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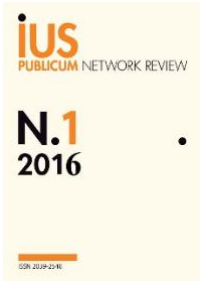

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THE ReNEUAL MODEL RULES ON EU ADMINISTRATIVE PROCEDURE IN DISCUSSION

A REPORT ABOUT A CONFERENCE IN LEIPZIG - GERMANY

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1. INTRODUCTION

During a discussion in 1981, *Hans Peter Ipsen* said, "The idea of a codification of the administrative law of the European Community is even more daring than the creation of a European constitution"[2] . In fact, more than 24 years have passed and a constitution had been drafted until about 120 participants from the academia, judiciary and attorneyship met in the German Federal Administrative Court (Bundesverwaltungsgericht) in Leipzig, Germany on the 5th and 6th of November 2015 to discuss the first draft for a codification of the European administrative procedure law. In hindsight, a meeting in Osnabrück, Germany in 2009 was the catalyst for establishing the Research Network on EU Administrative Law (ReNEUAL), which aims to promote the process of juridification of EU administrative law and is led by *Jens-Peter Schneider* (University of Freiburg, Germany), *Herwig C. H. Hofmann* (University of Luxembourg), and *Jacques Ziller* (University of Pavia, Italy).

In September 2014, the multinational network[3] presented its research findings in the form of a codification consisting of six books.[4] The titles of the books follow the treated types of act: Book I – General Provisions, Book II – Administrative Rule-Making, Book III – Single Case Decision-Making, Book IV – Contracts, Book V – Mutual Assistance, and

[2] Cf. H. P. Ipsen, in: J. Schwarze (Ed.), Europäisches Verwaltungsrecht im Werden, 1982, p. 123.
[3] For further details and a list of all network members see www.reneual.eu.
[4] The Model Rules in English and Spanish may be downloaded from www.reneual.eu. Furthermore, a German, a Polish and a Spanish version have been published in print. An English, a French, an Italian, and a Romanian print version will follow.

Book VI – Administrative Information Management.[5] During the conference, each book was introduced by the authors and, afterwards, subjected to a critical evaluation by two or three experts not part of the research network. This was followed by an open discussion. The dialogical format emphasised the concept of the network, which wants this draft to be understood rather as an interim conclusion open to modification than something that is set in stone. In accordance with this scientific approach, the "ReNEUAL Model Rules 2.0" (*Jens-Peter Schneider*) shall be developed further through criticism as well as open debate.

The conference in Leipzig was mainly held against the backdrop of the German legal system, which seemed, in regard to other conferences in Barcelona (January 2015) and Rome (March 2015), the intention of the ReNEUAL. Hereafter the main points discussed at the conference will be relayed, grouped by topic.

2. NEED FOR CODIFICATION

Even though this question was not given a specific time frame, the "additional value" of a codification of EU administrative procedure law was always a focal point of interest. There was a general agreement that the EU administration is expanding and will continue doing so due to address transnational problems such as the financial crisis and the growing number of immigrants. This applies both in quantitative terms, as more Member States and an emerging network of EU authorities generate an increasing number of decisions, as well as in qualitative terms, since the EU authorities, deviating from the principle of "indirect enforcement" of EU law by Member States' authorities[6] , increasingly execute decisions by themselves.

[5] A short introduction concerning development and content of the ReNEUAL Model Rules can be found at H.C.H. Hofmann/J.-P. Schneider/J. Ziller, Review of European Administrative Law 7-II (2015), p. 45 et seq.
[6] In German literature, this principle is mostly based upon Art. 291 (1) TFEU

One argument pointed out by the drafters in favour of a codification was the legal clarification a codification would provide, not only in regard to increasing the efficiency of the EU administration but also providing orientation for citizens. Furthermore, the authors stressed that a key challenge is the need for a legally binding containment of the EU and referred to a codification as "an important contribution to the European peace project" (*Jens-Peter-Schneider*). *Klaus Rennert* (German Federal Administrative Court) agreed and conceded a codification to be a "compensation" for a legitimacy deficit of the EU, particularly of EU agencies. *Vassilios Skouris* (formerly Court of Justice of the European Union) referred to a juridification as a "properly understood separation of powers". In his opinion, the implementation of the EU Charter of Fundamental Rights into EU primary law had evinced how the Court of Justice of the European Union (CJEU) could return from developing law by judicial decisions to its genuine task of applying law. *Heidi Hautala,* who took part as representative and rapporteur of the European Parliament, shared this opinion and praised a codification as "part of the European principle of integration".

But considerable concerns were raised as well. Inevitably, a juridification would limit the administration's flexibility, which could go against the intended appropriateness. *Walter Mölls* (Legal Service of the European Commission) pointed out that a detailed, sector-specific secondary law already exists. *Alexander Balthasar* (Federal Chancellery of Austria) put the focus on jurisdiction and raised the question whether an effective judicial control of procedural standards in EU primary law secures the rule of law appropriately and might be preferable to a codification due to its flexibility.

3. SUITABILITY FOR CODIFICATION

The question remains whether the codification of a "general set" of administrative rules applicable throughout the EU system makes sense. *Walter Mölls* disagreed and preferred the development of the existing policy-specific law. He pointed out that the data protection law (Regulation No 45/2001) and the law on access to documents (Regulation No

1049/2001) are already codified in a general manner and considered these fields to make up an essential part of law having the ability of generalization. Moreover, *Walter Mölls* stressed that the EU administration – in contrast to the (common) Member States' authorities – is highly specialized and disparate concerning its tasks and demands. In conclusion, he opined that sector-specific rules are indispensable. Indeed, a codification aims at providing orientation and systemizing law. This requires either a "trans-sectorial regulatory gap that can be closed properly" (*Martin Burgi* [University of Munich, Germany]) or a sufficient number of congruent rules in sector-specific law. *Hence Thomas von Danwitz* (Court of Justice of the European Union) pointed out one should only regulate in a generalized way what applies to all fields of administrative law. Thus, he suggested "going through sector-specific EU administrative law to find out which rules could be replaced by general provisions". In the end, the question if, besides the need for generalization, a sufficient *suitability* for generalization exists, remained unsolved.

4. SCOPE OF APPLICATION

Jacques Ziller explained that in accordance with article I-1 (1) of the Model Rules (MR), the drafted rules apply to all procedures of EU institutions, bodies, offices, and agencies. In contrast, an application to Member States' authorities executing EU law should only be possible if sector-specific law so provides (article I-1 [2] MR). A different scope of application only relates to Book V – Mutual Assistance and Book VI – Administrative Information Management, which have to apply to Member States' authorities since they are dealing with inter-administrative co-operation. The drafters' fundamental constraint of the Model Rules on the EU authorities seemed to be guided by the aim of political realization, which was illustrated by *Jacques Ziller*, saying, "Qui trop embrasse, mal étreint". Nevertheless, *Oriol Mir Puigpelat* (University of Barcelona, Spain) reported that the authors had discussed this issue controversially. *Vassilios Skouris* and *Jürgen Schwarze* (University of Freiburg, Germany) pointed out two main obstacles for an extension of the scope of the application to the enforcement of EU Law and policies by Member State authorities. On the one hand, an amendment of the European Treaties to extend the EU competences would be

necessary. On the other hand, a lot of Member States stick to their domestic traditions of administrative regulation. Nevertheless, the latter pleaded for a wide scope of application as an interim goal in order to make sure that EU law is executed properly in all Member States. *Wolfgang Weiß* (University of Speyer, Germany) added that a separation seems impossible in composite procedures, meaning procedures in which EU authorities and Member State authorities are working together. Eventually, *Thomas von Danwitz* referred to article I-3 MR recommending Member State authorities to use the Model Rules "as guidance" when implementing EU law and policies. He pointed out that this provision harbours the risk to create a "hybrid" law running counter to the aspired legal clarity.

5. CONTENT OF THE MODEL RULES

5.1. Between Consolidation and Creation of a New System

5.1.1. Consolidation by an Integrative Approach

Methodically, the Model Rules are based on an integrative and comparative approach, which was widely approved. The draft is based on the network's self-image as a laboratory benefiting from an intensive exchange of scholars and practitioners from a significant number of Member States. As a result, the Model Rules "do not leave the national law behind, but feed on them" (*Klaus Rennert*). In fact, the Model Rules are more or less a consolidation of the heterogeneous domestic administrative laws as well as the existing principles set forth in EU primary law and the CJEU's jurisprudence. In return, it became obvious that the draft's "balance" seems to promote its ability to achieve consensus. This is further illustrated by the presentation of *Heribert Schmitz* (German Federal Ministry of the Interior), who pointed out the extensive similarities between the ReNEUAL Model Rules and the German federal administrative procedure act (Bundesverwaltungsverfahrensgesetz) in detail and came to the conclusion that the Model Rules "basically meet German demands".

5.1.2. Innovative Nature

Through consolidating the existing rules, the Model Rules were criticised for lacking an innovative content. *Namely Rainer Pitschas* (University of Speyer, Germany) emphasized that the draft neither aims at a reconstruction of the Union's institutional architecture nor at the implementation of a "European administrative co-operation law". *Martin Burgi* recommended a clarification of the purpose of the administrative procedure. All in all, the conference drew up a picture of a draft that avoids any ruptures within current organizations and procedures.

Nevertheless, the innovative content needs differentiated consideration. In drafting Book II – Administrative Rule-Making, the authors meet the demand of the "Mandelkern Group on Better Regulation" to regulate the procedure for making administrative rules. The discussants referred to the regulation as "breaking new ground" even if the US-American Administrative Procedure Act contains similar rules, which were mentioned by *Matthias Ruffert* (University of Jena, Germany) and *Astrid Wallrabenstein* (University of Frankfurt am Main, Germany) during their talks. The essential Book III – Single Case Decision-Making was evaluated less enthusiastically as a "successful mixture of both a systematization and consolidation of the existing rules and selective innovations" by *Michael Fehling* (Bucerius Law School Hamburg, Germany). Concerning Book IV – Contracts, *Martin Burgi* highlighted that due to inconsistent jurisprudence of the CJEU, "general principles of law do not yet exist in European contract law". Furthermore, the rules of a "competitive award procedure" (article IV-9 et seq. MR), which were presented by Ulrich Stelkens (University of Speyer, Germany), seemed innovative from a German point of view. Therefore, Martin Burgi came to the conclusion that Book IV is "rather a new design of contract law than a reconstruction". The same conclusion may be reached for Book V – Mutual Assistance and Book VI – Administrative Information Management. Martin Eifert's (Humboldt-University of Berlin, Germany) finding of a "proliferation of secondary law and administrative practices" in this field of law confirmed Jens-Peter Schneider's description of the drafters as "pioneers". Nevertheless, it was assessed differently if these books are a mere consolidation of existing practices and case law (Rainer Pitschas) or an "innovative and modern approach" (Johannes Caspar [Data Protection Commissioner of the State of Hamburg, Germany]).

5.1.3. Particularity of the EU Administration

The comparative approach of ReNEUAL raised concerns if the particularity of the EU administration had been sufficiently taken into consideration. *Martin Burgi* emphasized that the heterogeneous EU authorities are highly specialized and act on a multinational level. This sets it fundamentally apart from common local (German) authorities characterized by a more or less general competence for a narrowly confined area. Referring to Book IV – Contracts, he gave another example. In his opinion, a more elaborate codification of public contracts is desirable in German administrative law. But co-operation requires a certain proximity, which is lacking in the relationship between the EU and its citizens. As a consequence, one may not refer to content and importance in EU law in the same way. Moreover, the discussion raised the question whether the linguistic diversity in the EU has received adequate attention in the Model Rules.

It seemed even more complicated to answer the question how to deal with the administration in the EU multi-level-structure regarding administrative procedure law. During the conference, it became evident that the Model Rules admit to the existence of composite procedures and a common European administrative space. This can be illustrated by the provision declaring any reimbursement of costs for mutual assistance dispensable (article V-6 MR), since a "fictive mutuality" exists. This was actually evaluated as "unrealistic" by Indra Spiecker gen. Döhmann (University of Frankfurt am Main, Germany). Nevertheless, the Model Rules contain only rudimentary regulations referring to composite procedures, namely concerning inspections by EU authorities (articles III-18 – III-21 MR) and the right to be heard (articles III-24 – III-27). Thus, Wolfgang Weiß highly recommended an extension of these legal provisions, especially in order to warrant due access to effective judicial review in spite of shared accountabilities.

5.2. Coherence Orienting towards Three Guideline Principles

Throughout the books, the drafters made clear that the Model Rules are based on certain notions. Namely, the three principles of "participation", "knowledge", and "transparency", which correspond to the aim of strengthening legitimacy, efficiency, and the rule of law (cf. article 11 TEU, article 298 [1] TFEU), were picked up.

5.2.1. Participation

The authors pointed out that they seek to deepen a culture of participation. This should be achieved through a stronger involvement of citizens and enterprises. In accordance with article II-4 MR, any person is invited to electronically submit comments on intended new administrative rules. Furthermore, the draft provides the possibility of a consultation with the interested public before taking a single case decision (article III-25 MR). Finally, one may also refer to the provisions concerning contracts between authorities and citizens (Book IV) as a paradigm of leaving the traditional notion of an asymmetrical "subordination" behind. During the presentations and discussions, the participatory concept of the Model Rules was commended due to the fact that it would increase citizens' acceptance.

But *Matthias Ruffert and Astrid Wallrabenstein* also expressed concerns as to whether a rule always benefits from the fact that those who are subjected to it may participate in its creation (article II-4 MR). In their opinion, the often technical and specialized character of EU law might hinder an effective participation. Moreover, this kind of corporatism tends to promote "lobbyism" (Matthias Ruffert). In conclusion, *Matthias Ruffert* voted for a qualitative and temporal limitation of those who may contribute their ideas during rule-making. *Walter Mölls* mentioned another limit of the concept of participation: the narrower the authorization to set administrative rules, the smaller becomes the scope to take comments into consideration. This might make ReNEUAL reconsider if, in certain cases, participation may also lead to frustration and therefore does not strengthen the desired throughput-legitimacy.

5.2.2. Knowledge

Partial reflection of this participatory consultation is the guiding principle of a comprehensively informed administration, which is able to identify the need to make

decisions and to define decision-making criteria as well as to make qualitative decisions due to its extensive knowledge (Indra Spiecker gen. Döhmann). In the Books III – Single Case Decision-Making and IV – Contracts, the authors decided to embed the principle of examining the facts by the office of its own motion ("ex officio") (article III-10 MR, article IV-7 MR). Thus, CJEU case law on the obligation of diligent and impartial investigation should be addressed. These provisions were explicitly welcomed by Ingo Kraft (German Federal Administrative Court). Nevertheless, he suggested emphasising the rejection of the principle of production of evidence by the parties in a linguistically more obvious way.

In particular, Book VI – Administrative Information Management deals with generating knowledge in administrations. Obliging authorities to use information (article VI-20 MR), the authors base their draft on the assumption that a decision's quality highly depends on the information being at the decision-makers' disposal. Although it has to be taken into consideration that not the mere quantity of information necessarily improves a decision's quality, the importance of information as a "key to an efficient administration in the digital age" (Johannes Caspar) was broadly supported. But a mass data exchange without a specific reason was also met with concern regarding fundamental rights. Johannes Caspar stressed that the fundamental right to informational self-determination is also applicable if data is transferred "inside" a network of authorities, which cannot be referred to as an "informational unity". In conclusion, both the receiving authority and the submitting authority need a legal authorization. *Johannes Caspar* said that the Model Rules generally meet this requirement by directing a "need for a basis act" (article VI-3 MR). Nevertheless, in his opinion, the principle of an informed administration must not promote an "atmosphere where officials have too much leeway". Particularly, he pointed out that the rules concerning mutual assistance (Book V) might not legalize a data transfer act. With regard to the aspired legal clarity, he found those provisions of Book VI – Administrative Information Management which deals with data protection as problematic because it implements a second legal regime in addition to the existing data protection law. He therefore requested the authors to scrutinise the use of legal terms for consistency.

5.2.3. Transparency

Finally, transparency seemed to be a further principle of the ReNEUAL Model Rules. It became obvious during the authors' presentations that the Model Rules try to strengthen the rule of law and the authorities' legitimacy by promoting duties of disclosure and reasoning. The draft thereby opposes the reproach of an "arcane" EU administration. Herwig C. H. Hofmann pointed out that comments made during the making of administrative rules have to be published (article II-4 [4] MR). Furthermore, the EU authority in charge of drafting the act shall create a report explaining which consultations had been taken into account during the procedure (article II-5 [1] MR). Astrid Wallrabenstein valued this measure of facilitating public control over decisions made by EU authorities. But she also mentioned that the duty to make comments public "in a way that allows public exchange of views" (article II-4 [4] MR) might leave too much room for diverging interpretation.

Concerning the single case decision-making, article III-4 (1) MR requires authorities to provide online information. This was appreciated by Michael Fehling. He additionally claimed for a duty to inform all possibly concerned persons as far as these can be determined. In his opinion, this would be necessary to warrant due legal protection. A further measure to improve transparency, inspired by Italian administrative law, is the authorities' duty to name a responsible person (article III-7 MR). Walter Mölls criticized this stipulation because EU authorities work in teams. Hence, in his opinion, delegating the responsibility to a certain person appears unrealistic.

6. DEPTH OF CODIFICATION

The question of the suitability of administrative law for a codification is closely linked to the question of a codification's appropriate depth. The Model Rules' authors avoided any provisions concerning substantive administrative law; furthermore, some procedural aspects are regulated in a rather general way.

Astrid Wallrabenstein and Hans-Joachim Prieß (Freshfields Bruckhaus Deringer) suggested the addition of general principles such as "equal treatment" or "proportionality" to the Model Rules. In their opinion, this would improve user-friendliness and the codification's

steering capacity. Other discussants replied that the European primary law already enshrines a number of general principles[7]. Furthermore, *Astrid Wallrabenstein* pointed out during her presentation that the provisions of Book III, which deals with administrative rule-making, are limited to the question of consultation. For example, neither the ending of the rule-making procedure nor the rules' publication is considered. Hans-Joachim Prieß, who held a presentation concerning Book IV – Contracts, suggested adding substantive regulations specifying the selection and award criteria as well as exclusion criteria in a competitive award procedure. Moreover, he recommended an inclusion of the competition award of individual licenses and a duty to publish all public tenders on an internet platform. Concerning the claimed rules dealing with legal protection, Ulrich Stelkens replied that the detailed EU primary law narrowly limits a possible regulation on this point.

Besides these desiderata for further regulations, there were proposals to increase the depth of the existing rules as well: Ingo Kraft suggested a more detailed wording and the renunciation of vague legal terms in order to simplify the application for the courts. Michael Fehling explained that the term "familial interest", as condition of a bias (article III-3 [2] MR), leaves too much room for interpretation and suggested a more specific wording as well. Admittedly, the effort to a comprehensive regulation might avoid uncertainty in law. One has to keep in mind however, that this probably contributes significantly to an often-bemoaned flood of norms. So, *Herwig C. H. Hofmann* highlighted that a universal code is dependent on a certain degree of abstraction. Only a short and understandable act will meet the goal of being citizen-friendly and transparent. *Oriol Mir Puigpelat* added that these claims have to be evaluated against the backdrop of a German administrative procedure act, which regulates the matters it covers in extraordinary detail from a comparative point of view. Last but not least, further provisions in a "general part" may increase the need for derogations on sector-specific law. That seems to be at odds with the aspired legal clarity.

[7] The Preamble of the Model Rules contains a wide range of general provisions as well.

7. IMPLEMENTATION

7.1. Administrative Procedure Law as Subject to Harmonisation

Although ReNEUAL is first and foremost an academic project, the question of adopting an EU administrative procedure act was discussed extensively. The arguments in favour of an enactment may be summarized by three features of the Model Rules: Firstly, the authors avoided any regulation of substantive administrative law. This led *Eberhard Bohne* (University of Speyer, Germany) to point out as considerable advantage that the Model Rules do not contain a political positioning. Secondly, the participants agreed that article 298 (2) TFEU, enacted by the Lisbon Treaty, grants a sufficient legal base to regulate procedures of EU authorities. Finally, the restriction of the scope of application on EU authorities was an argument in favour of a legal implementation perspective since such a regulation would not cause an intrusion into national legal traditions and domestic law. This might meet the political position of several Member States who are critical towards an enhanced integration. This aspect was illustrated by the statement of Vassilios Skouris, who mentioned in his inaugural speech that similar efforts neither in criminal law "as national policy domain" nor in civil law, except for contract law, "had made sufficient progress".

In contrast, there were serious concerns that a codification may send a signal of a sovereignty of the EU, provoking a negative attitude. *Rainer Pitschas* pointed out that a codification of the procedures of EU authorities might bring closer an extension of the scope of application on Member States' authorities executing EU law even if there is a lack of competence so far. He asked, "Do we interfere in a national domain?"

7.2. Society: Integrative Approach to Maintain Majority Support

Altogether, most of the participants had a positive attitude towards a codification. Obviously, the broad, continuous, and practical exchange of the research network with experts from justice, administration, and politics led to a positive and integrative effect, which – like *Eberhard Bohne* mentioned – may ease the way for an implementation. Ingo *Kraft*,

Klaus Rennert, *Vassilios Skouris*, and Thomas von Danwitz, the attending high-profile judges, supported a codification of the procedure law of the EU administration. Likewise, most of the participating scholars expressed approval. Jürgen Schwarze however, warned that "a great deal of water will flow under the bridge" before an enactment might be realized. This led to a growing number of calls for a codification of selected parts. Klaus Rennert referred to the "development as a process" of German administrative procedure law. *Jens-Peter Schneider* talked about the stepwise implementation of an administrative act in the Netherlands. Book III – Single Case Decision-Making was given by Alexander Balthasar, among others, the best prospects for realization, while, at first glance, the legal establishment of Book V – Mutual Assistance and Book VI – Administrative Information Management, which are – according to the drafters' opinion – not covered by the legal base of article 298 (2) TFEU, seemed the least likely. In particular, the mutual assistance (Book V), which pronounced *Thomas von Danwitz and Indra Spiecker gen. Döhmann* to have a high practical relevance, could be dealt with by a kind of "stand-by-codification". This means that the rules would enter into force in specific sectors if directed by secondary laws. It seems questionable however, whether such a fragmentation can live up to the expectations of a comprehensive code.

7.3. Institutional Level: Parliament – Commission – Council

A European administrative procedure act might be adopted by a regulation under the ordinary legislative procedure (article 298 [2] TFEU). Insofar, it seems problematic that the European Commission has the monopoly right on initiatives. Although *Walter Mölls* explained that the Commission "has not yet formed an opinion", which "does not mean that it won't take action", the Commission's doubts regarding the need for a codification became obvious during his speech. A knock-on effect may start from the European Parliament. Heidi Hautala announced a draft of the Parliament in January 2016. Nevertheless, the detailed content remained concealed. *Alexander Balthasar's* suggestion of initiating an administrative procedure act by a European Citizens' Initiative (article 11 [4] TEU) seemed less promising: Procedure law might not have sufficient "emotional" power to reach the quorum of one million citizens. The opportunities to gain a simple majority in the Parliament and a qualified majority in the Council (article 294 [7, 8] TFEU) were difficult to sound out. In particular,

the Member States' positions are hard to assess precisely. *Heribert Schmitz*, who works for the German Ministry of the Interior, was open-minded, whereas *Alexander Balthasar* took a more restrained position. It may be assumed that those Member States not having codified administrative law tend to be more sceptical towards a European codification.

7.4. Preliminary Impact

While legal implementation may take some time, the Model Rules may have more immediate indirect effects. *Jurgita Pauzaite-Kulvinskiene* (University of Vilnius, Lithuania) predicted that the draft would have a certain preliminary impact on the young administrative procedure acts in more recent Member States. In his inaugural speech, Klaus Rennert sounded out the possibilities to "set an example and encourage the Member States to develop their legal systems" and referred to a "competition of models and arguments". Martin Burgi agreed that one would retrieve elements of the ReNEUAL Model Rules sooner in domestic legal systems than at the EU level. This appraisal seems realistic as also illustrated by Heribert Schmitz, who explained that the draft is a source of "interesting inspirations for the development of the German administrative procedure act". The authors declined to take an active role in the discussion of such a "harmonising" impact, which might even have a negative effect on the stance of some Member States concerned about an erosion of national sovereignty.

8. CONCLUSION

The conference left an inspiring impression on both authors and participants. It benefited from its dialogue-oriented schedule and excellent organisation. The event will encourage ReNEUAL to continue its ambitious project. The talks and statements reached from abstract and basic issues – it remains the task to persuade critics regarding the need for a codification – to detailed criticism of the draft's wording, which will provide new impulses to improve certain provisions. The restriction of the scope of application on EU authorities

can be regarded as ambivalent. On the one hand, it may be a "sign of political wisdom" (Ingo Kraft). On the other hand, it lags behind the authors' aspiration to develop a coherent codification applicable to complete enforcement of EU law and policies. The vast majority of the participants agreed that the great merit of ReNEUAL lies in its contribution to a systematization and further development of EU administrative procedure law. The progress of this project, which will now focus on consequences of defects in procedure and form, will be followed with interest by academics as well as on a political level. It is the hope that a "daring" idea – *Jürgen Schwarze* reminded of Ipsen's statement at the very end of the conference – might, one day, come true.

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RECRUITMENT AND AUTONOMY IN ENGLISH UNIVERSITIES

(*february 2016*)

NICK HAYWARD - EDOARDO ONGARO

SUMMARY

INTRODUCTION

This chapter offers the reader some reflections on the state of English universities, and notably their autonomy and the ways in which they recruit.

The authors are a British-born academic, who has spent all his professional life in the UK Higher Education (HE) system (Hayward) and a foreign-born academic, who has spent the last five years in the UK HE, having worked in a continental European university system beforehand (Ongaro), though his higher university degrees are both from England (King's College London and LSE). We hope this mix of backgrounds and viewpoints has helped us in forming a balanced view of the English university system.

