

Green paper

The EU mission in education and research: available legal tools for policy development in the next decade and beyond

Towards embedded mobility and European quality assurance

The EU stands at a crossroads: we face challenges to the overall mission of creating an 'ever closer union' which lays at the very core of the European integration project and which is the most iconic implication of the spirit of cooperation and good neighbourhood that should steer the Union's action in the pursuit of our common aims and values. This is a time for reflection and introspection. At the same time, though, it is a time to be bold. To reinvigorate the European spirit, starting with quality education and cutting-edge scientific advancements. To provide citizens and residents all over the EU as well as schools, training institutes and universities with enhanced educational and research opportunities by using the legal tools available to the Union's institutions to the fullest. In order to build trust, commitment and attachment to the European project, you have to deliver.

This paper is meant to give a high-level introduction to the European Union competences on education and research, and to highlight both constraints and opportunities offered by the existing legal framework in which any initiative launched by EU institutions must unavoidably fit.

It is structured in two layers: in the first instance, some limitations to the Union's action as stated in primary law are articulated, making it clear that they are such that only by way of treaties amendments they could conclusively be overcome; in the second instance, however, the paper will identify available tools under the current primary law framework, as well as possible strategies and achievements through which we hope to show that, even with a limited margin of manoeuvre, methods exist to make the most of the powers the institutions already possess.

Where we are now: EU education and research policies over the last 20 years

Looking back to the decade 2010-2020, turning to a conclusion in one year's time, means first of all confronting with the implementation of ET 2020 and of the achievements of the European Research Area. During its lifespan, the strategic framework for European cooperation in education and training¹ emerged as increasingly connected to the Europe 2020 strategy², proposed by the Commission as an ideal continuation of the Lisbon strategy³ which had characterised the first decade of the new millennium. As such, the evolution of education and vocational training policies can be narrated in terms of disruption with respect to twentieth century paradigms, and of continuity over the last 20 years. At the same time, the launch of ERA⁴ back in 2000 was inherently entrenched with the Lisbon strategy, which it became an integral part of and, later on, found its place directly in the body of primary law.

The Open Method of Coordination, the main instrumental driver coupled with Lisbon, was essentially the same model which has guided the Bologna process all over its two-decade-long existence. Founded on a self-feeding circle of objectives agreement, benchmarking, peer learning

¹ Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ('ET 2020') (2009/C 119/02).

² Commission communication 'Europe 2020' : A strategy for smart, sustainable and inclusive growth (COM(2010) 2020) of 3 March 2010, later adopted by the European Council conclusions of 17 June 2010.

³ European Council presidency conclusions of 23 and 24 March 2000, Lisbon.

⁴ Commission communication of 18 January 2000 'Towards a European research area' (COM(2000) 6 final).

and exchange of good practices, the OMC represented an unequivocal departure from the previous focus on the Community method.

Going through the establishment of the first Multiannual Financial Framework after the entry into force of the Lisbon Treaty and the simultaneous merger of seven previous spending programmes into Erasmus+ and of three previous programmes into Horizon 2020, EU educational and research systems were put to the test by a worldwide financial crisis which, although not originating from within, hit the continent to the full.

One of the key innovations introduced by the Lisbon strategy was to recognise the role of education and research as key economic drivers. Yet the contribution that any reform to schooling and higher education systems can give is not one that businesses can immediately cash.

Targets relating to knowledge development and innovation, such as the lowering of drop-out rates, the better attainment of skills for the improvement of employability and the increased public and private financing of R&D, became an integral part of the European Semester, through country-based recommendations and a strict monitoring on the implementation of yearly National Reform Programmes. At the outset of the crisis, however, the journey towards a level of coordination among the various national education systems capable of actually fostering economic and social welfare was mostly proceeding, for structural and institutional reasons, at a slow pace. The financial crisis caught European education and research policies still at half way through the process of attainment of those flagship goals which, if achieved, would have supposedly played a part in creating a more robust and resilient economic environment.

More recently, phenomena such as terrorism, intolerance and violent radicalisation have emerged as completely unforeseen challenges for public communities. Schooling policies have forcibly been called on to pay their contribution counteract these phenomena, with the obvious effect to further disrupt previous plans. This has once again showcased the attempt to use education as a vehicle for heterogeneous purposes which, critics may claim, it does not belong to: it's now job creation and economic recovery, now maintenance of public security.

In 2017, as the European integration process turned sixty, and one of the Member States came to decide to leave our Union, a new phase of reflection was set in motion by the European political leadership. Existential questions are currently being asked, through the launch of the Commission's *White Paper on the Future of Europe*. This is accompanied by a number of thematic reflection papers and the launch of the so-called 'Road to Sibiu', which should ideally lead the European Council to draw its first conclusions on the EU's way forward ahead of this year's parliamentary elections. In response to major challenges and opportunities to the present Europe's social model, including an increasingly globalised world, digitalisation and the fast-paced evolution of the world of work, the White Paper envisions 'a massive investment in skills and a major rethink of education and lifelong learning systems'. At the same time, the research sector is hailed as one of the drivers of Europe's future and Horizon 2020 is pointed out as the world's biggest multinational research programme keeping our continent 'at the cutting edge of innovation'.

