The commercial nature of higher education institutions in The European Union

Research dissertation presented in partial fulfilment of the requirements for the degree of LLM in International Law

(QQI)

Law School, Griffith College Dublin

Jean Théophane Cornet

2016

Acknowledgements

I would like to thank Griffith College for the opportunity of writing this dissertation. More specifically the headmaster who has been very interested in this work and with who I had captivating conversations.

I should also thank the director of the LLM: Fiona Broughton who supported me and gave me advice during all those months. She was always available to speak about the subject and listen to all the problems that might occur during the research.

In addition, many thanks to Áine Connor, my dissertation supervisor that kindly agreed to follow me and counsel me during all those months of research. Besides the numerous readings of the different versions of the dissertation and all the counsels, she sent me relevant information about cases in competition law.

Finally, a thank you to all the teachers and lawyers that have been very helpful with their methodologies, counsels and all the encouragements. Namely, Michael Mac Namara, Thomas Cortes, Patrick Thill, Susan Rose Power and all the others that have been very helpful.

Table of contents

Abstract

In this dissertation it was shown that higher education is considered as a commercial activity in Europe. Indeed, the research that has been undertaken in the field of European law, more specifically on the European Convention on Human Rights and in European competition law, and in French law, with the French constitutional law and the French competition law, proving the commercial nature of higher education institutions.

However, the domain of higher education has a special status due to the fact that education is often seen as being part of the sovereign power of the Member States and as such, usually considered as being part of the public service of each Member State. Regarding this particularity, public higher education institutions are often, de facto, rejected from the application of competition law as soon as the Member State considered that this institution was part of the public service.

As a result, in France, private higher education institutions are often subject to competition law and, on the contrary, public higher education institutions are systematically rejected from the field of competition law regarding their different nature and the notion of public service. Besides the unequal situation between private and public higher education institutions in France, there is no exhaustive definition of the content of the public service of education. In consequence, the application of competition law seems to depend only on the discretionary power of the French state in that matter.

All higher education institutions are considered to be commercial by nature under European law but they don't get the same treatment depending on their public or private nature and on the discretionary power of the state.

Introduction

In order to understand this dissertation properly, it is important to highlight the roots of the research. This dissertation is the result of numerous pieces of research on the legality of the discriminative state funding between private and public universities in the European Union. The goal of this research was to find a legal basis that would prove the illegality of the discrimination. The previous research was commissioned by a French law firm for the benefit of several directors of private universities in France and Ireland. During the scholar year 2015-2016, the research evolved because the needs of the client evolved. The inquiry that resulted in this dissertation began on October 2015 and was completed at the beginning of July 2016. During those months, several legal arguments were looked at in order to find one that would prove the illegality of the discriminative state funding between private and public universities in the European Union.

Shortly after beginning the research for the law firm, I chose to complete my dissertation on the subject of education. At the beginning of the dissertation I chose the exact same subject as my work for the law firm: the legality of the discriminative state funding between private and public universities in Europe. However, the more I learned the more I realised that the subject was inappropriate for a dissertation. The reason was that, the answer to the legality of the discriminative state funding between private and public higher education institutions in Europe depends on the commercial nature of higher education. Indeed, the goal of the first subject was to prove the illegality of the discriminative state funding according to competition law. In order to achieve this, the first step was to verify the applicability of competition law to higher education. One of the necessary conditions for the application of competition law is that the activity carried out by the entities involved must be a commercial activity. In short, higher education must be considered as a commercial activity by the law in order to apply competition law to the discriminative funding.

Having regard to these facts and the amount of research necessary to answer to the first question, I chose to focus my dissertation on the first step of my research: the potential commercial nature of higher education. Is higher education a commercial activity in Europe?

Firstly, this question seems more intelligible than the subject on the discriminative funding, it is more open. Secondly, I was able to use the major part of my research in order to answer the question of the commercial nature of higher education. Finally, I was not far from the original subject on the discriminative state funding because the conclusion of the first subject depends on whether or not higher education is deemed to be of a commercial nature. The dissertation was therefore changed and focused on the commercial nature of higher education.

The study on the commercial nature of higher education in Europe necessitated a review of several laws and examples. I have chosen to explore two types of different laws in order to answer to the main question. The first type of law can be called: primary law. It means the law that in some way reflects the spirit of a country, such as constitutional law. All the main principles, freedoms and duties are contained in constitutional law. Moreover, education is often seen as a sovereign power. As such it seems logical to study laws having a constitutional value because those texts are often a description of the role of the State toward its citizens.

The second type of law had to be economic. Indeed, an economic law is deemed to be able to assess the commercial nature of activities. This is mainly because, before issuing rules, a law defines its scope of actions and all the protagonists concerned by its action. There are many economic laws but competition law seemed to be more appropriate. Contrary to financial laws or other specific economic laws, competition law concerns all commercial activities in its jurisdiction. Moreover, since the adoption of the Treaty on the Functioning of the European Union and the improvement of the cooperation between national competition authorities and the European Commission, national and European competition laws and case laws are very similar, which is not the case for many other economic laws. Finally, competition law provides a detailed and precise definition of a commercial activity shared by all the Member States of the European Union.

After having chosen those two set of laws, the sources must be chosen: European or National. It had to be both of them. European Union law had to be chosen because of its scope and of its degree of power. As the most important and powerful law in Europe, its position on the matter is decisive and vital for the study. Even if no education institutions is run by the European Union the real contribution is contained in numerous

cases brought before the European Court of Justice. For example, the European Court of Justice has stated that:

> "in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". [1]

So the European Court of Justice jurisprudence on what constitutes an economic activity is relevant to the question "Is higher education a commercial activity in Europe?"

However, the study of an example of how this is viewed in a Member State is equally relevant for this research. Member States can have different interpretations of European law because the implementation of the Law depends on the unique situation in each country. In short, the study of European Law is not enough, there must be an example of a Member State: France.

The primary law for the European side of this study is the European Convention on Human Rights. Even if this text was not originally created for the European Union, it has been integrated into EU primary law. Besides the obvious constitutional value of this text for the European Union, the European Convention on Human Rights established the right to education. In consequence, there are many cases that have been judged by the European Court of Human Rights in relation to education and sometimes in relation to higher education. It seems that the European Convention on Human Rights is a relevant primary law for this research. On the French side of the study, the primary law that has been chosen is French constitutional law. It contains all the regulations and freedoms linked to education and the role of the state toward it. Moreover, the French constitutional court has often dealt with the nature of education and more specifically, the nature of public higher education institutions.

The dissertation will logically treat in the first chapter the primary law and in the second chapter, the competition law. The first part will consider the vision of higher education in the European Union and the vision in a Member State such as France. The organisation and the nature of education will be studied with reference to the European Convention on Human Rights and French Constitutional law. The second part of the dissertation will focus on competition law. Firstly, on the European side and then, on the French side to see the similarity and differences between both legal systems.

---

[1] *Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECJ I-01979.*

Before entering entirely in the subject the following must be said.

First, in undertaking this research several methodologies were chosen. To start, there is logically a doctrinal methodology. Many different laws from several sources will be explored in this dissertation. A thorough analysis of certain laws and sometimes a critical engagement toward certain rules will be done. We can add to this methodology, a comparative element with the treatment of the European and French law. The structure of the dissertation is created in order to be able to compare those two legal systems. Then, there is also a socio-legal methodology: looking at the law in context. The comparison between the theoretical European Law and the implementation by the Member States is fully part of this methodology. Finally, the research is also extended to the study of the theoretical European legal system and their multiple interpretations: the theory-based legal methodology. The combination between all those methodologies seemed necessary in order to explore entirely this subject.

The second important point to highlight in the introduction is a list of all the weaknesses of this dissertation.

The first main weakness concern the number of Member States studied. As has been said, the interpretation of European law differs in each Member State. In consequence, the study of the French example is naturally limited and can't be entirely applied to another Member State of the European Union.

The second weakness is the choice of legislation. Even if it is necessary to eliminate some laws from the scope of study in order to research other adequately , this enevitably limits the research. In consequence, a broader research containing other legal basis could change the analysis given in this dissertation.

A third weakness could be the link between the dissertation and the work with the law firm. Indeed, in all working relationships the work evolves according to new instructions. Some subjects become less urgent than others over time. It is, in a way, a weakness because some subjects may need more time but your working relations want to explore a new field.

Another weakness would certainly be the lack of information and the difficulty to access most of the relevant information in the field of education. It is difficult to find precise information in the French or European legal circumlocutions.