Whilst there are many similarities in the way that universities in the United Kingdom (i.e. England Scotland, Wales and Northern Ireland) are organised, funded and operated, the different histories of these countries, and the changing and asymmetrical nature of devolution

in the UK, suggests that an element of caution would apply in attempting any generalisations and thus the focus here is on England. That said, there are even considerable differences between, for example, the collegiate universities of Oxford and Cambridge, and those English institutions whose history dates back only to the 1960s. However long or short those histories may be, all English universities have come to cherish what the older institutions have long regarded as an essential dimension of their activity, a dimension that underpins the reputation enjoyed by British higher education for the high quality of its education and scholarship: and that is, the autonomy of universities as institutions, and the autonomy of academics within those institutions.

Each English university has been established by Royal Charter or by Act of Parliament, each with degree-awarding powers, each governed by an independent council. Indeed, according to the European University Association (EUA) English universities are ranked second in its autonomy index in relation to staffing issues, such as the hiring, firing, remuneration and promotion of academic staff, and as 'exceptionally autonomous' when taking into account the EUA's three other measures of institutional autonomy - organisational, financial and academic. (EUA, no date) And yet, within English universities and amongst a wider group of interested individuals, there is a sense of mounting concern about changes in the university sector, which are impacting on notions of autonomy as well as, so it is argued, the very nature of the work done in, and by, universities.

The British universities, Oxford and Cambridge included, are under siege from a system of state control that is undermining the one thing upon which their worldwide reputation depends: the calibre of their scholarship. (Head, 2011)

Through an examination of the concept of autonomy in higher education, this chapter seeks to offer a contemporary view of life within English universities with particular regard to the role and status of academic members of staff in those institutions. Drawing on the EUA's classification of the different elements of university autonomy, this chapter will focus on three main forms of that autonomy, around which there is much debate regarding their changing nature and the impact of those changes on what universities are and on what they do. Firstly, we will examine organisational autonomy and the degree to which universities are self-governing bodies, able to carry out their principal functions of teaching and research in a self-directed manner without direct influence from external agents.

Inevitably, given the sums of money involved, some sourced directly or indirectly from the public purse and an increasing proportion, following the most recent reforms, coming from students as the cost of higher education is shifted further onto those who benefit directly from it [Universities UK, 2013a: 55-63] through subsidised lending, those who provide the funding will exercise some measure of influence on universities, and this will be examined. In contemporary public management terms, what we are investigating are the dimensions of the policy autonomy (the extent to which the organisation chooses its objectives within the policy field where it operates, hence affecting the overall policy objectives, or the tools with which to implement the policy objectives, without external approval or authorisation), and the financial autonomy (the extent to which the organisation is autonomous in the acquisition and deployment of financial resources, without the requirement to be granted external authorisation) of universities as public and partly autonomous organisations (see Verhoest et al., 2004; Verhoest et al., 2012).

It should be said that universities in England are registered as educational charities, which brings benefits such as certain tax reliefs, but which also places limitations on universities by requiring them to act in pursuit of the charitable aims of their governing documents (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/350471/research_by_higher_education.pdf Accessed 13.1.16) Most English universities have so-called 'exempt status', meaning their charitable aims and activities are monitored and supervised by a 'principal regulator' (in this case – at the time this chapter is being written - the Higher Education Funding Council for England [HEFCE]) (https://www.gov.uk/government/publications/exempt-charities-cc23 Accessed 12.1.16) rather than the Charity Commission, which is the body that normally regulates charitable bodies in England (https://www.gov.uk/government/organisations/charity-commission/about accessed 12.1.16). Historically there has also been one private, not-for-profit university, which is the University of Buckingham, incorporated by Royal Charter in 1983 and it is also a charity, registered directly with the Charity Commission (http://www.buckingham.ac.uk/about/ Accessed 12.1.16). Whilst it prides itself on its independence from some of the government bodies (discussed below) to which all the other English universities must account, Buckingham's charitable status and its Royal Charter, which lays down certain governance procedures, including, for example, the operation of an

Academic Advisory Council of senior academics external to the university to advise on academic matters and endorse the appointment of external examiners to the university, do lay certain requirements on the institution. http://www.buckingham.ac.uk/about/independence Accessed 12.1.16). Since 2012, a number of other colleges have been granted university status, thus starting to build a small cluster of private universities: a novelty for the historically entirely public English university sector.

Secondly, we will explore universities' autonomy in relation to the recruitment and career development of academics – the core concern of the book in which this chapter is hosted (a profile which in mainstream public management literature is included within the category of the 'personnel management autonomy'). From a legal standpoint, as established by the aforementioned founding Charters and Acts, universities operate independently of government. With regard to the hiring of academics and in the way they provide academics with the means to discharge their duties within a framework that offers opportunities for professional and career development, they must, of course, conform to requirements laid down in employment legislation regarding such issues as equality, discrimination, health and safety, etc. Institutional autonomy is further restricted, to a greater or lesser degree, by the external environment and notably financial management conditions and the pressures stemming from the higher education policy as steered by central government entities such as the HEFCE and the Quality Assurance Agency for Higher Education (QAA).

Drawing on some of the preceding reflections, this chapter will then seek to scrutinise the working life of academics by investigating the idea of academic autonomy. Long established, though increasingly, so it seems, subject to dispute within and beyond the universities, the ability of academics to determine what they teach and how they teach it, and to develop their research interests and focus as they wish, will be central to this section.

Finally, to try to capture a sense of the intense debate about higher education, we propose some more general reflections on English universities, aimed mainly at an international audience.

1. A (VERY BRIEF) HISTORICAL BACKGROUND

Throughout the lengthy history of universities in England, from the establishment of the universities of Oxford and Cambridge in the High Medieval period, to the great expansion of the Victorian era with the 'redbrick' universities (a reference to their architectural style) in most major cities, they were never quite subjected to the sort of bureaucratic control that was a feature of other European countries (Anderson, 2004: 193) and from this developed their reputation for autonomy. It was as late as the 19th century that the English capital saw the establishment of a university and in 1849 a significant departure occurred when it became possible to study for a London degree but away from London itself. Colleges around the country that were preparing students for examination for London degrees were soon demanding university status in their own right and thus, in the latter half of the 19th century, 'redbrick', or 'civic', universities were established in many English provincial cities. (Graham, 2002: 8)

Up until the 1960s, only around 6% of young people in England progressed into higher education (Browne, 2010:18). In 1963 Lord Robbins, at the behest of the Prime Minister, published his report on the future of higher education, calling for a significant expansion of higher education to all those with both the ability and the desire to avail themselves of the opportunity. His report prefigured the Labour government's establishment of the polytechnics in pursuit of the Robbins' ambition. The Open University was also established to exploit the new opportunities offered by the advances in radio and television technologies to bring the highest quality of degree-level learning to anyone and everyone, who was unable, or who had not had the opportunity, to attend a campus-based university. (http://www.open.ac.uk/about/main/strategy/ou-story Accessed 9.6.15)

The establishment of a degree-awarding body has, however, always required a Royal Charter or an Act of Parliament, such as followed the Labour Government's 1966 White Paper 'A Plan for Polytechnics and Other Colleges', which heralded the first major expansion of higher education in the post-war era, when some 30 polytechnics as new institutions of higher education were created, conferring degrees awarded by The Council for National Academic Awards (CNAA). But as well as signaling a major expansion in higher education, the creation of polytechnics was also seen as a welcome challenge to the then existing higher education system in the way the Polytechnic 'philosophy' confronted the thinking that was arguably predominant in the universities about the separation between, ".. the pure and the

applied, the intellectual and the useful, and the merits of scholarship and the thrust of the 'mere' entrepreneur.." (Brosan: 1972, 41)

Polytechnics were, following the Conservative government's Further and Higher Education Act 1992 (http://www.legislation.gov.uk/ukpga/1992/13 Accessed 5.1.16) granted the same status as universities and given degree-awarding powers. This was one stage in what Watson (2014: 194) referred to as the 'extraordinary legislative hyperactivity' of British governments in policy towards higher education in comparison to other countries, whilst Graham (2002: 11) argued that, throughout the history of higher education in England, the idea of autonomy has never meant an absence of state involvement, even as far back as the foundation of the earliest colleges in Oxford and Cambridge, when monarchs and nobles were keen to become involved as patrons.

Whilst the disappearance of the Polytechnics suggested an end to the binary divide in higher education, some remained sceptical.

"When the polytechnics were restructured as universities under the 1992 Higher Education Act (implemented in 1994), the relabelling did increase the number of working class students in universities. Indeed it tripled the total university population. This did not eliminate inequality, however; it incorporated it into the university system. What had been a distinction between universities and non-universities was increasingly turned into a hierarchy of universities. As inequality of income increased, inequality in higher education tracked it. Incorporation into the unitary national system also reduced the extent to which the new universities responded to local economic and social conditions or aspirations – something that had been a strength of the previous polytechnics. This was part of a general pattern of centralisation of authority in Westminster and a reduced role for municipal government and local coalitions joining business and public authorities. In the unified system, a competitive admissions process reinforced by inequality of previous schooling concentrated students of less privileged backgrounds in the former polytechnics" (Calhoun: 2014, 71-72).

After a doubling of participations rates in higher education following Robbins (Bolton, 2012: 14), the period when Britain was beset by deep economic problems in the 1970s and 1980s saw a tailing off in the number of young people taking up higher education, before increasing again in the late 1980s, boosted at least in part by the impact of the 1988

Education Reform Act (NCIHE, 1997). The most recent, published, official statistics on the proportion of English domiciled young people (17-30 years old) participating in higher education within the United Kingdom for the first time in 2013-14 indicated a participation rate of 47% compared with 42% in 2006-07 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458034/HEIPR_PUBLICATION_2013-14.pdf Accessed 13.1.16). Simeon Underwood, Academic Registrar and Director of Student Services at London School of Economics and Political Science (LSE), offered an illuminating, if personal, picture of the increasing numbers of students in higher education.

'When I started my professional life at Leeds University in 1977 it had 9,500 students: it now has 31,000. When I moved to York in 1980 it had 3,500 students: it now has 15,000. When I moved to LSE in 2000 it had 7,000 students: it now has 10,500' (Underwood: 2014, 50).

Funding remained, however, a major obstacle to ambitions for expanding the sector yet further and it was, in fact, at the centre of the major developments in higher education in the 1990s and beyond, with proposed solutions being seen by many as alarming for their intensification of the drive towards the 'marketisation' of higher education. (Brown & Carasso, 2013: 1-3) This will be discussed later in the chapter.

2. ORGANISATIONAL AUTONOMY

From the earliest days of universities in England, but especially from the time of the first great expansions in the Victorian era, the picture of university autonomy was perhaps somewhat exaggerated.

From the 1870s, state interest intensified. Royal commissions, often followed by legislation, investigated university education … state grants to the new civic universities began in 1889; there was a new public concern for industrial competitiveness, 'national efficiency'…. A modest start was made in the state funding of scientific and medical research. By 1914, therefore, Britain had the elements of a state university system (Anderson, 2004, 194)...

It was the economic crisis of the 1970s that proved something of a watershed in the relationship between educational institutions and the British state and arguably it marked the moment when policy-makers, postulating a connection between the economic ills of society and claimed flaws in education, began to argue more forcefully for a greater degree of intervention in education - and not just by the state. Labour Prime Minister, James Callaghan, speaking on the occasion of the laying of the foundation stone at Ruskin College, Oxford, in October 1976, called for greater state and industry involvement in shaping education policy, citing his concern at what he had been hearing from business leaders around the country:

"… that new recruits from the schools sometimes do not have the basic tools to do the job that is required …. I have been concerned to find out that many of our best trained students who have completed the higher levels of education at university or polytechnic have no desire to join industry …."

On the question of autonomy, Callaghan went on to raise questions about

"… the proper way of monitoring the use of resources in order to maintain a proper national standard of performance … the role of the inspectorate in relation to national standards …" (Callaghan, 1976)

According to Robert Philips (citing Bash and Coulby's work on education reform), Callaghan's speech was significant in shaping the discourse about the central link between perceived problematic standards in education and the economic failings of the country (Phillips, 2001, 15).

What Callaghan set in motion with his 1976 speech, the Conservatives pushed further under their administrations from 1979-1997, particularly in the shape of the 1988 Education Reform Act, which imposed central control of pre-university education through the introduction of the National Curriculum, at the same time as fostering 'competition' in the sector through the institution of grant-maintained schools and city technology colleges that operated outside the control of local education authorities (Phillips, 2001, 17).

Universities, too, were to be increasingly exposed to 'market solutions' and the assumed rejuvenating impact of competition being introduced across the public sector. Throughout the 1980s methods of assessing the performance of all publicly-funded bodies

were developed, in particular through the adoption of performance indicators. In measuring performance, the aim was to be able to assess that performance and thereby hold public bodies to account. Based on the metrics, the push for greater efficiency was launched. (Head, 2011; Scott, 2014) For universities, comparative statistical information would then act as a driver for greater competition between them, resulting in greater efficiency in the use of public money – or so the theory went. Heads of these institutions seemed to agree:

"A range of performance indicators should be developed, covering both inputs and outputs and designed for use both within individual institutions and for making comparisons between institutions" (Committee of Vice-Chancellors and Principals, 1985, as in Johnes, 1996)

A measure of the distance between many in academia and the pro-market policy-makers of the 1980s was encapsulated in the row following Oxford university academics' decision not to award Mrs Thatcher an honorary degree in 1985. At a speech in Newcastle later that same year, the Prime Minister mocked those who, she claimed, were most critical of the 'risk takers' and the 'wealth creators':

".. nowhere is this attitude more marked than in .. the common room. What these critics apparently can't stomach is that wealth creators have a tendency to acquire wealth in the process of creating it for others." (As in Kavanagh, 1987; 291)

This was not a narrow, ideological point as successive New Labour governments were equally in tune with the agenda of the country's 'wealth creators' and clearly signaled their belief that higher education had to do more to respond to the needs of industry. In a telling gesture, Gordon Brown's government abolished the Department for Education & Skills and the Department for Trade & Industry in 2007 and created two new departments: the Department for Children, Schools and Families, and the Department for Innovation, Universities and Skills. Two years later, the Department for Innovation, Universities and Skills simply dropped the 'universities' part of its title and became the Department for Business, Innovation and Skills, but still with responsibility for universities. (https://www.timeshighereducation.co.uk/news/universities-department-abolished/406877.article Accessed 16.6.15) Innovation, skills acquisition, business development – this was increasingly the agenda for the universities.

Beyond any ideological inspiration behind the drive to move higher education closer to business and industry and to open it up further to competition, state budget concerns were also part of the picture. A major shift in the funding of higher education came about in 1998 when, following a report by Sir Ron Dearing, the Labour Government introduced a system of tuition fees in the Teaching and Higher Education Act 1998, which, over the following years, became the main source of funding for the universities as the direct teaching grant shrank in importance. (UniversitiesUK: 2013b, 11) Towards the end of the last century, around one-third of 18 year-olds were looking to enter higher education (Bolton: 2012, 14) and, as the sector expanded, and as polytechnics were transformed into universities in the early 1990s, it was the funding of higher education that became the critical issue. The Dearing Committee (NICHE: 1997) recommended that places in higher education be further expanded and that students pay a deferred contribution to the cost of their tuition once in work and earning above a certain level of income. This was a highly significant moment in higher education policy in England, as it signaled the end of fee-free higher education in England and the start of an acrimonious debate amongst the political parties in England and heated disputes within the university community of senior managers, academics and students about the financing of higher education in the country (www.politics.co.uk/reference/tuition-feesAccessed 6.1.16) http://www.theguardian.com/education/2007/jul/24/highereducation.tuitionfees Accessed 6.1.16; https://www.timeshighereducation.com/news/dearing-still-shapes-the-agenda-he-set/209757.article Accessed 6.1.16). Students take out a loan to cover tuition fees, which were initially introduced at the level of £1000 per annum, but following the approval of the Higher Education (Basic Amount) (England) Regulation 2010 (http://www.legislation.gov.uk/ukdsi/2010/9780111504161/contents Accessed 13.1.16), the tuition fee cap for English universities was raised to £9000 and changes to repayment schedules by graduates were also introduced. According to a report by the Institute for Fiscal Studies (IFS) for the Sutton Trust, average student debt, as a consequence of the new rules, would rise to more than £44,000 (http://www.suttontrust.com/wp-content/uploads/2014/04/payback-time-report.pdf Accessed 13.1.16). The report suggested that more than 70% of graduates would have some debt written off – an average of £30,000, and whereas under the previous system, some 40% of graduates would have paid off their debts in full by the time they had reached 40, the calculation was that, under the new system, only 5% of graduates would be in this position. Mistaken assumptions about the likely

earnings level of graduates and the decision to write off the debt after 30 years would do nothing to solve the problem of the sustainable financing of higher education. Nick Hillman, who had worked for the Conservative universities minister, David Willets, who introduced the 2010 changes, believed that the government had 'got the maths wrong' (http://www.theguardian.com/education/2014/mar/21/tuition-fees-former-tory-adviser-government-maths-wrong Accessed 13.1.16).

Alongside the development of performance indicators to help bring academia more to account, this other feature – which we may label as consumerism, though conscious this may be a contested definition – has been increasingly deployed in higher education. As 'champions' of the consumer, governments forge common cause with students to set about the claimed necessary shake-up of academia, which, for too long, has been the unreformed bastion of a self-serving, liberal, intellectual elite that pays little heed to the 'needs' of students – at least so one oft-heard argument goes (See, amongst others: Palfreyman & Tapper: 2014, 89-117; Salter & Tapper: 2013, 32; Demaine: 2000, 11).

The 'Browne Report into higher education funding and student finance', chaired by John Browne, a former chief executive of BP, made a strong, and contestable, argument, which assumed as its starting point that student choice should be used as the means for driving up quality in higher education. The education sector, however, like healthcare and other knowledge-intensive sectors, displays a strong asymmetry in knowledge between the 'provider' and the 'customer', leaning towards the former and might, arguably, be better conceived of as a professional-client relationship (teacher-pupil, in old fashioned terms) for which the adequacy of free choice models is questionable (Maringe: 2011, 148-153; Hambleton:1988, 128-130; McMillan & Cheney: 1996, passim). Learning processes are complex, and thus one may dispute Browne's claim that:

"When students are faced with complex choices, it is important that the systems they deal with are as simple as possible" (Browne: 2010: 31).

This statement places great confidence in the idea of the fully-informed 'rational actor' using a series of metrics of quality to exercise choice and therefore drive up standards, although Lord Browne does express concern about developing measures of quality, which result in (rationally acting) universities concentrating "..on the measurement process rather

than on their students" (Browne: 2010, 29). Browne then lists a series of measures (recognisable in the questions on the National Student Survey, which is open to all final-year, undergraduate students in England to complete and which, according to the office responsible for collating higher education statistics, is completed by around 80% of eligible undergraduates https://unistats.direct.gov.uk/find-out-more/about-the-data/ Accessed 6.1.16) to which universities devote considerable resources to 'managing' as they use aggregated responses to individual questions as the basis for 'action plans' in the hope of improving the metrics next time around. A Google search of 'universities responses to NSS' (last run 6.1.16) reveals a long list of universities and university departments indicating how they respond to the results of the NSS with typical promises to use the results to inform how they seek to improve their performance.

The perils of encouraging closer links with business and a more entrepreneurial engagement with other potential sources of funding for higher education through sponsorship and philanthropy has occasionally led to unwelcome media attention. Nottingham University's decision in 2000 to accept sponsorship from British American Tobacco (BAT) to build a Centre for Corporate Social responsibility, (http://www.theguardian.com/uk/2000/dec/05/highereducation.education Accessed 19.6.15) Sir Howard Davies' resignation as Director of the London School of Economics (LSE) in the midst of speculation about the LSE's links to Colonel Gaddafi's Libyan regime (http://www.bbc.co.uk/news/uk-12642636 Accessed 19.6.15) and Jane Rendell's 2013 resignation as Vice-dean for Research at the Bartlett School of Architecture at University College London (UCL) when the school accepted a very large donation from BHP Billiton, the world's largest mining company, to build a brand-new Institute of Sustainable Research (Warner; 2015), have all been subjected variously to ridicule and arguments that the cases should be seen as cautionary tales about the consequences of a policy direction requiring higher education to fight for funding in the market place. Management practices within the universities have also responded to that great aider of consumer choice – the league table. Several annual league tables of university rankings are published, based on particular factors deemed important by the publishers, weighted in different ways. The main league tables are based on information drawn largely from official statistics provided by bodies like the HEFCE, the Higher Education Statistical Agency (HESA) and the Quality Assurance Agency for Higher Education (QAA), etc. These have increasingly become key 'drivers' in so many

aspects of teaching and research in English universities, as university managements place increasing pressure on academics to channel their efforts into achieving ever improving 'scores' in the key indicators used by the most prominent of these league tables, such as The Complete University Guide, The Guardian League Table, The Sunday Times University Guide table (Jones-Devitt & Samiei: 2014, 86-100).

Whilst each table may weight specific factors differently in order to calculate its overall rankings of universities, there is a shared view of several of the key components that go to measuring the 'quality' of a university. These include: the results of the National Student Survey on student satisfaction; the outcome of the Research Assessment Exercise, now 'Research Excellence Framework' (REF), which claims to measure the quality of the research undertaken in the university and may include a measure of the proportion of staff involved in research; employment prospects for graduates; the record of awarding so-called 'Good Honours' degrees (i.e. those degrees classified as upper seconds - final, overall average mark of 60-69% - and firsts - final, overall average mark of 70% or above) as well as possibly the percentage of students who successfully complete their degrees and the views of heads of schools/colleges/sixth forms about universities (http://www.thecompleteuniversityguide.co.uk/league-tables/methodology/; http://www.theguardian.com/education/2014/jun/03/methodology-of-the-guardian-university-guide-2015; http://web.archive.org/web/20110716135415/http://www.timesonline.co.uk/tol/life_and_style/education/sunday_times_university_guide/article2497779.ece. Accessed 1.6.15).

Arguments about consumers making 'informed choices' based on an array of performance indicators so as to trigger competition, which consequently raises quality, are based on a set of ideological assumptions, the challenge to which frames much of the serious debate within academia and amongst those with an interest in higher education about the nature and future of higher education. (Molesworth et al: 2011, passim)

3. STAFFING AUTONOMY AND RECRUITMENT

On the surface, it would seem difficult to say much of general applicability about the terms and conditions according to which academics in English universities are recruited,

remunerated and promoted because each university sets its own requirements (consistent with employment legislation such as the Employment Rights Act 1996 http://www.legislation.gov.uk/ukpga/1996/18 Accessed 10. 1.16) Recruitment of staff, particularly to full-time, academic posts, is generally done through job adverts in national and international outlets like the Times Higher Educational Supplement (THES), learned and professional societies, and websites like Warwick university's www.jobs.ac.uk/ To comply with national and European employment equality and fairness legislation, in particular the Equality Act 2010 http://www.legislation.gov.uk/ukpga/2010/15 Accessed 10.1.16) universities will have set procedures for short-listing, interviewing and making job offers to candidates. To ensure compliance with the law, guidance on procedures is available through the Government Equalities Office (GEO), which is "..responsible for equality strategy and legislation across government.. (and) action on the government's commitment to remove barriers to equality and help to build a fairer society, leading on issues relating to women, sexual orientation and transgender equality." (https://www.gov.uk/government/organisations/government-equalities-office Accessed 10.1.16). Commonly in university recruitment procedures, interview panels are guided by pro-formas, which list explicit criteria against which candidates may be ranked. Applicants may be required to present to panels of academics from the relevant subject/department, student panels, research panels and/or a formal interview panel, this latter panel often comprising interviewers, who are external to the department concerned, and a representative from the university's central office dealing with personnel matters. In view of the increasing sensitivity to league tables, the hiring of academic staff may be on condition that applicants meet some essential criteria including education to doctorate level (which is anyway in most cases desirable but not an essential requirement for being recruited to academic posts, differently from other continental European countries for which it may be an ex lege requirement), a publication record likely to contribute positively to the research assessment exercise (currently denominated Research Excellence Framework).

The teaching credentials of academics in English higher education are coming under increased scrutiny, with further debate about the extent to which academics are sufficiently 'good' teachers and universities do enough to promote teaching excellence and to offer sufficient recognition, rewards and career-promotion opportunities to those who excel in teaching rather than research. A perceived dichotomy between research and teaching is,

perhaps, evident in this debate and has been cast into sharper focus by the intense activity that has surrounded the different research assessment exercises. It seems to be a perception that is increasingly picked up by students, too. A recently published survey of students' experience from the Higher Education Academy (HEA) and the influential Higher Education Policy Institute (HEPI), directed by Nick Hillman, one-time special adviser to former Conservative Minister for universities, David Willets, asked university students to list the three most important attributes they wished to see in those who taught them 39% of the students surveyed prioritised the need to have been trained to teach above being an active researcher, which was prioritised by 'only' 17% of respondents. http://www.hepi.ac.uk/2015/06/04/2015-academic-experience-survey-2/ Accessed 14.1.16) with the resulting, predictable headlines in the higher education press. (https://www.timeshighereducation.com/news/student-survey-rates-teaching-qualifications-above-research-activity Accessed 10.1.16) It has to be said, though, that such apparent 'opposition' between teaching and research, is rejected by those, who believe it to be based on a failure to understand that.. 'teaching and research are both about learning' (Rowland et al: 1998, 134). According to Frank Furedi's contribution to the debate initiated by Rowland (1998):

'The separation of teaching from research works to the detriment of both … teaching becomes separated from the generation of new ideas and necessarily turns into yet another introduction to the subject… The separation of teaching from research also leads to the abstraction of learning from its subject matter.' (Furedi in Rowland et al: 1998, 137)

But, as early as 1997 the Dearing Report (NICHE), had also called for action on the teaching credentials of university lecturers, recommending that, in order to successfully complete their probationary period, all new lecturers should have to gain associate status with the proposed Institute of Learning and Teaching in Higher Education, a professional body responsible for recognizing excellence in teaching. (NCIHE [Dearing Report]: 1997, 125-126) The Conservative Government's recent announcement of a Teaching Excellence Framework (TEF) (https://www.timeshighereducation.com/news/jo-johnson-commits-teaching-excellence-framework Accessed 10.1.16), seems set to intensify the focus on teaching in universities and may prompt more universities to incorporate a teaching qualification, or at least membership of the HEA, as a pre-requisite for an academic post.