As the end of the decade approaches, it is for the Commission, the European Parliament and the Council to assess on which aspects the Union has delivered and on which ones it has been lagging behind. In envisaging what comes next in terms of identification of priorities and of step-planning, selecting the right legal instruments is not only of pivotal importance, but lays at the very core of the elaboration of a strategy to give EU education and research policies a new impetus. In this respect, the experience accumulated so far can be a most precious starting point.

On one side, the OMC has progressively showed its obvious, inherent limits. The mostly non-binding nature of the legal instruments and procedures, the often loose engagements which national authorities were willing to undertake, the tendency to bend commitments and guidelines to national priorities rather than favouring Europe-wide convergence and the fact of being a goal-driven rather than an instrument-driven method were initially considered its most promising features.

Strikingly, those same features largely resulted in a hindrance to the effective transmission of inputs from the highest level of government cooperation down to the playing field of domestic reforms. A discouraging mismatch has emerged between the massive grass-roots effort that should have been put in place, in order to fulfil the ambitious ET 2020 goals and, on the other hand, the marginal ability to punctually verify progress in implementation and to mobilise a sufficient amount of financial resources.

On the opposite hand, the so-called Community method suffered by definition for the idea that it was unduly concessive towards EU common institutions, whereas the OMC strengthened the belief that Member States' governments were the only authorities with sufficient legitimacy to intervene in schooling, training and higher education issues.

Other than this, it is fair to say that the Community method has been somehow stuck in those primary law limitations and constraints which have always turned out to impair the ability of common institutions to act. Even more importantly, a persisting focus on traditional topics of regulation should also be pointed out. The hard core of the Union's remit consists of evergreen themes more strictly connected to the transnational dimension of education, such as the right to mobility or qualifications recognition. However, results in these areas have often been secured in previous decades and further advancements are neither easy nor uncontentious.

The attempt to expand the discourse to other topics such as schooling, quality assurance, adult education or challenges posed by current migratory influxes should be noticed. Nevertheless, this often comes to be made, again, by loose governance techniques rather than by measures to be implemented against strictly measurable indicators.

The fundamentals of EU education law, namely primary law and CJEU case-law, have remained substantially unchanged. The focus of research and innovation policies has long been on both expanding financial capabilities and making better use of them, in a context where operators have traditionally suffered from the difficulty to transform R&D outputs into commercial opportunities. The need to remove legal and fiscal obstacles to international partnership is increasingly imposing as an inescapable priority to ensure that the European scientific community keeps on delivering worldwide recognisable results. It is therefore on legal experts to elaborate on available instruments and come up with workable options to be used in institutional practice. The task is both to identify the space for totally new initiatives on education and research and to deepen and enlarge the scope of existing forms of cooperation in unprecedented ways.

As the province of the education and research lawyer relates to the identification of tools, these should be (1) legally sound, (2) consistent with the current reflection on Europe's future as requiring innovative action (3) yet not disconnected from the present legal background.

Legal basis for EU action on education, research and knowledge development: a recap

In the area of education and research, the EU already has several important competences. As far as education is concerned, the most specific competence is laid down in Articles 165 and 166 TFEU, the first focusing on education and the second on vocational training. Research and technological

development is dealt with in Articles 179 to 190 TFEU, not to mention Article 4(3), which is crucial to define the shared remit in this sector.

Both Article 165 and 166, each for its specific area of interest, define to what extent and in which direction common institutions shall act, striking a balance between competences belonging to the EU and those staying with the Member States. In particular, goals to be pursued in each of the two fields are outlined, as well as the procedures for the adoption of legal acts by the institutions.

Article 165 provides, *inter alia*, that the European Parliament and the Council, in accordance with the ordinary legislative procedure, shall adopt incentive measures to contribute to 'the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their actions'. The wording of Article 166 is similar albeit not identical, and states that the Union's action shall include the implementation of 'a vocational training policy which shall support and supplement the action of the Member States'.

The specific aims which such actions shall tend to are enlisted, respectively, under paragraphs 165(2) and 166(2), and span the development of the European dimension in education, the encouragement of student and teacher mobility, the promotion of cooperation between educational and training establishments and firms, and the facilitation of access to vocational training – to name just a few points. In the light of the current definition of the principle of conferral pursuant to Article 5(2) TEU, and the great variety of topics which Article 165 and 166 touch upon, the discussion is still ongoing as to whether such provisions should be intended just as examples or rather as an exhaustive list of goals. Furthermore, such articles could be relied upon by the EU legislator to go beyond promoting the mobility of students, such as providing for legal constructs facilitating (cross-border) cooperation between educational establishments or even obliging Member States to introduce a European dimension in (national) citizenship education curricula. Pursuant to Article 165(1), Union's initiatives shall be limited to the development of quality education, in relation to which EU actions shall not go beyond a mere 'contribution'. Further in this direction, according to Article 6 TFEU, such actions must provide support, coordination or supplementation to actions carried out by each Member State, and shall take place merely 'at European level'.

