

# FAIR PUBLIC FINANCIAL SUPPORT FOR INDEPENDENT SCHOOLS

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Which legal proceedings aimed at fair funding of IS  
exist under

- ◆ EU Law
- ◆ National law
- ◆ ECHR ?

## Status quo :

### Incoherence and Lack of legal certainty

- IS versus IS: Often, legal or contractual privileges favour confessional and selected other independent schools
- IS versus PS: IS receive often far less public funding than PS and are often subject to discretionary rules and additional conditions

### Which legal considerations could play a role?

1. There is a distortion of competition by other IS
2. There is a discrimination on the basis of religion or belief by other IS
3. There is manifest unequal treatment of IS in relation to PS
4. The freedom to found IS is affected
5. The freedom of education is affected

Which legal provisions may be relied upon by IS ?

1. TFEU Art. 107, 108 on State aid entitle the COM to prohibit State aid which distorts competition
2. EU Charter Art. 21(1) prohibits discrimination
3. A general EU-legal principle requires equal treatment of comparable situations
4. EU Charter Art. 14(3) grants freedom to found IS
5. ECHR Protocol Art. 2 grants freedom of education

### Article 21(1)

Charter of fundamental rights of the EU:

*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*

## Article 14(3)

### Charter of fundamental rights of the EU:

*The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

## Article 2

### Right to education under the Protocol to the ECHR as amended by Protocol No. 11

*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.*

## Five legal arguments may thus be made by IS (1/2)

1. High public funding granted to selected other IS may infringe the State aid rules, Art. 107, 108 TFEU
2. High public funding granted solely e.g. to confessional IS may constitute discrimination based on religion or belief and thus infringe Art. 21(1) EU Charter

## Five legal arguments may thus be made by IS (2/2)

4. Public funding of IS which is subst. lower than that of PS may infringe the general jurisprudential EU principle requiring "*comparable situations*" to be treated equally
5. Low public funding of IS which threatens the continued existence of IS may infringe the right to found IS under Art. 14(3) EU Charter
6. Low public funding of IS that threatens their continued existence might infringe Art. 2 Protocol ECHR

## Legal proceedings based on these provisions 1/2

1. Com vs MS : IS lodges complaint to EU Commission claiming that competing (e.g. confessional) IS receive State aid which distorts competition + In case of a negative decision action for annulment to CJEU against COM
2. IS vs MS: IS brings national lawsuit against national decision refusing higher public funding for IS, followed by nat. lawsuit claiming infringement of Art. 21, 14 EU Charter, and equal treatment + Referral to CJEU for Preliminary Ruling, Art. 267 TFEU

## Legal proceedings based on these provisions 2/2

3. Com vs MS:  
IS lodges informal Complaint to EU COM claiming that MS disregards Arts 14, 21 EU Charter, and equal treatment, in the best case followed by an Infringement Proceeding by COM against the MS
4. IS vs MS:  
After having exhausted national remedies, IS brings legal action to European Court for human rights under ECHR against the MS

## 1a) Distorting State aid for competing IS ?

### Waldorf vs COM

- In 2007 Complaint ia by Austrian Waldorfschools to COM
- Claiming that the State aid granted (only) to confessional schools under *Privatschulgesetz* infringes EU State aid rules
- Com concluded: the educational services of the confessional schools have no economic character because the parents' low fees are out of proportion to the real value of these services – therefore no State aid
- The chance to contest this view in the CJEU was not seized

## 1b) Distorting State aid for competing IS ?

### Montessori vs COM

- In 2008 complaint by Italian Montessori school to COM
- Claiming that tax exemptions for confessional services, incl. confessional schools, were distorting State aid
- Commission rejected to open formal proceedings
- Montessori appealed to CJEU
- Com opened formal proceedings now admitting the possible economic nature of the school services because of the parents' fees
- Case still pending at the Commission

## 2. National lawsuit + referral to CJEU IS vs Member State

- IS applies to national authority for higher subsidies
- The well argued application is rejected (or no decision taken)
- IS attacks the decision in the competent national court
- Requests the referral of the case to the CJEU
- Submits questions re interpretation of Art. 14(3), 21 Charter and general principle of equal treatment
- CJEU would give replies interpreting these provisions re IS
- National court to decide in light of CJEU replies

## 3. IS informal Complaint to EU Commission COM vs Member State

- In case a national legal action proves to be impossible
- IS addresses informal complaint to COM against MS
- IS claims infringement by MS of Art. 14, 21 of the EU Charter and of the general principle of equal treatment
- Evidence to be submitted; infringement to be well argued
- Correspondance between COM and MS concerned
- Best case: COM opens Infringement Proceedings against MS concerned, Art. 258-260 TFEU



## 4. Case to the ECHR Court

- Beforehand, IS must have gone up to the highest nat court
- IS brings legal action to the Court of the ECHR (Strasbourg) against a Member State of this Convention
- Claims infringement of Article 2 of Protocol Number 1 of the ECHR
- Negative precedent: Ruling of 6 September 1995
- The Court then rejected the case as inadmissible arguing that the plaintiff as opposed to the confessional schools did not contribute to alleviating the burden of the State.

## Conclusion

- Priority should be given to developing a transparent objective European concept of the legally and economically appropriate public funding of IS
- Articles 14 (3), 21 (1) of the EU Charter of Fundamental Rights together with the EU principle of equal treatment of comparable situations would provide a legal basis
- Case-Law of the CJEU and of nat. Courts would help develop such concept.

## Transparent objective European concept

- Right to found establishments in Article 14(3) includes a right to the continued existence of such establishments
- Right to exist includes a right to receive public funds (in Germany: in the level of the Existenzminimum), cf Rundfunkfreiheit
- To be distinguished three cost elements: teaching, other costs and building costs; eventually distinguish also the founding costs
- Independent schools have to contribute to costs: through own services, parents fees and sponsoring
- Should the level of the public funding be linked to the funding of PS? Yes
- Special compensation for the obligation not to segregate appears justified
- Special compensation of costs linked to pedagogic concept justifiable.