And there may be some evidence that universities are increasingly looking to emphasise their acknowledgement of the importance of teaching quality.

In the HEA's latest research, published in 2013, into whether the universities are rewarding excellence in teaching through career promotion possibilities, it finds that:

'Most institutions recognize that they need to have policies for promotion based on teaching and learning, however these policies are not yet well embedded and there is a significant lag between policy and implementation. …. Government focus on raising standards of teaching by introducing some 'market forces' via student choice into the sector may focus institutions on some aspects, however this mat also skew attention onto metrics, important for league tables, but may deflect from factors which will have a bigger impact on the real student experience.' (p. 36) (https://www.heacademy.ac.uk/sites/default/files/hea_reward_publication_rebalancingpromotion_0.pdf Accessed 14.1.16)

Role descriptions, eligibility criteria and formal application procedures are commonly used in universities for the purposes of career advancement, particularly for posts of Reader, Professor and for top executive positions. For academic staff below professorial/Head of Department level, terms and conditions will have, to varying degrees, been set in accordance with the national agreements between the university employers, operating under their umbrella University and Colleges Employers Association (UCEA), and the trade union representing academics in higher education: the University and Colleges Union (UCU), an amalgamation of two previously separate unions, the Association of University Teachers (AUT) and the National Association of Teachers in Further & Higher Education (NATFHE), which tended to operate within the boundaries that existed in higher education prior to the 1992 Act. In 2004 UCU members - then as AUT and NATFHE - accepted a significant new agreement - 'The Framework Agreement for the modernisation of pay structures'. This led to higher education salary arrangements undergoing a major change and individual universities have been required to implement new pay and grading arrangements mapped to a national single pay spine, effective from no later than 1 August 2006 (http://www.ucu.org.uk/hepay Accessed 2.6.15).

National agreements in relation to academics' contracts below the level of Professor/Head of Department remain in place despite pressures to allow institutions the flexibility to respond to what they may deem to be 'local conditions'. With regard to nationally negotiated terms, conditions and pay scales for academics, universities are still distinguished by their pre and post 92 status when they were either universities or polytechnics/colleges. Pre-92 institutions are governed by their various foundational statutes, charters and ordinances covering all aspects of employment (https://www.lfhe.ac.uk/download.cfm/docid/A688E1AF-A36F-4885-A223248434AFF578 Accessed 10.1.16), and those statutes can only be varied by application to the Privy Council, that body of senior politicians, current and former members of the House of Commons or the House of Lords, that advises the monarch on these aspects of the sovereign's duties (http://privycouncil.independent.gov.uk/privy-council/ Accessed 10.1.16).

In 2002 a working group of UCEA/UUK, chaired by Professor Graham Zellick, developed proposals to amend the university model employment statutes concerning redundancy, disciplinary, dismissal and grievance procedures, which proved sufficiently controversial to arouse the opposition of the then lecturers' trade union, the AUT. The measures were, nevertheless, adopted (http://www.ucu.org.uk/2529 Accessed 18.6.15).

Post-92 institutions saw a national agreement reached in 1990, which provided for an agreed contract of employment and national staff handbook to be in place in each post-92 institution for all full-time and fractional lecturing staff by 31 August 1992. This national agreement, national contract and the national staff handbook remained in place as a new pay framework was implemented in all the universities, pre-92 and post-92 (http://www.ucu.org.uk/1970 Accessed 18.6.15).

Terms and conditions of academic staff at Chair/Head of Department/Professorial level and above are set individually by institutions and it is a development that has proved controversial within academia, as reported by Britain's leading HE newspaper, the Times Higher Educational Supplement in March 2013:

"Professorial salaries are rising more than twice as fast as pay for other academic grades, raising fears about the inflationary impact of next year's research excellence framework. With just seven months to go until the cut-off point for inclusion of staff in the

REF, figures released by the Higher Education Statistics Agency suggest that professorial staff are gaining higher wage rises than rank-and-file academics squeezed by low national pay offers" (http://www.timeshighereducation.co.uk/news/professorial-pay-rises-twice-as-fast-as-rest/2002818.article Accessed 18.6.15).

This was just one aspect of a growing concern about the fragmentation of the workforce in higher education where academics, despite national agreements, may be employed on different types of contract. There are teaching only contracts or research only contracts, whereby universities employ staff to exclusively do either teaching or research, annual contracts, which may, or may not be renewed at the end of the year, termly contracts, which likewise may or may not be renewed at the end of the term, or zero hours contracts, where the employer is under no obligation to provide the employee with a minimum number of hours of work. This fragmentation raises profound questions relating to fairness, even to morality. There is mounting disquiet about the casualization of academic work (http://www.ucu.org.uk/3532 Accessed 18.6.15), although definitions and statistics are somewhat opaque. The Higher Education Statistics Agency (HESA) latest numbers for 2013-14 report that over half the academic contracts in the UK were fixed term contracts, although The Guardian newspaper reporting on the previous year, suggested that the figure does not include the 82,000 academics on what HESA describes as 'atypical' contacts, who may be hired to teach by the hour. (http://www.theguardian.com/education/2013/feb/04/academic-casual-contracts-higher-education Accessed 18.6.15) The university academics' trade union, UCU, reports that over half of the universities, which responded to a 2013 Freedom of Information request, replied that they were using controversial 'zero hours' contracts for teaching staff (http://www.ucu.org.uk/6749 Accessed 18.6.15).

It should be noted, however, that 'atypical contracts' may be a relatively new concern to British academia, but they have been widely used in other continental European systems (with a strong oversimplification, especially in the Southern and the central-Eastern European countries) over decades. Casualisation of academic life is also generally deemed to be part of the landscape in the US, where it also is reportedly further on the rise, hence to this regard there seems to be a growing similarity between the UK and the US higher education systems.

4. ACADEMICS' AUTONOMY

There are contrasting views and opinions as to the role of the academic in higher education and to some degree these reflect different views about what universities are for. John Henry Newman stressed the teaching role of the universities, their role being

"..the diffusion and extension of knowledge rather than the advancement." (Newman, 2008: ix)

Here the lecturer was teacher, trying to mould the personality of students through a liberal education, which would turn them into gentlemen of wisdom and good character.

There are, however, important differences between the liberal education university and the Humboldtian (von Humboldt) conception of the university. The latter is intimately linked to the notion of 'national culture': the collective (communitarian) horizon that, in a way, superintends and provides sense to the overall enterprise of researching and teaching, tying the national bonds. The former, influenced by the Enlightenment notion of critical reasoning, is more rooted in the idea of universities as places where research and teaching, intimately linked, are developed jointly by teachers and pupils through the exercise of critical reasoning and questioning. Whilst the Humboldtian conception of the university is of HE institutions as having deep roots in the national history; the liberal education university tends to be more universalistic in its thrust (and in a sense more in line with the etymology of university: 'in all directions').

The twentieth century saw the emergence of thinking that considered the economic imperatives of university education and research. Anderson (2004: 200) points to the geo-political context of the Great Power rivalries as giving impetus to the call for the wider provision of higher education. As the European Powers vied with one another in their expansionist endeavours, claims of a civilising mission were grounded in reference to the great institutions of learning at home as the expansion of university education came to represent the foundations of a modern civilisation. It was increasingly recognised that such places of learning were also critical to the country's economic ambitions in an increasingly competitive international trading environment. Anderson (2007: 207) refers to Joseph Chamberlain's 1902 claim that 'university competition between states is as potent as competition in building battleships, and it is on that ground that our university conditions become of the highest possible national concern'.

The previously mentioned 1963 Robbins report highlighted the needs of the UK national economy for a highly educated workforce that could respond to the rapidly changing economic and technological environment of the 1960s as an important reason for expanding higher education in the UK and succeeding Labour and Conservative governments have, arguably, each gone further than the other in the economic instrumentalism with which they have pursued higher education policy (Kogan & Hanney, 2000).

"The state has established parameters which are managed by the funding councils. It is within the framework of these parameters, and the managerial strategies of the funding councils, that the universities now exercise their autonomy" (Tapper & Salter, 1995: 59).

Of particular significance amongst these 'parameters' was the New Public Management (NPM) inspired initiative of the Thatcher governments of the 1980s, designed to bring about a radical transformation in the public sector, and which has been having a profound impact on higher education. (Kogan & Hanney, 2000: 32) The development heralded the introduction of 'market mechanisms', performance measurement of academics against key indicators and output objectives, the emphasis on 'service quality' and 'customer responsiveness'.

One interpretation of the effects of the NPM has been that of a shift of decision-making power away from professional and towards the 'new managerial professions' (a leading author is here Ferlie – see Ferlie et al., 1996). In the terms of our framework of analysis centred on the notion of autonomy, the debate since this time has been about the degree to which these parameters/reforms have eroded, and continue to erode, academic autonomy, even if the universities themselves, or rather their governing and management bodies, are 'enjoying' some greater autonomy.

Another transformative effect of the NPM has been in the direction of establishing and entrusting more or less independent agencies to run important public functions – at some distance from elected officials and government departments. Especially important in this respect are HEFCE and QAA.

HEFCE describes itself as the 'lead regulator for higher education in England'. (http://www.hefce.ac.uk/reg/ Accessed 15.6.15) Its role and legal powers are derived from various Acts of Parliament, and, according to the 1992 Further and Higher Education Act,

HEFCE must provide the Secretary of State with such information or advice relating to the provision of higher education as he or she may require or the Council may think fit, and the Secretary of State may also give HEFCE directions and instructions.

The QAA is the body, independent of government and of higher education providers, that is mandated to monitor and assess standards in English universities. In particular, the QAA conducts what it describes as 'evidence-based external reviews of higher education providers' and publishes the outcomes of these reviews. It operates under contract with the HEFCE and refers to its work 'in this important sector of the UK economy ', checking that universities 'meet agreed UK expectations.' (http://www.qaa.ac.uk/about-us Accessed 15.6.15).

To some considerable degree, however, it may be argued that the process for assuring the quality of what happens in higher education, both in terms of teaching and research, is in the hands of academics. Teaching is guided by the need to ensure that programmes conform to the various subject benchmarks, compiled by groups of academics in the relevant disciplines, who have been invited by the QAA to agree descriptive statements about what should characterise a student who has graduated in a particular subject discipline. So-called 'subject benchmark statements' may be sent out widely for consultation prior to final publication. (http://www.qaa.ac.uk/assuring-standards-and-quality/the-quality-code/subject-benchmark-statements Accessed 26.5.15) Periodic reviews of each subject area in each university are also part of the process of assuring the quality of what happens within the sector. The fact that these are run largely by the universities themselves, even though they operate according to guidelines agreed with the QAA and include an academic from another university, means that they compete for recognition of worth with other indicators, of the sort that make up the various league tables already discussed. In terms of the day-to-day activity of the academic, there may be a measure of autonomy still exercised as the expertise and authority of the academic is ultimately upheld by institutions, which do not generally allow for complaints against lecturers related to academic judgement of student performance.

In terms of research, the idea of the 'lone scholar' spending time in pursuit of knowledge for knowledge's sake and attending conferences and publishing papers to bring the fruits of such research to a wider audience, is an enduring, if not entirely accurate one, and even in the arts and humanities subject areas, collaboration is seen as an intrinsic aspect

of research. (http://www.ahrc.ac.uk/documents/project-reports-and-reviews/shearer-west-article/ Accessed 11.1.16) Different trends are at work here: the lone scholar may be challenged by global transformations in what is requested of research work, whereby team-work and networks of research teams may be a functionally more and more appropriate form for organising research work. (http://www.independent.co.uk/student/student-life/learning-to-collaborate-no-more-lonely-scholars-394217.html Accessed 11.1.16) Research in English universities is increasingly driven by competition for funds and prestige, a development dating back to 1986 when the University Grants Committee (UGC), a predecessor of the present Higher Education Funding Councils, dispensed research money. Subsequent 'research assessment exercises' were conducted in 1992, 1996, 2001 and 2008 jointly by the various UK Higher Education Funding Councils. With research, the quality of the research output of each university is assessed and ranked by panels of academics and professionals from governmental, non-governmental and private sector bodies and published - in its most recent phase, ending 2014, as the Research Excellence Framework, which informs the selective allocation of research funds to universities. (Foskett: 2011, 33. See also http://www.ref.ac.uk/). In sum, raising funds, producing relatively specific outputs (those that will be submitted to the next REF), and more recently doing research that has impact on public policy and society are acquiring a pre-eminent position because of specific institutional and policy pressures active in the higher education system https://www.timeshighereducation.com/news/lammy-demands-further-and-faster-progress-towards-economic-impact/408111.article Accessed 20.5.15).

Not unexpectedly, a number of aspects of this framework have been subjected to criticism from within and beyond the academy. The determination that funded research should demonstrate 'impact', in other words, be of demonstrable value to the world beyond universities, such as business, public services, policymaking, etc, was lampooned by British historian Felipe Fernández-Armesto, who argued that the research of pre-eminent thinkers such as Copernicus, Darwin and Einstein would have been rejected because of the inability to demonstrate 'impact' (https://www.timeshighereducation.co.uk/comment/columnists/poisonous-impact/409403.article Accessed 20.5.15). Simon Head, in an article for the New York Review of Books, described performance measures such as 'impact' an 'especially dysfunctional aspect of the British (higher education) system'. Inviting the 'end-users' of academic research

such as pharmaceutical companies to be involved in assessing the worth of research was particularly 'alarming' given that industry's record of 'abusing the integrity of research' (http://www.nybooks.com/articles/2011/01/13/grim-threat-british-universities/ Accessed 20.5.15).

The reaction of university senior managers to disappointing REF outcomes, leading to a decision to drastically prune 'under-performing' research areas of the university http://www.timeshighereducation.co.uk/news/anger-as-surrey-plans-to-slash-jobs-in-politics-department/2019118.article Accessed 21.5.15) or even close some departments, has been criticized by the academics' trade union, UCU, as having "… had a disastrous impact on the UK higher education system". (http://www.ucu.org.uk/index.cfm?articleid=1442 Accessed 20.5.15) This is, however, a trend more than the totality of the picture. In fact, reputed academics can generally cope with pressures while at the same time continuing to pursue their long-term research agenda – which, in our view, is more likely to bear the most important fruits for the advancement of knowledge. http://www.ahrc.ac.uk/documents/project-reports-and-reviews/shearer-west-article/ Accessed 11.1.16) However, pressures towards measurable dimension, hyper-competition and consumerism seem to have taken root. What conception of the university is becoming the dominant paradigm in England? We don't have any firm answer on this, yet we hope to offer the reader some reflections.

5. CONCLUSIONS: UK UNIVERSITIES BETWEEN THE 'PARADIGM OF EXCELLENCE', THE ENLIGHTENMENT, AND VON HUMBOLDT

Where are English universities heading to? On the one hand, it seems that consumerism and a certain interpretation of the 'paradigm of excellence' is becoming a dominant one. However, the advance of the language of the market and consumers in higher education remains something of a conundrum when one considers that the 'product' i.e. the education 'purchased' is so dependent on the input of the consumer as well as that of the manufacturer. This would seem to be all the more so the case with the emphasis in the universities on self-directed and independent learning, something which distinguishes universities from schools.

Howard Hotson, Fellow and Tutor in Modern History at St Anne's College, Oxford, and Professor of Early Modern Intellectual History, who is also a member of the executive committee of the Council for the Defence of British Universities (CDBU) is profoundly concerned about the impact of recent reforms to higher education.

"Universities, once regarded as self-governing communities of students and teachers seeking deeper understanding, are now line-managed like private corporations, devoted to maximising performance metrics which do not remotely capture what universities aspire to achieve. These management models impoverish teaching, undermine creativity, trivialise research, and alienate teachers. Worse still, this market system transforms students from active apprentices in the craft of higher learning to passive consumers attempting to leverage their purchasing power into high lifetime earnings. The numerous "mission groups" – the Russell Group, University Alliance, 1994 Group and the rest – do not represent universities as such. They represent senior university administrators, whose primary task is to advance financial interests. Academic unions defend the working conditions of academics, not the values that make their work worthwhile. Learned societies promote individual disciplines, not learning as such. In such conditions, proposals which subvert fundamental academic principles meet no effective opposition" (http://www.theguardian.com/commentisfree/2012/nov/11/universities-great-risk-we-must-defend-them Accessed 21.5.15).

Indeed, the very existence of a body 'for the defence of British universities', supported, as it is, by so many eminent scholars, thinkers and professionals from the arts, humanities and sciences, is instructive in itself.(http://cdbu.org.uk/).

One might ask whether the trend towards consumerism and a paradigm of excellence whereby certain metrics determine what 'excellence' in higher education is, does, indeed, represent the whole picture. It is hard to call: we may well assume that the enduring inspiration of the Enlightenment conception of liberal education is still at work throughout most of the UK (not a typo: here we mean the whole of the UK: England as well as Scotland, Wales and Northern Ireland). It may be more problematic to call whether the Humboldtian conception ever took roots in the UK, and whether it has been challenged more widely by globalisation (linked as it is to the notion of national culture). Yet both remain continued sources of inspiration (Collini, 2012) for scholars and students alike, and for the wider debate

about the role and direction of universities in England as well as throughout the United Kingdom.

The launch of Her Majesty's Government's 'productivity agenda' in July 2015 simply throws into sharp relief the enduring and fundamental disagreements about the purpose of higher education and its future. Even amongst the key policy-makers in Westminster, different emphases and contradictory analyses prevail. While the government's paper promotes the above-mentioned Teaching Excellence Framework (TEF) for universities as an important mechanism for helping to align 'graduate skills and expectations with the needs of employers', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443898/Productivity_Plan_web.pdf p. 28. Accessed 14.1.16) research commissioned from the National Institute of Economic and Social Research (NIESR) by the parliamentary committees for Education and for Business, Innovation & Skills, points out that:

"As mass higher education has developed in the UK, it has been tempting for many employers to recruit more and more graduates from full-time HE courses (educated largely at state and individual expense) and then to complain about their lack of employability skills……. In short, employer commitment to apprentice training in the UK continues to be limited by comparison with Germany and some other Continental European nations. In large part this reflects the business strategies deployed by many British firms which do not seek to specialise in high skill, high value added product areas or to organise their workplaces in skill-intensive ways…" (http://www.publications.parliament.uk/pa/cm201516/cmselect/cmbis/565/56510.htm Accessed 14.1.16).

And even the universities themselves seem at odds somewhat as to their central 'mission'. In opening statements on the 'about us' section of its website, the University Alliance, a group of mainly 'new' (post-1992) universities and the Open University, refers to the way it excels in 'preparing students for a career in industry …We understand our role in a changing economy … we are active in the global marketplace ..' (http://www.unialliance.ac.uk/about/ Accessed 14.1.16), whereas the Russell Group of 24 pre-1992 universities prefers to emphasize how its '…research-intensive, world-class universities play an important part in the intellectual life of the UK and have huge social,

economic and cultural impacts ..' (http://russellgroup.ac.uk/about/ Accessed 14.1.16) A seemingly minor difference, perhaps, but in the words and phrases with which these institutions choose to describe themselves, one does detect traces of the disagreements played out in debates and publications, such as those already mentioned from the CDBU and academics already cited in this work, such as Jones-Devitt (2011), Head (2011), Graham (2002), amongst others, who argue against such things as the 'marketisation' of higher education and the march of a neo-liberal agenda through the university system. For the foreseeable future, it seems that disagreements about the fundamental principles and values of higher education in England will continue.

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LE RECRUTEMENT DES UNIVERSITAIRES EN FRANCE, OU LE MOUVEMENT PERPÉTUEL

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En France comme dans de nombreux États, le recrutement des universitaires est imprégné d'une règle coutumière, celle de la cooptation qui, provenant du latin *cooptare* – « *agréger, choisir pour compléter un collège* » – signifie au sens moderne « *admission, nomination d'un nouveau membre, par ceux qui font déjà partie du corps* ». L'exclusivité par laquelle les universitaires relevant d'un champ scientifique donné choisissent leurs « pairs » participe de l'autonomie traditionnelle de la communauté universitaire et exprime, autant qu'elle la conditionne, leur indépendance.

Cette tradition, toutefois, est dévoyée. Le népotisme, le localisme, l'endogamie sévissent comme les effets d'une autonomie irresponsable qui conduit au rétrécissement de l'Université sur des logiques internes, loin de sa vocation et en rupture avec le service public : trop souvent, l'Université fonctionne en vase clos, se nourrissant de son propre mouvement. Ce phénomène, en mécanique, est défini comme le « mouvement perpétuel » – un mouvement périodique, interne à un système c'est-à-dire sans apport extérieur susceptible de le régénérer, et capable de durer indéfiniment sans jamais faire évoluer le système en question.

Toute réflexion sur le recrutement universitaire se confronte à l'introuvable conciliation de l'effectivité de la cooptation – essentielle pour que l'Université reste maîtresse d'elle-même – et des modalités susceptibles de lui conférer de façon pérenne une légitimité, une crédibilité, une efficacité. C'est le problème général du rapport de la liberté à la responsabilité qui s'exprime, ici, au sujet de l'Université. Le sujet est donc difficile, ce qui explique sans doute que le recrutement universitaire subisse tant de réformes : son autre mouvement perpétuel est lié à l'instabilité législative et réglementaire sur cette question. En France depuis à peine plus de 35 ans, 18 décrets ont concerné le recrutement universitaire, directement ou indirectement : en moyenne, il subit une réforme – de plus ou moins grande portée – tous les deux ans, pour ne jamais changer vraiment.

Il est donc possible de décrire les grands marqueurs du recrutement universitaire en France, qui sont constants : d'une part, il articule deux niveaux de décision, national et local ; d'autre part, il mêle deux types de légitimité, académique et politique – politique au sens du développement stratégique de l'établissement universitaire concerné. La présentation qui suit, de la phase nationale puis de la phase locale du recrutement universitaire, correspond à sa chronologie.

1. LA QUALIFICATION AUX FONCTIONS UNIVERSITAIRES : LA PHASE NATIONALE DU RECRUTEMENT

La France organise, de longue date, un contrôle central de l'accès à la profession universitaire : depuis les années 1880[2], il est requis pour y postuler d'être inscrit sur une liste nationale, dressée par des représentants de la discipline concernée. L'instance aujourd'hui chargée de cette régulation de l'emploi universitaire, le « conseil national des universités » (CNU), délivre une « qualification » qui, seule, autorise un candidat à se présenter à un concours de recrutement dans une université pour devenir « maître de conférences » ou « professeur des universités »[3] ; le CNU, qui a d'autres attributions[4], se réunit une fois par an sur ce sujet.

[2] Voir Emmanuelle Picard, « Éléments pour une histoire des instances d'évaluation des enseignants des facultés des lettres et des sciences, 1880-1985 », in Marie-Françoise Fave-Bonnet (dir.), L'évaluation dans l'enseignement supérieur en questions, L'Harmattan, 2010, p. 100.

[3] Toutefois dans les disciplines juridiques, politiques, économiques et de gestion (sections 01 à 06 du CNU), sont organisés des concours nationaux d'agrégation qui permettent aux docteurs – maîtres de conférences ou non – d'accéder au professorat sans intervention du CNU. Bien connue des juristes et des économistes, puisqu'elle joue dans les disciplines concernées un rôle structurant historique en y formant la majorité des professeurs, l'agrégation de l'enseignement supérieur – concours qui, ouvert une fois tous les deux ans dans chaque discipline concernée, s'étend sur plusieurs mois – est souvent méconnue de leurs collègues des autres disciplines, très largement majoritaires. Elle constitue pourtant l'unique voie d'accès à des fonctions universitaires mêlant aux critères scientifiques des considérations pédagogiques. En effet, ne comportant que des épreuves orales, le concours national d'agrégation s'ouvre certes par une épreuve sur les travaux, destinée à éliminer d'emblée les candidats

Ce filtre entre l'obtention du doctorat et le recrutement exprime une centralisation typiquement française, rappelant de façon concrète le caractère national du service public de l'enseignement supérieur. Son existence est fondée sur le postulat que l'écrémage des docteurs candidats aux fonctions universitaires est nécessaire, et que la sélection est à la fois plus impartiale, équitable et rigoureuse lorsqu'elle est assurée, pour toute la France, depuis Paris : le CNU serait la condition et l'expression d'un service public national de qualité.

Est-il vraiment le nécessaire garde-fou contre le favoritisme local et le garant d'un service public du meilleur niveau, ou la manifestation désuète que « l'arbitraire local est la phobie politique française par excellence »[5], le témoin d'un jacobinisme dépassé dans un siècle qui, partout, s'engage sur l'approfondissement des logiques de décentralisation ? Nous verrons en tout cas que la façon dont le CNU est actuellement conçu et organisé détermine un mode de fonctionnement inadapté à l'accomplissement de ses missions.

dont les activités de recherche ne satisfont pas aux exigences requises ; mais il se poursuit – c'est donc là une caractéristique remarquable en comparaison des concours locaux, étudiés plus loin – par plusieurs « leçons » qui, à travers les grandes spécialités de la discipline, sont censées faire apparaître les aptitudes des candidats à la synthèse, à l'élévation sur un sujet complexe qui seule permet de le présenter simplement aux étudiants, et à la maîtrise d'un contenu qu'il s'agit d'ordonner puis de délivrer dans un temps donné (les « leçons en loge », après un temps de préparation solitaire de 8 heures, durent exactement 30 minutes, tandis que les « leçons en équipe », après un temps de préparation libre de 24 heures, sont prononcées pendant 45 minutes, les unes et les autres étant ou non suivies de questions des membres du jury selon ce que prévoit le règlement de chaque concours). Ces « leçons » obligent les candidats à traverser l'ensemble de leur discipline, c'est-à-dire à sortir de leur spécialité ; elles sont conçues comme une sorte de valorisation pédagogique de la recherche, dont la clarté et le caractère dynamique sont regardés comme des qualités essentielles.
Pour un article récent sur les concours d'agrégation, voir Fabrice Melleray, « Les concours nationaux d'agrégation de l'enseignement supérieur », *AJFP* 2013 p. 70.