The persisting responsibility of Member States for both the content of teaching and the organisation of education and training systems, the obligation to respect cultural and linguistic diversity, as well as the prohibition to harmonise Member States' laws and regulations represent additional restrictions which, all together, shape an area of policy where the autonomy of national authorities largely outweighs the powers conferred upon European bodies.

Although the Union formally enjoys a shared competence on 'research, technological development and space' according to Article 4 TFEU, the powers afforded to the common institutions consist of the ability to conduct 'activities' and to 'define and implement programmes', provided that any action however undertaken does not prevent any Member State to exercise its own competences in the same field. This approach clearly conveys the idea that the efforts put in place by the EU and the national governments shall proceed in parallel and, although fostering synergies whenever possible, they should not jeopardise the attainment of one another's goals. This is consistent with the perspective that 'activities' carried out by the Union should essentially be of a financial kind. This is further confirmed by the centrality of the multiannual framework programme for research and technological development, implicitly indicated by Article 182 as the main tool through which an EU innovation and technological development policy shall be implemented.

This makes the case for a reduced space for all-round regulation in the area of pure and applied science, even when this is developed by bodies performing public functions such as universities and research centres, or thanks to public resources. Nonetheless, it is for the legislative acts establishing the framework programme according to the ordinary legislative procedure (Article 182) not only to set out priorities and methodologies, but also to define the rules for the participation of undertakings, research centres and universities, as well as the dissemination of research results, the establishment of joint research structures and cooperation with third parties.

As to the other provisions falling in broad terms in the area of education and research, Article 53 TFEU is the main reference on recognition of 'diplomas, certificates and other evidences of formal qualification'. This constitutes a solid legal basis for the adoption of directives which, most notably, do not suffer from the limitations foreseen by Articles 165 and 166. Furthermore, Article 53, set out in the context of the right of establishment and the free movement of self-employed workers, is broad in scope and embraces not only qualifications which are a pre-condition for the exercise of reserved or regulated professions, but more widely all those functional to the taking-up and pursuit of economic activities.

Articles 114 and 115 TFEU provide the EU with the competence to act where the educational and innovation-related goals to be achieved contribute to the functioning of the internal market, by removing obstacles or distortions of competition. Some harmonisation of Member States' educational and research policies could conceivably be adopted on this basis, although the limitations provided for in Article 4(2) TEU should be taken into account. In terms of the potential and scope of Article 115, many of the achievements of the Bologna process could also have been introduced through a directive, adopted on the basis of that provision. In order to facilitate educational exchanges and student, teacher and researcher mobility, it is also worthwhile to explore the potential of Article 21(2) TFEU, as it provides the EU with the possibility to act with a view to contribute to the core right of EU citizens to 'move and reside freely within the territory of Member States'.

Finally, the EU could have recourse to Article 352 TFEU, although its added value may be limited since it cannot be used to harmonise measures in areas where such harmonisation is excluded (as education and vocational training). Given that Article 165 also allows for the adoption of binding measures, and Article 352 prescribes unanimity in the Council, the latter one is not suggested as a priority competence base.

Facing the shortcomings of the current allocation of competence: inefficiencies and contradictions in the primary law architecture

Articles 165 and 166 TFEU are the main legal reference for any positive action on education. Neglecting or minimising the numerous and diversified limitations set forth therein is certainly not an option as it would just shift the issue of *ultra vires* exercise of powers to a later stage. At the same time these articles should not be interpreted restrictively. Indeed, it is our submission here that reliance on these legal bases to date has been too conservative and that significant scope for action remains, as will be set out in the next section.

However, interpretation can only go so far. The reality is that the Union's ability to take action and, as a consequence, the effectiveness of any resulting legislation is hampered by the present legal arrangements. This leads to a number of deficiencies, the first being policy fragmentation.

This can simply be explained by the consideration that the rule-making ability which most national governments enjoy in this field is simply out of reach for EU institutions: although 'education,

vocational training, sport and youth' is ideally defined as an all-round policy area, limitations are such that large 'chunks of the cake' are missing. The result is that measures are put in place with an intermittent pattern, as several aspects in the field cannot be covered to the full and the possibility to resort to techniques of direct regulation is reduced to a minimum.

This has consequences in turn. Learning, managing and monitoring processes are in no way easy to govern, quality of education and research at European level cannot be ordered by decree, and a significant distance exists between policy-making and the daily playground of educational providers and academic institutions. Achieving concrete results, especially if as ambitious as those set by ET 2020, often entails complex interventions and a holistic approach, which is easily clamped down by the many constraints of Articles 165 and 166.

So-called 'negative integration' has always taken place in the education sector through the CJEU case-law, which does not experience the same limits applicable to 'positive integration'. The removal of illicit provisions or practices by way of judicial decisions inevitably leaves blank spaces in the regulatory net, which should be up to the EU political bodies to take care of. As a wide room for intervention pops up due to sudden advancements in law, the inability of the common institutions to deliver structured reforms leaves the regulatory burden to Member States. This leads to heterogeneous solutions even where consistency may be desirable.