The answer to the main question as to whether higher education is a commercial activity in Europe will be treated as follows. The first chapter of the dissertation will be dedicated to the study of the nature of higher education according to primary law. It will begin with the analysis of the European Convention on Human Rights, more specifically with the right to education (A). Then, there will be a study of the French constitutional vision on the nature of education in France (B). The second chapter will focus only on competition law. The first part will be dedicated to the European competition law and the contribution of multiple ECJ judgments (A). The second part will be focused on the French competition law and several cases from the French competition authority (B).

Chapter 1 – The primary legislation

This dissertation is focused on the potential commercial nature of higher education in the European Union. It is therefore crucial to understand how the European Union views higher education, what is the nature, scope and definition of education according to the laws of the European Union? In order to answer this question we will look closely at the European Convention on Human Rights and the case law of the European Court on Human Rights in relation to higher education. The decision to focus on the regulations and laws coming from the European Convention on Human Rights instead of other primary laws of the European Union may seem questionable in the matter of education. However, as we will see, the right to education is contained in the ECHR and there are many judgments in relation to education and even higher education handed down by the ECHR. Since the ECHR is part of European Union primary law, the choice of this set of laws seems to represent the position of the European Union towards education. Moreover, as we will see in this chapter, the position of French constitutional law will be studied in a second part, just after the European Convention on Human Rights. As such, it seems reasonable to compare the ECHR and the constitutional law of a Member State regarding their legal, social and philosophical importance.

In a second step we will study French constitutional law. The goal of this second study is to analyse the interpretation and implementation of European laws within the legal system of a Member State. Even if the supremacy of European law over the national laws of Member States can't be contested there is, nonetheless, different ways of implementing European rules. Especially since the subject is related to an original sovereign power: the education. Indeed, the entire European Union system is based on the principle of conferral, meaning that the EU is a union of member states, and all its competences are voluntarily conferred on it by its members. The EU has no competences by right, and thus any areas of policy not explicitly agreed in treaties by all Member States remain the domain of the Member States. Education is a sovereign power and the Member States have not given up this right, even if the European Union promotes more and more projects partially directed towards education in Europe. In short, the Member States are normally responsible for their education systems. However, regarding the increase of power of the European Union and its implication within the field of education it seems

important and logical to study European Union legislation concerning the education matter.

A – The perception of the nature of high education by the European Convention on Human Rights

At the European level, the right to education is discussed in Article 2 of the first additional protocol of the European Convention on Human Rights:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The right to education is also defined in a case named: "Campbell and Cosans c." .In this case, the European Court of Human Rights stated that education:

"(…) is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development".[2]

It is clear therefore that education is a major concern of the European Union. However, there is no clear mention regarding the nature of education, and more specifically higher education, in the European Convention on Human Rights or the Case law of the European Court of Human Rights. This is because education is deemed to be a sovereign power in Member States. Indeed, education is seen as being part of the sovereign powers of a Member State. Member States enjoy considerable latitude in the way they want to deal with education. The only references to education deal with the right to education which provides a right to be educated by the state but there is no reference to the nature of education as such because it is part of the sovereign powers of the Member States.

The freedom enjoyed by the Member States toward the management of education is obvious regarding the case law of the European Court of Human Rights. However, this freedom is accompanied by a limitation. Indeed, according to the case law, the discretionary power of the state toward education grows in proportion with the level of education. Clearly, the higher the level of education, the higher the discretionary power of the member state.

---

[2] *Campbell and Cosans v The United Kingdom (App no 7511/76; 7743/76) ECHR 1982.*

For example, in a case called "Tarantino and others v. Italy" [3]of the European Court of Human Rights on the 2nd of April 2013, the court dealt only with higher education institutions. This case looked at the treatment of higher education compared to primary or secondary education. Indeed, the court insisted on the discretionary power of the state toward higher education in terms of management, funding, fees. The court found that the state has the right to have discriminatory rules, on certain conditions, for higher education but not for lower levels of education. Moreover, this case highlighted the existing difference between the private and public nature of higher education institutions and the consequences of those different natures.

In this, case, eight students had failed to pass their exams in medical schools. They claimed that the Numerus Clausus of students permitted to attend higher education institutions was discriminatory and was against the right to education contained in the European Convention on Human Rights. Indeed, they claimed that:

"The applicants alleged that freshly graduated students had more chance of passing knowledge-based examinations, in particular those based on high school syllabi, and that therefore the system was discriminatory on grounds of age".[4]

The court rejected their claim and explained the scope of freedom enjoyed by the Member States in the field of education.

There are four main contributions provided by this case.

First, the court considered that education to be within its sphere of competence and refused to give up this competence. Higher education establishments remain in the field of the control of the court. However, according to the court, the state has a discretionary power in the field of higher education in terms of management, funding and all administrative procedures. Furthermore, the discretionary power of the state is important regarding the sociological and economic implications. The court stated that:

"The Court further considers that these restrictions (the numerus clausus) conform to the legitimate aim of achieving high levels of professionalism, by ensuring a minimum and adequate education level in universities in appropriate conditions, which is in the general interest."[5]

---

[3] *Tarantino and others v Italy (App nos 25851/09, 29284/09 and 64090/09) ECHR 2013.*

[4] *ibid*

[5] *ibid*

Thus, the court has to ensure proportionality between the individual interest of the complainant and those of all the other students attending to this course.

Secondly, the court reminds that the second additional protocol of the European Court of Human Rights is applicable to higher education institutions:

"The Court reiterates that the guarantees of Article 2 of Protocol No. 1 apply to existing institutions of higher education within the member States of the Council of Europe and that access to any institution of higher education existing at a given time is an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1". [6]

Thirdly, the court emphasised the fact that: "the fundamental right of everyone to education is a right guaranteed equally to pupils in State and independent schools, without distinction". This is an important point on the difference between private and public high education institutions. According to the court, the right to education is guaranteed for students of private and public high education institutions without distinction. However, the last contribution of the court strongly weakened this point by giving a discretionary power to the state in the field of higher education.

Finally, this decision described the role of the state towards education.

In short, the court said that, even if the right to education is fundamental, there could be some limitations for higher education. Thus, limitations imposed by the state are permitted "since the right of access by its very nature calls for regulation by the state"[7]. Thus, the regulation of education institutions can vary from country to country: "the Contracting States enjoy a certain margin of appreciation in this sphere, although the final decision as to the observance of the Convention's requirements rests with the Court".

In order to assess restrictions imposed by the countries, and in order to see if they are not depriving the right to education of its effectiveness, the court must see that the restrictions are foreseeable for those concerned and that they pursue a legitimate aim. It is worth noting that there is no exhaustive list of legitimate aims under Article 2 of protocol 1. Moreover, in order for a limitation to be compatible with Article 2 of protocol 1, "there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".[8]

---

[6] *Tarantino and others v Italy (App nos 25851/09, 29284/09 and 64090/09) ECHR 2013.*
[7] *ibid*
[8] *ibid*

To put it in a nutshell, the State has a discretionary power regarding higher education. Thus, the management and the nature of higher education institutions in Europe can vary from State to State, the only limitation being the respect of the European Convention on Human Rights.

An important case of the European Court of Human Rights on the 21st of June 2011 Anatoliy Ponornaryov and Vitaliy Pornornaryov v. Bulgaria described more precisely the role of the state in education. [9]

First, the court provided the same reasoning as the case Tarantino and Others v. Italy:

"Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations; put differently, there is discrimination if the distinction in issue does not pursue a legitimate aim or the means employed to achieve it do not bear a reasonable relationship of proportionality to it".[10]

In a second part, the court added that:

"The States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment". [11]

Finally, the court stated that:

"For the Court, the State's margin of appreciation in this domain increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which so far remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries". [12]

This case provides an important insight into the role of the State towards higher education and the nature of higher education as viewed by the ECHR. Indeed, the content of the judgement is quite similar to the Tarantino case above-mentioned. Due to the optional nature of higher education and the level of studies, the state has a broader margin of appreciation toward management and policies vis-à-vis students.