[4] Voir Fabrice Melleray, « Les attributions du conseil national des universités », *AJDA* 2015 p. 928.

[5] Marcel Gauchet « Vers une "société de l'ignorance" ? », *Le Débat* 2009, n° 156 p. 152.

A. La composition du Conseil national des universités

Il est certes difficile de se faire une opinion précise et systématique sur une instance constituée, « CNU Santé » inclus[6], de 80 sections aux attentes et pratiques étonnamment différentes et comprenant plus de 2 500 membres titulaires (pour autant de suppléants) dont les compétences personnelles sont forcément inégales, et les motivations hétérogènes ; d'autant plus difficile que le CNU examine chaque année environ 25 000 dossiers[7], qui expriment autant d'expériences singulières. Pour autant, des traits communs déterminent la vie des sections ainsi que les résultats des évaluations qui y sont menées, et permettent une analyse globale de l'institution : ces caractéristiques sont, pour partie, liées à des choix d'organisation. La « composition » du CNU s'entendra ici d'abord au sens de sa structuration interne, puis au point de vue de la désignation de ses membres.

1) La structuration du CNU par sections disciplinaires

C'est dans le cadre de sections dites disciplinaires que sont examinés les travaux des candidats[8]. Mais qu'est-ce qu'une discipline ? S'agissant de sélectionner, parmi les docteurs de l'Université, ceux qui sont aptes à y développer la recherche et y transmettre les savoirs, la question de l'amplitude du champ disciplinaire dans lequel s'exerce l'évaluation est déterminante.

[6] Les missions, l'organisation et les modes de fonctionnement du CNU sont fixés par le décret n° 92-70 du 16 janvier 1992 relatif au conseil national des universités ; mais pour les disciplines relevant du secteur de la santé, un texte spécial prévoit des règles particulières (décret n° 87-31 du 20 janvier 1987 relatif au conseil national des universités pour les disciplines médicales, odontologiques et pharmaceutiques).

[7] Pour l'année 2015, 21 722 candidatures ont été enregistrées, hors CNU Santé ; Premiers résultats de la campagne 2015 de qualification aux fonctions de maître de conférences et de professeur des universités,http://www.enseignementsup-recherche.gouv.fr/cid22708/bilans-statistiques.html.

[8] Art. 2 du décret du 16 janvier 1992.

Alors que tous les discours vantent les mérites de l'interdisciplinarité, en France les aspirants aux fonctions universitaires soumettent leurs travaux à des instances dont le champ scientifique n'a cessé de se réduire au fil du temps, défini le plus souvent par une sous-discipline ultra-spécialisée. C'est ainsi par exemple que, dans le champ des sciences humaines et sociales, pas moins de huit sections interviennent pour traiter les candidatures en « langues et littératures »[9], sans échanger entre elles ; ou que dans le champ des sciences dites exactes, huit sections se partagent les candidatures des chimistes et biochimistes[10].

Ce découpage du CNU en sections trop étroitement disciplinaires est un obstacle pratiquement insurmontable à la transversalité scientifique – tandis que l'influence qui en découle des relations interpersonnelles n'est pas conforme à l'objectivité et à l'impartialité requises d'une évaluation.

L'enfermement intellectuel et scientifique

Ce n'est pas renier les disciplines que de rappeler une évidence : c'est à leurs croisements que se situent les progrès de la science, dans la fécondation de leurs rencontres. L'Université, précisément, se caractérise fondamentalement – dans l'adossement des formations à la recherche – par la réunion des savoirs disciplinaires et leur enrichissement mutuel au service de la découverte scientifique, et par leur élargissement culturel en vue des enseignements.

[9] Sections 08 à 15 : « Langues et littératures anciennes », « Langue et littérature françaises », « Littératures comparées », « Langues et littératures anglaises et anglo-saxonnes », « Langues et littératures germaniques et scandinaves », « Langues et littératures slaves », « Langues et littératures romanes », « Langues et littératures arabes, chinoises, japonaises, hébraïques, d'autres domaines linguistiques ».

[10] Sections 31 à 33 puis, dans d'autres champs, 64, 80, 85, 44.01, 57.03 : « Chimie théorique, physique, analytique », « Chimie organique, minérale, industrielle », « Chimie des matériaux », « Biochimie et biologie moléculaire » (deux sections, dont l'une fait partie du « CNU Santé »), « Sciences physico-chimiques et ingénierie appliquée à la santé » (deux sections également), et « Sciences biologiques » incluant la biochimie.

À l'encontre de cet acquis historique, sans recherche de vue d'ensemble ni considération de culture générale, l'évaluation individuelle est encore largement dominée dans chaque section du CNU par le culte de la spécialité, parfois même de l'hyperspécialisation, ce qui dément toutes les exhortations à la pluridisciplinarité et conduit à l'élaboration de savoirs parcellaires et confinés, ne permettant que très imparfaitement de traiter les problèmes qui constituent les enjeux de la recherche en traversant les disciplines : par sa structure même, le CNU se ferme aux démarches scientifiques audacieuses et innovantes. Il est significatif qu'en 2015, les 13 325 personnes physiques candidates à une qualification aient déposé au total 21 722 dossiers, contraintes de postuler dans plusieurs sections à la fois compte tenu de l'étroitesse du champ couvert par chacune. Or comme le démontre François Garçon, plusieurs milliers de postulants à la qualification sont écartés de l'Université au motif, précisément, de la non conformité de leurs travaux au bornage de la section sollicitée : « être hors champ, autrement dit avoir des travaux que les membres de la section visée considèrent comme étranger à "leur" discipline, est le premier motif de rejet de la qualification »[11] – ce qui apparaît comme le symptôme d'une conception sclérosante de l'évaluation scientifique.

Des évaluations dépendantes d'effets de réseaux

L'autre effet du découpage du CNU en micro-disciplines est une masse critique insuffisante, au sein de chaque section, pour préserver l'évaluation des risques de proximité et de partialité.

En effet dans une large majorité de sections, le nombre des enseignants-chercheurs représentés n'est pas suffisant pour sortir les candidatures des effets de réseau qui se créent au sein des disciplines, pour les protéger des conflits d'écoles, pour les prémunir des querelles personnelles. Il est donc réducteur de ne considérer la suspecte proximité que sous

[11] François Garçon, Le dernier verrou – En finir avec le Conseil national des universités, The Media Faculty, 2012, pp. 45-46.

l'éclairage géographique : en l'occurrence, la centralisation parisienne ne limite aucunement les manœuvres diverses que facilite, que suscite presque, le mode de désignation des membres du CNU.

2) La désignation essentiellement syndicale des membres du CNU

Les deux tiers des membres du CNU sont élus, au scrutin de liste[12]. Les listes étant très généralement soutenues par une organisation professionnelle, les candidats n'y figurent en position éligible que sur la base de leur appartenance syndicale ou de leur inscription dans une démarche corporatiste, à la faveur de leur ancrage dans des réseaux qui se définissent d'abord idéologiquement.

La nomination du tiers restant des membres du CNU par le ministre ne garantit pas non plus la désignation d'évaluateurs politiquement neutres et objectifs, d'autant que l'examen des circuits de la décision montre que les noms, avant d'être purement et simplement entérinés, lui sont proposés par ceux qui conduisent les listes aux élections pour le CNU, sur sollicitation du cabinet.

Il est permis de s'interroger sur la légitimité d'un tel mode de désignation des membres, qui comporte un double risque : quant à l'objectivité des évaluateurs, et quant à leur compétence scientifique.

Les dangers du conditionnement idéologique

La représentation syndicale que favorise au sein de chaque section le mode de désignation des évaluateurs imprime inévitablement ses effets sur le fonctionnement du CNU. On ne peut que déplorer, en sciences humaines et sociales, l'existence de rapports d'évaluation marqués par une lecture idéologique, et regretter toutes disciplines confondues les solidarités qui se créent en séance au mépris du dossier, qui devient alors accessoire ; et

[12] Art. 4 du décret du 16 janvier 1992 précité.

peut même devenir l'accessoire de luttes de pouvoir internes. Jean Bastié, géographe, estimait dès 1972 que « les partisans de la politisation de l'Université ont changé de tactique depuis trois ans, leur entreprise de mainmise totalitaire sur notre Université ne repose plus pour l'instant sur l'agitation, mais sur une pénétration sournoise et souterraine des instances chargées de prendre des décisions et notamment celles relatives au personnel »[13].

Cette forme d'entrisme, parfois revendiquée par des membres du CNU qui expliquent vouloir y défendre une conception de l'Université, n'est pas admissible au sein d'une instance d'évaluation. Si la légitimité des syndicats est incontestable pour désigner des représentants des enseignants-chercheurs dans les organes de direction des établissements d'enseignement supérieur ou dans des structures nationales de concertation, leur présence est dépourvue de fondement dans une instance dédiée à l'évaluation scientifique.

La situation créée en France par le mode de désignation des membres du CNU, celle d'un amalgame entre la compétence pour évaluer des travaux scientifiques et des parcours universitaires, et le soutien d'un mouvement syndical ou la confiance d'un cabinet ministériel, introduit de façon contre-productive au cœur de la responsabilité la plus sensible de l'autogestion des universitaires – garantie historique et privilège exorbitant de leur indépendance – des conflits d'intérêts sans rapport avec la pertinence scientifique des travaux et la qualité globale des dossiers.

Le risque d'incompétence scientifique

Le mode de désignation des membres du CNU n'a manifestement pas pour objet de distinguer les qualités requises pour l'évaluation : qu'ils soient élus ou nommés, ils ne

[13] Cité par Emmanuelle Picard, « Les universitaires de Mai 68 : tensions structurelles et radicalisation syndicale autour de la réforme du Comité consultatif des universités », in Gilles Morin, Christian Chevandier et Bruno Benoit (dir.), Mai 68 et les identités professionnelles, IEP Lyon, 2011, p. 277.

sont pas choisis sur un critère de compétence, ils ne sont pas désignés sur la foi de leur dossier scientifique ou de leur expérience professionnelle dans la recherche et l'enseignement. De fait, certains évaluateurs sont totalement inexpérimentés, et parfois ne peuvent pas même se prévaloir de la plus modeste publication.

S'il s'agit de privilégier les étudiants et la recherche en qualifiant les candidats les mieux armés et les plus prometteurs pour l'enseignement supérieur, si l'enjeu est bien d'assurer la meilleure évaluation possible, l'objectif ne sera atteint qu'en prenant des garanties plus solides sur les dossiers propres des évaluateurs. Certes, leur mode de désignation n'exclut pas le choix d'universitaires éminents, qui assument leurs responsabilités avec une rigueur et une conscience professionnelle au-dessus de tout soupçon. Mais on ne peut cacher que leur présence, parfois leur vigilance, ne règlent pas le problème de la légitimité scientifique d'évaluateurs sans travaux, qui phagocytent les sections du CNU au fonctionnement desquelles ils ne participent qu'à la faveur de logiques partisanes : l'institution s'en remet à leur appréciation lorsqu'elle écarte de la carrière universitaire d'excellents candidats et promeut au contraire les auteurs de travaux conventionnels sans portée scientifique, ce qui ruine sa crédibilité et comporte le risque, majeur, du renouvellement endogène de l'Université.

L'organisation du CNU – sa structuration en micro-sections, sa composition fortement syndicale – conditionne largement son fonctionnement, dont l'examen ne réserve malheureusement pas de grande surprise.

B. Le fonctionnement du Conseil national des universités

Après l'obtention du doctorat, le candidat aux fonctions universitaires soumet son dossier à la section compétente du CNU, dont le bureau désigne deux rapporteurs. Une fois achevé leur travail sur le dossier, ces évaluateurs présentent leur rapport en séance plénière de la section disciplinaire, avant qu'une discussion s'engage sur la candidature et qu'un vote, à bulletin secret, décide de la qualification ou la refuse.

Les dérives constatées dans le fonctionnement du CNU sont certes difficiles à rapporter : les éléments tangibles sont souvent connus par hasard, et peuvent donc être relativisés comme ponctuels par les défenseurs du système actuel ; d'autant que peu d'informations arrivent à la connaissance du public en raison du faible nombre de recours contentieux contre les décisions du CNU, de la part de candidats vulnérables. Il n'en reste pas moins que les rapports annuels des sections livrent des renseignements intéressants et que des faits et témoignages convergents permettent d'observer combien les évaluations par les rapporteurs, de même que le travail collégial en séance, sont aléatoires.

1) L'aléa des évaluations

Toute évaluation est par hypothèse imparfaite, fragile, critiquable, particulièrement celle d'un travail scientifique. Mais s'agissant de la qualification aux fonctions universitaires telle qu'elle existe actuellement, le risque d'erreur et d'injustice se manifeste d'un bout à l'autre de la procédure. Il commence dès l'amont : si les sections sont généralement précises sur les pièces qu'elles exigent des candidats, elles sont souvent peu disertes sur ce qu'elles attendent d'eux quant au fond du dossier à constituer, entretenant une forme d'opacité sur les critères de qualification qui est, au mieux, un manquement au devoir d'accompagnement des candidats – au pire, la porte ouverte à des manœuvres.

En tout cas la désignation des rapporteurs, comme les conditions d'examen des dossiers, interrogent.

La désignation des rapporteurs

Cette désignation, qui sera décisive, est assurée au sein de chaque section par le bureau élu en début de mandat[14]. Aucun texte toutefois – ni le décret qui institue le CNU, ni les règlements intérieurs – ne régit l'attribution des dossiers aux rapporteurs (en considération de leur spécialité par exemple), laquelle s'effectue en pratique sous l'autorité du président

[14] Art. 12 du décret n° 92-70 du 16 janvier 1992 précité.

de la section, en bureau. Il ne saurait être question de figer dans des procédures écrites ce qui peut se faire naturellement et par consensus ; mais ce flottement est susceptible de donner lieu à des solutions boiteuses, voire à des arrangements dans le contexte politisé décrit plus haut.

À défaut d'une véritable instruction préalable de l'ensemble des dossiers par le bureau, c'est au mieux le titre de la thèse qui oriente les travaux de chaque candidat vers des rapporteurs dont la spécialité paraît proche ; cette solution de facilité ne met pas à l'abri de nombreux faux-sens. Alors président de la section 10 du CNU (« Littératures comparées »), Daniel Mortier dressait, voici quelques années, le constat que les membres du CNU sont amenés à « rapporter sur des dossiers qu'ils maîtrisent mal »[15].

Ce constat est loin d'épuiser les aléas d'une évaluation qui confine trop souvent à l'indigence.

L'évaluation proprement dite

L'absence de grille commune d'évaluation qui traduirait, au-delà des spécificités de la discipline considérée, les exigences de fond relatives à une qualification aux fonctions universitaires, contribue à la disparité extrêmement forte des pratiques entre les sections du CNU : certaines sections se montrent très exigeantes, les rapporteurs lisant les thèses et remettant parfois en cause totalement l'évaluation et le rapport du jury, tandis que d'autres sections ne demandent même pas aux candidats la communication de leur thèse ; certaines désignent deux rapporteurs par dossier comme l'exige le décret statutaire[16], quand d'autres

[15] Daniel Mortier, « La "réforme" du CNU », in Claire-Akiko Brisset (dir.), L'Université et la recherche en colère, Éd. du Croquant, 2009, p. 198. L'auteur évoquait les membres du CNU nommés par le ministre, indiquant que « le cabinet ne se préoccupe guère de nommer des personnes dont les compétences compléteraient utilement celles des élus, ce qui oblige parfois ceux-ci à rapporter sur des dossiers qu'ils maîtrisent mal » ; son observation peut être élargie aux membres élus.

[16] Art. 24 du décret n° 84-431 du 6 juin 1984.

n'en mobilisent qu'un seul[17] ; dans certaines sections, les rapporteurs consacrent deux journées pleines de travail à chaque dossier, tandis que dans d'autres le temps moyen de traitement d'un dossier a été estimé à une heure[18]. Les résultats traduisent ces conceptions différentes du travail d'évaluation : d'une section à une autre, les taux de qualification variaient en 2015 de 24 à 95 % pour la maîtrise de conférences, et de 8 à 100 % pour le professorat – étant précisé que l'absence de cadrage autorise aussi une très grande disparité d'implication au sein d'une même section, où des rapports de 15 pages peuvent côtoyer des rapports de 2 lignes selon le sérieux du rapporteur.

Fin 2013, l'Inspection générale de l'administration de l'Éducation nationale et de la Recherche, corps respecté pour son travail et son indépendance, relevait sur la base de statistiques précises que « les candidats à la qualification (…) n'abordent pas leur passage devant le CNU avec les mêmes chances (…) ; pour certains, l'examen de leur dossier constituera pratiquement une formalité alors que, pour d'autres, il s'agira quasiment d'un concours. Cette situation (…) constitue pour les candidats un véritable facteur d'inégalité »[19].

2) Le simulacre des délibérations

Les délibérations au sein de chaque section, qui ne s'appuient sur aucun échange préalable avec les candidats, n'en sont pas en réalité : les sections se contentent d'entériner, dans l'urgence des séances plénières, les pré-décisions des rapporteurs.

[17] La commission permanente du CNU suggère elle-même de « systématiser l'examen des dossiers par deux rapporteurs – et non un seul – pour l'ensemble des missions d'expertise (qualification, …) » ; Le rôle du CNU dans le recrutement des enseignants-chercheurs, CP-CNU, 24 janv. 2015, p. 10.

[18] Voir François Garçon, *op. cit.* pp. 55 et suiv.

[19] IGAENR, Des effets de la loi LRU sur les processus de recrutement des enseignants-chercheurs, rapport n° 2013-089, nov. 2013, p. 32.

L'absence d'audition des candidats

L'absence d'audition des candidats, lors de leurs deux premières tentatives de qualification[20], est l'une des anomalies du système d'évaluation tel qu'il est organisé au CNU. Le fait qu'aucune place ne soit donnée *ab initio* à un échange oral avec les candidats, qui permettrait de mieux apprécier la cohérence de leur dossier – en particulier s'il sort des sentiers battus –, la pertinence de leur projet, leur esprit critique et leur liberté d'expression, leur capacité à enseigner, est au regard des exigences de la profession qu'ils prétendent embrasser, laquelle comporte des responsabilités sociales fortes et exigent de l'initiative et du caractère, une prise de risque considérable, que le caractère superficiel d'un grand nombre de rapports permet d'ailleurs de mesurer (comment ne pas suspecter que derrière l'argument du manque de temps, le refus de tout entretien dispense certains évaluateurs d'un examen approfondi des travaux ?).

Par ailleurs, outre qu'une évaluation qui se conclut par une décision se résumant à l'autorisation ou à l'interdiction de faire acte de candidature à l'Université peut être regardé par les intéressés comme une forme de jugement qui impose une audience contradictoire[21], l'audition favoriserait une vraie collégialité, réduisant l'inconvénient actuel d'une soumission mécanique des votes, en séance plénière, aux avis des rapporteurs.

Des délibérations hâtives

En matière d'évaluation, la collégialité finale est censée offrir les garanties d'impartialité et de qualité capables de neutraliser les risques de parti pris, de superficialité ou de faux-sens

[20] En vertu de l'article 24 al. 5 du décret n° 84-431 du 6 juin 1984 modifié, « les candidats dont la qualification a fait l'objet de deux refus consécutifs de la part d'une section du Conseil national des universités (…) au cours des deux années précédentes, peuvent saisir de leur candidature le groupe compétent du Conseil national des universités (…) en formation restreinte aux bureaux de section. Ces formations (…) procèdent en outre à l'audition des candidats ».

[21] Voir Jean-Philippe Derosier, « Le CNU et les droits de la défense », *JCP* 2013 p. 326.

qui pourraient altérer les rapports. Mais la collégialité des évaluations en séance plénière de section, dans le cas du CNU, est un espoir déçu : l'examen des dossiers par la section disciplinaire ne se fait, dans le meilleur des cas, qu'à la lumière de ce que voudront bien en dire très brièvement les deux rapporteurs. Il est évident que, dès lors, ce sont les rapporteurs qui font seuls la décision ; et même un seul d'entre eux lorsqu'il est défavorable à la qualification du dossier ou même seulement réservé, puisque s'est instaurée dans de nombreuses sections, soumises à la pression d'un nombre de candidatures très supérieur à celui des postes ouverts au concours, une pratique selon laquelle la qualification ne peut être acquise qu'au bénéfice de deux rapports favorables.

L'exemple assumé de la section 27 (« Informatique ») est éloquent[22] : toutes demandes comprises, le nombre de dossiers qui lui sont soumis chaque année ne lui permet de consacrer à chacun d'eux, en séance, que… trois minutes en moyenne (comprenant la lecture des rapports, une discussion puis le vote à bulletins secrets). Trois minutes permettent ainsi d'évaluer collégialement 8 à 10 années d'études supérieures et de sceller un destin professionnel.

Certains membres du CNU n'hésitent d'ailleurs pas à rapporter que « parfois les gens ne viennent pas, ou s'absentent en séance » ; et parlent d'un « travail d'évaluation *a minima* », « en urgence »[23]. Sans doute les contraintes de temps qui pèsent sur les membres du CNU, et la légèreté avec laquelle s'expédient les dossiers en séance, contribuent-elles à expliquer le caractère extrêmement sommaire, et presque toujours stéréotypé, de la motivation pourtant obligatoire[24] qui accompagne (parfois) les refus de qualification.

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[22] Voir François Garçon, *op. cit.* p. 59.

[23] Stéphane Beaud, « Enquête sur les pratiques de l'évaluation collégiale : le CNU », séminaire EHESS, 16 déc. 2009 ; http://pds.hypothèses.org/379.

[24] Art. 24 al. 4 du décret n° 84-431 du 6 juin 1984 modifié : « Le bureau communique par écrit à chaque candidat non inscrit sur la liste les motifs pour lesquels sa candidature a été écartée ».

Loin des exigences de base de l'évaluation scientifique, le CNU est devenu essentiellement un lieu d'influence, et constitue dans chaque discipline un enjeu de pouvoir. Ce contre quoi il a été instauré, c'est-à-dire le népotisme à l'échelon local, a été purement et simplement reproduit au niveau central ; tandis que dans le même temps, comme le relève Fabrice Bouthillon, « le CNU est incapable de lutter contre le localisme : ce qui est logique, car il est de l'essence d'un pouvoir impérial de rémunérer la collaboration des élites locales à son maintien »[25].

2. LES CONCOURS ORGANISÉS AU SEIN DES UNIVERSITÉS : LA PHASE LOCALE DU RECRUTEMENT

Le recrutement universitaire proprement dit est assuré par des concours qui pour les maîtres de conférences, comme pour les professeurs dans la grande majorité des disciplines, sont organisés au sein des établissements.[26]

Le principe de cooptation déjà évoqué procède d'une tradition fondatrice puisque c'est précisément du besoin d'une gestion autonome, lui permettant d'échapper au pouvoir temporel et au droit commun, qu'est née l'Université au Moyen Âge : considérée comme l'acte fondateur de l'institution universitaire, la bulle pontificale *Parens Scientiarum Universitas* de Grégoire IX, du 13 avril 1231, mentionne en premier lieu la question du recrutement et fixe le principe de la consultation obligatoire de l'ensemble des pairs. Par un avis du 31 octobre 1893, le Conseil d'État français reconnaissait que les professeurs de l'enseignement supérieur ne devaient « leur nomination qu'à eux-mêmes »[27]. Enfin en

[25] Fabrice Bouthillon, « Nocivité du CNU », *Commentaire*, n° 146, 2014 p. 371.

[26] Ces concours permettent de pourvoir, chaque année, 97 à 98 % des postes ; voir Campagne de recrutement et d'affectation des maîtres de conférences et des professeurs des universités, doc. ministériels, http://www.enseignementsurecherche.gouv.fr/cid22708/bilans-et-statistiques.html. Sur ces concours, voir André Legrand, « Le recrutement local des universitaires », *AJFP* 2013 p. 67.

[27] Cité par Pierre Avril et Jean Gicquel, Droit parlementaire, Montchrestien, 2010, p. 42.

1984, le Conseil constitutionnel français conférait à l'indépendance des professeurs d'université une valeur constitutionnelle[28] : ce principe implique notamment que les universitaires tranchent seuls les questions individuelles qui concernent les membres de leur corps, et par extension ceux qui se portent candidats pour en faire partie[29]. En 2010, Olivier Beaud pouvait écrire que « ce principe de cooptation collégiale par les pairs est, sans conteste, la règle cardinale de toute constitution universitaire »[30].

Cette coutume rappelée, il convient de la situer dans un système politique et juridique – étatique comme universitaire – qui, en huit siècles, a naturellement subi quelques évolutions… Aujourd'hui les universités françaises sont des établissements publics nationaux, et les universitaires des fonctionnaires d'État soumis au statut général des fonctionnaires qui, tout en leur conférant d'importantes garanties, fait peser sur eux un certain nombre de contraintes. Ainsi, les universitaires participent à la mise en œuvre de politiques publiques – celles de l'État, et celles de leur établissement de rattachement qui aiguilleront souvent les recrutements – et doivent par ailleurs appliquer, en vue du renouvellement de leur communauté, le droit des concours : les textes relatifs aux « concours » ont supplanté les traditions de « présentation » et d' « élection » des candidats. Or si la cooptation peut épouser la forme d'un concours, celui-ci ne répond pas toujours à son esprit : c'est ce qu'illustrent les concours ouverts par établissement, qui font en effet

[28] CC 20 janv. 1984, décision n° 83-165 DC, *Loi relative à l'enseignement supérieur*.

