament are puppets who are paid to do nothing.).

2426 See *Seurot v France* no 57383/00 (ECtHR Decision 18 May 2004) (n 323). See A Gardner, ‘Preparing students for democratic participation: why teacher curricular speech should sometimes be protected by the First Amendment’ (2008) 73 *Missouri Law Review* 213, 240 (‘The court should employ a balancing test that is well grounded in the democratic purpose of education. While the government may articulate a legitimate interest which may limit teacher curricular speech, this interest should be weighed mightily against the interest of serving the fundamental purpose of our educational system’); Veny, *Onderwijsrecht 1: Dragende beginselen van het onderwijsbestel*, § 377 ff.

reflects the social dimension of the right to education and strengthens the effectiveness of participation rights.<sup>2427</sup> Yet, at the same time, the human rights-based approach constrains the use of these competences. When designing curricula and formulating learning outcomes, public authorities must respect fundamental rights. Equality rights, for instance, preclude the reinforcement of prejudices against ethnic groups at school.<sup>2428</sup> Freedom rights too, such as the right to freedom of thought, conscience and religion (Article 9 ECHR) or the right to freedom of expression (Article 10 ECHR), may limit the setting of compulsory school curricula.<sup>2429</sup> Importantly, the right to education itself has—in addition to a social dimension, including a right of equal access and to quality education—a freedom dimension, reflected in parents' right to educate their children in conformity with their religious and philosophical convictions, and in the freedom to found educational establishments (Article 2 Protocol 1 ECHR, Article 14(3) CRC).<sup>2430</sup> The ECtHR has upheld the obligation on States and state schools to provide education in an objective, critical and pluralistic way, with no aims of indoctrination. Non-state schools (identity driven or religious schools) have a larger degree of autonomy.<sup>2431</sup>

To what extent can schools, teachers, parents, or pupils rely on their freedom rights to oppose a compulsory curriculum on EDC and its EU dimension? Admittedly, the exercise of legal competences by public authorities (at EU or Member State level) in order to impose an EU dimension restricts freedom rights of actors in the education field. However,

2427 See n 2129.

2428 Extreme example above, n 2186 (reinforcing Hutu-Tutsi prejudices).

2429 *Siebenhaar v Germany* no 18136/02 (ECtHR 3 February 2011), para 36: freedom of religion includes in principle the right to try to convince others, for example by means of education. See also UN ComESCR 'General Comment No 13: The Right to Education (Art. 13)' UN Doc E/C.12/1999/10, para 28: teaching should be respectful of the freedoms of opinion, conscience and expression; *Handyside v UK* no 5493/72 (ECtHR 7 Dec 1976). For safe spaces, see n 1263. See also CoE Steering Committee for Human Rights (CDDH), Guide to good and promising practices on the way of reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies (17 September 2019) CM(2019)148.

2430 Text to n 2129. See also Art 13(3)(4) ICESCR, Art 29(2) CRC, and several national constitutions (text to n 661).

2431 See i.a. *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), paras 50–53; *Hasan and Eylem Zengin v Turkey* no 1448/04 (ECtHR 9 October 2007), paras 52, 56, 57, 64; *Tarantino and Others v Italy* no 25851/09 et al (ECtHR 2 April 2013), Partly dissenting opinion of Judge Pinto de Albuquerque.

firstly, the provisions on the right to education circumscribe educational freedom: freedom is to be exercised ‘with due respect for democratic principles’ and ‘in accordance with the national laws governing the exercise of such freedom and right’ (Article 14 CFR); education in freely established institutions ‘shall conform to such minimum standards as may be laid down by the State’ (Article 13(4) ICESCR) and is subject always to the observance of the principle set forth in Article 29(1) CRC, i.e. the aims to which ‘education shall be directed to’ (Article 29(2) CRC).<sup>2432</sup> Moreover, while freedom rights limit to the action of public authorities, freedom rights themselves are not unlimited either. The constitutional core—for example, minority rights or equality rights—must be respected. Religious schools or individual teachers cannot invoke freedom of education to propagate views of *inequality* of men and women or of ethnic groups. In *Seurot*, the ECtHR decided that the limitation on the right to freedom of expression of a teacher (his dismissal) was legitimate: the indisputably racist content of the teacher’s article in a school journal was incompatible with the teachers’ special duties and responsibilities, i.e. their role as actors in EDC and their responsibility in the fight against racism and xenophobia.<sup>2433</sup> This echoes Popper’s statement: in the name of tolerance, there should be no tolerance of intolerance.<sup>2434</sup> Limitations to fundamental

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2432 In the same sense, text to n 2159.