---

[9] *Ponomaryovi v Bulgaria (App no 5335/05) ECHR 2011.*
[10] *ibid*
[11] *ibid*
[12] *ibid*

In the case of Leila Sahin v. Turkey on the 29th of June 2004, the European Court of Human Rights also insisted that Article 2 of the additional protocol of the European Convention on Human Rights is applicable to academic disputes and that the state has a certain margin of appreciation regarding higher education. [13]

In this case, a Muslim Austrian student moved to Turkey in order to finish her studies. At the University of Istanbul, the rector adopted a circular which stated that all students that were wearing beards and all those who had their head covered couldn't access the exams. This circular was made in order to avoid religious signs in the university. The Austrian student sought the annulment of the circular because she considered that this circular was against Article 2 of the additional protocol 1 of the European Convention on Human Rights. The European Court of Human Rights didn't agree with the student determining that, even if Article 2 implied a principle of equality of treatment between all students in the right to education without any distinction, it did not prevent the State from issuing regulations because it is a natural consequence of this right. In consequence, the state has a certain margin of appreciation. It is worth noting that the limitations have to be foreseeable and pursue a legitimate goal.

Again, the discretionary power of the state appears to be strong even when the state is in breach of the principle of equality. It seems that the European Court of Human Rights accords a tremendous amount of power to the state regarding higher education and its management.

Another case of the ECHR confirmed that Article 2 of the first additional protocol of the European Convention on Human Rights is applicable in education matters. [14]

However, it would be erroneous to say that the court would never intervene in the management of higher education in Europe. For example, on the 21st of October 2011, the European Court found a violation of Article 2[15]. This case dealt with access to secondary education for foreign students. Even if the case does not deal specifically with higher education the contribution is interesting and seems relevant to the subject. Bulgaria was imposing additional fees on foreign children in order for them to gain access to secondary education. The European Court of Human Rights used the combination of the

[13] *Leyla Sahin v. Turkey (App no 44774/98) ECHR 2004.*
[14] *Oršuš and Others v. Croatia (App no 15766/03) ECHR 2010.*
[15] Ponomaryovi v Bulgaria (App no 5335/05) ECHR 2011.

right to receive education and the prohibition of discrimination to demand that the state provide equal access to education. The court referred to education as one of the most important services in a modern state.

We can see from the case law of the European Court of Human Rights that the violation of Article 2 of the 1st additional protocol has often been rejected. It seems that the case law is following the case Ponornaryov v Bulgaria which considered that there is a margin of appreciation for the state depending on the level of education. As this dissertation is focusing on higher education, it seems that the state has a considerable discretionary power in that matter.

As the state has a discretionary power in terms of higher education it seems logical that the nature, commercial or not, of higher education institutions is different depending on the country concerned. For example we will study the constitutional French law which differentiates between private and public higher education institutions in terms of nature.

B – The perception of higher education according to French constitutional law

Before presenting the French system of education, in order to understand the second part of this chapter, it is worth speaking about the importance of private and public dichotomy in the French system.

The following cases on the constitutional French law toward education are systematically based on the distinction between private and public higher education establishments. The reason is simple: one is considered as a commercial activity and the other as a public service. If this observation is not surprising, partially because this is the case in most of the Member States, the subject is more interesting regarding the commercial nature. Indeed, it is one thing to say that certain higher education institutions are vested with a public service task of education and it is another to exclude this activity from the field of commercial activities. The consequences of such exclusion are tremendous in terms of competition because some activities can't be punished for being anticompetitive while others would be punished for the same behaviour. The consequences are even greater when exclusion from the commercial field is at the discretion of the state on a case-by-case basis. Accordingly, analysis of the nature of

higher education will be studied in the light of the distinction between private and public higher education institutions.

The organisation of the education sector in France has the particularity of being controlled quite exclusively by the state. Since the creation of the legal obligation of teaching in 1882, the state controls and administers the provision of education in France. As a consequence, there is a well-organised and developed teaching administration composed of centralised and decentralised education authorities. There are seventeen academic regions, thirty academies and ninety-seven departmental services of national education which run the entire administration.

At the beginning of the twentieth century, there was a repartition of power between the decentralised authorities of education (regions, departments…) and the State. The main schooling legislation of the Third French Republic (1870-1940) determined that a high portion of school funding would be covered by the regions and departments; mainly for the construction and maintenance of school buildings. Because of this decrease of power of the State, the regions and decentralised authorities were able to undertake a more important role in the organisation and administration of the national education in France. However, laws introduced in 1983 stopped the movement of decentralisation and returned power and authority to the state in the education sector. The function of the state in the field of national education is no longer residual.

A circular of the 23rd of April 1985 clarified the transfer of competences introduced by the laws of 1983. In short, this circular provided that, even if there was a repartition of competences between the State and the regions, the former would still be responsible for national education. The responsibility of the State in education had been constitutionalized in the preamble of the constitution of 1946 and retained in the constitution of the fifth French Republic.

Today the State is in charge of numerous specialised educational institutions but also has tremendous powers summed up in the French code of education in the article L.211-8. According to this article, the state is responsible for the remuneration of teachers and administrators regardless of the level of education (primary school, secondary school, high education…).

More specifically, in the field of higher education, the state will provide several means of financial support to public higher education institutions. According to article L 712-9

s of the French code of education, the state is compelled to provide for the funding of public higher education, every year, in the finance act. This funding concerns the running costs and property investment of these institutions. This article also listed the institutions considered as public higher education establishments.

The private higher education system is more recent in France. Freedom of education was declared in 1875 with the "loi Dupanloup" of twelfth of July 1875. Since then, there is no restriction on the creation of a private education establishment.

Moreover, a law of 25th July 1919 called "loi Astier" provides that no legislative provision can prevent the funding of private higher education institutions by local authorities. This rule was cited by the French Administrative Supreme Court (Conseil d'Etat) in a case called CANIVEZ on the 1st of January 1956. In this case, the funding provided by the local authorities was focused towards private education establishments, rather than towards public education establishments. The court stated that, even if the funding was more focused on the private institutions it was fully legal. The reasoning of the court was based on the fact that the local authorities are not officially in charge of education. Thus, there is no principle of non-intervention like the one for the State. Granting of funding will be assessed in the same manner as all aids provided by local authorities: in view of local public interest. In the field of education and, according to the judgment, the public local interest will be promoted by arrangements between the private higher education institution and the local community.

Finally, the private higher education institutions are governed in France by the article L 731-1 s of the educational code. This article provides all the legal requirements for the establishment of a private higher education institution. But there is no provision for state funding.

The difference in treatment between public and private higher education institutions is obvious when it comes to the figures. In the finance act, for the year 2015, the funding of public sector education represented 12.5 billion euros as against the budget for the private sector amounting to 78 million euros for the same year. The difference between those two amounts is huge. Even if there is a logical difference between those two domains because of the different costs engaged (fees charged by the private institutions to cover the cost of attending) it does not justify such magnitude of difference. Moreover, there is no legal provision for funding the private sector.

Even if the finance act is the most obvious reflection of the difference in treatment between private and public sector education, other financial evidence helps highlight the discriminative funding.

For example, the expenditure on property investment in the education sector represented a total of 840 million euros. In 2016, there will be an increase of 139 million euros. None of this money is to be allocated to private sector education. The same phenomenon is visible with the research funding which represents 7.71 billion euros in 2016. Again, nothing is earmarked for the private sector. Articles L 111-1 and L 111-2 of the French code of education create specific funding for accommodation for handicapped persons. Specifically, 27 million euros is given to public universities in order to create suitable access and facilities for disabled persons. The private sector receives nothing.

The presentation above of the French system offers a clear view on the real dichotomy between public and private sector of education in France. This differentiation is on the basis of the French system of education and is particularly present in that of higher education. The case law of the French constitutional court can't be fully understood without this dichotomy between the private and public sector of education because for the constitutional court, there is no one higher education but there are public institutions outside the commercial sphere and there are private higher education institutions which are in the commercial field.

Constitutional French law is the first legal basis that was looked at during the research. The decision to study French constitutional law comes from the fact that education is considered a sovereign power. Consequently, one way to understand the position of French law towards the nature of education, more specifically higher education, is to study French constitutional law and case law.

In this part, the study of relevant case law will demonstrate that, for the French constitutional court, the public and private higher education institutions are not in the same situation. Thus, there is no point in comparing the discriminative funding between those two different entities. One could be commercial and the other not, the public and private sphere of education are not in the same market. The categorical refusal of the French constitutional court to consider the private and public entities in the same market could be criticised regarding the nature of the service. However, this institution remains

the most powerful one in the matter of sovereign power, and consequently its decision is the most important and is rarely disputed.

Two constitutional principles are often raised in constitutional case law on the matter of education: the freedom of teaching and the principle of equality vis-à-vis public charges. Each time the French constitutional court rejects a breach of these two different principles it eliminates any possible conflict between the private and the public sphere in the education field.