[29] Le Conseil constitutionnel a vidé ce principe de son sens en 2010, en estimant que dès lors que les dispositions contestées devant lui « *associent les professeurs et maîtres de conférences au choix de leurs pairs* », elles « *ne portent pas atteinte au principe constitutionnel d'indépendance des enseignants-chercheurs* » ; CC 6 août 2010, décision n° 2010-20/21 QPC, *M. Jean C. et autres [Loi Université]*. Voir Bertrand Mathieu, « De la disparition d'un principe constitutionnel : l'indépendance des professeurs d'université », *JCP* 2010 p. 862 ; Fabrice Melleray, « Le Conseil constitutionnel au secours de la loi relative aux libertés et responsabilités des universités », *Dalloz* 2010 p. 2335 ; Mathieu Touzeil-Divina, « À la recherche du principe perdu : l'indépendance des enseignants-chercheurs », *LPA* n° 89-2011 p. 46 ; Olivier Beaud, chapitre « La loi LRU devant le Conseil constitutionnel : les libertés universitaires à l'abandon », *in* Les libertés universitaires à l'abandon ?, Dalloz, 2010, p. 285.

[30] Olivier Beaud, Les libertés universitaires à l'abandon ?, Dalloz, 2010, p. 260.

apparaître des tensions entre la tradition universitaire et le droit applicable. Liées à l'immixtion du droit commun dans le recrutement universitaire, ces tensions expliquent – avec le nombre élevé de candidats et le faible nombre de postes – l'irruption qu'y fait aussi le juge administratif : les contentieux sont de plus en plus fréquents, en particulier depuis la loi dite LRU du 10 août 2007[31] qui dans une logique managériale a bouleversé l'état du droit, et les équilibres traditionnels, au détriment des jurys (des « pairs ») et au profit des administrateurs des universités (le président, et plus largement les membres du conseil d'administration).

La jurisprudence a donc dû démêler les compétences des instances intervenant dans le recrutement[32], tandis que le législateur a lui-même procédé en 2013 à une revalorisation académique du recrutement universitaire ; sans chercher, toutefois, à endiguer le phénomène pourtant bien connu du localisme.

A. La répartition des compétences au sein de l'université

Si le déroulement du concours fait formellement intervenir, au début et à la fin, le ministre chargé de l'enseignement supérieur, en réalité il met en jeu deux types d'acteurs principaux : les instances élues de l'université, qui promeuvent une politique d'établissement, et le « comité de sélection » qui, essentiellement constitué de collègues de la discipline du recrutement, représente la légitimité académique.

Le choix est fait ici d'une présentation chronologique de la procédure de recrutement, pour davantage de clarté.

[31] Loi n° 2007-1199 du 10 août 2007 relative aux libertés et responsabilités des universités

[32] Sur cette question, voir Charles Fortier, « Le Conseil d'État, juge du recrutement des universitaires », in Jacques Caillosse et Olivier Renaudie (dir.), Le Conseil d'État et l'Université, Dalloz, 2015, p. 47, spéc. pp. 54 et suiv.

L'ouverture du concours et le profilage du poste, sur la proposition du conseil d'administration

À l'ouverture du concours, est lié le profilage du poste[33]. Cette identification de priorités thématiques au sein de la discipline, par le conseil d'administration, participe de la stratégie de l'établissement ; elle sera, le plus souvent, l'une des clés du recrutement.

Formellement, c'est le ministre chargé de l'enseignement supérieur qui détient la compétence pour ouvrir le concours et définir les caractéristiques de l'emploi à pourvoir – non sans que le conseil académique de l'université ait donné son avis sur ces caractéristiques[34]. La Cour administrative d'appel de Paris a ainsi qualifié d'acte préparatoire, donc insusceptible de recours, la délibération d'un conseil d'administration d'une université fixant le nombre et le profil des emplois vacants[35]. Il n'en reste pas moins que dans l'immense majorité des cas, à défaut de l'être en droit, la proposition du conseil d'administration de l'université est décisive en fait.

La nomination du comité de sélection par le conseil académique

Sur la base du fléchage du poste, le conseil académique de l'établissement, statuant dans une formation restreinte aux enseignants-chercheurs, décide de la composition du comité de sélection.

La nomination des membres se fait en deux temps[36]. Une première délibération du conseil académique fixe leur nombre (qui doit être compris entre huit et vingt) puis parmi

[33] Les textes évoquent la « qualification » des emplois (art. L. 712-6-1 du code de l'éducation). Le risque de confusion avec celle des candidats, par le CNU, nous incite à ne pas utiliser ce mot ici.

[34] Art. L. 712-6-1, III, du code de l'éducation.

[35] CAA Paris 22 oct. 2013, *Syndicat SNESUP FSU de l'Université Pierre et Marie Curie, Syndicat FERC-SUP CGT de l'Université Pierre et Marie Curie*, n° 12PA00128, *AJFP* 2014 p. 14.

[36] Art. 9 du décret n° 84-431 du 6 juin 1984.

eux le nombre de membres choisis hors de l'établissement (qui ne peut être inférieur à la moitié) et enfin le nombre de ceux relevant de la discipline dont relève l'emploi à pourvoir (qui doivent être majoritaires au sein du comité). Une seconde délibération nomme les membres, sur la proposition du président de l'université, et désigne le président du comité de sélection.

Le Conseil d'État veille à ce que cette procédure en deux temps soit respectée[37] : l'enjeu est que les universitaires en poste dans l'établissement, relevant de la discipline, puissent être consultés entre ces deux étapes sur l'identité des membres à nommer et sur la personne la plus légitime pour assurer la présidence du jury. La proposition qu'ils feront n'appellera certes pas obligatoirement une décision conforme ; mais le plus souvent, elle lie le président de l'université puis le conseil académique restreint – sauf irrégularité juridique, choix manifestement contestable ou manipulation grossière tendant à orienter les délibérations du jury.

Le rôle du jury : la sélection des dossiers, l'audition des candidats et leur classement

En 2007, le législateur avait remplacé les « commissions de spécialistes », instances essentiellement locales, élues et compétentes pour les recrutements pendant plusieurs années, par des « comités de sélection » qui ne sont plus essentiellement locaux, qui sont nommés et compétents pour un seul recrutement[38] Ces comités de sélection, toutefois, avaient été conçus comme de simples organes consultatifs : c'est au conseil

[37] CE 1er oct. 2012, *Mme Picard*, n° 351225.

[38] Sur la réforme du recrutement par la loi LRU, voir André Legrand, « La démocratie de proximité, un pari pour l'université », *AJDA* 2007 p. 2135, spéc. pp. 2140-2141, et « Pour la crédibilité du recrutement des enseignants-chercheurs », *AJDA* 2009 p. 1527 ; Charles Fortier, « Recrutement des enseignants-chercheurs : l'occasion manquée », *AJFP* 2007 p. 225 ; Raphaël Romi et Thomas Le Mercier, « Les nouvelles modalités de recrutement des enseignants-chercheurs : une réforme à parfaire ? », *AJDA* 2009 p. 192 ; Pierre-François Fressoz, « Les enseignants-chercheurs dans la loi liberté et responsabilité des universités », in Terres du droit, mélanges en l'honneur d'Yves Jégouzo, Dalloz, 2009, p. 299 ; Olivier Beaud, « La réforme du recrutement ou l'aggravation des tares du système français », *Cités* 2012 p. 126.

d'administration de l'université que le législateur avait implicitement conféré la qualité de jury, les comités de sélection ne rendant qu'un « avis motivé » avant que le conseil d'administration, dans sa formation restreinte aux enseignants-chercheurs, ne « propose la nomination » au ministre – « sous réserve de l'absence d'avis défavorable du Président » de l'université. Par ses circulaires, le ministère insistait sur cette nouvelle répartition des compétences[39] c'est-à-dire sur le libre choix du lauréat par le conseil d'administration, y compris éventuellement hors de la liste proposée par le comité de sélection[40]. Le Conseil constitutionnel a finalement interdit, explicitement, au conseil d'administration de choisir un candidat hors de la sélection opérée par le comité de sélection[41] ; sur cette base, le Conseil d'État a pu pousser la logique à son terme et imposer sa propre lecture des pouvoirs respectifs du comité de sélection et du conseil d'administration. En effet par un arrêt du 15 décembre 2010, il a estimé que « le comité de sélection, qui comporte une majorité de spécialistes de la discipline dans laquelle le poste est ouvert, (…) agit en qualité de jury du concours »[42]. Cette jurisprudence *contra legem* se fonde sur le pouvoir des pairs et plus

[39] Circulaire ministérielle du 9 janvier 2008 : « *il est rappelé que le rôle du comité de sélection est de donner un avis sur le recrutement des candidats. Il ne constitue pas une formation de jury. Ce rôle est exercé par le conseil d'administration siégeant en formation restreinte* » ; circulaire ministérielle du 23 avril 2008 : « *le conseil d'administration siégeant en formation restreinte constituant une formation de jury, (...)* ».

[40] Fiche technique du 18 juillet 2008, provenant de la Direction générale des ressources humaines du ministère : « *le CA a la possibilité de retenir un candidat non classé par le comité de sélection* ».

[41] CC 6 août 2010, *M. Jean C. et autres [Loi Université]*, n° 2010-20/21 QPC. Selon le Conseil constitutionnel, « *le législateur a entendu laisser au comité la responsabilité d'établir une sélection et interdit au conseil d'administration de proposer au ministre chargé de l'enseignement supérieur la nomination d'un candidat non sélectionné par le comité* ».

[42] CE 15 déc. 2010, *Syndicat national de l'enseignement supérieur et autres*, n° 316927 et 316986 ; voir F. Melleray, « À la recherche des jurys de recrutement des enseignants-chercheurs », *AJDA* 2011 p. 539 ; M. Verpeaux, « Les libertés universitaires mal protégées : Constitution, loi et décret, quand tout le monde s'en mêle », *AJDA* 2011 p. 1791 ; A. Legrand, « La loi, le juge et les libertés universitaires », *AJFP* 2011 p. 69 ; A. Zarca, « L'égalité au service de l'indépendance. Retour prospectif sur les configurations du jury de recrutement des universitaires », *RDP* 2012 p. 3.

précisément sur la présence nécessairement majoritaire, au sein du comité de sélection, de personnes compétentes dans la discipline du recrutement. C'est ainsi que le comité de sélection, initialement censé formuler un « avis », est devenu le jury du concours.

C'est naturellement à lui, et à lui seul, qu'il revient de sélectionner les dossiers en vue des auditions, de procéder à ces auditions puis de classer les candidats. Depuis 2015, le jury peut procéder à une « mise en situation professionnelle » des candidats : « l'audition des candidats par le comité de sélection peut comprendre une mise en situation professionnelle, sous forme notamment de leçon ou de séminaire de présentation des travaux de recherche », cette épreuve pouvant être publique[43]. Cette nouvelle modalité de sélection répond à l'idée simple qu'un bref entretien avec le jury, fût-ce à la suite d'une pré-sélection sur dossier, ne compense pas suffisamment l'absence du candidat lors de la procédure de qualification et ne peut suffire à se forger une idée fidèle de sa valeur : cette possibilité est de nature à renforcer la qualité des recrutements universitaires, en diversifiant les critères sur lesquels ils se fondent et en les connectant à la profession visée telle qu'elle est exercée dans chaque discipline, alors que jusqu'alors aucune considération liée aux vertus didactiques ne pouvait être prise en compte. Son caractère très récent et facultatif, ainsi que la difficulté de sa mise en œuvre compte tenu du temps limité que les universitaires ont pris l'habitude de consacrer aux recrutements, n'ont pas encore permis d'éprouver les bienfaits de cette mesure.

L'appréciation que porte le jury sur la valeur et les mérites des candidats est souveraine : de façon fort classique, le Conseil d'État refuse tout contrôle juridictionnel, même de surface, sur cette appréciation[44]. Mais « souveraineté du jury » quant à l'appréciation de la valeur des candidats ne signifie pas « pleins pouvoirs » : le Conseil d'État rappelle régulièrement aux comités de sélection leurs obligations, et les limites de leur compétence. C'est ainsi, en particulier, que le jury doit inscrire son appréciation dans le

[43] Art. 9-2 modifié du décret n° 84-431 du 6 juin 1984.

[44] CE 9 fév. 2011, *M. Piazza*, n° 317314.

cadre du profil du poste voté à l'amont par le conseil d'administration plénier, même si le Conseil d'État n'exerce qu'un contrôle restreint sur l'adéquation, à ce profil, de la candidature qu'il propose[45]. Par ailleurs, l'obligation générale de respecter les conditions prévues par les textes relatifs au concours s'impose au comité de sélection comme à tout jury de recrutement dans la fonction publique[46]. Enfin, en vertu de l'article 9-2 du décret du 6 juin 1984 modifié, « le comité de sélection émet un avis motivé unique portant sur l'ensemble des candidats ainsi qu'un avis motivé sur chaque candidature », étant précisé que « ces deux avis sont communiqués aux candidats sur leur demande ».

La vérification, par le conseil académique, de l'adéquation du candidat proposé au profil du poste

C'est encore le conseil académique, toujours dans sa formation restreinte, qui intervient pour valider ou rejeter la proposition du comité de sélection[47] : au vu de l'avis motivé du jury, il propose le nom du candidat sélectionné, ou le cas échéant une liste de candidats classés par ordre de préférence, sans pouvoir proposer des candidats non retenus par le comité de sélection ni modifier l'ordre de la liste de classement.

Au fond, son appréciation ne peut porter que sur l'adéquation de la proposition du jury à la stratégie de l'établissement, telle qu'exprimée par le profil du poste, ce qui en soi

[45] *Ibidem*.

[46] Par exemple, le Conseil d'État fait observer rigoureusement la procédure en deux temps distincts à laquelle est réglementairement tenu le comité de sélection, y compris lorsque tous les candidats sont auditionnés par le jury (CE 5 mars 2014, n° 363715) ; il annule la procédure de recrutement si le comité de sélection a accepté la présence à ses réunions d'un collègue qui n'appartient pas au jury – comme le directeur du laboratoire concerné, ou celui du département d'enseignement – même si ce collègue n'y avait qu'une voix consultative (CE 23 mars 1994, *Feyel,* n° 104420, Lebon p. 150) ; sur le fond, un comité de sélection n'est pas autorisé à instaurer une exigence nouvelle, qui lui paraîtrait appropriée pour forger son appréciation, et ne peut donc pas demander à un candidat la communication d'un document non prévu par les textes (CE 9 juillet 2007, *Université de Nice Sophia-Antipolis*, n° 268208, *AJDA* 2007 p. 1775).

[47] Art. 9-2 du décret n° 84-431 du 6 juin 1984.

ne met pas en cause l'appréciation qu'a portée le comité de sélection sur les mérites du candidat[48]. Le Conseil d'État veille, précisément, à interdire une telle mise en cause[49]. Si sa jurisprudence ne concerne encore que les interventions des conseils d'administration des établissements, qui en effet détenaient cette compétence avant qu'elle ne soit transférée, à partir de 2015, aux conseils académiques, rien ne justifierait qu'elle évolue de façon significative. Or le Conseil d'État a jugé qu'un conseil d'administration commet une erreur de droit en se fondant par exemple, pour rejeter la proposition du jury, sur l'insuffisance des travaux de recherche du candidat proposé[50] – et c'est dans la même logique que le conseil d'administration ne pouvait pas modifier le classement établi par le comité de sélection[51], interdiction aujourd'hui formalisée réglementairement pour ce qui concerne l'exercice par le conseil académique de sa nouvelle compétence.

Ainsi, le pouvoir du conseil académique, comme celui auparavant du conseil d'administration, se résume à la validation de la liste proposée par le jury ou à son rejet global. Si l'on s'en tient à la jurisprudence du Conseil d'État, sa compétence ne s'exerce légalement, par ailleurs, qu'à la faveur d'une motivation circonstanciée qui doit permettre de connaître avec précision en quoi le profil du candidat proposé par le jury s'éloigne du profil recherché[52].

L'ultime contrôle du conseil d'administration

Le droit de veto que détenait jusqu'alors le président de l'université, et qui lui permettait de s'opposer seul au recrutement d'un universitaire, a été supprimé par la loi du

[48] CE 19 oct. 2012, *M^me^ Bouteyre*, n° 354220.

[49] CE 14 oct. 2011, *M^me^ Jehan-Larose*, n° 341103.

[50] CE 9 fév. 2011, *M^me^ Bourguignon*, n° 329584.

[51] CE 26 oct. 2011, *M^me^ Debled-Renesson*, n° 334084 ; voir A. Legrand, « Le recrutement des professeurs d'université : le retour au droit des concours », *AJDA* 2012 p. 169.

[52] CE 24 oct. 2012, *M. Sébastien B.*, n° 354077 ; CE 23 oct. 2013, n° 360084 ; CE 5 mars 2014, n° 364500.

22 juillet 2013 relative à l'enseignement supérieur et à la recherche[53]. Toutefois, l'avis défavorable motivé du conseil d'administration restreint s'y substitue[54]. Mais les motifs pour lesquels cet avis défavorable peut être émis ne sont précisés ni par le législateur, ni par le pouvoir réglementaire.

C'est donc à un double contrôle interne, du conseil académique puis du conseil d'administration, qu'est désormais soumise la proposition du comité de sélection – lequel avait déjà, lui-même, pour mission de respecter le fléchage du poste (tout cela sans préjudice d'un contrôle administratif externe puisque le ministre aura, *in fine*, la compétence – discrétionnaire ! – de refuser la nomination sur le fondement du non respect du profil du poste[55]).

Il est toutefois possible de déduire de la logique du nouveau dispositif que l'adéquation de la proposition du jury au profil du poste sera essentiellement contrôlée par le conseil académique, tandis que le conseil d'administration pourra, dès lors, se limiter à vérifier que le déroulement du concours n'est entaché d'aucune irrégularité – étant entendu qu'il est tenu d'interrompre toute procédure irrégulière[56]. Il est souhaitable que la

[53] Sur cette loi, voir Charles Fortier, « Les universités dans la loi du 22 juillet 2013 », *AJDA* 2013 p. 2251.

[54] Selon l'article L. 712-3 du code de l'éducation, « *(...) aucune affectation d'un candidat à un emploi d'enseignant-chercheur ne peut être prononcée si le conseil d'administration, en formation restreinte aux enseignants-chercheurs et personnels assimilés, émet un avis défavorable motivé* ». Le décret n° 2014-997 du 2 septembre 2014 précise que le président de l'établissement communique au ministre le nom du candidat sélectionné « *sauf dans le cas où le conseil d'administration émet un avis défavorable motivé* » (nouvel art. 9-2 du décret n° 84-431 du 6 juin 1984 modifié).

[55] *Cf. infra*.

[56] CE 5 mars 2014, *M. B. A.*, n° 363715. Voir aussi, sur l'étendue des pouvoirs que détenait le président de l'université, CE 19 oct. 2012, *M. Sayah*, n° 344061 : « *il appartient au président de l'université de faire usage, le cas échéant, des pouvoirs qu'il tient des dispositions de l'article 9-2 du décret du 6 juin 1984 pour ne pas donner suite à une procédure de recrutement entachée d'irrégularité* » ; J.-F. Calmette, *Droit administratif* 2012, note p. 28.

jurisprudence du Conseil d'État sur le rôle, à ce stade, du conseil d'administration restreint vienne délimiter avec précision les motifs pour lesquels il peut s'opposer à la poursuite de la procédure.

Le président de l'université, quant à lui, n'a plus d'autre possibilité que de transmettre au ministère, en vue de la nomination, le nom qui lui aura été communiqué par le conseil d'administration.

La nomination par le ministre ou par le président de la République

Le ministre chargé de l'enseignement supérieur nomme les maîtres de conférences, et transmet au président de la République les propositions de nomination des professeurs. Il peut donc aussi, formellement, s'y opposer ; et il s'est effectivement produit que le ministre s'oppose à la nomination d'un professeur d'université, pour des motifs liés à la mauvaise adéquation du profil du candidat au poste ouvert au concours. Le Conseil d'État n'a exercé sur cette décision qu'un contrôle restreint, offrant ainsi au ministre un pouvoir discrétionnaire[57]. Si la Haute juridiction a précisé que, compte tenu des motifs qui fondaient la décision litigieuse, « les principes de l'autonomie des établissements d'enseignement supérieur, de l'indépendance des enseignants-chercheurs et de la souveraineté du jury » ne pouvaient être en cause, il a aussi indiqué que cette décision refusant de nommer un universitaire « n'avait pas à être motivée ». Un tel arrêt n'est pas de nature à convaincre que la jurisprudence du Conseil d'État tend à préserver aux universitaires la maîtrise du renouvellement de leur communauté, hors de toute intervention politique.

Toutefois, il est rarissime qu'un ministre ne respecte pas les délibérations des universitaires et les propositions des universités en matière de recrutement.

[57] CE 15 nov. 2006, n° 283996.

B. La persistance du localisme

Chacun sait que le recrutement universitaire est marqué, en France, par une tendance lourde au clientélisme et au localisme[58] – que l'intervention préalable du CNU n'a donc nullement enrayée, comme il a été souligné plus haut.

Pour lutter contre cette tendance, on a vu que le législateur avait remplacé en 2007 les « commissions de spécialistes » par des « comités de sélection » comprenant au moins une moitié de membres extérieurs à l'université qui pourvoit le poste. Mais l'objectif visé n'a pas été atteint : les membres extérieurs étant proposés, pour chaque concours, par les ressortissants locaux de la discipline considérée, rien ne pouvait exclure qu'ils fussent choisis au gré des relations personnelles selon les enjeux en cause… Bien inspiré, le système s'avère au mieux insuffisant ; et au pire contreproductif, permettant que l'issue du concours soit verrouillée par la formation *a priori*, au sein du comité de sélection, d'une solidarité conduisant à une majorité artificiellement renforcée au service des préférences locales.

C'est la raison pour laquelle le rapport final des Assises nationales de l'enseignement supérieur et de la recherche, fin 2012, proposait encore de « lutter contre l'abus des recrutements locaux »[59]. Mais le législateur de 2013 s'est contenté de confirmer le CNU dans sa mission de garde-fou contre le favoritisme local, dont il savait fort bien qu'il ne la remplissait pas, sans modifier non plus, de ce point de vue, les modalités du recrutement lui-même : les diverses améliorations apportées au recrutement universitaire proprement dit – valorisation académique de ce processus par le transfert d'un certain nombre de compétences du conseil d'administration au conseil académique, suppression du droit de veto du président de l'université, instauration d'une facultative « mise en situation

[58] Voir Olivier Godechot et Alexandra Louvet, « Le localisme dans le monde académique : un essai d'évaluation », 22 avril 2008, http://www.laviedesidees.fr/Le-localisme-dans-le-monde.html ; Olivier Beaud, « La réforme du recrutement ou l'aggravation des tares du système français », *Cités* 2012.126.

[59] Vincent Berger, Rapport final des assises, 17 déc. 2012, voir la proposition 125.

professionnelle » des candidats – ne modifient en rien les équilibres qui affectent l'objectivité des délibérations au sein des jurys, ne donnant que trop peu d'impact à la qualité des dossiers et des prestations des candidats.

Ainsi, mettre fin au localisme n'a été la priorité ni du législateur, ni du pouvoir réglementaire qui a même instauré une voie d'accès au professorat ouverte sur la seule base de l'investissement administratif local. En effet, un nouvel article 46, 5° du décret statutaire réserve certains concours aux maîtres de conférences ayant exercé « des responsabilités importantes » au sein d'une université, donnant une portée inattendue à la confusion de la reconnaissance académique dont témoigne le titre de professeur – du latin *professor*, « celui qui est ouvertement déclaré expert dans une science ou un art », par extension « celui qui s'adonne à son enseignement » – et de l'appartenance administrative à un corps de fonctionnaires. Nonobstant la nécessaire gratification des maîtres de conférences concernés, qui pourrait prendre diverses formes, cette nouvelle voie d'accès au professorat le dévalorise en faisant tomber les conditions essentielles pour y parvenir ; et accentue les risques du localisme endogame dans lequel se rétrécissent encore trop d'universités françaises.

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* *

La loi déjà citée du 22 juillet 2013 a prévu que dans un délai de deux ans suivant sa promulgation, « le Gouvernement [remette] au Parlement un rapport formulant des propositions en vue d'améliorer le recrutement, la formation et le déroulement de la carrière des enseignants-chercheurs » : ce rapport doit, en particulier, « [analyser] les mesures mises en œuvre ou envisagées afin de renforcer la transparence des procédures de sélection des enseignants-chercheurs et de lutter contre le phénomène de localisme dans leur

recrutement »[60] – annonçant ainsi une nouvelle réforme, qui ne remettra donc pas en cause le dispositif existant de pré-sélection puis de recrutement proprement dit.

Dans l'attente de ce travail commandé par le législateur, les institutions concernées ont déjà pris leurs marques : alors que depuis dix ans, un code de bonne conduite en matière de recrutement des chercheurs, formulé par la Commission européenne[61], affiche les objectifs d'améliorer la transparence des critères de sélection, de diversifier les épreuves, de reconnaître la mobilité, d'ouvrir les comités de sélection à des experts d'autres disciplines ainsi qu'à des membres extérieurs à l'établissement qui recrute, ou encore de motiver les décisions, le conservatisme inspire leurs propositions. En effet au nom du CNU, il est indiqué que « les universitaires sont, pour la grande majorité d'entre eux, très attachés (…) à cette procédure nationale » de la qualification[62] dont aucune piste sérieuse d'évolution n'est esquissée, tandis qu'au nom des présidents d'université, un rapport rappelle que « le recrutement est une composante de la stratégie de l'établissement » et précise qu' « il est peu réaliste de fonder une stratégie sur la lutte contre l'endorecrutement »[63]. La réflexion reste donc manifestement fermée[64], comme pour donner raison à André Legrand qui écrivait en 2013, au sujet du recrutement des enseignants-chercheurs, que « son devenir devrait être marqué au coin d'une grande stabilité »[65]…

[60] Art. 74 de la loi n° 2013-660 du 22 juillet 2013.

[61] http://ec.europa.eu/euraxess/index.cfm/rights/codeOfConduct.

[62] Voir le rapport exclusivement descriptif de la « commission permanente du CNU », Le rôle du CNU dans le recrutement des enseignants-chercheurs, 24 janv. 2015, pp. 5-6.

[63] Propositions concernant le recrutement, la formation et la carrière des enseignants-chercheurs, CPU, 25 nov. 2014.

[64] Pour quelques pistes d'évolution, voir Charles Fortier, « Recrutement universitaire : accélérer le changement », *AJFP* 2015 p. 287.