Furthermore, the very prohibition of harmonisation has largely proven ineffective. Its inclusion in Articles 165 and 166 has not prevented the EU legislator to resort to other legal bases where it enjoys a greater leeway and which, due to their broad scope, also offer some coverage of educational issues. Such 'harmonisation through the back door' is often grounded on internal market-related provisions and, needless to say, is where non-recognition of the specificities of education and research reaches the apex.

There were, of course, meaningful reasons why forbidding harmonisation in certain policy areas seemed the right thing to do when the treaties were negotiated. Such reasons mostly relate with issues of political legitimacy.

Member States were inspired by an instinct of self-protection from the risk of an overwhelming and intrusive EU authority, in what was conceived as a sanctuary of national culture preservation. However, the ban on harmonisation has conclusively turned out to be unfit even for the Member States themselves, who felt the need to put in place, through the Bologna process, measures which were tantamount to a harmonisation of higher education, particularly in the area of organisation of national degree systems. This would have been impossible for the Union's co-legislators, at least through Articles 165 and 166: similar measures would have infringed both the harmonisation prohibition and the duty to respect the exclusive responsibility for organisational profiles of higher education systems. Nonetheless, national governments enthusiastically pushed for a long-lasting effort of rapprochement of study cycles on a continental scale.

If on one side this resulted in the opening of a new front of reforms where the European Commission has been able to play a prominent role, on the other the Union's institutional and procedural machinery was stripped of a work which could have otherwise been carried out within the block's rules. The purely inter-governmental nature of Bologna has determined that EU legislative procedures and guarantees were sidelined, with a substantial loss in terms of democratic decision-making, transparency, stakeholders' participation and judicial scrutiny.

Although strategies can be put in place to adapt single EU initiatives to the current primary law framework, it is clear that these structural shortcomings are inherent to the present architecture and

cannot be completely overcome as long as the Treaty on the Functioning remains unchanged. As surprising as it may seem, the straightforward prohibition of harmonisation has proved to be a simplistic and naïve attempt to avoid the phenomenon as such. Instead, it has allowed for harmonisation to emerge elsewhere, now on the ground of alternative legal bases, now outside the Community method, now outside the EU framework as a whole. In all cases where this happened, it responded to an actual interest to harmonise national education systems – an interest that was undoubtedly there, but could not be confessed in the first place.

The removal of the prohibition of harmonisation would open up to the ambitious measures needed to turn the project of a European Education Area into practice. At the same time, it would unfold a whole new space for policy development, which would allow to combine EEA with the European Research Area, to the benefit of higher education institutions which naturally perceived themselves as entrusted with one single mission of knowledge development. As a bottom line, such removal would increase the power of the EU institutions to attain the goals they were tasked with by the treaties. Any such treaty amendment should be accompanied by the strengthening of mechanisms preventing the Union's role to become too expansive and, ultimately, to make sure the main lead on education and research stays with national or sub-national authorities, according to each Member State's sectoral legislation.

The responsibility to launch any process of review of the treaties rests, of course, with the Member States in their capacity as Contracting Parties. However, flagging the downsides of the *status quo* is the first step to admit that there are margins of improvement in the current shape of primary law in this area. Without a re-think of the basic assumptions around which the Union's competence on education has been conceived, issues like poor quality of legislation, reduced effectiveness of policies and absence of democratic checks on how decisions are taken are doomed to persist.

Coping with the current framework: Articles 165, 166, 179 TFEU and more

The elements explained above make, all together, for a rather despondent picture for the elaboration of a coherent European Union educational and research policy, and the number and articulation of the restraints can be discouraging. Nevertheless, it is the task of the lawyer to identify the tools and strategies to harness the Union's competences as they are, and come up with solutions being at the same time workable, comprehensive and fully compliant with existing primary law.

Of course, difficulties originating from a legal basis explicitly designed to curb the options at hand cannot simply disappear, and fragmentation, the limited scope of legislation, or the necessity to adapt initiatives to non-education-related legal bases will remain outstanding issues. Despite all of this, it should be made clear that margins exist for expanding the scope of a regulatory approach on education and research, improving the effectiveness of coordination among all relevant players, connecting investments to the achievement of policy goals but also to the punctual implementation of agreed steps, and experimenting new forms of cross-border co-operation.

Aims enlisted in Articles 165 and 166 do not only indicate sectoral goals the Union shall pursue, but also as many segments of the education policy spectrum where the institutions enjoy a reasonable leeway to put projects into practice. The treaties should ideally be understood, first and foremost, as creating and empowering common institutions, rather than clamping down their ability to act.

It follows that, with proper precautions, a regulatory approach can be used not only for traditional topics such as qualifications recognition or freedom of circulation of students and researchers, but potentially for any area of action which the EU is competent at in education.

Both Articles 165 and 166, referring to the ordinary legislative procedure, evoke the possibility to adopt both binding and non-binding legal acts. The prohibition of harmonisation relates to 'laws and regulations of the Member States' and should be understood as a result-based concept, regarding the standardisation of national education systems, rather than one hitting each single initiative aimed at establishing coordination on issues of common interest.