2433 *Seurot v France* no 57383/00 (ECtHR Decision 18 May 2004) (above § 42 ). See also *Jersild v Denmark* no 15890/89 (ECtHR 23 September 1994), para 30: ‘the vital importance of combating racial discrimination in all its forms and manifestations’.

2434 The paradox of tolerance: unlimited tolerance leads to the disappearance of tolerance. See also NM Stolzenberg, ‘“He drew a circle that shut me out”: assimilation, indoctrination, and the paradox of a liberal education’ (1993) 106 *Harvard Law Review* 581 (‘indoctrination in tolerance’). Thought-provoking also is the Böckenförde dilemma: E-W Böckenförde, *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Suhkamp 1976), 60 (‘Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann (...) Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und—auf säkularisierter Ebene—in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat’; (tr) The liberal secularised State is based on prerequisites which it cannot itself fulfil (...). On the other hand it cannot seek to preserve these inner regulatory forces itself, that is to say by enforcing the law and the prescriptions of public authority, without jettisoning its liberal ethos and—at the secular level—reverting to just that demand for totality from which it freed us after the wars of religion.).

rights and freedoms can in general be justified under the conditions of Article 52(1) CFR (that is, where they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others) or—in the case of the freedom rights in Articles 9 and 10 ECHR—when they are ‘necessary in a democratic society’ and pursue the legitimate aims laid down in the second paragraphs. Applying these conditions, the ECtHR has ruled that limitations on freedom rights by a compulsory school curriculum were justified. In *Osmanoglu*, the ECtHR held that compulsory swimming lessons were a justified restriction on the freedom of religion of the (Muslim) parents, since the measures sought to achieve successful social integration and pursued the legitimate aim of protecting the public order or the rights and freedoms of others (set forth in Article 9 (2) ECHR).<sup>2435</sup> Contrary to the freedom in Articles 9 and 10 ECHR, the freedom of education in Article 2 of Protocol 1 ECHR does not bind the ECtHR with an exhaustive list of ‘legitimate aims’ justifying restrictions.<sup>2436</sup> The ECtHR held in *Kjeldsen* that the Danish legislation on compulsory integrated sex education did not offend the religious and philosophical convictions of parents to the extent forbidden by the second sentence of Article 2 of Protocol 1 (parents’ rights), interpreted in the light of its first sentence and of the whole of the Convention.<sup>2437</sup> It is settled case law that Article 2 constitutes a whole that is dominated by its first sentence.<sup>2438</sup> In *Valsamis*, where pupils were obliged to participate in a school parade on the Greek National Day, the ECtHR weighed the general interests of the community against the right of parents and found no breach of Article 2 Protocol 1 ECHR.<sup>2439</sup>

Balancing compulsory citizenship education against freedom rights is a matter of debate in Europe and worldwide.<sup>2440</sup> Can the state impose its own versions of history and ‘correct’ diverging views in school textbooks

2435 *Osmanoglu and Kocabas v Switzerland* no 29086/12 (ECtHR 10 January 2017), paras 85, 96, 105.

2436 *Tarantino and Others v Italy* no 25851/09 et al (ECtHR 2 April 2013), para 45.

2437 *Kjeldsen, Busk Madsen and Pedersen v Denmark* no 5095/71 (ECtHR 7 December 1976), para 54.

2438 *Kjeldsen*, para 52; *Campbell and Cosans v UK* no 7511/76 et al (ECtHR 23 March 1983), para 40.

2439 Explained in text to n 699.

2440 See i.a. *Folgerø and Others v Norway* no 15472/02 (ECtHR 29 June 2007); *Hasan and Eylem Zengin v Turkey* no 1448/04 (ECtHR 9 October 2007); *Lautsi and Others v Italy* no 30814/06 (ECtHR 18 March 2011), and n 462. See also *Fernández Martínez v Spain* no 56030/07 (ECtHR 12 June 2014), para 123 (what is ‘necessary in a democratic society’). Further E Janssen, *Faith in Public Debate*:

on citizenship education?<sup>2441</sup> Can public schools enforce compulsory readings on different religious and philosophical convictions if parents claim that ‘there is but one acceptable view, the Biblical view’?<sup>2442</sup> Can public schools oblige pupils to salute the American flag and recite the Pledge of Allegiance? In *Barnette*, the US Supreme Court held that this obligation was contrary to free speech under the First Amendment.<sup>2443</sup> Case law of the ECtHR gives states a rather wide margin of appreciation when balancing the right to education in its social dimension with freedom rights. Yet, limitations must be proportional to the legitimate aims pursued.<sup>2444</sup>