[65] « Le recrutement local des universitaires », *AJFP* 2013 p. 69.

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WHEN ARE UNIVERSITIES BOUND BY EU PUBLIC PROCUREMENT RULES AS BUYERS AND PROVIDERS? - ENGLISH UNIVERSITIES AS A CASE STUDY

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ABSTRACT

In this study we provide an up-to-date assessment of situations in which universities are bound by public procurement rules, as well as the combined changes that market-based university financing mechanisms can bring about in relation to the regulation of university procurement and to the treatment of the financial support they receive under the EU State aid rules. National differences in funding schemes are likely to trigger different answers in different EU jurisdictions. This study uses the situation of English universities as a case study.

The first part focuses on the role of universities as buyers. The traditional position has been to consider universities bound by EU public procurement rules either as state authorities, or because they receive more than 50% public funding. In the latter case, recent changes in the funding structure can create opportunities for universities to free themselves from compliance with EU public procurement rules.

In the second part, we assess the position of universities as providers. Here the traditional position has been that the State can directly mandate universities to conduct teaching and research activities. However, new EU legislation contains specific provisions about how and when teaching and research need to be procured if they are of an economic nature. Thus, accepting the exclusion of university services from procurement requirements as a rule of thumb is increasingly open to legal challenge.

Finally, the study assesses if and in how far universities can benefit from exemptions for public-public cooperation or in-house arrangements either as sellers or buyers.

1. INTRODUCTION

This paper assesses the situations in which universities are currently bound by public procurement rules, as well as the combined changes that market-based university financing mechanisms can bring about in relation to the regulation of university procurement and to the treatment of the financial support they receive under the EU State aid rules. The paper looks at the interaction between universities and EU public procurement and State aid rules from the double perspective of universities as buyers (§2) and universities as suppliers or providers of services to other public entities (§3). The paper also focuses on the increased scope for universities to escape compliance with those rules in specific circumstances that may enable them to have recourse to the so called in-house and public-public cooperation exceptions under the 2014 EU public procurement rules (§4).

The first part of the paper focuses on the role of universities as buyers (§2). Universities' continued obligation to comply with EU public procurement rules when they purchase derives from their status as 'contracting authorities' under Directive 2014/24. The traditional position has been to consider universities bound by EU public procurement rules either because they are state authorities, or because they receive more than 50% of their funding from the State; either on a structural basis (making them bodies governed by public law) or regarding specific projects. Where universities are not public authorities in nature, changes in the way they are funded can create opportunities for universities to free themselves from compliance with EU public procurement rules when they acquire goods or commission services or works (§2.A). National differences in funding schemes are likely to

trigger different answers in different EU jurisdictions. This paper uses the UK situation and, more specifically, the case of English universities as a case study to discuss the position of universities as contracting authorities. In doing so it aims to assess whether, as has already been suggested by the UK's Department of Business, Innovation and Skills (BIS)[3], on-going changes in funding for English universities can actually allow them to lose their condition of 'contracting authorities' and, ultimately, stop being bound by EU public procurement rules—particularly due to the increasing importance of tuition fees, the lift in student number controls and the pressure for universities to raise other sorts of commercial revenue. This is an issue open to discussion because the latest analysis of the universities' condition of contracting authorities by the Court of Justice of the European Union (CJEU) in *University of Cambridge*[4] did not take into account any of these recent trends in university financing in England. It will be clear that the analysis ultimately relies on an assessment of whether tuition fees are 'state funds' or not, as well as on their relative importance vis-à-vis other sources of public and private funding. The former becomes more unclear where a system of student loans is operated that does not necessarily function in commercial terms, as is the case with the English Student Loans Company (SLC). This triggers a related discussion on whether the State is deemed to control the funds administered by such arms-length (private) student loans organisations, which is another hotly disputed area of EU economic law; in this case, State aid (§2.B).

[3] See J Beresford-Jones, "Removal of cap on student numbers - will this affect universities' status as "contracting authorities"?", 1 July 2015, *Procurement Portal*, available at http://www.procurementportal.com/blog/blog.aspx?entry=464&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+procurementportal%2Fblogfeed+%28Mills+%26+Reeve%3A+Procurement+Portal+blog%29 (last accessed July 3, 2015). This issue has been in the political agenda for quite some time now. See A Albert, "Universities to be exempt from EU public procurement rules", 5 October 2011, *Supply Management*, available at http://www.supplymanagement.com/news/2011/universities-to-be-exempt-from-eu-public-procurement-rules#sthash.YfveQGXu.dpuf (last accessed September 3, 2015).

[4] Judgment of 3 October 2000 in *University of Cambridge*, C-380/98, EU:C:2000:529.

In the second part, the paper explores the position of universities as providers of services, or sellers (§3). Here the traditional position has been to consider that universities can provide a significant volume of services to the State, or to the general public, without having to comply with procurement requirements; ie that the State can directly mandate universities to conduct teaching and research activities, as well as award them specific types of R&D contracts excluded from the procurement Directives. However, recent developments might cast doubt on the continued validity of this traditional position. The new Framework for State Aid for Research and Development[5] makes it clear that research which constitutes an economic activity has to be commissioned by means of a (quasi) procurement exercise in most cases. Directive 2014/24 equally contains specific provisions about how and when teaching and research needs to be procured. Thus, accepting the exclusion of university services from procurement requirements as a rule of thumb is increasingly open to legal challenge. At the same time, the possibility to regulate some or all university activities as either social services of general interest (SSGI) or services of general economic interest (SGEI) also creates complexity. This part of the paper thus assesses to what extent the commissioning of education and research services to universities needs to be subjected to procurement requirements (§3.A). It also looks at the application of State aid rules to the commissioning of these services when procurement is not required (§3.B).

Finally, the paper stresses how even in those cases where, generally, public procurement would need to take place and bind the university as either a buyer or a seller, there are still exemptions for public-public cooperation or in-house arrangements that universities may try to benefit from (§4). These could respectively shield universities from competition by non-public and commercial providers when they are sellers, as well as allow them to avoid a public procurement procedure when they are buyers. For these exceptions to apply, there needs to be an element of control of the providing entity by the contracting

[5] Commission Communication 'Framework for State aid for research and development and innovation' OJ [2014] C 198/01 (hereinafter referred to as new Research Framework).

authority. Thus, certain organisational decisions (such as university spin-offs of revenue-making units) could provide a secondary opportunity for universities to avoid direct compliance with EU public procurement rules when acquiring goods or services from affiliated entities by means of public-public cooperation or in-house arrangements (§4.A). Differently, in the case of universities as providers and in view of their inherent *autonomy*, establishing control by other public sector entities interested in commissioning their services is a difficult task. Indeed, a literal interpretation of the recent *Datenlotsen*[6] case might give the impression that control cannot be present in the university-state relationship, which would bar the use of in-house or public-public exemptions when universities act as providers. However, Directive 2014/24 explicitly allows non-market arrangements previously rejected by the CJEU (such as horizontal in-house situations) and there are indications that the control requirement may have been relaxed. The question therefore arises how these developments in the regulation of public-public and in-house exceptions in Article 12 of Directive 2014/24 relate to the *Datenlotsen* Judgment and, more generally, to what extent the CJEU will be willing to ring-fence procurement in favour of university providers (§4.B).

The conclusions of the paper (§5) recapitulate our findings on the extent to which and the conditions under which universities are bound by EU public procurement rules as either buyers or providers.

[6] Judgment of 8 May 2014 in *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303.

2. UNIVERSITIES AS BUYERS

From an EU law perspective, a university's obligation to comply with the public procurement rules of Directive 2014/24[7] crucially depends on its inclusion within the scope of coverage of the Directive[8]. Some English universities consider themselves bound to comply with EU public procurement rules[9], while others do not[10], and yet others have procurement processes in place that may well be compliant with the EU rules but do not clarify whether the university considers itself obliged to follow them[11]. This seems to

[7] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

[8] For a general overview, see S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 339-383. See also A Semple, *A Practical Guide to Public Procurement* (Oxford, OUP, 2015) 2-3.

[9] For example Durham, Bristol and Sussex. This list is not meant to be exhaustive, but simply a small selection of clear cases. See Durham University Procurement Policy, *Guide to EU Public Procurement Directive* (undated), available at https://www.dur.ac.uk/procurement/procurement_policy/8euregulations/ (last accessed September 3, 2015). University of Bristol, Procurement Policy (August 2015) *on file with authors*. Slightly outdated, but this is also clear in the policy followed by the University of Sussex Procurement Office (undated), available at http://www.sussex.ac.uk/procurement/documentsandpolicies/buyersguideandorderingprocedures/euregulationswhentheybecomeapplicable (last accessed September 3, 2015).

[10] For example Cambridge. See University of Cambridge, Finance Division, Procurement Services, *The EU Directives on Public Procurement* (EU Guide v 3d May 2015), available at https://www.admin.cam.ac.uk/offices/purchasing/guides/eu_guide.pdf (last accessed September 3, 2015).

[11] For example Oxford. See University of Oxford, Council Regulations 1 of 2010, *Financial Regulations, made by Council on 21 June 2010* (Supplement 1 to Gazette, No. 4923, 25 June 2010). Last amended on 10 April 2015 (Gazette, Vol. 145, pp. 447-449, 26 March 2015), available at http://www.admin.ox.ac.uk/statutes/regulations/101-078.shtml (last accessed September 3, 2015).

derive from legal uncertainty as to the actual scope of coverage of the EU rules—which carries on to the domestic Public Contracts Regulations 2015 that transpose them[12]. Of course, universities can always decide to comply with the EU public procurement rules voluntarily and some of them do[13]. However, from the perspective of legal certainty, it is important to clarify when universities are actually under a duty to comply with EU public procurement rules. Not only to open up possibilities for alternative procurement practices where they are not actually bound by the EU rules, but also to clarify the situation of university purchasing consortia that are accumulating more and more purchasing volume[14], and which obligation to comply with EU rules may well be derived from that of the universities themselves[15]. Therefore, assessing the actual extent of the obligation to comply with EU public procurement rules by universities—either directly or through university purchasing consortia—can contribute to increasing legal certainty in this important area of public sector expenditure, widely defined. This is the purpose of this section.

An obligation to comply with the rules in Directive 2014/24 can result from two different situations. Firstly, the obligation can derive from the classification of universities

[12] The Public Contracts Regulations 2015 (SI 2015/102), available at http://www.legislation.gov.uk/uksi/2015/102/contents/made (last accessed September 3, 2015).

[13] This is the case of the University of Cambridge, maybe as a result of its previous litigation, since it was involved in the case that led to the Judgment in *University of Cambridge*, C-380/98, EU:C:2000:529, which is discussed below.

[14] It may be worth noting that there are four regional educational purchasing consortia in England: London; LUPC – London Universities Purchasing Consortium (http://www.lupc.ac.uk/); North East; NEUPC – North-eastern Universities Purchasing Consortium (http://www.neupc.ac.uk/); North West; NWUPC – North-western Universities Purchasing Consortium (http://www.nwupc.ac.uk/); and South; SUPC – Southern Universities Purchasing Consortium (http://www.supc.ac.uk/).

[15] This would ensue from Art 2(1)(1) of Directive 2014/24 whereby 'contracting authorities' includes associations formed by one or more bodies governed by public law. Any eventual *primary* obligation of such purchasing consortia to comply with EU rules is not assessed, as it would exceed the possibilities of this paper.

as 'contracting authorities' in nature in terms of Article 2(1)(2) of Directive 2014/24, which would be the case were universities are formally a State authority[16]. This is an issue left to the Member States' internal organisational autonomy and operates on the basis of a closed list that rarely includes universities amongst State authorities. Thus, this situation will not be discussed in any further detail.

Second, and more crucially, universities can be bound to comply with EU public procurement rules due to the origin of their funding. There are two situations that trigger coverage by funding, which in turn refer to either structural or sporadic receipt of state funds. Structural receipt of state funds can lead to the classification of a university as a 'body governed by public law' under Article 2(1)(4) of Directive 2014/24 where the public funds are the major source of university funding (below §2.A). Sporadic receipt of public funds also triggers compliance with EU public procurement rules if they cover most of the cost of specific contracts involving works for university buildings, or supplies or services connected therewith as per Article 13 of Directive 2014/24. However, this is a rather residual issue in practice and, in any case, it is not within the core issues affecting universities' general obligation to comply with the EU public procurement rules. Hence, this is also not discussed in any further detail.

The remainder of this section thus explores universities' coverage by funding as a trigger for their obligation to comply with EU public procurement rules as bodies governed by public law (below §2.A), putting a special emphasis on the specificities of university funding in England, where the Government operates a semi-privatised system of student loans that complicates the assessment of the nature of the funds (below §2.B).

[16] However, this is the case of France, Greece and Sweden, which have designated their universities as central government authorities in Annex I of Directive 2014/24. Please note that the Annex is in the original language of each of the Member States, which complicates the identification of inclusion of universities named in foreign languages that the authors do not know.

2.A. Coverage by structural funding: English universities as bodies governed by public law.

As mentioned above, universities can be included in the scope of coverage of Directive 2014/24 if they can be classified as 'bodies governed by public law'. Article 2(1)(4) of Directive 2014/24 sets out three conditions that need to be met cumulatively for a university to match the definition: (a) it must be established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) it must have legal personality; and (c) it must be financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or be subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law[17].

These conditions were discussed explicitly in relation to English universities by the CJEU in the *University of Cambridge* case[18]. There was no doubt that the first two conditions were met, and the assessment of the university status as a body governed by public law depended on whether it was *'"financed for the most part" by one or more contracting authorities within the meaning of the third indent of that provision'*[19]. In that regard, the CJEU stressed that *'[o]nly payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as "public financing"'*[20]. The CJEU considered that both (i) awards or grants

[17] For an analysis of the issue of control over universities, see below §4.B, where the difficulties derived from university autonomy regulations are assessed in detail.

[18] *University of Cambridge*, EU:C:2000:529, *in totum*.

[19] Ibid, para 19.

[20] Ibid, para 21.

paid by one or more contracting authorities for the support of research work and (ii) student grants paid by local education authorities to universities in respect of tuition for named students constituted 'public funding' for these purposes[21]. The Court also clarified that 'financed for the most part' means 'more than half'[22], so that universities need to receive more than 50% of their total funding from the State for them to meet this condition. To that effect, the CJEU ruled that *'in order to determine correctly the percentage of public financing … account must be taken of all … income, including that which results from a commercial activity*[23]*.'* In short, then, if a university receives more than 50% of its total income from the State by means of awards or grants related to research and teaching activities not paid as consideration for specific research or other services provided to the funding authority or authorities, then it is a body governed by public law and bound to comply with the rules of Directive 2014/24.

Thus, the current state of the law would seem to leave limited space for doubt as to the classification of English universities as bodies governed by public law, which would depend on a relatively straightforward analysis of their financial statements. However, cumulative changes in the way in which universities receive funding, particularly for their teaching activities, have blurred the legal test initially adopted by the CJEU in *University of Cambridge*. The introduction of a new system of student fees backed up by a semi-privatised scheme of student loans creates uncertainty as to the origin and nature of the tuition fees that English universities now receive from their students. Crucially, the introduction of the tuition fees was not part of the analysis in the *University of Cambridge* case because, even if it was decided in 2000, the CJEU only took into account the request for a preliminary reference issued in July 1998 by the High Court of Justice of England and

[21] Ibid, paras 22-23 and 26.

[22] Ibid, para 33.

[23] Ibid, para 36.

Wales, Queen's Bench Division (Divisional Court)[24]. This leaves the reform of English university financing in need of a fresh legal assessment. We now turn to the basic elements of the current system, and try to reconcile it with the principles for the classification of funding as public or private for the purposes of EU public procurement law under the *University of Cambridge* test.

Tuition fees were first introduced in 1997 to compensate for shortfalls in strictly public support for English universities' teaching activities and were legally enacted by means of the *Teaching and Higher Education Act 1998*[25]. The fees started at £1,000 per year in academic year 1998-99 and were then trebled in 2006 and again in 2012, to the current cap of £9,000[26]. Their overall importance in university funding has thus been quantitatively increasing[27], and English universities depend more and more on this source of income[28]. This trend is likely to continue in the future, particularly in view of the current

[24] *University of Cambridge*, EU:C:2000:529, para 1.

[25] SI 1998/30.

[26] For a critical overview, see J Ball, 'Explained: how is it possible to triple tuition fees and raise no extra cash?', 21 March 2014, *The Guardian*, available at http://www.theguardian.com/news/datablog/2014/mar/21/explained-triple-tuition-fees-no-extra-cash (last accessed September 3, 2015).

[27] Interestingly, in 2011-12 (i.e. before the last raise in the applicable cap), undergraduate student fee income varied between 0 and 37% of universities' total income; see Universities UK, *Where student fees go*, available at http://www.universitiesuk.ac.uk/highereducation/Documents/2013/WhereStudentFeesGo.pdf (last accessed September 3, 2015).

[28] This dependence was very clear in the reaction by Universities UK to the Labour proposal to reduce the fee cap from £9,000 to £6,000 during the 2015 general election campaign. Universities UK estimated at £10 billion the need for additional public support that would result from such a reduction of the fee cap. See 'Universities UK board highlights concerns with £6,000 tuition fees proposal', 2 February 2015, available at http://www.universitiesuk.ac.uk/highereducation/Pages/UUKboardFeesLetter.aspx#.VehnOflVhBc (last accessed September 3, 2015).

plans to lift the cap on fees[29], at least for universities that *'can show they offer high-quality teaching'*[30], as well as the suppression of the student number control that existed until academic year 2015-16[31]. Thus, tuition fees as a major source of income are likely to grow to become quantitatively the largest funding stream for English universities, or at least for the largest majority of them, and will in any case remain a key income stream across the sector. However, the qualitative nature of this source of funding is changing in a way that creates some analytical complications concerning their classification as public or private funding.

Tuition fees are formally paid by students and could be considered a source of private funding or income for universities. However, the UK Government has created a semi-privatised system of student loans which makes the assessment not so straightforward[32]. The Department of Business, Innovation and Skills (BIS)—together with

[29] Although there is some uncertainty about this. See F Perraudin, 'Universities minister doesn't rule out raising tuition fees', 30 June 2015, *The Guardian*, available at http://www.theguardian.com/education/2015/jun/30/universities-minister-doesnt-rule-out-raising-tuition-fees (last accessed September 3, 2015).

[30] J Morgan, 'Budget 2015: fees can rise for universities with "high-quality teaching"', 8 July 2015, *Times Higher Education*, available at https://www.timeshighereducation.co.uk/news/osborne-signals-rise-9k-fee-cap-tef (last accessed September 3, 2015).

[31] See N Hillman, *A Guide to the Removal of Student Number Controls* (2014) Higher Education Policy Institute Report 69, available at http://www.hepi.ac.uk/wp-content/uploads/2014/09/Clean-copy-of-SNC-paper.pdf (last accessed September 3, 2015).

[32] There were plans for its full privatisation, but these seem to have been abandoned. See A Chakrabortty, 'Student loans: not even Cameron could privatise the unprivatisable', 22 July 2014, *The Guardian*, available at http://www.theguardian.com/commentisfree/2014/jul/22/student-loans-cameron-privatise-sale (last accessed September 3, 2015). However, rumours of reinvigorated attempts to at least sell part of the loan portfolio are recurring; O Williams-Grut, 'The Tories are resurrecting plans to privatise a big chunk of Britain's student loans', 21 May 2015, *Business Insider UK*, available at http://uk.businessinsider.com/chancellor-george-osborne-to-sell-off-1998-2012-student-loan-book-now-vince-cable-gone-2015-5 (last accessed September 3, 2015).

the Scottish Ministers, the Welsh Assembly Government and the Department for Employment and Learning in Northern Ireland—owns *The Student Loans Company* (SLC) [33], which adopts the form of an Executive Non-Departmental Public Body (NDPB)[34], is entirely Government-funded[35] and not-for-profit, and the appointment of the members of its Board are made by the shareholders directly (ie by the BIS and other State authorities). So there is no doubt that it constitutes a body governed by public law (see discussion above). Its creation as a NDPB is meant to allow for its operation as a *'body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers'*[36]. Moreover, its executive status means that, amongst other things, the SLC is able to make decisions in an autonomous way, enter into contracts and own assets and dispose of them[37]. Therefore, the SLC is a body governed by public law that manages public funds in a rather independent fashion in terms of specific decisions whether to lend or not money to specific applicants. However, it also has very limited autonomy in the way it adopts its non-

[33] http://www.slc.co.uk/about-us/remit.aspx (last accessed September 3, 2015).

[34] For background, see https://www.gov.uk/guidance/public-bodies-reform (last accessed September 3, 2015).

[35] It received £154 million in 2013-14; see Cabinet Office, 'Public bodies 2014: data directory', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387313/Annex_B_-_Public_bodies_2014_Data_Directory_PDF.pdf (last accessed September 3, 2015). However, the SLC pays £5.9 billion to higher and further education providers yearly and manages a loan book with a value of £62 billion; Student Loans Company, *Corporate and Business Plan FY14-15 to FY16-17* (2015) 5, available at http://www.slc.co.uk/media/3435/corporate_and_business_plan_fy14-15.pdf (last accessed September 3, 2015).

[36] Cabinet Office, *Public Bodies: A Guide for Departments*, 2006, available at http://www.civilservice.gov.uk/wp-content/uploads/2011/09/2_policy_Characteristics-word_tcm6-3410.doc (last accessed September 3, 2015).

[37] M Treasury, *Classification of Expenditure Public and Private Sectors: New Bodies, Partnerships, Joint Ventures, Privatisation and Nationalisation*, November 2000, available at http://www.wga.gov.uk/pages/classification.html (last accessed September 3, 2015).

commercial decisions (see below §2.B for further details)[38]. *The fact that the SLC pays tuition fees directly to universities on behalf of students complicates the simple assessment that such fees are paid by the students*. This is a key issue for the purposes of our discussion because classifying tuition fees as private income for universities would potentially bring public funding below the 50% threshold that triggers the obligation to comply with the EU public procurement rules. Thus, a detailed analysis is carried out in the following subsection.

2.B. Key issue: are student fees financed through student loans state resources?

The previous discussion stressed how the CJEU interprets "public funding" as inclusive of student grants paid by local education authorities to universities in respect of tuition for named students[39]. The question is whether the same reasoning applies to tuition fees paid directly by the SLC to universities on behalf of named students. A quick answer could be that it simply does[40]. However, determining the nature of this source of university income may be complicated if we take into account that the university sets its tuition fee level regardless of the actual student's access to finance. That is, the university expects the same fee regardless of the student opting to pay for it directly or with an SLC loan, or any other financial facility. Moreover, lack of payment by the SLC to the university would not

[38] The criteria for such decisions are, indeed, set by the Government. See Cabinet Office, Student Finance, available at https://www.gov.uk/student-finance (last accessed September 3, 2015).

[39] *University of Cambridge*, EU:C:2000:529, paras 23 and 26.

[40] Clearly supporting this position, see Beresford-Jones (n 3), who stressed that 'the increasing sum being paid through tuition fees funded via the SLC is unlikely to assist universities to wriggle free of the public procurement regime'.

necessarily exempt the student from having to pay the tuition fees, or else see its registration terminated—although universities have implemented temporary loan schemes to try to avoid this. Consequently, the main 'funding' relationship is that between each student and the university it chooses to enrol in, and the SLC could be seen as a 'mere' intermediary or an agent for the student. The fact that the student has at least a *residual obligation* to pay the tuition fee to the university may have changed the nature of the funding received by English universities. Thus, this issue seems to merit some closer scrutiny.

EU public procurement rules and the interpreting case law of the CJEU have not developed the criteria to distinguish between private and public funding any further than in *University of Cambridge*. However, functionally equivalent criteria are clearly developed in the neighbouring area of EU State aid law, where the imputability of an aid measure to the State—or, in simpler terms, the existence of 'public funding' *lato sensu*—is a key jurisdictional requirement to apply the prohibition in Article 107(1) TFEU[41]. We submit that the same criteria can be used for the analysis of the private or public nature of the tuition fees paid by the SLC directly to English universities.

In that regard, it is interesting to stress that the CJEU has been developing a growing body of case law concerned with the assessment of the public or private nature of the funds managed by arm's length entities and not-for-profit associations. There are two 2013 cases particularly relevant for our discussion, which set conditions and requirements at two different levels. At a general level, the CJEU has clarified that the key element to determine whether specific funds are 'public' or, technically, 'State resources' is to focus on the control over those funds[42]. Indeed,

[41] See the *Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*, available at http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf (last accessed September 3, 2015).

[42] Judgment of 19 December 2013 in *Vent De Colère and Others*, C-262/12, EU:C:2013:851.

The concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid ...

even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources[43].

In that regard, the fact that BIS controls the SLC and could at any point in time reduce or even withdraw the grant aid support it provides for its subsequent payment to higher education institutions[44] is a very strong indication that the creation of such arm's length entity does not suffice to 'privatise' the funds made available to universities through the direct payment of the corresponding tuition fees by SLC on behalf of the students. Indeed, the difficult issue regarding State control of the funds in this setting derives from the direct payment SLC makes to universities because students are never in possession or control of the funds, so there is no risk that students will dedicate their loans to anything different than paying the tuition fees (and this is, most likely, the precise goal of the direct payment mechanism). If the loans were paid to students and they then paid the fees on to the university, given that the State would have lost control of the use of the funds, this could change the analysis. Of course, if students were contractually obliged to use the funds exclusively to pay the tuition fees and that was effectively monitored, the situation would be in a grey area and a discussion on the intensity of that control could ensue. However, under the current design of the SLC loans and for so long as the SLC pays tuition fees to

[43] Ibid, paras 20-21, references omitted.

[44] This has been the case of further education; L Okolosie. 'Adult education is being slashed and burned – this is too important to ignore', 26 March 215, *The Guardian*, available at http://www.theguardian.com/commentisfree/2015/mar/26/adult-education-funding-cuts (last accessed September 3, 2015).

universities directly and on behalf of the students, there seems to be little scope to challenge that those funds remain under public control at all times.