Regulatory policies exclusively centred on scientific innovation and technological development is challenged by the lack of a fully-fledged catalogue of legal measures to be adopted according to primary law in this respect. Yet, the idea of smart legislation related to the use of financial resources and the possibility to resort to alternative treaty provisions in order to tackle issues anyway connected with research activities is inevitably making its way as an attractive strategy to be explored.

Leveraging on existing and prospective secondary legislation. The hypothesis of a framework directive on education and research

A number of existing legal acts already regulate single aspects of education and research or directly impact on national education and research systems. These include directives on the recognition of professional qualifications⁵, on the qualification of lawyers⁶ and on freedom of movement and residence⁷. Such pieces of legislation do not strictly relate neither to the academic recognition of qualifications nor to the access to further education, but rather to the access to regulated professions. Yet, they do exercise a forceful influence on the design of learning tracks leading to the qualifications which are a prerequisite for such admission. A number of regulations and decisions should also be mentioned, such as those setting up advisory or executive bodies such as EACEA⁸, Cedefop⁹, the European Training Foundation¹⁰, the Research Executive Agency¹¹ and the European Institute of Innovation and Technology¹², but also the Decision on the Europass framework for the transparency of qualifications and competences¹³, the Regulation outlining statistical standards for the production of harmonised data¹⁴ and the Regulation laying down the rules for participation and

⁵ Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications.

⁶ Directive 98/5/EC of the European Parliament and of the Council to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

⁷ Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

⁸ Commission Implementing Decision of 18 December 2013 establishing the 'Education, Audiovisual and Culture Executive Agency' and repealing Decision 2009/336/EC (2013/776/EU).

⁹ Regulation (EEC) No 337/75 of the Council establishing a European Centre for the Development of Vocational Training.

¹⁰ Regulation (EC) No 1339/2008 of the European Parliament and of the Council establishing a European Training Foundation (recast).

¹¹ Commission Implementing Decision of 13 December 2013 establishing the Research Executive Agency and repealing Decision 2008/46/EC (2013/778/EU).

¹² Regulation (EC) No 294/2008 of the European Parliament and of the Council of 11 March 2008 establishing the European Institute of Innovation and Technology.

¹³ Decision (EU) 2018/646 of the European Parliament and of the Council on a common framework for the provision of better services for skills and qualifications (Europass) and repealing Decision No 2241/2004/EC.

¹⁴ Regulation (EC) No 452/2008 of the European Parliament and of the Council concerning the production and development of statistics on education and lifelong learning.

dissemination in Horizon 2020¹⁵. The current regulations establishing Erasmus+¹⁶ and Horizon 2020¹⁷ should also be included in this set, not to mention the variety of recommendations covering all sort of ET and research and innovation issues.

The main concern vis-à-vis this plurality is not one of coordination among measures issued in different years and justified by different motivations (although coordination is indeed an outstanding concern), but one of enlarging the scope of legislation, so that a European dimension of education and research and the much-talked-about European Education Area can be achieved in tandem with the ERA.

The current fragmentation of legal production in education and training, where major regulatory topics such as freedom of circulation and mutual recognition of qualifications are dealt with through binding instruments whereas all other topics are left to recommendations and the like, is a product of the CJEU case-law, whose footsteps have always been followed when putting forward any first-tier piece of legislation.

Time for this conservative approach is now over. Paramount challenges have long lied ahead of the European education and scientific sector, which cannot wait for further delays due to the absence of inadequate legal tools to address them.

Digitalisation as a disruptive force in society is heavily meddling into learning processes, introducing major changes both inside and outside traditional educational establishments. Far from being conceived as an additional hurdle, technology should be seen as a precious opportunity to respond to existing learning demands and to connect the teaching function to the forefront of scientific advancements in universities and research centres. This calls for the institution of a 'Bologna digital' also in accordance with the decision, by the Paris ministerial conference in May 2018, to 'add cooperation in innovative learning and teaching practices as another hallmark of the EHEA'¹⁸, as well as the Commission's strategy for a Digital Single Market¹⁹ and the Digital Education Action Plan²⁰.

The need to expand the impact of Erasmus+ paves the way to concepts such as 'Erasmus at home' and reinvigorates the attention towards building European higher education networks and even fully fledged European universities – all proposals well-positioned to win the general public attention.

Existing legislation may come in aid to make such goals happen, such as with the regulation on the European Grouping of Territorial Cooperation²¹. Yet, a new extended set of rules is undoubtedly needed.

¹⁵ Regulation (EU) No 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in Horizon 2020 – the Framework Programme for Research and Innovation (2014-20) and repealing Regulation (EC) No 1906/2006.

¹⁶ Regulation (EU) No 1288/2013 of the European Parliament and of the Council establishing 'Erasmus+': the Union programme for education, training, youth and sport and repealing Decisions No 1719/2006/EC, No 1720/2006/EC and No 1298/2008/EC.

¹⁷ Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-20) and repealing Decision No 1982/2006/EC.

¹⁸ EHEA Ministerial communiqué, Paris, 25 May 2018.