As far as the question of the EU dimension in EDC is concerned, I submit that Member State measures which require quality education to include minimal, acceptable EDC and its EU dimension, satisfy the condi-

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*On Freedom of Expression, Hate Speech and Religion in France & the Netherlands* (Intersentia 2015); Willems and Vernimmen, ‘The fundamental human right to education for refugees: Some legal remarks’, 229–230; K Willems, ‘Balancing neutrality and religion in public schools: on educational curricula and religious signs’ in P Meix Cereceda and J de Groof (eds), *Religious and Ideological Rights in Education* (Wolf Legal Publishers 2017); J Lievens, *De vrijheid van onderwijs* (Intersentia 2019).

- 2441 Supreme Court of Japan, *Ienaga v Japan*, No 1428 of 1986, Judgment of 16 March 1993, No 1119 of 1994, Judgment of 29 August 1997. Professor Ienaga lost the case against the Japanese government which had removed descriptions of atrocities committed by Japanese military during WWII from school textbooks. The government was deemed competent to decide on the content of education for children to the extent that is necessary and reasonable. See further Tomaševski, *Human rights in education as prerequisite for human rights education*, p 16, 19: changes of government and victories in political or armed conflicts often lead to re-writing of textbooks for history (see also n 2186); Beiter, *The Protection of the Right to Education by International Law* 495. Another example of State intervention in education is the required learning of creationism (no teaching of Darwin’s evolution theory).
- 2442 No violation of the free exercise clause of the First Amendment: line of case law based on *Mozert v Hawkins County Board of Education*, 827 F. 2d 1058 (1987). The role of education is to prepare all pupils for pluralism in a democratic society.
- 2443 ‘I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all’. See *West Virginia State Board of Education v. Barnette*, 319 US 624 (1943), Justice Jackson: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein’.
- 2444 *Tarantino and Others v Italy* no 25851/09 et al (ECtHR 2 April 2013), para 45; *Leyla Şahin v Turkey* no 44774/98 (ECtHR 10 November 2005), para 154.

tions justifying restrictions on freedom rights. It has been demonstrated in the preceding Parts that the EU dimension is necessary in a democratic society. Such measures are in the general interest of society and necessary for the protection of the rights and freedoms of others (EU rights). If a balance is to be struck between, on the one hand, the interests of educational actors invoking freedom rights and, on the other hand, the interests of citizens who wish to receive an adequate education to empower them as EU citizens and the needs of the community at large, then—in the light of the international consensus on EDC and the constitutional tenets of the system in which EU citizens live—requiring an EU dimension in EDC is a justified restriction of freedom rights. The state can impose minimum norms in education and in doing so fulfils its obligations corresponding to the right to education.<sup>2445</sup> Legislation requiring an EU dimension in the school curriculum pursues a legitimate aim and is proportional, in particular when based on EU primary law in conjunction with Member State constitutions, and thus clarifying the DNA of the system in which citizens live.<sup>2446</sup> It can be assumed that all actors, in state and non-state schools, in public and private teaching, aim to empower their learners. This requires minimal ('thin') EDC, learning about the foundational values, objectives and principles of the system, in keeping with the constitutional compound of EU law and Member State constitutions.<sup>2447</sup> How 'thick' they wish EDC to be, and how they colour the EU dimension, is a matter for schools and teachers to decide, in exercise of their freedom rights. Freedom rights in education aim to safeguard pluralism, which is essential for the preservation of a democratic society.<sup>2448</sup> Pluralism is protected if the compulsory curriculum starts from EU dimension based on EU primary law while remaining open to content input from the educational actors. The specific (philosophy and) identity of an individual school will still come to the fore in the way EU rights and obligations are appraised, and in the emphasis placed on certain values, objectives and principles. Case teaching and discussion of controversial issues (e.g. on valuing diversity) create opportunities for identity driven schools to highlight the school's own perspectives. The essence of the freedom rights is respected.

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2445 The four A scheme includes the obligation to provide acceptable education. See State parties' obligations under the ICESCR and the CRC (§ 289 ).