It is also important to stress that, in determining whether the funds actually managed by the arm's length entity are available to the competent national authorities, the CJEU has paid particular attention to whether the decisions are adopted independently from Government or not. The Court found that such was not the case where the *'organisation … decides how to use those resources, which are entirely dedicated to pursuing objectives determined by that organisation'*[45]. As mentioned above, the SLC actually has very limited discretion concerning the use of the resources made available to it, particularly because the conditions for the entitlement to a student loan—and especially a tuition fee loan—are predetermined by the Government. Thus, public control of the funds made available to SLC operates at two levels: firstly, in terms of the total volume of funding made available (or not) to SLC and, secondly, in terms of the conditions in which that funding can be used to provide student financial support.

Further, at a more specific level, the CJEU has also clarified that there has to be a minimum exercise of 'State prerogatives' by the arm's length institution for the funding it manages to remain 'public'. Or, *a contrario*, that the possibility of exercising 'State prerogatives' taints the funding with a clear public shade. Indeed, in considering that a specific intervention did not constitute public funding, the Court stressed that

> *That mechanism does not involve any direct or indirect transfer of State resources, the sums provided … do not go through the State budget or through another public body and the State does not relinquish any resources, in whatever form (such as taxes, duties, charges and so on), which, under national legislation, should have been paid into the State budget. The contributions remain private in nature throughout their lifecycle and, in order*

[45] Judgment in *Doux Élevages and Coopérative agricole UKL-AREE*, C-677/11, EU:C:2013:348, para 37.

to collect those contributions in the event of non-payment, the … organisation must follow the normal civil or commercial judicial process, not having any State prerogatives[46].

This is not the case of the SLC, particularly when it comes to the recovery of the student loans. The SLC has the possibility of benefitting from the State prerogatives linked to the collection of taxes and, as a matter of general design, student loans are repaid through salary withholdings by employers[47]. Regardless of the poor practical results of this strategy[48], it is clearly not an *inter privatos* or commercial mechanism. Moreover, student loans are subjected to a final age-based write-off[49], and other types of condonation conditions that are resulting in a large volume never being repaid[50], which is yet another clear indication of the public nature of the funds because the consequences of such write-offs and any other failure to recover the loans ultimately hits the public purse[51], and not the universities' balance sheets.

[46] Ibid, para 32.

[47] See HM Revenue & Customs, *An Employer's Guide to the Collection of Student Loans* (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276347/E17_2014_.pdf (last accessed September 3, 2015).

[48] R L Cosslett, 'No wonder people aren't paying back their student loans', 28 November 2013, *The Guardian*, http://www.theguardian.com/commentisfree/2013/nov/28/paying-back-student-loans (last accessed September 3, 2015).

[49] http://www.slc.co.uk/services/loan-repayment/loan-cancellation.aspx (last accessed September 3, 2015).

[50] S Mali, 'Student fees policy likely to cost more than the system it replaced', 21 March 2014, *The Guardian*, available at http://www.theguardian.com/education/2014/mar/21/student-fees-policy-costing-more (last accessed September 3, 2015).

[51] R Syal, 'Up to 40% of new student loans may never be repaid', 11 December 2013, *The Guardian*, available at http://www.theguardian.com/education/2013/dec/11/student-loans-may-never-be-repaid (last accessed September 3, 2015). R Garner, 'Tuition fees: Three quarters of students won't be able to pay off their debt', 18 November

For all these reasons, it seems clear that the changes introduced in the way English universities receive funds for their teaching activities has not qualitatively changed in a way capable of eroding their condition of "public funding" for the purposes of their inclusion in the scope of coverage of the EU public procurement rules as bodies governed by public law under the *University of Cambridge* test.

Incidentally, thus, this source of funding should also be considered public funding when the recipients are not traditional universities, but alternative and private providers of higher education services, which now benefit from the scheme of student loans[52]. In these cases, then, the status quo could change if the percentage of fees paid through SLC-backed student loans exceeds 50% of their total revenue, in which case the rest of the conditions for their classification as bodies governed by public law would require reassessing (above). The key point in that case would be to determine whether commercial and alternative providers funded in more than 50% through student loans as described above could be considered to have been established *'for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'*. This seems highly unlikely for commercial providers, but cannot be automatically discarded for other alternative providers of higher education. If the situation arose where non-commercial alternative providers funded in more than 50% by student loans could operate without complying with procurement rules while 'traditional' universities are bound by those rules,

2014, *The Independent*, available at http://www.independent.co.uk/news/education/higher/tuition-fees-three-quarters-of-students-wont-be-able-to-pay-off-their-debt-9866446.html (last accessed September 3, 2015).

[52] See 'Watchdog called in on private college use of student loans', 22 May 2014, *Times Higher Education*, available at https://www.timeshighereducation.com/news/watchdog-called-in-on-private-college-use-of-student-loans/2013526.article, and the ensuing National Audit Office, *Investigation into financial support for students at alternative higher education providers*, HC 861 Session 2014-15, 2 December 2014, available at http://www.nao.org.uk/wp-content/uploads/2014/12/Investigation-into-financial-support-for-students-at-alternative-higher-education-providers.pdf (both last accessed October 5, 2015). See also C Cook, 'Huge growth in private students taking state loans', 26 January 2015, *BBC News*, available at http://www.bbc.co.uk/news/uk-politics-30988416 (last accessed October 5, 2015).

a difficult issue of level playing field could arise. In those circumstances, the creation of an 'exposure to market competition' exception to compliance with public procurement rules could be desirable—as has been always recognised under the utilities procurement regime[53]. However, these considerations exceed the possibilities of this paper and will, consequently, not be explored any further.

2.C. Preliminary conclusion

The discussion in the first part of this paper has shown how English universities are very unlikely to free themselves from the obligation to comply with EU public procurement rules as buyers, even if their dependence on student loan-backed tuition fees continues to increase in the future and becomes the largest source of income for these higher education institutions. Only a significant reform of the way in which the SLC is controlled and funded, or in the way in which loans are paid out, would alter this situation, which at present seems unlikely. Consequently, for as long as the main source of revenue continues to originate—directly or indirectly—in the general budget, English universities will remain bound to comply with these rules. This case study could be useful in other EU Member States currently considering a reform of the way in which their universities and higher education institutions are funded and, generally, seems to indicate that universities will structurally remain within the scope of coverage of the EU public procurement rules unless they become institutions with major commercial or private revenue streams. If universities' activities were to be classified as themselves having to be procured from them by the state, this would constitute such a commercial revenue stream. In how far this could be the case will be the topic of the next section.

[53] Article 34 of 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

3. UNIVERSITIES AS PROVIDERS

In this second part of the paper we will explore the position of universities as providers of public services, broadly defined. First, continuing with the case study of universities in England, we will assess in which cases public procurement needs to take place when universities provide public services to the State (§3.A) in the form of tuition of higher education students or research services. Regarding higher education tuition in England, it is worth stressing that, despite the fact that students pay tuition fees (most of them indirectly, through SLC-backed student loans, see above §2.B), the State directly tops-up university funds by means of teaching-related funding that is made available to universities through grants of the *Higher Education Funding Council for England* (HEFCE)[54]. Thus, there is a first question to be addressed in determining whether the granting of such funding to universities is in strict consideration for those educational services, which should thus require a tendering exercise under the EU public procurement rules. Or, in other words, it requires clarifying whether the State (through HEFCE) enters into public contracts for the provision of higher education services with the universities in such a way as to trigger compliance with the EU public procurement rules or not (§3.A.I). A similar issue arises concerning the general funding that HEFCE makes available for 'quality-related research' developed by English universities, in particular under the Research Excellence Framework (REF)[55]. Such general (public) research services will be distinguished from the provision of commercial or economic research services to the public sector, which will trigger different public procurement treatment (§3.A.II). Given that

[54] HEFCE, *How teaching is funded*, available at http://www.hefce.ac.uk/lt/howfund/ (last accessed October 15, 2015).

[55] HEFCE, *How we fund research*, available at http://www.hefce.ac.uk/rsrch/funding/ (last accessed October 15, 2015).

procurement rules will not always be applicable or, where applicable, will not necessarily exclude the granting of an economic advantage to English universities, the analysis in this part of the paper will also extend to the assessment of the funding linked to the provision of education and some research-related services from a State aid perspective (§3.B).

3.A. When does public procurement need to take place?

It is worth highlighting from the outset that *'there is a basic tension between the freedom of Member States to identify public services and designate undertakings as responsible for carrying out public service obligations and requirements that in doing so they must respect the public procurement rules'*[56]. This tension is reflected in the question 'when do public procurement rules apply to the commissioning of services provided by universities?', which is not easy to answer.

Directive 2014/24 applies only to public contracts[57]. Public contracts are defined by Article 2(1)(5) of Directive 2014/24 as *'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'*. As an important requirement under the definition, the commissioning body needs to be a contracting authority. Unlike the scenarios discussed above where the universities are the buyers (§2), it is clear that when they are the providers of educational and research services, the State as the buyer is a contracting authority (Article 2(1)(1)). There is no

[56] W Sauter, *Public Services in EU Law* (Cambridge, CUP, 2015) 163.

[57] Or, in terms of its Article 1(1) it establishes rules on the procedures for procurement by contracting authorities with respect to public contracts.

question either that, if they are providing economic teaching and research services[58], universities can qualify as economic operators under the definition in Article 2(1)(10) of Directive 2014/24, whereby an economic operator is an entity offering goods, services or supplies on a market. As stressed in Recital 14 of the same Directive:

> *'It should be clarified that the notion of 'economic operators' should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, […], universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances.'* [59]

It is also clear that the definition of public contracts does not require providers to make a profit, and that a pecuniary interest for the purposes of the definition under Article 2(1)(5) can amount to the reimbursement of costs[60]. Thus, the existence of a written contract (or a 'contract concluded in writing') becomes the key issue in the assessment of whether the funding made available by HEFCE to English universities fits the definition of a public contract so that the commissioning of services to universities is covered by the EU public procurement rules[61]. Given that Member States have the possibility to mandate and

[58] This is related to the question whether or not an economic activity is taking place to which we will get back to below at the end of this section.

[59] Emphasis added.

[60] Judgment of 19 December 2012 in *Ordine degli Ingegneri della Provincia di Lecce*, C-159/11, EU:C:2012:817, para 29. See further Arrowsmith (n 8) 394-397, and Semple (n 8) para 1.03

[61] We will discuss this here for generic funding provided by HEFCE for teaching and research as the most unclear area of public funding provision. In other areas of research funding (e.g. through the research councils or government departments) the existence of some form of written contract can generally be assumed which makes this criterion more clear cut.

support the provision of this type of services without entering into written contracts, for instance, by simply creating regulatory regimes that achieve the same result, this is a point that deserves careful consideration. Indeed, as Recital 114 of Directive 2014/24 states

Member States and public authorities remain free to […] organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Thus, where the provision of such social services[62] does not rely on a contract-based method of delivery and management, public procurement rules will not apply. Ultimately, then, it is necessary to determine whether HEFCE's financial support entails the 'mere financing of such services' and is therefore not covered by the procurement rules or, conversely, it takes place within the framework of a public contract and, by implication,

[62] We use the expression 'social services' in a broad way, to refer both to social services of general interest (SSGI) and services of general economic interest (SGEI), so as to cover all possibilities. Strictly speaking, procurement rules will generally not apply to SSGI that are non-economic in nature because some of the conditions in the definition of public contract will not be met. Moreover, distinguishing whether an activity is an SSGI or an SGEI will sometimes require assessments that already involve a consideration of how the services are commissioned, which could render some tests circular. Furthermore, as discussed below (n 75), Directive 2014/24 uses all these terms in a rather confusing manner without that resulting in a different legal regime as far as procurement rules and requirements are concerned. Thus, for our purposes, social services is an all-encompassing category, and it explicitly covers higher education, despite the fact that Directive 2014/24 sometimes uses the expression special services to refer to education. Generally, on these conceptual complications, see U Neergaard, 'The Concept of SSGIs and the Asymmetries between Free Movement and Competition Law', in U Neergaard et al (eds), *Social Services of General Interest in the EU* (The Hague, TMC Asser, 2013); U Neergaard, 'Services of general economic interest: the nature of the beast', in M Krajewski, U Neergaard and J van de Gronden (eds), *The Changing Legal Framework for Services of General Economic Interest* (The Hague, TMC Asser, 2009); and GS Ølykke and P Møllgaard, 'What is a service of general economic interest?' (2013) *European Journal of Law and Economics* 1-37.

needs to be subjected to such rules. As we discuss in this section, answering this question is not straightforward, particularly when services are provided under complex regulatory schemes such as the funding system in place for English higher education institutions.

In the recent *Libert* Judgment[63], the CJEU offered some guidance as to the interpretation of the written contract requirement in scenarios where the provision of the public service does not necessarily derive from a unique and complete single written contract between the contracting authority and the supplier, but from an interplay of contractual and regulatory obligations[64]. The dispute concerned the obligation to submit the development of social housing to public procurement. The Belgian State had not been tendering contracts for social housing because the obligation to market a specified proportion of homes through social housing organisations in advantageous terms to predefined social groups was created by a general law. The question was whether the inexistence of a single direct contractual relationship between the developers and the Belgian authorities excluded compliance with EU procurement rules. The CJEU found that these circumstances did not preclude the possibility of the existence of a contract between the authorities and the developer in question for the purposes of the application of the procurement rules. However, the CJEU did hint that for such contract to exist, it had to '*regulate the relationship between the contracting authority and the economic operator concerned [… and] the development of social housing units [rather than] the next stage which entails placing them on the market'*. The determination of *'whether the development of social housing units […was] within the framework of a contractual relationship between a contracting authority and an economic operator'* was left to the domestic court[65].

[63] Judgment of 8 May 2013 in *Libert and Others*, C-197/11, EU:C:2013:288.

[64] The latter was also partially discussed in the Judgment of in *Asociación Nacional de Empresas Forestales (Asemfo)*, C-295/05, EU:C:2007:227, where the CJEU took into consideration that the non-commercial terms of the acts of entrustment to the in-house entity were determined by law. For analysis, see Arrowsmith (n 8) 391-392.

[65] See *Libert*, C-197/11, EU:C:2013:288, at paras 112 to 115.

Mutatis mutandi, we submit that determining whether the provision of the (public) services of higher education and university research is subjected to the EU public procurement rules depends on the assessment of whether such activities take place 'within the framework of a contractual relationship' between HEFCE and each of the English universities it funds. This will be particularly relevant because the absence of a contractual relationship—understood as one where the funding is provided in exchange or in consideration for the provision of specific services under predetermined conditions—would exclude HEFCE's grants from any tendering obligation whatsoever. Thus, assessing to what extent the funding is tied to specific conditions that make the relationship acquire a 'contractual nature' is crucial for our purposes.

In this regard, it is important to stress that the funding HEFCE provides is instrumented through 'funding agreements', which HEFCE itself defines in the following terms:

> *The annual funding agreement between HEFCE and the institutions it funds sets out the recurrent grant allocated for the year, the circumstances under which that grant may be adjusted, and* ***particular terms and conditions associated with it. These include, for example, any requirements relating to student numbers and to comply with regulated tuition fee limits and access agreements****. For publicly funded higher education institutions, the funding agreement is part two of the Memorandum of Assurance and Accountability*[66].

Such a Memorandum of Assurance and Accountability between HEFCE and Institutions is subtitled 'Terms and conditions for payment of HEFCE grants to higher education institutions' and, in our view, could be regarded as the basis of the contractual relationship between HEFCE and the publicly funded higher education institutions because, as the document itself clarifies:

[66] HEFCE, *Glossary*, available at http://www.hefce.ac.uk/glossary/#letterF (last accessed October 15, 2015). Emphasis added.

The memorandum of assurance and accountability between HEFCE and the institutions we fund sets out the terms and conditions for payment of HEFCE grants. This memorandum should be read in conjunction with the 'funding agreement' for each institution, which gives ***specific conditions, funds available and educational provision agreed in return for those funds***[67].

Assessing the content of such 'specific conditions' is quite difficult because they are not public. However, in its general guidance, HEFCE indicates that

Terms and conditions set out in the funding agreement include, for example, requirements to: make certain data returns, including those that inform our allocations or that are used for public information purposes, such as the KIS; comply with regulated tuition fee limits and any access agreement with the Office for Fair Access; provide or update a strategic statement about widening participation and make annual monitoring returns; comply with the Quality Assurance Agency for Higher Education (QAA) UK Quality Code for Higher Education as it relates to postgraduate research programmes[68].

Generally, then, it is quite clear that funding is not unconditional and that it is closely linked to the provision of specific volumes of services (at least as teaching is concerned) and compliance with specific qualitative controls of the services provided. It should be acknowledged that HEFCE leaves significant leeway to individual institutions to decide how to use the funds they receive[69]. However, in our view, that does not erode the

[67] HEFCE, *Memorandum of Assurance and Accountability between HEFCE and Institutions*. The document is fully accessible at http://www.hefce.ac.uk/media/hefce/content/pubs/2014/201412/HEFCE2014_12.pdf (last accessed October 15, 2015).

[68] HEFCE, *Guide to funding 2015-16. How HEFCE allocates its funds*, para 181, available at http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2015/201504/2015_04.pdf (last accessed October 15, 2015).

[69] See HEFCE, *Guide to funding 2015-16* (n 68) para 17: '*Institutions receive most of their teaching, research and knowledge exchange funding as a grant that they are free to spend according to their own priorities, within our*

general contractual nature of the relationship and the strong link between the volume of funding and that of the services provided by each institution[70]. Thus, the existence of specific conditions and monitoring mechanisms point clearly to the existence of a 'framework of a contractual relationship' between HEFCE and the universities it funds. Thus, it seems to us that, from this perspective, the EU public procurement rules are generally applicable to the commissioning of teaching and research (public) services by HEFCE to English universities by means of the annual grants it provides to complement the funding universities receive from students via fees (above §2) and other sources of commercial revenue.

However, also at a general level and related to the question whether an entity is an economic operator, it is worth stressing that public procurement rules only apply to 'economic activities' (Recital 6 of Directive 2014/24). Therefore, another issue requiring clarification before definitely concluding whether HEFCE commissioning should comply with EU public procurement rules is to determine if the activities conducted by universities are of an economic nature or not. We will discuss this further below, separately for teaching (§3.A.I) and research (§3.A.II). Finally, there are quantitative value thresholds under which the Directive does not apply. As the thresholds differ for different activities these will equally be discussed separately below (§3.A.I for teaching and §3.A.II research).

broad guidelines. We do not expect them, as autonomous bodies that set their own strategic priorities, to model their internal allocations on our calculations. However, certain conditions are attached to funding and are specified in institutions' funding agreements with us'.

[70] See HEFCE, *Guide to funding 2015-16* (n 68) para 36: *'... we fund the activities of institutions. However, we do count students in our funding methods, as a proxy measure for the level of teaching and research activities taking place at institutions.*'

3.A.I. Teaching activities

As mentioned above, the most important remaining question is whether the provision of higher education services constitutes an economic activity, i.e. if English universities are offering those services in a market. While the European Commission, with reference to the CJEU's case law in the area of the free movement of services[71], has traditionally regarded higher education as non-economic in nature, it has also more recently established that *'in certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic'*[72]. Whether this is the case for higher education has to be decided on a case by case basis taking into account the political choices of the Member State[73]. In England, where private operators are increasingly competing with publicly-funded ones and the whole set of recent reforms was aimed at creating a market place[74], the question of whether or not an economic activity is taking place triggers an interesting discussion. In such a system one might consider higher education as an economic service for which the institutions get paid partly through tuition fees (which are mostly financed through public loans, see discussion above §2) and partly through the reimbursement of costs by the state by means of the block grants HEFCE makes available to universities. If we thus conclude that universities in England are

[71] Judgment of 27 September 1988 in *Belgian State v Humbel and Edel*, C-263/86, EU:C:1988:451, para 14 seq, and Judgment of 7 December 1993 in *Wirth v Landeshauptstadt Hannover*, C-109/92, EU:C:1993:916, para 13 seq.

[72] Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest OJ [2012] C 8/02 paragraph 28.

[73] See further A Gideon, 'Higher Education Institutions and EU Competition Law' (2012) 8 *Competition Law Review* 169 and A Gideon, 'The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective' (2015) 53 *JCMS: Journal of Common Market Studies* 1045.

[74] BIS, HIGHER EDUCATION - Students at the Heart of the System (The Stationary Office 2011).

economic operators providing public services of an economic nature (i.e. SGEIs) for which they are partly reimbursed by the state through HEFCE grants, then public procurement rules (should) apply to the commissioning of those services to English universities by the State through HEFCE—and, conversely, the direct award of that funding without competitive mechanisms could amount to the award of State aid (as discussed below §3.B).

However, the rules in Directive 2014/24 do not apply in their entirety to the commissioning of this type of services, as public service contracts for certain services listed in Annex XIV[75], which mentions inter alia 'administrative social, educational, healthcare and cultural services'[76] fall under a light touch regime which enables a more social approach in this area[77]. Title III Chapter I of Directive 2014/24 sets out the particular procurement regime for these services. According to Recital 114, the reasoning behind this alternative, softer regime is that the level of competition that can be expected for these services is rather limited, at least from a 'cross-border dimension', because such 'services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions'. The light touch regime applies to contracts above a specific value (€750,000) that we assume to always be exceeded by the level of the grants provided by HEFCE[78], and mainly requires announcement of intention to award a contract and

[75] As mentioned above (n 62), this is an example where education is named separately from social services; both in the heading of the relevant subsection of Directive 2014/24 (as 'social and other specific services') and in the body of the Annex (as 'administrative social, education, healthcare and cultural services'). However, given that the applicable legal regime is the same (*i.e.* light touch), for the purposes of our discussion, there is no need to use the expression 'social services' with any further degree of precision.

[76] More specifically, the Annex includes higher education services (CPV code 80300000-7).

[77] Semple (n 8) para 1.37.

[78] According to Article 4(d) of Directive 2014/24 the value threshold is of €750,000, which is to be equated to £625,050 as per Communication of 14 December 2013 on corresponding values of the thresholds of Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council [2013] OJ C366/1. This instrument is still in force despite referring to the previous generation of EU Directives.

publication of results (Article 75). Otherwise Member States are free to set the specific rules for the award of these contracts as long as they guarantee fairness and transparency and take into account the specificities of the service and other aspects such as accessibility and needs of certain users, etc. (Article 76). They can also reserve certain services to certain participatory third sector organisations (Article 77). When applying the light touch regime, Member States are also prescribed to take Article 14 TFEU and Protocol No 26 into consideration as well as the 'rules applicable to service contracts not subject to the specific regime' (recital 114).

It is worth stressing that even if, contrary to our assessment above, the arrangements between HEFCE and the universities were not to be regarded as public contracts, the general Treaty principles of transparency and equal treatment reflected in the Directive still apply to the assignment of special and exclusive rights, such as licences and authorisations to engage in certain regulated economic activities[79], at least if there is a potential cross-border interest[80]. The only situation that could completely escape the application of the general principles would be the provision of *non-economic services*[81]. As discussed earlier in this section, this is unlikely to cover higher education services where

One can safely assume that the amount of reimbursement costs for publicly funded higher education services exceeds the mentioned threshold. For academic year 2015-16, HEFCE granted £1,418 million in teaching-related funding and only 130 universities were funded; see HEFCE, *Guide to funding 2015-16* (n 68) para 67.

[79] Indeed, the CJEU has also requiring compliance with these principles when no public contract is involved, such as in the case of authorisations; see GS Ølykke, 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions? Recent developments in case law and their implications for one of the last sanctuaries for protectionism' (2014) 23(1) *Public Procurement Law Review* 1-20.

[80] A Sanchez-Graells, 'Competition and State Aid Implications of the Spezzino Judgment (C-113/13): The Scope for Inconsistency in Assessing Support for Public Services Voluntary Organisations' (2015) June SSRN p. 5, Semple (n 8) para 1.74 seq, Sauter (n 56) p. 166 seq.

[81] Article 2 of Protocol No 26 TFEU.

the provision is based on competitive market-like mechanisms. The application of the Treaty principles can complicate certain aspects of the organisation of those arrangements, such as the imposition of an absolute exclusion of non-English universities—which would need to be assessed under the rules applicable to State aid and, in particular to State aid for SGEIs (as discussed below §3.B). Thus, the only way to try to avoid compliance with the soft touch regime of EU public procurement rules and the general Treaty principles entirely would be to articulate them as non-economic services. In the case of England, this does not seem plausible, as it would require undoing a very significant number of market-oriented reforms of the higher education sector. Having said that, despite a partly bold approach in earlier case law favouring the Treaty rules on free movement[82], more recent cases such as *Spezzino*[83], but also *Direxta* or *Sarc*[84], seem to indicate a certain reluctance by the CJEU to get too involved in policy decisions in areas where the main responsibility rests with the Member States. Therefore, this could create more scope of non-subjection of (non-contractualised) higher education models to general EU law requirements. This will be

[82] Most significantly perhaps in the area of education, Judgment of 7 July 2005 in *Commission vs Austria*, C-147/03, EU:C:2005:427; and Judgment of 1 July 2004 in *Commission vs Belgium*, C-65/03, EU:C:2004:402 where the Court significantly altered national university access policies. But see also Judgment of 23 October 2007 in *Morgan and Bucher*, joined cases C-11/06 and 12/06, EU:C:2007:626; Judgment of 18 July 2013 in *Prinz and Seeberger*, joined cases C-523/11 and C-585/11, EU:C:2013:524; Judgment of 24 October 2013 in *Thiele Meneses*, C-220/12, EU:C:2013:683; Judgment of 24 October 2013 in *Elrick*, C-275/12, EU:C:2013:684, and, recently, Judgment of 26 February 2015 in *Martens*, C-359/13, EU:C:2015:118 on the extension of portability of study grants. Or Judgment of 11 September 2007 in *Schwarz and Gootjes - Schwarz*, C-76/05, EU:C:2007:492; Judgment of 18 December 2007 in *Jundt*, C-281/06, EU:C:2007:816; and Judgment of 20 May 2010 in *Zanotti*, C-56/09, EU:C:2010:288 on changes in tax deductibility.