The principle of equality vis-à-vis public charges is contained in the Declaration of Human and Civil Rights of 26 August 1789. The article 13 provides that:

"For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay".

The Declaration of Human and Civil Rights of 26 August 1789 has been integrated in the preamble of the actual constitution (the Vth Republic).

The freedom of teaching has not the same roots. This principle was recognised in 1931 and integrated in the constitution in 1971 as a fundamental principle recognised by French law.

The first relevant constitutional case has to do with the adoption of a law on the 5th of March 2014[16]. This law was about the apprenticeship tax. More precisely, the apprenticeship tax is a taxation levied on companies that are subject to corporate tax. This French tax is composed of two different portions. The first portion is composed of the "régionale" portion (51%) and the "quota" portion (26%). The second part is composed of the "hors quota" portion (23%). Some companies can be exempted from the second part of this tax proportionally to the payment made toward some listed-approved establishment. In short, companies are able to benefit from a tax relief if they give money to specifically listed establishments. The list of the establishments concerned is set out by the article L 6241-9 of the French labour code. According to the article L 6241-9 of the French labour code, only some establishments are able to receive the "hors quota" portion. First of all, there are all the public schools, public high schools and public

[16] French Constitutional Council <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-496-qpc/decision-n-2015-496-qpc-du-21-octobre-2015.144582.html> accessed 10 August 2016.

universities. Secondly, there are some private higher education institutions that give specific professional diploma. Finally, there are all the non-profit private higher education institutions. All the profitmaking private universities are excluded from the benefit of this tax advantage.

In 2015, a constitutional question was put to the French constitutional court on the legality of the new law on the apprenticeship tax.

In article L 6241 of the French labour code in compliance with the principles guaranteed by the French constitution, more specifically the right of free enterprise and the principle of equality vis-à-vis public charges?

The question was asked by a French association called "Fondation pour l'Ecole" (Foundation for school). Firstly, the association argued that the principle of equality is not opposed to the legislator dealing differently with different situations. However, this difference should be judged in the light of rational and objective criteria in order to be compliant with the principle of equality vis-a-vis public charges.

The constitutional court rejected the complaint of breach of equality vis-à-vis public charges. First, the court recalled the goal of this tax advantage, created to encourage the public resource allocation designed to fund professional and technological formations. Secondly and more importantly, the court said that the situation of private profitmaking institutions is totally different from the other establishments, thus there can't be any breach of equality vis-à-vis public charges between the public and private high education establishments. With this latter statement, the constitutional court ended the debate on whether a private profitmaking higher education institution is always in a different situation because of the legal statute, the way of managing, educational obligations and related controls. As a result, there is no actual ground for a breach of equality vis-à-vis public charges.

Secondly, in relation to the right of free enterprise, the constitutional court has also rejected this specific ground. The court said that the contested provisions does not violate the individual character of private education and don't prevent private institutions from being created, managed or funded. Even if the ground have been rejected in this case, it is interesting to see that any law that could prevent a private higher education institution from being created, managed or funded is prohibited.

This recent case law reveals that, for the French constitutional court, the situation between private and public higher education institutions is too different to be compared to or to be subject to the same set of laws and principles.

It is worth noting that, even if there is a natural state discrimination coming between private and public higher education, the situation is clearly different for regional authorities. As it was said in the introduction, the state is bound to respect the principle of non-intervention vis-à-vis private education. However, local authorities are legally entitled to fund private higher education establishments as long as they are respecting the local public interest.

The reasoning of the constitutional French court has been adopted by the Bordeaux administrative court of appeal recently[17]. This case was on the 15th of December 2015 and dealt with the apprenticeship tax. This case refers to a French private higher education establishment specialised in the field of tourism and hotels. This specific establishment was able to benefit from the apprenticeship tax. Article 18 of the law n°2014-288 of the 5th of March 2014 had modified the list of the establishments which were able to benefit from the apprenticeship tax. Unfortunately, the private establishment aforementioned was removed from the list. The complainant argued that the elimination of the establishment from the list on the sole reason that it was a profitmaking establishment was discriminatory, contrary to Article 14 of the European Convention on Human Rights which guarantees the freedom of teaching.

The administrative court of appeal rejected the argument that there were obstacles to freedom of enterprise and freedom of teaching considering that the elimination did not prevent in itself a private higher education establishment being created, managed of funded. Thus, this measure did not affect in a disproportionate manner the freedom of teaching.

Regarding the principle of equality, the administrative court of appeal followed the constitutional court considering that the private and public higher education institutions are too different to be treated in the same manner. In short, the judgment considered that public and private higher education establishments were naturally in

[17] Bordeaux Administrative Court of Appeal <http://www.juricaf.org/arret/FRANCE-COURADMINISTRATIVEDAPPELDEBORDEAUX-20151215-15BX01831> accessed 10 August 2016.

different situations because of the management, the legal status, and educational obligations. Thus it is logical that they could be treated differently.

In another constitutional case law on the 14th of November 2014 the constitutional court adopted the same reasoning[18]. In this case the complainant was an insurance company. This company contested the constitutionality of article 1001 of the General Tax Code. Article 1001 levies a tariff of the special tax on insurance contracts. The first part of this article deals with fire insurance. According to this article certain preferential tariffs exist for certain persons or companies, including public higher education institutions which occupy local administration properties. The insurance company contested the fact that private higher education institutions were not entitled to benefit from those provisions whereas public institutions could. According to the insurance company it was an unconstitutional provision, more specifically reggarding freedom of enterprise and the principle of equality.

The constitutional court applied the same reasoning. First, in relation to the alleged breach of equality vis-à-vis public encumbrances, the court separated public and private higher education establishment in terms of management, funding and educational obligations and concluded that they were too different to apply the same rules. The court found that there can be a difference of treatment between private and public high education institutions. Secondly, regarding the freedom of enterprise, the court stated that the provision did not constitute an excessive burden on private higher education institution, thus the freedom of enterprise was not impeded.

Accordingly, it is clear that the French constitutional court considers that public and private higher education entities cannot be treated in the same way because of their different nature. The former is part of the public service, outside the commercial sphere; the latter is an entirely commercial activity.

[18] French Constitutionnal Council <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-425-qpc/decision-n-2014-425-qpc-du-14-novembre-2014.142640.html> accessed 10 August 2016

Chapter 2 – Competition Law

"Competition law is a law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies[19]."

The choice of competition law in order to examine the potential commercial nature of higher education is based on the major protagonist of competition law: the company. As we will see, competition law is entirely directed toward undertakings which could be defined as being engaged in commercial activities. Competition law cannot be applied to a person other than in the context of a commercial activity. Therefore, a good way to discover the potential commercial nature of higher education is to analyse the position of competition legislation and competition authorities' vis-à-vis higher education.

European Union competition law was created following the Second World War with the European Coal and Steel Community (ECSC) agreement between Germany, Luxembourg, Netherlands, Belgium, Italy and France in 1951. The main goal of this agreement was to prevent Germany from being in a dominant position in the production of steel because some thought that it had contributed to the outbreak of the war. In 1957 competition rules were included in the EC treaty, known as the Treaty of Rome. In this founding treaty the main competition rules were created and officialised, like the prohibition of anti-competitive agreements or the abuse of a dominant position. These main rules could be seen as traditional competition law, meaning that they represent the reason for the creation of competition law.

In the following treaties, more subjects were added to European Union competition law like regulations on mergers and the prohibition of state aids. The former was added later because the Member States were unable in 1951 to come to agreement on the subject. The latter were created in order to create a single European market. It was not aimed at companies but at Member States. The principle is that all state aids which distorts competition is prohibited. The goal was to create a single market with free competition between undertakings without any protectionist measures by Member States.

[19] Taylor, Martyn D. (2006). *International competition law: a new dimension for the WTO?*. Cambridge University Press. p. 1. ISBN 978-0-521-86389-6

A – The nature of high education according to the EU competition law

The analysis of EU competition law is meant to give a true indication of the nature of higher education in Europe. I will address this in two different parts.

The first part is dedicated to classical competition, i.e. anticompetitive agreements and abuse of dominant position.

The goal of this part is to analyse the view of the ECJ towards higher education, to establish whether education is a commercial activity. In order to answer this question we have to establish to what extent competition law is applicable to higher education. There is a lot of case law emanating from the European Court of Justice dealing with education and more particularly with higher education.

The European Court of Justice also appears to indicate that there is a distinction between public and private higher education institutions. Indeed, the court says on the one hand that competition law is applicable to all companies private or public, but on the other hand that public entities cannot be subject to competition law because it is not considered as a commercial service. In short the court seems to make the distinction in terms of public and private higher education institutions.