¹⁹ Commission Communication of 6 May 2015 'A Digital Single Market Strategy for Europe' (COM(2015) 192 final).

²⁰ Commission Communication of 17 January 2018 on the Digital Education Action Plan (COM(2018) 22 final).

²¹ Regulation (EC) No 1082/2006 of the European Parliament and of the Council on a European grouping of territorial cooperation (EGTC).

A framework directive on education and research could at the same time amend the current need for a more systematic provisions on the status of educational establishments and users as players of a European Education Area, and provide the legal ground for most forward-looking initiatives, such as the establishment of a European statute to allow smooth daily functioning and cross-border financing of transnational-minded establishments.

Adaptive governance modules and set of rules can pioneer in making this possible while respecting Member States' responsibility for the content of teaching and the organisation of national education systems. Existing pieces of legislation rely on different TFEU legal bases and often simply neglect articles specific to education, training and research activity. Even so, this plurality of sources can be an asset to take advantage of, and blending could actually work as a strategy to overcome the uneven potentials offered by the various provisions of the treaties.

A framework directive would be in a position to also cover elements of the European Research Area, such as the rights and obligations laid down in the *Charter for Researchers*, the *Code of Conduct for the Recruitment of Researchers*²² and follow-up work such as the code for Open, Transparent and Merit-Based Recruitment (OTM-R). This would mean linking the EHEA and ERA, to the benefit of so-called 'research-intensive universities' which are the backbone of both scientific and business-oriented innovation.

Needless to say, even the long-favoured focus on qualifications recognition has room for updates, as efforts to achieve automatic recognition keep on crashing against persisting obstacles both in the Lisbon Recognition Convention, in Directive 2005/36/EC, as well as in the new Council Recommendation on the automatic mutual recognition of qualifications and learning periods abroad²³. That's the case of the distinction between, in the first instance, access to a fair evaluation and recognition of one's qualification; secondly, the right to have that same qualification effectively and conclusively recognised as equal to one issued in the Member State of destination; and, thirdly, the actual admission decision, allowing the candidate to enter a study or research programme of choice, which is up to the degree awarder and may be conditional on other factors, such as available seats or linguistic competences. These distinctions often frustrate the actual right of learners and researchers to, for example, continue their studies in another country or being recruited abroad.

Upgrading soft techniques of policy implementation through smarter interaction with stakeholders

This option implies maintaining current paradigms of soft law, horizontal governance, peer-review and support, mutual learning and self-assessment of needs which have long been at the core of both Bologna and the EU own OMC. Given the current centrality of such working methods, which leave virtually all responsibility for policy fulfilment to national governments while exerting only a light pressure on them to deliver, they will most likely be part of the future toolbox for education and research policies. Even so, one could hardly limit to a life-as-usual approach.

A general effort must be made to ensure that pursuance of agreed goals can be monitored and verified vis-à-vis action-specific benchmarks, ensure that workarounds exist when uncooperative or little cooperative actors are encountered and, conclusively, render the entire process far more impactful than it is right now. Taking stock of the experience gained in the context of the H2020

²² Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers (2005/251/EC).

²³ Council Recommendation of 26 November 2018 on promoting automatic mutual recognition of higher education and upper secondary education and training qualifications and the outcomes of learning periods abroad (2018/C 444/01).

Policy Support Facility both through voluntary in-depth assessment modules and mutual learning exercises can be an encouraging starting point to expand good practices and improve their effectiveness.

From a legal perspective, the advantage of this way of proceeding is that no specific requirement or condition must be met in order to review and modify the Commission's own working method. If national ministries of education and scientific research do not have to ask for permission if they want to change their domestic policy course, certainly the same goes for European institutions as long as they act within a soft governance framework.

The pool of actors which interaction is aimed at could be broadened to introduce a systematic co-operation with national and European interlocutors, leveraging on the concept of multi-level governance and going beyond a purely ministerial dimension of policy implementation. Autonomy of education providers and research institutes should be considered a reality in Europe. Willing higher education institutions, network of schools and similar organisations could, if stimulated, prove to be useful and dedicated partners as long as being given achievable outcomes to work on.

In short, even when moving in a legally loose environment as the OMC largely is, the Commission should never view itself as the powerless victim of national decision-makers, nor the relationship between the EU executive and Member States in education and research can be downgraded to a principal-agent one. The idea is rather for the Commission to take stock of its own room of manoeuvre to bring EU-wide policy down to earth.

Financing as a key for both operative and regulatory advancements

The work done by both Erasmus+ and Horizon 2020 in the field of education and research has been pivotal and widely praised by European legislators, with subsequent calls to reach more ambitious targets in terms of participants to each programme.

Although mobility of students and, to a minor extent, of researchers has always been a predominant component of Erasmus both for its flagship value and for the amount of deployed resources, the potential of a carefully tuned spending policy goes well beyond, and involves both the delivery of stand-alone projects which Erasmus+ is already a champion at, thanks to chapters dedicated to innovation, exchange of good practices and support to policy reform, as well as the realisation of structural changes in day-to-day management – an approach still largely unexplored in the education sector, but already tested in other budgetary areas.