2446 Text to n 1051.

2447 Third caveat, § 73 .

2448 *Kjeldsen*, para 50.

Admittedly, in many cases where education for democracy and the freedom of expression of teachers have to be weighed in the balance, it is hard to assess the appropriateness and the proportionality of teachers' actions to achieve the aims of learning and critical thinking. Lessons are not—and should not be—recorded. It must also be remembered that teachers are usually in a position of power with a captive audience of pupils in the classroom. In *Vogt*, the ECtHR considered the risk that teachers might possibly 'take advantage of [their] position to indoctrinate or exert improper influence in another way on pupils during lessons', a possibility at odds with the special duties and responsibilities incumbent on teachers.<sup>2449</sup> It is therefore important to establish curricular or learning outcomes *linked with* EU primary law (objectivity)<sup>2450</sup> and to provide clear guidelines for teaching controversial topics.<sup>2451</sup> EU primary law interconnected with national constitutions may provide guidance in conflicts. Some national constitutions stipulate that freedom in education does not release any person from the duty of allegiance to the constitution.<sup>2452</sup> In seeking to establish a balance with freedom rights, a safe path can be taken by including an EU dimension in mainstream education in accordance with the Treaties and CFR, while allowing critical thinking.

Recognising that in the European constitutional space, a constitutional core must be respected,<sup>2453</sup> is an application of Callan's normative view on citizenship education. He suggests differentiating between a minimal core of adequate citizenship education, where the role for individual autonomy is modest, and a wider sphere of respectable contention, where views can diverge.<sup>2454</sup> This confirms that an EU dimension of EDC based on EU primary law—including the fundamental rights laid down in the CFR—and on case teaching, is a good learning method, with no aim of indoctrination. The alternative would be to hold back and to lower ambitions for the EU dimension of EDC. That would definitely exclude the risk of indoctrinating pupils. Yet, avoiding this risk means one thing is certain: there will be a vacuum in the minds of young citizens, a lack of knowledge and understanding about the EU. This vacuum could be filled by populist indoctrination and one-liners unhindered by learning outcomes or founda-

2449 *Vogt v Germany* no 17851/91 (ECtHR 2 Sept 1996), para 60.

2450 § 164 ff.

2451 § 179 .

2452 Germany Art 5(3) Basic law, Greece Art 16(1), Cyprus Art 20(1). See n 672 and text.

2453 See i.a. §§ 167 and text to n 1159, also § 251 .

2454 Callan, *Creating Citizens: Political Education and Liberal Democracy* .

tional values and principles.<sup>2455</sup> This end-result could be worse than taking a risk (the ‘beautiful risk of education’<sup>2456</sup>).

To conclude these reflections on the human rights-based approach, in the exercise of competences in education, national educational autonomy is limited, on the one hand, by the obligations corresponding to the social dimension of the right to education (the state must take action to achieve the compulsory aims in international agreements and provide quality education, upholding the link with constitutional texts) and, on the other hand, by freedom rights, such as the right to freedom of education and the right to freedom of expression.<sup>2457</sup>

### Conclusion to Part four

#### 327 Proposal for recitals

Based on Part four, these recitals are proposed for inclusion in the preamble of a hypothetical EU legislative act:

*Whereas competence has been conferred on the EU to support and supplement Member State action in order to contribute to the development of quality education, to the European dimension in education and to encouraging young people to participate in democratic life in Europe, and to do so by providing incentives and making recommendations (Article 165 TFEU).*

*Whereas quality education comprises education directed to the preparation of the learner for effective participation and responsible life in a free society, and to strengthening respect for human rights and fundamental freedoms, as stated in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, and therefore includes education for democratic citizenship and human rights.*

*Whereas the Member States are invited to take more action to provide such education, including its EU dimension.*

*Whereas quantitative and qualitative indicators reveal that Member States do not sufficiently achieve the objective of quality education including an EU*

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2455 E.g. ‘Hungarian PM to EU: “We won’t be a Colony”’ in <euobserver.com/843/115613>: “We will not be a colony. Hungarians won’t live according to the commands of foreign powers, they won’t give up their independence or their freedom,” Orban told over 100,000 people in Budapest.’

2456 Biesta, *The Beautiful Risk of Education*. I do not agree with all the opinions expressed in this article, but space does not allow me to develop this here.

2457 Further nuancing the so-called killer phrase (n 83).