The second contribution from case law is on the exception for public service. According to the TFEU, competition law is always applicable to public or private companies. However, competition law cannot be an obstacle to the mission of the state to deliver public services. Regarding this statement, the question would be: what is the scope of the public service of education? Or is higher education in the public service of education? There is no clear answer to this question in European case law.

The scope of public service in education is not contained in European legislation, thus each member state should have a definition of its public service as regards education. The last part of the second chapter, on French competition law endeavours to highlight the lack of a proper definition of the public service of education in a Member State. At the end we are unable to define definitively the real and exhaustive scope of the public service of education in France or in Europe and thus, unable to define the real nature of higher education institutions.

The second part of EU competition law section is focused on European Union regulations on state aids. Even if those regulations are part of the EU competition law, there must be a distinction between the classical charges and the specific regulations on state aids; the reasoning is different. In this part the goal is to see if the regulations on state aids can be applied to public funding of public higher education institutions. If such regulations can be applied it would indirectly prove the commercial nature of higher education in Europe. This reasoning came from a case of a competition authority in 2005 which implied that state funding to public higher education institutions could be regarded as state aids[20]. However, even if the reasoning is different the result is the same: the absence of a definition of the public service of education prevents us defining the exact nature of higher education.

1 - The vision of higher education through the prism of the classical competition law

The subject of competition law has been defined in the European Union in Articles 101 to 109 of the Treaty on the Functioning of the European Union. Article 101 provides that:

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…".

This deals with the anticompetitive behaviour. Article 102 deals with the other part of traditional competition law, which is the abuse of a dominant position: "

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

According to these two articles, competition law is exclusively directed towards undertakings or entities capable of anticompetitive behaviour. The definition of an

[20] French Competition Autority <http://www.autoritedelaconcurrence.fr/pdf/avis/05d68.pdf > accessed 10 August 2016.

undertaking has been given by the European Court of Justice in a 1991 case called "Höfner"[21]. In this case the court stated that:

"It must be observed, in the context of competition law (...) that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".

According to this case, the definition of an undertaking aims at every commercial activity without any regard for private or public funding.

Another case of the European Court of Justice on the 16th of June 1987: European Commission v Italy, tried to define the concept of undertaking[22]. In this case the court interpreted the undertaking as an entity offering products or services. And again, the court stated that the dichotomy between public and private entities is not relevant in order to qualify as an undertaking.

The goal of this dissertation is whether higher education is a commercial activity. Because competition legislation is directed solely at commercial activity, the question could be to what extent competition law is applicable to higher education. More specifically, regarding case law, the question is whether education is service.

The definition of a service in European Law is given by Article 60 of the Treaty Establishing the European Community. This article provides that:

"Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions."

Regarding this article, we can see that the relationship between the notion of service and the notion of normal remuneration is highlighted. It seems that there must be a normal remuneration in order for an activity to be defined as a service.

---

[21] *Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECJ I-01979.*

[22] *Case 118/85 Commission of the European Communities v Italian Republic [1987] ECR.*

The case law has applied the notion of "service" to education in several cases.

On the 27th of September 1988, in the case Belgian State v René Humbel and Marie-Thérèse Edel, [23]the court stated that:

"Courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services for the purposes of Article 59 of the EEC Treaty ."

In this case, a young French student wanted to study in a Belgian institution. In order to be registered in this institution he had to pay higher fees than the other students who were Belgian. This surcharge was called the "Minerval". The complainants were the parents of the young French student. In their questions before the European Court of Justice they asked if the education given in this institution could be considered as a service according to the definition of article 59 of the Treaty Establishing the European Community.

First, the court examined the sentence: "normally provided for remuneration" of Article 60 of the TFEU. In order for an activity to be defined as a service, there must be remuneration. The court tried to define the concept of remuneration in the light of the second part of Article 60 where the EU legislator gives examples of services, like activities of an industrial or commercial character and the activities of craftsmen and the professions." According to the court:

"The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service."[24]

Finally, the court observed that the essential characteristic was absent in the case of courses provided under the national education system particularly because the funding came from the State and not from the parents of the students.

"First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents"[25]

---

[23] *Case 263/86 Belgian State v René Humbel and Marie-Thérèse Edel [1988] ECR I-5388.*
[24] *ibid*
[25] *ibid*

Indeed, with State funding, there is no link between the real cost of the service and the amount of money given by the parents or by the students themselves.

According to this case, the essential characteristic of a service is the remuneration. Consequently, there is no direct distinction between private and public education; they are all subject to competition law. However, if the essential characteristic of remuneration is not fulfilled as soon as the State is accomplishing its "duties toward its own population (...) funded from the public purse", then public education seems to be indirectly excluded from the notion of service and consequently from the field of EU competition law.

This interpretation of Article 60 of the Treaty on the Functioning of the European Union has been confirmed by more recent cases dealing with higher education institutions.

For example, in a 1993 case about the grant of a national assistance to education, the court stated that:

"Courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 60 of the EEC Treaty.

Under the first paragraph of Article 60 of the Treaty, the chapter on services covers only services normally provided for remuneration. The essential characteristic of remuneration, which lies in the fact that it constitutes consideration for the service in question, is absent in the case of courses provided in an establishment of higher education which is financed out of public funds and where students pay only enrolment fees.

Conversely, courses given in an establishment of higher education which seeks to make an economic profit and which is financed essentially out of private funds, particularly out of payments made by students or their parents, do constitute services within the meaning of Article 60 of the Treaty."[26]

The reasoning of the court is the same as in 1988: the essential characteristic is remuneration. In the case of a majority state funding there can't be a service because there is no services normally provided for remuneration. Moreover, the fact that parents or pupils are obliged to pay certain enrolment or teaching fees for the operating system, does not affect the nature of the activity.

The analysis of the court clearly highlights the different nature of private and public high education institutions. The dichotomy between those two sectors also comes partially from Article 106 of the TFEU which provides the exception for public services.

---

[26] *Case C-109/92 Stephan Max Wirth v Landeshauptstadt Hannover [1993] I – 6448.*

As was said above, EU competition law is contained in articles 101 to 109 of the Treaty on the Functioning of the European Union. According to article 106:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

In short, no rule emanating from EU competition law can be used to obstruct a member state's right to deliver public services. However, public companies have to play by the same rules as everyone else, they have to comply with EU competition law. The goal of this article is to maintain the institutions and social characters of the Member States but also prevent them from intervening on the internal market and distort competition.

For example, in a case called Cisa[27], a person complained about the state's compulsory workplace and disease insurance scheme. This scheme was run by an organization called "INAIL". The court held that competition law was not applicable because the notion of undertaking implied entities that carried on some kind of economic activity. That was not the case with INAIL because this organization was operating according to the principle of solidarity. For example the low paid workers were subsidized by contributions from high paid workers. In consequence, their activity fell outside the scope of competition law.

Article 106(2) highlights also the fact that competition law will be applied everywhere except where it might obstruct the provision of a public service. An example can be found in the case "Ambulanz Glöckner[28]" in 2001. In Germany, ambulances were exclusively provided by a company which was allowed to provide also non-emergency transport. The ambulance sector was not profitable but the other sector was profitable. Thus, the company was allowed to set profits off from one sector to another in order to

[27] *Case C-218/00 Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) [2002] ECR.*

[28] *C-475/99 Ambulanz Glöckner v Landkreis Südwestpfalz [2001] ECR.*

avoid excessive taxation. The legality of this scheme was challenged before the European Court of Justice in 2001. The court stated that it was a legitimate system, clarifying that:

"...the extension of the medical aid organisations' exclusive rights to the non-emergency transport sector does indeed enable them to discharge their general-interest task of providing emergency transport in conditions of economic equilibrium. The possibility which would be open to private operators to concentrate, in the non-emergency sector, on more profitable journeys could affect the degree of economic viability of the service provided by the medical aid organisations and, consequently, jeopardise the quality and reliability of that service."[29]

However, it is worth noting that the court emphasised the fact that the state had to ensure an efficient service.

The importance of a Social European Economy has been reemphasised in the Treaty of Amsterdam, more specifically in Article 16 which provides that:

"...the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions". [30]

All those cases and articles highlight the specific treatment of public services in the field of competition law. Thus, the focus must be on the content of public services. More specifically, to what extent higher education is part of the public service. It is obvious that education for young children is part of the public service task of education and, in consequence, excluded from compliance with competition law. However, it could be argued that, in the field of higher education, the state would be acting as a private entity on the market of faculties and universities.