It should be pointed out here that any Union's financing strategy on education and research shall comply with those same limitations which any other initiative, both legislative and non-legislative, is subject to, including the due respect of national authorities' remit and the merely supporting and supplementing role of the Union.

Nonetheless, this does not prevent the establishment of spending arrangements which, through blending of different legal bases and conditional assignment of funds, can guarantee the respect of such principles. This entails, for example, the attribution of part of the decision-making to entities other than the EU institutions, through decentralisation.

Moreover, money is not the only good that educational establishments strive for – far from it –: streamlined recognition of diplomas, programme or institutional accreditation, eligibility to specific research or teaching projects are all benefits which could well be part of an emboldened European education and research space. These typically rely on mutual trust among Member States and

quality assessment procedures that often proceed at a sluggish rhythm, thus leaving room to alternative international accreditation procedures.

In certain areas the overall focus may thus shift from how money is spent to prerequisites to be satisfied to obtain an economic advantage. As a result, there is no reason to keep viewing financing ordinary management as a taboo, and the idea that EU budget resources must anyhow be finalised could well be overcome.

Even in areas such as student and researcher mobility, current drawbacks indicate a need for change.

Ambitious targets in terms of number of participants urge not only to increase contribution from Member States, but also to tackle income inequalities among candidates to a mobility period, as these inevitably result in a lack of inclusiveness that leaves many potential beneficiaries behind. Legislation setting up an EU system of study grants or study loans, as well as coordinating it with analogous national support schemes, could be a real game-changer. The Youth Guarantee launched in 2013 might be of inspiration in this respect.

Building coalitions of pioneers in specific areas through enhanced cooperation

Consistently with the 'Those who want more do more' scenario of the White Paper on the Future of Europe, the education and research sector could see groups of Member States willing to embark on deeper integration on specific topics.

Enhanced cooperation, as envisaged by the Treaty on the Union and subject to the technicalities detailed in Articles 326 to 334 TFEU, is virtually applicable to all non-exclusive areas of action, comprehensive of social policies where competence is limited to support, coordination and supplementation. Article 184 TFEU explicitly outlines the possibility to set up supplementary programmes enabling some Member States only to participate in limited research tracks, while also envisaging possible financial contributions from the EU budget.

It should be clarified that enhanced cooperation is not a method to circumvent existing constraints to the Union's competences. Instead, it is a tool to address the lack of consensus in the Council, in presence of a nucleus of governments ready to adopt one or more proposed measures. Should this happen in a plurality of cases, there would be no need that participants be all the same in the various enhanced cooperation schemes, although it goes without saying that a homogeneous pool of Member States coming together around a common set of reforms (as opposed to variable geometries where a State endorses a proposal while rejecting another) guarantees more coherence and gives the sense of the way forward.

As a result, citizens living in different Member States may enjoy different educational rights and be subject to different obligations as long as they participate in learning or research tracks. Issues of coordination between one State and another may occasionally arise and should be resolved either by *ad-hoc* adjustments or judiciary proceedings.

Transnational knowledge-sharing programmes, scientific initiatives or educational institutions could be established, involving certain countries only. Updated rules could apply to traineeships undertaken both during a course of study and beyond, depending on the location where they take place. A special section of the EU budget could foster executive learning tracks targeting lifelong learning needs of adults who have been beaten most by the crisis, but only in contributing Member States.

Notwithstanding downsides, enhanced cooperation should ideally work as a propulsive force for the entire Union. Non-participating Member States should see their motivation to join increase, based on the success of those already engaged.

A vision to gather: embedded mobility and quality assurance as pillars of a European Education and Research Area

The above overview is enough to show that more instruments are at hand that we usually tend to believe, if we just depart from the comfort-zone of consolidated practice.

One may argue that, due to how competence on education and research is currently shaped, such policies will always be in need of special legal tutelage to ensure full compliance with the strict requirements set forth in the law. Still, one thing is clear: legal solutions exist, and political will can make them work. Matching education and training policies with research and innovation can turn out to be a real driving force to shape a European education and research space capable to stand on its own vis-à-vis its major global competitors. It follows that the lack of viable options is hardly a conclusive factor in deciding whether to pursue a policy or not – political agreement being far more important. This brings the focus back on consensus-building and on the ability to have a shared narrative emerge.

Here, the starting point is arguably in those issues that have been left unresolved by the integration process in the education and research sector and which have often been a fertile ground for the reluctance to accept the idea that education as such can be a field where the EU should have any say. The creation of a system of mobility of students and, to a minor extent, of teachers and researchers by way of 'negative integration', consisting of the simple removal of regulatory barriers to the circulation of persons, has been a powerful stimulus for internationalisation, but has left a normative vacuum where limitations directly or indirectly based on nationality previously stood.

Although such advancements were built on the assumption of reciprocity, Member States have been left with the burden originating from the straight and unconditional disappearance of borders. It cannot be overlooked that student mobility has an impact on States of destination. In particular, a right of circulation of students and researchers grounded on the principle of non-discrimination has significant financial and organisational implications on national education systems – not to mention the right to non-discriminatory access to other services which, although not belonging to the hard core of education, a student or researcher from a different Member State is anyway entitled to have.