The right to education is recognised by the European Union. This principle is contained in Article 2 of the 1st protocol of the European Convention on Human Rights

---

[29] *C-475/99 Ambulanz Glöckner v Landkreis Südwestpfalz [2001] ECR.*

[30] Treaty of Amsterdan amending the Treaty on European Union, the Treaties Establishing The European Communities and certain related acts [1997] OJ 97/C 340/01.

which is contained in European Union law. However, there is no explanation of this right to education, thus we do not know if higher education is contained in this principle.

The case law of the European Court of Justice does not answer this question clearly. In the above-mentioned case "Humbel", the court stated that:

"...the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields..." [31]

Regarding this quotation, it is clear that the court insists on the fact that the state is fulfilling its own duties toward the population; it seems that the court is referring to the domain of the public service task. However, there is no official definition of the public service task. There is no indication as to the scope of the public service in this case. The 1993 case above-mentioned does not give any details on this scope either.

It seems that there is no direct or clear obstacle which would prevent higher education being considered as a commercial activity. Indeed, case law shows that profitmaking and non-profitmaking higher education institutions have to be considered as commercial activities. The case law is clear that the profitmaking or the non-profitmaking nature of the activity does not affect the qualification of undertaking. For example, the French non-profit organisation (FFSA) set up to manage an old-age insurance scheme was found by the ECJ to be an undertaking because it carried on an economic activity in competition with life assurance companies in France [32]. The fact that it was non-profit making did not affect the conclusion that it was an undertaking. In the above mentioned case, Höfner and Elser a State-run employment recruitment agency in Germany which did not make a profit and provided its services freely constituted an undertaking because such services were also provided by private entities in Germany[33]. Thus the question is the one of the market. In the field of education, it seems that the nature of the service delivered byt public and private entities is similar. It seems that public and private higher education entities have to be considered as undertakings.

---

[31] *Case 263/86 Belgian State v René Humbel and Marie-Thérèse Edel [1988] ECR I-5388.*

[32] *C-244/94 Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995].*

[33] *Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECJ I-01979.*

However, the above mentioned developments showed that institutions which are mostly funded by the state and not aimed at making profits cannot be considered as services and thus, are rejected quasi automatically from the field of commercial activities. In short, most of the public higher education institutions are de facto excluded from the field of commercial activities. The only legal explanation to this contradiction is the exception made for public services. But, the lack of a proper definition of the public service of education prevents us from knowing if higher education is part of the public service or, is part of a competitive market. To put it in a nutshell, higher education is not officially excluded from the field of commercial activities, however the specific treatment enjoyed by the public institutions enable them to exclude themselves de facto from the field of commercial activities and, consequently, from the field of competition law.

The lack of a proper definition of the content of the public service of education has been highlighted by the French competition authority in another field of the European Union competition law: the prohibition of state aids.

2– The legal basis of State Aids

Within the EU internal market and in the context of free competition there are sometimes Member States which take actions to promote their own economy or protect their national industry. Before the creation of the European Union and even, during the reconstruction after the Second World War, this behaviour was normal. However, Article 107 of the Treaty on the Functioning of the European Union lays down a general rule that the state may not aid or subsidise private parties in distortion of free competition. Article 107 of the TFEU prohibits state aids except certain projects aiming at regional development or natural disasters. The general prohibition is set out in article 107 of the TFEU which states:

"Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

If we break down this article we can see that, for there to be state aid, there are three conditions required:

- There must be a transfer of Member State's resources.
- This must create a selective advantage toward one or more undertakings.
- This advantage must have the potential to distort the trade between Member States in the relevant business market.

If all those criteria are met State Aids deemed to exist and is automatically prohibited. However, there are some exemptions laid down by the European Commission. Regarding the focus of this dissertation, the commercial nature of higher education, the study of whether higher education could benefit from one or more exemptions is irrelevant. However, a brief description seems at least necessary in order to understand the domain of the state aid regulations.

There are four different types of aid exempted from the general prohibition in Article 107 TFEU.

The first category contains De Minimis aid, i.e. those which involve small sums. The amount can't exceed 200 000 euros for three fiscal years.

The second category involves the implementation of services of general economic interest. This category is described by the above-mentioned Article 106 of the TFEU.

The third category concerns aid automatically compatible with the competition rules. This category is mentioned in the article 107§2:

"The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point."

Finally, the fourth category, as described by Article 107§3, is aid that may be considered to be compatible with the internal market:

"The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

It seems, regarding those regulations, that there are two steps towards the application of the state aid regulations. First, the three conditions above-mentioned have to be met: the existence of a transfer of member state's resources, the creation of a selective advantage toward one or more undertakings and finally, the advantage given must have the potential to distort the competition on the relevant market. If those three conditions are met, then a state aid exist and is automatically prohibited under European Union law. If the member state wants to keep granting this aid it must prove that the aid fulfils one of the exemption categories. This is the only way to avoid the prohibition of the aid.

Before applying this reasoning to the field of education we must look at the real meaning of state aid, the scope of those two words.

First of all, the definition of "State" is very broad. It aims every public authority that is able to express itself at every level of the state: regional, departmental or national.

Secondly, the term "Aid" is also very broad. There is no exhaustive list of all the different types of aids due to their large number. However, we can cite some examples of aid. There is the example of a non-repayable grant or a capital contribution. There is the example of the security deposit given by the state in the case where, without this aid, it would have been difficult for the company to obtain such warranty. There is also aid related to the tax administration: exemption, tax cuts…

A state aid can be linked to the concept of insufficient compensation in terms of over payment. For example, if a local authority wants to attract a company, there could be an exemption from taxes for several years. If the local authority asks the company to pay for urban renewal, there will be a comparison between the amount of the exemption and the cost for urban renewal. If the local authority has given more than the cost to the

company, there will be a state aid because there is an insufficient compensation in terms of over payment.

Having defined and described the notion and scope of state aid we can then apply the concept to the field of education in order to see if education is a commercial activity. Indeed, we have seen that there are three conditions that have to be met for there to be a state aid. In those three conditions, the second one states that the state aid must create a selective advantage toward one or more undertakings. Regarding this condition and regarding the fact that we are still in the field of competition law, we understand that state aid regulations are only directed toward undertakings that has been defined before as commercial activities. Thus, if a court decides to apply the state aid rules to the sphere of higher education it would mean that institutions providing higher education are considered to be undertakings and consequently, higher education would be a commercial activity.

This reasoning comes from a 2005 case of the French Competition Authority[34]. In this case the authority said that state funding received by a public higher education institution could be seen and defined as state aid according to the EU regulations and consequently prohibited.

In this case the National Committee Chamber of the Private Distance Learning (CHANED) argued that the National Centre of Distance Learning (CNED) received discriminatory advantages because of its being a public higher education institution. Those advantages enabled it to abuse its position toward private higher education institutions working in the field of distance learning. According to the CHANED, the CNED was allocating state aid to competitive activities which allowed it to be free from market constraints and to engage in predatory pricing which had the effect of foreclosing private competition in the market. The plaintiffs also complained against regulatory provisions and administrative practices which penalised private higher education establishments:

- The provisions of the law of the 12 July 1971 which imposed constraints on recorded delivery for private institutions.

[34] French Competition Autority <http://www.autoritedelaconcurrence.fr/pdf/avis/05d68.pdf > accessed 10 August 2016.

- Refusal to take over the training costs related to distance teaching by the ASSEDIC (Association for Employment in Industry and Trade).
- Refusal to accord the same fiscal treatment (exemptions and reductions) for parents having their children in a private distance teaching compared to the parents having their children in the CNED.
- The impossibility for students of private education institutions to enjoy the status of student.

The plaintiff's claims were eventually dismissed, mostly because of the lack of proof of prejudice and the lack of responsibility of the CNED. However, certain points made by the French Competition Authority are of use for this dissertation.

The first and most important contribution of this case is not far from the question of the dissertation: is education a commercial activity?

In a 2003, a letter from the education minister addressed to the CNED, the minister said, regarding the tariffs of the education provided in the CNED that they cannot be below the standard industrial costs. Such direction must be encouraged by the creation of a cost accounting which distinguishes the commercial activities from the other.

Yet, the competition authority said that it was not competent to decide the content and the scope of the public service of education. Moreover, there was no proof of distortion of competition because of public funding, thus no abuse of dominant position.

We can see that, according to the minister of education there is a commercial part and a non- commercial part to education, depending on the content of the public service task of education. However, regarding the answer of the court, it seems that there is no official ruling on the scope of the public service of education. The court is unable to distinguish between what is part of the public service of education which is protected against competition law and what is in the competitive market of education, subject to competition law and seen as a commercial activity.

The second important contribution, linked to the first, is about the applicability of state aid regulations in this case.

According to the plaintiffs, the CNED received aid from the state which are prohibited under TFEU regulations on state aids (Article 107). According to the court, those state funds may have constituted state aid in accordance with Article 107 of the

TFEU. Nevertheless, the court considered that the competition authority did not have the competence to judge the subventions and the other potential state aid received by the CNED according to the EU regulations on state aid. The strange thing is that the case was sent before the Paris Court of Appeal, and not before the European Commission which is the only competent body.

Although the competition authority took the view that it was not of its competence, it did not exclude the existence of state aid in this case.

Again, the commercial nature of higher education seems unclear because of the lack of definition of the scope of public service of education. The competition authority highlighted the lack of information about the public service of education. However, regarding this decision it seems that the authority would easily consider certain state funding for higher education institutions as state aid. If such a competent authority in the field of competition law would apply competition law to higher education institutions, it seems logical that the competition authority considers higher education institutions as a commercial activity, thus subject to competition law. Such a conclusion seems logical and will be applied as soon as the shield of an unclear definition of public service disappears.

B – French competition law

In France, the principle of free competition has been officially recognised in the Penal Code of 1810. Originally, this principle was created in order to prevent farmers from selling their products at twice their price after the French Revolution. The goal was to avoid unfair behaviour. Simultaneously, freedom of commerce and industry was proclaimed in France after the French Revolution. This liberty came from the decrees of Allarde on the 2nd and the 17th of March 1791.

At the end of the nineteenth century, the philosophy evolved: the goal was to permit free competition in the economy. This principle was based on article 1382 of the French Civil Code which was created for the civil responsibility.

Between the Second World War and 1986, competition and prices were controlled by the state. This is surprising given that the French Republic signed up to the Treaty of Rome in 1957. The principle of free competition was one of the pillars of this treaty:

"The market being based on the principle of free competition, the Treaty prohibits restrictive agreements and state aids (except for the derogations provided for in the Treaty) which can affect trade between Member States and whose objective is to prevent, restrict or distort competition". [35]

However, the principle of free competition was not implemented at that time. The first goal of the Europe after the Second World War was to build a New France and a new economy. The reality of the principle of free competition did not begin until 1986.

In 1986, French competition law was amended to comply with the Treaty of Rome which contained the obligation of free competition. The current French competition law is based on the reform of 1986.

In order to apply French competition law to a situation, there are some prerequisites. First, you have to determine the relevant market in relation to your case. Is it a European or French market? Who are the competitors? How many market shares do the protagonists possess? Secondly, the protagonists must comply with the definition of an economic activity in French Competition Law. For example, French competition law cannot be applied to individuals; certain requirements created by the case law have to be met. Finally, the choice of the relevant law has to be made regarding the specific context of the case and the relevant market. The fulfilment of those requirements conditioned the application of the competition law.

The delimitation of the relevant market is essential in order to apply competition law because it details exactly the perimeter of the market and the companies and economic activities concerned.

There are two criteria in order to define the market.

First, the relevant market of products and services must be determined. This market contains all the products or services considered as interchangeable by the consumer because of their characteristics, their prices or their purposes. We can take into

[35] Treaty establishing the European Economic Community, EEC Treaty [1957].

account the resemblance of the characteristics. For example, in a 1999 case about the anticompetitive behaviour of a French company producing dolls and model dolls, the French competition authority specified that there is a market for model dolls and a different one for dolls. [36]We can also take into account the perception of the consumers towards certain products. For example, consumers can identify upmarket products from low-end products even if the product is similar. Thus, companies can sell expensive products compared to similar products created by other companies simply because of the perception of the consumers of this product. In the field of education, the interchangeability between products can be seen at the level of the different diplomas. In order to see if two courses are seen as interchangeable, the content must be looked at but also the level of the content and the public perception of this level.

Secondly, the geographical market must be determined. It means the territory where the supply and demand encounter that sufficiently homogeneous and can be distinguished from nearby geographical area. For example, certain legal and regulatory barriers have to be taken into account in order to determine the relevant market. For example, in the market of medication, there is rarely a truly international market because there are numerous and very different regulations in terms of medication in each country. Thus, it is very difficult for a pharmaceutical company to possess an international market. There is also the transport time that can decide the scale of the market. In the cement market, because it is a heavy good, the time of transport is very important in deciding the price of the product. For such products the geographical area is limited. In the field of education the geographical area can be very wide. However, there are several legal and regulatory barriers that could narrow the scale. For example, if the fees in a foreign university are higher than the fees for a national one, the scale of the market is in some way limited.

The subject of competition law is the company. According to article L 410-1 of the French commercial code which is the first article of book IV entitled Pricing, freedom and competition:

[36] French Competition Authority <http://www.autoritedelaconcurrence.fr/pdf/avis/99d45.pdf> accessed 10 August 2016.

"The rules defined in this book shall apply to all production, distribution and service activities, including those which are carried out by public persons, in particular in the context of public service delegation agreements."

This article seems to provide that all undertakings are subject to competition law even if they are carried out by public persons. This definition has been confirmed by a case from the European Court of Justice called Höfner. In this case the court stated that:

"It must be observed, in the context of competition law (...) that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". [37]

It is clear that the public or private status of an undertaking has, theoretically, no importance. However, the application of article L 410-1 of the French commercial code has raised some problems, for example, in the case about the city of Pamiers. At that time the city controlled the distribution of water. The city called for several specialised companies in order to make some improvements. The modalities of the choice of the company which was awarded the contract was criticised by the other companies. On the 30th of June 1988 the Paris Court of Appeal stated that competition law was applicable because the city, in seeking tenders from several companies, had exercised an action on the market and thus, competition law was naturally applicable. However, on the 6th of June 1989 the French Tribunal of Conflicts said that the distribution of water, managed by the city, was not a commercial activity[38]. In consequence, competition law was not applicable. In 2005, the Tribunal of Conflicts explained its reasoning in this matter. Normally, the distribution of water is managed by an industrial and commercial public service. Competition law would be applicable. However, the Tribunal considered that the prices had to be taken into account. If the price paid matched with the actual cost of the service, there is a commercial activity subject to competition law. However, the service cannot be considered as a commercial and industrial activity when there is no actual relation between the real cost and the price that has been paid by the consumer.

---

[37] *Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECJ I-01979.*

[38] French Tribunal of Conflict <https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=EE4CDDF5E32BD302DD490801D0BA8631.tpdjo04v_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000007607135&fastReqId=183501500&fastPos=12 > accessed 10 August 2016.

There is another problem when the legal person is not originally an economic activity. For example bar councils or any other civil body. Even if they are not producing something and, are not considered as commercial activity they are able to take decisions that have an impact on their professional community. In that case, competition law can be applied to them because they are behaving as undertakings. For example, certain pharmacists wanted to create a home-delivery service. The pharmacists association forbad this practice. The French Supreme Court (Cour de Cassation) condemned the pharmacists association on the basis of the competition law[39].

Another important point in the definition of undertaking is the criteria of independence: the undertaking to which competition law is applied must be independent. The notion of independence must be seen in the management of the undertaking. The company must be free to set the price policy, commercial policy or strategy. A counter example would be certain types of relations between a parent company and its subsidiary. If the parent company has a discretionary power in the different domains referred to earlier, the subsidiary won't be responsible but the parent company will.

Finally, the last prerequisite for the application of competition law is the choice of the law. In short, the use of European or national competition law will depend on the market scale. If the market concerns more than one country in the European Union thus, the EU law is primarily applicable.

In France, competition cases are often solved by the national competition authority. However, if anticompetitive practices cannot be separated from an administrative act then the administrative judge has the competence. This situation has been illustrated in a case of the French court of conflicts[40]. In this case the Paris Public Airport was convicted of anticompetitive behaviour, namely illicit agreements and abuse of dominant position, by the French competition authority. The French court of conflicts stated that the competition authority was incompetent in this case because the Airport was accused of anticompetitive practices concerning acts of a public authority. Thus, the

---

[39] French Supreme Court (Cour de Cassation) <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007041516 > accessed 10 August 2016.

[40] French Tribunal of Conflict https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007607359 accessed 10 August 2016.

competition authority was not competent, only the administrative judge is able to assess the behaviour of an entity performing acts of a public authority.