A space exists for a system of embedded mobility addressing the imbalances among the various Member States involved, and namely: the country of origin of the individual, the country which the individual contributes to from a financial viewpoint, and the country where the same individual finds him or herself for schooling or academic reasons. Rules facing the financial and non-financial complexities of mobility and aimed at compensating persisting discrepancies among national educational and welfare systems could conceivably form a corpus of legislation of paramount importance in substantive EU law, and a real focal point on education and research regulation.

Back once again to the list of aims which the Union's initiatives shall be oriented to, the first place is given to the development of a 'European dimension in education'. There is no doubt that such expression relates to the very content of teaching, as confirmed by the reference to languages as one of the school disciplines most contributing to a sense of transnational citizenship. Further on this, the 'development of quality education' represents an overarching goal in the whole structure of Article 165.

Therefore, not only quality of education plays a pre-eminent role in how this area of policy was outlined in the treaties, but it can be viewed as one main drivers towards the implementation of a coherent and holistic approach in addressing teaching and learning processes. An established literature in pedagogic and organisational studies exists as to the centrality of quality assurance.

In this light, considerable work has already been done internationally to make checks and monitoring on educational processes a question of benchmarking and referencing rather than an arbitrary exercise. Citizenship education is a privileged vehicle for the transmission of a worldview where the European dimension can be part of the cultural background of each individual. In this sense, the Council of Europe has once again turned out to be a forum where national governments, including those being part of the EU, are willing to engage in content-based policy building through the achievement of consensual conclusions. An example of this is the *CoE Reference framework of competences for democratic culture*, which the Member States have already endorsed.

As such, a distinct way forward is to take stock of previous recommendations on quality assessment in schools²⁴ and in VET²⁵, and to build on the consensus already achieved in international forums the EU partners participate to. Such material could then be transposed into the establishment of a formal EU system of quality assurance. The output of such system could then be used for referencing purposes in other workflows, such as qualification recognition or financing of educational institutions or academic and scientific tracks.

Conclusively, while legal specialists can provide technical support to refine the best arrangement toward a certain goal, it is for the EU political leadership, starting with the Commission, to identify the foundational elements of a long-term strategy to successfully navigate the next decade and beyond. Lawyers and policy experts can, of course, lend a hand, in the firm belief that only an education and research sector ready to face to the enormous challenges lying ahead of the European project will be able to respond to the pressing demands of learners, teachers, researchers and the European society as a whole.

²⁴ Recommendation 2001/166/EC of the European Parliament and of the Council on European cooperation in quality evaluation in school education.

²⁵ Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training (2009/C 155/01).

Policy-making beyond 2020: some concrete proposals

Proposal	Goals, methodology	Legal basis	Legal instrument (subject to impact assessment as required)
Enhancement of European topics in citizenship education	Promoting the expansion of the European dimension in school curricula, by agreeing a multi-annual step plan with national ministries, associations of schools and other networks of educational establishments. This can be supplemented by the provision of specific funding, which would require dedicated legislation.	Articles 165 and 166	Structured cooperation with stakeholders. Regulation
Directive on mobility of students, teachers and researchers	Defining rights of learners, teachers and researchers circulating within the Union, either in the framework or outside the Erasmus+ mobility scheme. Definition of financial mechanisms aimed at re-balancing the effects of uneven fluxes of students in different Member States.	Articles 21(2), 114, 115, 165, 166, 352 TFEU	Directive
Directive on assessment of learning and research outcomes and quality of education	Rules to be opted to on a voluntary basis by each Member State or each educational establishment or research institute, aimed at establishing common standards for the assessment of quality of education and research, for the release of an	Articles 165, 166 and 183	Directive

	appropriate certification to the single institution meeting pre-determined criteria.		
Directive for the mutual recognition of degrees	Achievement of automatic recognition of academic degrees, through the establishment of procedural as well as content-based requirements both on the release of qualifications and the recognition process.	Articles 21(2), 53, 165 and 166 TFEU	Directive
Review of Regulation No 1082/2006 on EGTC	Reviewing the Regulation creating the European Grouping for Territorial Cooperation, with a view to make it an attractive vehicle for cross-border cooperation of educational establishments and to provide a legal protection to HEI operating cross-border or with a prominent international orientation.	Article 175 TFEU	Regulation
Directive on the institution and promotion of European higher education institutions	Making available an <i>ad hoc</i> set of rules, which HEI may decide to opt to, with a view to promote the creation of European networks of existing HEI, in order to establish structured forms of cooperation such as sharing of teaching, research and administrative functions. The directive may also provide the legal ground for the institution of self-	Articles 165, 166, 179, 180, 182, 183, 184, 185, 187 and 188 TFEU	Directive

	standing European universities.		
Regulation establishing an EU student financing system	Institution of a system of student financing for higher education, drawing directly on dedicated contributions to the EU budget. This may be structured either in the form of study loans or study grants, to be awarded on the basis of uniform criteria defined at EU level.	Articles 165 and 166 TFEU	Regulation

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