It is worth noting that the administrative judge will often seek advice from the national competition authority.

In the field of education, more specifically higher education, it seems that the administrative judge would be the natural and logical judge. Regarding the place of the state in France, it is obvious that education is considered as a public prerogative, even a sovereign power. As such, the administrative judge is competent regarding educational matters.

The commercial nature of the public higher education institutions has been treated in several cases in France and in the European Union.

A first case could be a 2007 case of the Nantes administrative court of appeal[41]. This case was focused on the lucrative nature of a non-profit organisation which was providing French lessons. The name of the organisation was: "Association Centre d'Etudes Franco-Americains" (French-American Study Centre) and was meant to provide French lessons to foreign students. The problem was that the tax authority wanted to categories the organisation as a profitmaking company because it considered that the lucrative activities of the non-profit organisation were excessive for the organisation to be able to benefit from the different tax advantages created for non-profit organisations. The complainant argued that the non-profit organisation was not in a competitive market because no official diplomas were granted, contrary to all the other possible competitors who are providing French lessons for foreigners. The court stated that this argument was insufficient and, moreover, the price conditions are similar to those of the other competitors and this course did not concern underprivileged people. Finally, the organisation had not only the revenues of the education activity but also the revenues coming from catering and hosting services which were not distinguishable from the revenues coming from the education service.

With this case, it seems that the lucrative nature of an institution is based on objective criterions. The dichotomy between private and public institutions doesn't seem

---

[41] Nantes Administrative Court of Appeal <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000018257458> accessed 10 August 2016.

to be relevant; the focus is more on the activity in itself. However, other cases from the administrative judge seem to exclude public higher education institutions automatically without checking if those criterions are fulfilled.

One of them was on a 13th of May 2003 by the Nantes administrative court of appeal[42]. In this case, the municipality of Saint Cyr-en-val wanted the administrative court to annul the judgement of the Orleans administrative court of 1999 that had rejected the municipality's request: the annulation of the decree which created the municipality communities of Orleans. In the decree mentioned before, article 6 created an action plan for the economic development of the municipality communities. The problem was that the support toward high education was part of the economic development. The administrative court of appeal cancelled the article 6 of the decree considering that the support toward higher education can't be considered as an economic development action. According to the Administrative Court of Appeal, public higher education can't be considered as an economic activity, as an undertaking.

[42] Nantes Administrative Court of Appeal <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007539396> accessed 10 August 2016.

Conclusion

It seems that the commercial nature of higher education is a sensitive subject. It may be because of the relationship between education and the sovereign power of the Member States. There are few powers that remain entirely under the control of the Member States. The intervention of the European Union seems not entirely legitimate in this matter, because of the sovereign nature of education, but unavoidable. The lack of definition and clear position on the nature of higher education and the entities responsible for its management is an indication of the tense situation and a power struggle between Member States and the European Union. However, the absence of a clear definition does not mean that the main protagonists have opposed views in the matter of education. Indeed, the previous developments show a sort of consensus on the subject of education. By all means, this context requires a clear definition, but the question is more where should it come from? Should it be the European Union of the Member States? Regarding the lack of legitimacy of the European Union and the probable difficulty to reach a common ground on this subject because of the specificity of each Member State, it would be more realistic to say that Member States have to give a clear but not uniform definition.

The European Court of Human Rights seems to insist on the freedom of Member States as regards higher education. Even if the court generally condemns all discriminations in the field of education, it seems that the court is giving a greater margin of appreciation to the Member States in the management higher education in their territory. They are even authorised to discriminate in the field of higher education. French constitutional case law is therefore authorised to treat public and private higher education institutions differently. For the court, they don't seem to have the same nature. The former is not a commercial activity, the latter is a commercial activity.

Competition law has been more precise on the subject of higher education in giving a reason to differentiate between public and private higher education institutions and to explain their different nature.

Most of the decisions agree on the commercial nature of higher education. However, because of the automatic exclusion of state-funded institutions from the commercial sphere, public higher education institutions seem to be outside the commercial sphere, thus not considered as commercial activity.

The lack of a clear definition of the public service of education from the Member States only adds to the confusion. It is understandable for the European Union to be elusive on the subject regarding the sovereign power of the states. But it seems strange that France does not have a clear definition of the public service of education. Regarding the increasing powers of the European Union and its responsibilities in the field of education the necessity to define the scope of the public service of education will certainly increase over time.

Recommendations

In several cases coming from Member States of the European Union, public higher education institutions are seen as undertakings for the purposes of competition law. For example, in an English case of 2006, there was an Office of Fair Trading (OFT) cartel investigation into fee paying schools. The schools were considered to be undertakings for the purposes of competition law the same as any other business (source mail). Another example would be contained in recent events in Ireland where a merger between a numbers of higher education institutions was notified to the Irish Competition Authority (CCPC) for clearance. This notification was made on the basis that the institutions are "undertakings" engaged in an economic activity and have turnover in excess of the thresholds requiring notification. The higher education involved are public, not private. Those cases seem to be the illustration of the future nature of education. It seems that the perpetual increase of powers of the European Union has already affected the domain of education. Regarding this phenomenon, the French attempts in order to exclude the public higher education from the field of competition seems more and more desperate. In the end it seems unavoidable that all higher education authorities will be considered as undertakings for the purposes of competition law.

However, we hope that the exception of public service tasks will be spared by the inexorable march of the European Union's powers.

The situation would be more easily treated if the limitation between the exception of public service tasks and the competition area were clearer. For that purpose, the creation of a clear definition on the content of the public service of education seems to be the best answer. Logically, if education is still a sovereign power, the definition would be at the discretion of each Member State. The definition does not need to be uniform as long as it enables the competent authorities to see clearly the institutions which are in the competition area and the institutions which are not.

Bibliography

Cases:

- Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECJ I-01979.
- Campbell and Cosans v The United Kingdom (App no 7511/76; 7743/76) ECHR 1982.
- Tarantino and others v Italy (App nos 25851/09, 29284/09 and 64090/09) ECHR 2013.
- Ponomaryovi v Bulgaria (App no 5335/05) ECHR 2011.
- Leyla Sahin v. Turkey (App no 44774/98) ECHR 2004
- Oršuš and Others v. Croatia (App no 15766/03) ECHR 2010
- Case 118/85 Commission of the European Communities v Italian Republic [1987] ECR.
- Case C-109/92 Stephan Max Wirth v Landeshauptstadt Hannover [1993] I – 6448.
- Case 263/86 Belgian State v René Humbel and Marie-Thérèse Edel [1988] ECR I-5388
- Case C-218/00 Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) [2002] ECR.
- C-475/99 Ambulanz Glöckner v Landkreis Südwestpfalz [2001] ECR.
- C-244/94 Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995].

Books:

- Taylor M.D. International competition law: a new dimension for the WTO? (Cambridge University Press 2006).

European Treaties:

- Treaty of Amsterdan amending the Treaty on European Union, the Treaties Establishing The European Communities and certain related acts [1997] OJ 97/C 340/01.

- Treaty establishing the European Economic Community, EEC Treaty [1957].

Websites:

- French Constitutional Council <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-496-qpc/decision-n-2015-496-qpc-du-21-octobre-2015.144582.html> accessed 10 August 2016.
- Bordeaux Administrative Court of Appeal <http://www.juricaf.org/arret/FRANCE-COURADMINISTRATIVEDAPPELDEBORDEAUX-20151215-15BX01831> accessed 10 August 2016.
- French Constitutionnal Council <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2014/2014-425-qpc/decision-n-2014-425-qpc-du-14-novembre-2014.142640.html> accessed 10 August 2016
- French Competition Autority <http://www.autoritedelaconcurrence.fr/pdf/avis/05d68.pdf > accessed 10 August 2016.
- French Competition Authority <http://www.autoritedelaconcurrence.fr/pdf/avis/99d45.pdf> accessed 10 August 2016.
- French Tribunal of Conflict <https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=EE4CDDF5E32BD302DD490801D0BA8631.tpdjo04v_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000007607135&fastReqId=183501500&fastPos=12 > accessed 10 August 2016.
- French Supreme Court (Cour de Cassation) <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007041516 > accessed 10 August 2016
- French Tribunal of Conflict https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007607359 accessed 10 August 2016.

- Nantes Administrative Court of Appeal
  <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000018257458> accessed 10 August 2016.
- Nantes Administrative Court of Appeal
  <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007539396> accessed 10 August 2016.