[83] Judgment of 11 December 2014 in *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:2440.

[84] Judgment of 12 December 2013 in *Direxta Alta Formazione*, C-523/12, EU:C:2013:831 ; and Judgment of the General Court of 12 June 2014 in *Sarc v Commission*, T-488/11, EU:T:2014:497. Yet in these cases there was a certain overlap with policy aims followed at the EU level itself.

discussed further below (§3.B). For a definite conclusion a judgment by the Court might have to be awaited.

3.A.II. Research activities

Once again, the most important remaining step in our analysis requires to evaluate whether the carrying out of research activities by universities constitutes an economic activity for the purposes of their subjection to EU public procurement rules. Research would, according to the Commission's Framework for State Aid for Research and Development[85] (hereinafter Research Framework), constitute a non-economic activity if it was 'independent R&D for more knowledge and better understanding'. Activities 'such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research', on the other hand, are activities of an economic nature. Generic funding provided by HEFCE and most public competitive funding for research in universities would thus be linked to a non-economic activity because universities undertake that research independently and in pursuance of more knowledge and better understanding; while contract research carried out by universities for public authorities would be of an economic nature[86].

However, in some cases it might be difficult to draw the line between competitive funding of a non-economic nature and a research service provided for a public authority, for example, when public calls are so specific that they could be interpreted as the public

[85] Commission Communication 'Framework for State aid for research and development and innovation' OJ [2014] C 198/01.

[86] See with a more detailed assessment for research funding in three Member States A Gideon, 'Blurring Boundaries between the Public and the Private in National Research Policies and Possible Consequences from EU Primary Law' (2015) 11 *Journal of Contemporary European Research* 50.

authority actually commissioning a service. In such situations it would not matter if the authority is a government department or a dedicated funding body. It merely depends on the nature of the research. Thus, in this area there is no hard and fast rule that allows to determine whether research-related funding is exempted from compliance with the EU public procurement rules, and a case by case analysis will be necessary. As we will see below, if the research is of an economic nature and funded / awarded directly or in discriminatory ways, this could also constitute State aid (§3.B).

Unlike its older version[87], the new Research Framework explicitly lays out the rules that need to be adhered to when the state is commissioning economic research. Accordingly, if a public authority contracts research, it has to follow the public procurement rules[88]. Otherwise the price has at least to reflect the market value. It is assumed that such is, in particular, the case if the selection procedure is open, all rights and obligations are made available to everyone interested, there is no preferential treatment and either the results may be widely disseminated and the public purchaser gets the intellectual property rights (IPR) or the public purchaser gets free access to all IPR and other parties can get non-exclusive licenses for the market price[89]. Where this is not the case, *'Member States may rely on an individual assessment of the terms of the contract between the public purchaser and the undertaking, without prejudice to the general obligation to notify R&D&I aid pursuant to Article 108(3) of the Treaty'*[90].

Regarding compliance with the applicable procurement rules, Directive 2014/24 contains specific provisions about how and when research needs to be procured. In Recital

[87] Community framework for state aid for research and development and innovation OJ [2006] C 323/01

[88] Research Framework (n 85) para 32.

[89] Ibid, para 33.

[90] Ibid, para 34.

35, the Directive stresses the importance of co-funding of research by industry and declares that the Directive therefore only applies if there is no-co-funding, but, instead, the contracting authority receives all the results unless the co-funding or result sharing is only symbolic. If the contracting authority does receive all the results, the provider *'having carried out those activities, […] [may still] publish an account thereof'*. Recital 47 declares research and innovation to be *'among the main drivers of future growth'* and makes an explicit connection to the Europe 2020 strategy. Public authorities are therefore encouraged to use procurement to *'spur innovation'*[91]. Directive 2014/24 should thus *'contribute to facilitating public procurement of innovation and help Member States in achieving the Innovation Union targets'* in combination with the Pre-Commercial Procurement Communication[92] which deals with procurement activities not falling under the public procurement directives. According to Article 14 Directive 2014/24, the Directive only applies to certain types of research[93], which include those research services that seem to be relevant for universities: research and development services and related consultancy services, research and experimental development services, research services, research laboratory services, marine research services, experimental development services, design and execution of research and development, pre-feasibility study and technological demonstration and test and evaluation services. Further, as already stressed in Recital 35,

[91] The usefulness of public procurement for innovation has indeed already been examined and found to be greater than that of direct subsidies. M Amann and M Essig, 'Public procurement of innovation: empirical evidence from EU public authorities on barriers for the promotion of innovation' (2015) online first Innovation: The European Journal of Social Science Research. For general discussion, see A Sanchez-Graells, 'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?' (2016) 22(2) *European Public Law Journal*, forthcoming.

[92] Commission Communication 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe' COM(2007) 799 final of 14 December 2007.

[93] Those which fall within CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5.

the research service has to be entirely for the public authority (i.e. it receives all the benefits and pays for it entirely).

If we do have an economic research service for a public authority –no matter if it is a research council or a government department– whether or not a public procurement procedure would have had to be held would depend on the value of the contract. In so far the general thresholds in Article 4 of Directive 2014/24 apply to research, its rules will be applicable to contracts in excess of €134,000 (£111,676) for public service contracts awarded by central government authorities (including BIS and HEFCE according to Annex 1 of the Directive itself) and €207,000 (£172,514) for public service contracts awarded by sub-central contracting authorities. Research procurement that does not fall under the Directive can still be assessed under the Pre-commercial Procurement Communication. This Communication suggest *'an approach to procuring R&D services which involves risk-benefit sharing and does not constitute State aid'*[94]. The approach is based on risks and benefits sharing, competitive development in phases (i.e. a variety of companies can participate in the beginning the number of which will be limited in later phases) and the separation between the pre-commercial and the commercial phase. The use of this form of procurement is encouraged by Horizon 2020 and other EU research policy mechanisms[95].

3.B. Relation to state aid law

The previous sections have clarified in which cases the commissioning of public services to English universities should comply with EU public procurement rules. This section explores some of the State aid implications of the English university funding system

[94] Pre-commercial Procurement Communication para 5.

[95] Semple (n 8) para 1.29

and the interplay of state aid and public procurement. Generally, if an economic activity takes place, aid may not be provided selectively to undertakings if this distorts competition and affects trade between Member States. It is not the aim of this article to provide a detailed analysis of the English university funding regime under Article 107 TFEU. Suffice to say that, given the fact that some providers of higher education (universities) have access to HEFCE's grants while others do not (alternative and commercial providers)[96] and some research funding for economic activities might reach providers selectively, there are open questions regarding the general rules under Article 107 TFEU—and the selectivity of HEFCE's funding scheme could come under significant pressure due to the lack of notification of HEFCE's State aid scheme to fund higher education in England to the European Commission. We will limit the analysis here to the area where public procurement law and the state aid rules overlap. There are two points that might be worth mentioning at a preliminary phase of our analysis. First, that compliance with State aid law can take place in cases of breach of EU public procurement law[97], and vice versa—although this second scenario is not commonly accepted[98]. And, second, that decisions concerning

[96] See UCU briefing, *The private providers' 'designation' bonanza*, February 2014, at 2: '*Private providers cannot currently access the HEFCE administered funds*', available at http://www.ucu.org.uk/index.cfm?articleid=6975#.Vh_XEX6rSUk (last accessed October 15, 2015). See also HEFCE, *Guide to funding 2015-16* (n 68) para 6, where it is stated that *'HEIs are bound by the requirements of their charter and statutes (or equivalent) and by the law relating to their charitable status*' and para 29, where it is stressed that that the governing body of an HEI must assure that it *'delivers its charitable purpose for the public benefit*'. Both aspects clearly seems to exclude the possibility of for-profit providers accessing HEFCE funding. On HEFCE's glossary page (n 66), the definition of 'Alternative provider' strengthens this conclusion by indicating that it is '*A general term for providers of higher education which are not funded by regular government grants. They can be or-profit or not-for-profit, and of any corporate form*'.

[97] Indeed, it should be stressed that the absence of a tendering procedure does not preclude a finding that State aid and other competition rules have not been violated; see *Olsen v Commission*, T-17/02, EU:T:2005:218, confirmed on appeal by the CJEU, *Olsen v Commission*, C-320/05 P, EU:C:2007:573.

[98] For discussion, see A Sanchez-Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21(6) *Public Procurement Law Review* 205-212.

State aid for this type of public services raise very high political stakes, which may have justified a (progressive) lack of intervention by the European Commission and the CJEU in recent years.

For State aid rules to be regarded as infringed, teaching and research would need to be regarded as economic activities (in most cases SGEIs), since State support for non-economic services in the terms of Article 2 of Protocol No 26 TFEU would not be caught by the prohibition of Article 107(1) TFEU. Our discussion is thus framed within the narrow area of State aid for SGEIs, where compliance with public procurement law can be utilised to avoid regarding economic activities funded by the State as actually receiving State aid for the purposes of Article 107 TFEU. The landmark case of *Altmark*[99] essentially provided that recourse to public procurement law can avoid state aid accusations in such situations because the tendering of public contracts for the provision of the SGEIs is assumed to suppress any undue economic advantage that a direct award of the contract could have generated otherwise. More specifically, in Altmark, the CJEU determined that, together with the other three cumulative conditions, selecting the undertaking which is to discharge public service obligations 'pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community' excludes the existence of State aid[100].

Following this case, the so-called *Altmark*[101] and *Altmark II*[102] packages provide for assessment criteria to establish whether the Altmark conditions are fulfilled and,

[99] Judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

[100] *Altmark*, C-280/00, EU:C:2003:415, para 93.

[101] In 2005 the Commission adopted the first SGEI package, also known as the "Monti-Kroes-Package" setting out the conditions under which state aid in the form of public service compensation is compatible with the TFEU; see IP/05/937 available at http://europa.eu/rapid/press-release_IP-05-937_en.htm (last accessed 1 November 2015). This package was replaced by the "Almunia package", below (n 102).

consequently, there is no State aid in the funding of the provision of SGEIs (i.e. whether the public service obligation is clearly defined, the parameters on which the compensation is calculated are transparent and established in advance, the compensation is not excessive and the costs included in the calculation of the compensation are themselves reasonable)[103]. The current *Altmark II*[104] package provides for an exemption of State aid control for SGEIs receiving support below €15 million per year. As discussed above, the value for procurement of higher education services is well above that figure. Thus, as far as the teaching activities of universities fall within the category of SGEIs, it seems clear that lack of compliance with procurement rules, in addition to an infringement of those rules in themselves, also opens up the possibility of an infringement of the applicable State aid rules

[102] This is also known as the "Almunia package", which refers to the instruments adopted by the European Commission between December 2011 and April 2012 for the modernisation of SGEI rules. These are: 1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, Brussels, 20.12.2011, COM(2011) 900 final; 2) the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [OJ 2012/21/EU]; 3) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [OJ 2012/C 8/02]; 4) Communication from the Commission—European Union framework for State aid in the form of public service compensation (2011) [OJ 2012/C 8/03]; and 5) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [OJ 2012/L 114/8].

[103] For discussion, see A Sanchez-Graells, 'The Commission's Modernization Agenda for Procurement and SGEI', in E Szyszczak & J van de Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization*, Legal Issues of Services of General Interest Series (The Hague, TMC Asser Press / Springer, 2012) 161-181.

[104] Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest OJ [2012] L 7/3.

unless a clear case of absence of over-compensation can be supported.[105] For economic research services that remain below the €15 million per year threshold, this would mean that such services, if they are of general interest, would often be exempted from the state aid rules, though they may still fall under the public procurement regime (above §3.A.II).

This interplay between state aid rules and public procurement rules (i.e. that recourse to a public procurement procedure can, in the case of SGEIs and under certain conditions, avoid state aid accusations) seems to have been broadened in the recent *Spezzino* case[106]. In this case, the Court had not tested whether the services directly contracted by the State (ambulance services) were economic in nature or not, which complicates its interpretation[107]. Nonetheless, the Court determined that the assignment of those services would *'fall, in principle, within the scope of'* of the relevant procurement Directive[108]. The Court then went on to state that it was for the national court to decide if

[105] This is likely to be an almost impossible test, particularly if the CJEU follows the path very recently set out in *Germany v Commission (Zweckverband Tierkörperbeseitigung)*, C-446/14 P, EU:C:2016:97. For discussion, see A Sanchez-Graells, 'CJEU Consolidates Push for Overcompliance with EU Public Procurement Rules in the Provision of Public Services (C-446/14)', *howtocrackanut*, 19 February 2016, <http://www.howtocrackanut.com/blog/2016/02/cjeu-consolidates-push-for.html> accessed 9th March 2016.

[106] *Spezzino*, C-113/13, EU:C:2014:2440.

[107] Indeed, part of the reasoning of the Court in the *Spezzino* case seems to derive from the particular treatment of ambulance services under the relevant procurement rules (Directive 2004/18). This has been further complicated by the treatment of this services under Article 10 of Directive 2014/24, which raises questions about the delimitation of the effects of *Spezzino* for other types of social services, either economic or non-economic. For discussion of the complexities of the procurement treatment of ambulance services, see R Caranta, 'The Changes to the Public Contract Directives and the Story they Tell about how EU Law Works' (2015) 52(2) *Common Market Law Review* 391, 424 ff. See also R Caranta, 'Mapping the margins of EU public contracts law: Covered, mixed, excluded and special contracts', in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Copenhagen, DJØF, 2014) 87 et seq.

[108] *Spezzino* Ibid para 38.

the entrustment of the activities in question would fall under the normal or light touch procurement regime or, if the relevant value thresholds were not met, they would fall outside the Directive entirely. In any case the Court stressed that regardless of the applicability of any specific procurement regime, the Treaty principles on transparency and equal treatment would still have to be taken into consideration if there was a cross-border interest in the entrustment of the services (see above §3.A.I)—which, again, was to be decided by the national court. If this was the case, the Court continued, the direct award of the services to voluntary, non-profit organisations would be an infringement of the free movement of services and the freedom of establishment.

However, considering the primary responsibility of the Member States in the area of health care, the Court recognised that this infringement could be justified on the basis that the Member State was seeking to guarantee *'sufficient permanent access to a balanced range of high-quality medical treatment and, secondly, assist in ensuring the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources'*[109]. This was considered a valid justification if the scheme in question actually did contribute to its *'social purpose and the pursuit of the objective of the good of the community and budgetary efficiency'*[110]. In this respect the Court emphasised that the voluntary organisations may not pursue other objectives, make any profit, pass any profits to their members or break any requirements for such organisations in national law. Whether these conditions were fulfilled was for the national Court to decide. This thus indicates that national law can directly award certain social services to voluntary, non-profit associations if they actually fulfil the social aim pursued in awarding the services to them and contribute

[109] Ibid para 57.

[110] Ibid para 60.

to budgetary efficiency[111]. In so far, when it comes to such organisations, it is possible to avoid both the public procurement rules and state aid law (i.e. the *Altmark* test would not have to be conducted), since *'it follows from the findings relating to the interpretation of EU law on public procurement that there is no need to examine […] [the matter] in relation to those rules on competition'*[112].

The question for us then is whether this could be applied to universities. There certainly seems to be a cross-border interest for the provision of teaching and research services in many cases[113] and it seems likely that, as explored above (§3.A), the procurement rules or the alternatives named in the Research Framework are applicable to certain economic research services and the light touch regime or at least the general Treaty principles are applicable to teaching services (unless the activity is entirely non-economic). If this is the case and such activities are directly awarded to local voluntary providers, there would be an infringement of the free movement of services and the freedom of establishment which could, potentially, be justified according to the *Spezzino* case law.

As regards higher education, it is worth stressing that, as in the case of health care, this is also a primary responsibility of the Member States. Research, on the other hand, is a shared responsibility between the Member States and the European Union. Yet it is stressed in a specific caveat in Article 4(3) TFEU that *'in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence*

[111] On the question what 'budgetary efficiency' actually means and if it could be aligned with *Altmark* by interpreting it as the service provided by the non-profit organisation having to be equal or cheaper in costs than a typical undertaking see Sanchez-Graells (n 80).

[112] *Spezzino* para 64.

[113] See on various Court of Justice cases indicating that there is a cross-border link, Gideon (2015; n 73) and on the question of market definition across borders in EU competition law Gideon (2012; n 73).

shall not result in Member States being prevented from exercising theirs'. The last caveat seems to make the application of *Spezzino* possible from the perspective of extending its effects to core areas of Member State competence. In both cases, provision of education and research services through specific national providers could ensure equal access to education and knowledge and a high standard of both research and teaching activities, and thus serve a particular social purpose similar to the one in *Spezzino*.

Yet, it seems questionable that universities can fulfil the more detailed criteria the Court outlined in *Spezzino*, namely that they are voluntary organisations, that they may pursue only the social objective assigned to them and that they may not make any profit. For starters the form universities take differs between the Member States. In England, where universities are largely third sector organisations (charities), they are usually not strictly non-profit, but not-for-profit organisations[114]. Secondly, universities pursue a variety of objectives and it differs between Member States if these are assigned to them in national legislation. In England, for example, research is not even a statutory task of universities and universities provide all sorts of services including housing, catering and a variety of other clearly economic services. It thus seems, at least in the case of English universities, unlikely that they can benefit from *Spezzino* directly, at least if interpreted strictly. However, as we have seen above, the light touch regime for educational services in Directive 2014/24 provides a similar, yet broader, provision allowing to assign contracts to certain organisations only.

[114] On the definition of the notion of the third sector and the difference between non-profit and not-for-profit see I Wendt and A Gideon, 'Services of general interest provision through the third sector under EU competition law constraints: The example of organising healthcare in England, Wales and the Netherlands' in Schiek D, Liebert U and Schneider H (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge, CUP, 2011) 255 with further references.

Consequently, if following the *Spezzino* rationale narrowly[115], it seems that an infringement by universities of the procurement rules (whether fully or as light touch regime) or of the Treaty principles respectively, would still also indicate an infringement of the requirement in *Altmark* that providers are selected 'pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community'. Yet, *Spezzino* is not the only case where the Court showed more leniency when an area of primary responsibility of the Member States was concerned. It might therefore also be conceivable that the Court would broaden the *Spezzino* rationale in future case law in the sense that the requirement for least-cost oriented public procurement can at least be reinterpreted towards a process capable to assist in ensuring a *'sufficient permanent access to a balanced range of high-quality [services] and, secondly, […] the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources'*. This could suffice to relax both the procurement and State aid controls applicable to the commissioning of teaching and, to some extent, economic research activities to universities. However, exploring the full implications of this possibility exceeds the scope of this paper.

3.C. Preliminary conclusion

Member States which structure their higher education systems according to a market approach are likely to place higher education within the legal framework applicable to public services which constitute an economic activity. In that regard, in the case of England, we have seen how the entrustment and funding of the provision of higher education services within a contractual relationship between HEFCE and each university requires, in our opinion, compliance with the light touch regime created by Directive

[115] It is worth also bearing in mind here, as mentioned in n 107, that it is unclear how far the case law can be applied to services other than ambulance services at all.

2014/24. Even if that was not the case, the Treaty principles of non-discrimination and transparency would still apply unless the services would have to be regarded as entirely non-economic which seems unlikely. However, recent case law of the CJEU indicates its reluctance to get involved in areas of primary responsibility of the Member States, which may well result in an absence of practical consequences following from a lack of compliance with those EU procurement rules and principles. Certainty might only be achieved through case law in the future.

As regards research, non-economic research (which will comprise most publicly funded research) does not have to be commissioned on the basis of any procurement procedure. Research constituting an economic activity, if it is entirely for the contracting authority and its value exceeds the threshold of Article 4 of Directive 2014/24 needs to be commissioned through a full-fledged public procurement procedure (ie not under the light touch regime). Otherwise, in addition to infringing public procurement law, this could amount to the granting of State aid, unless it followed the procedure described in paragraph 33 of the Research Framework mentioned above (§3.A.II) or is notified to the Commission as a State aid measure and cleared according to that framework.

Our discussion has also assessed funding for both economic education and research under the State aid rules applicable to SGEIs. For these to apply, the economic teaching and research services would need to be of general interest and assigned in a clear entrustment act to the undertakings in question. Within this framework, our analysis has shown that there is a clear safeguard for acts of such research and teaching services that can be valued below €15 million a year, in which case there is no need to carry out any further assessment. This should exclude State aid implications in the case of most economic research contracts provided they are of general interest. Regarding economic education services, this means that providers that receive support in excess of that amount need to be chosen on the basis of the public procurement rules or, alternatively, be able to make a clear and compelling case of absence of over-compensation. We have also assessed to what extent this requirement can be relaxed on the basis of the recent *Spezzino* case. While a strict interpretation of that case seems to indicate that universities cannot profit from it, the Court has in recent case law shown a more lenient approach to the application of directly

applicable EU law to areas of primary responsibility of the Member States and it seems thus possible that the *Spezzino* rationale could be broadened. However, in this point, legal certainty will require future case law.

In addition, and in the light of the fact that Directive 2014/24 in recital 114 points to the provisions on SGEIs, it might more generally be possible to argue that the application of the Treaty rules would obstruct the performance of the services of general interest in question. As regards higher education, strictly applying the principles of non-discrimination and thus potentially having to fund foreign and / or private providers of higher education would arguably threaten the performance, viability and quality of the national higher education system. For research this seem less likely, as only economic research falls under the provisions in the first place and if economic research is being conducted on a market, it would not appear that generally the application of the Treaty rules would obstruct the performance. Aside from this, however, the new Research Framework and the new General Block Exemption Regulation (GBER)[116] provide for generous exemptions for research from the application of state aid law.

4. WHEN CAN UNIVERSITIES UTILISE IN-HOUSE OR PUBLIC-PUBLIC EXEMPTIONS?

In view of the significant constraints that EU public procurement rules impose on universities both as buyers (§2) and providers (§3), it is worth exploring legal avenues to create some flexibility in the system. Thus, this section will conduct an assessment of the exemptions for public-public cooperation or in-house arrangements that could shield

[116] Commission Regulation 651/2014/EU declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty OJ [2014] L 187/1.

universities from competition by non-public and commercial providers (§4.A). It will also assess in how far these exemptions are useful for universities when commissioning services themselves (§4.B).

4.A. Universities as providers

If we assume that, at least in some cases, universities would be providers of research or educational services for a contracting authority and thus fall under the public procurement rules (§3), there are still exemptions for public-public cooperation or in-house arrangements that could shield universities from competition by non-public and commercial providers. Article 12 of Directive 2014/24 provides that public-public cooperation mechanisms are excluded from the public procurement rules if they are based on cooperation between public authorities to perform public services together in the public interest and less than 20% of those activities are offered by the cooperating public authorities on the open market. In turn, in-house arrangements are excluded if the contracting authority exercises control similar to the one it exercises over its own departments over the service providing entity, and the entity[117] must carry out the essential part of its activities for the authority (at least 80%)[118]. The control element is important, as, when there is such control, the situation is more similar to an integrated system where the

[117] This requirement includes that there must be no private participation whatsoever, with the only exception of non-blocking private participation mandated by law in the service providing entity.

[118] See J Wiggen, 'Public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law' (2011) 20 *Public Procurement Law Review* 157; J Wiggen, 'Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and the 2011 proposal for a new Directive' (2012) 21 *Public Procurement Law Review* NA225; and J Wiggen, 'Directive 2014/24/EU: the new provision on co-operation in the public sector' (2014) 23 *Public Procurement Law Review* 83.

authority provides the service itself rather than to a market situation[119]. The in-house arrangement can be exercised jointly by more than one public authority, indirectly through another controlled entity, inverted (i.e. the controlled entity is the one contracting to the controlling entity) or horizontal (i.e. a contract is awarded to another entity which is controlled by the same mother entity)[120].

In the case of universities, the in-house providing exemption might be a useful avenue for the state to avoid having to use a public procurement procedure to allow universities to conduct education and research services. For this exemption to apply, there would thus need to be control of the university by the state and the university would need to conduct the vast majority of its activities for the contracting authority (i.e. be economically dependent)[121]. However, in the case of universities and in view of their inherent autonomy, establishing control is a difficult task. Indeed, a literal interpretation of the recent *Datenlotsen*[122] case might give the impression that control cannot be present in the university-state relationship. This case concerned a potential horizontal in-house relationship and was decided before Directive 2014/24 entered into force. The Court here rejected the horizontal relationship, which is now explicitly foreseen. However, the Court did continue that

[119] R Cavallo Perrin and D Casalini, 'Control over In-house Providing Organisations' (2009) 18 *Public Procurement Law Review* 227.

[120] For a critique on the new rules see A Sanchez-Graells, *Public Procurement and the EU Competition Rules* (Hart 2015) p. 252 seq, 265-272, WA Janssen, 'The institutionalised and non-institutionalised exemptions from EU public procurement law: Towards a more coherent approach?' (2014) 10 *Utrecht Law Review* 168. For a summary of the old rules including the case law see European Commission, 'Concerning the application of EU public procurement law to relations between contracting authorities (public-public-cooperation)' (2011) SEC(2011) 1169 final Commission Staff Working Paper, Cavallo Perrin and Casalini (n 119).

[121] On the economic dependency see further European Commission (n 120) p. 6 seq.

[122] Judgment of 8 May 2014 in *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303.

in any event […] the City of Hamburg is not in a position to exercise "similar control" over the University. The control exercised by the City of Hamburg over the University extends only to part of its activity, that is to say, solely in matters of procurement, but not to education and research, in which the University has a large degree of autonomy. Recognising the existence of "similar control" in such a situation of partial control would run counter to the case-law cited […]. ***In those circumstances, there is no need to examine whether the exception concerning in-house awards is capable of applying to so-called "horizontal in-house transactions****" […]*[123].

It might thus be conceivable that the Court would continue to reject a relationship of control even if it will now have to recognise the existence of the horizontal relationship. Yet, this does not seem to take into account the specific situations of universities. By their very nature universities have to be able to exercise academic freedom. It seems absurd that this in itself should take them out of the in-house exception. Instead, it seems preferable to follow the approach suggested by the Advocate General who proposed that

the autonomy which the universities enjoy in relation to teaching and research is the expression of the freedom of teaching and research, a principle that is set out […] in the Charter of Fundamental Rights of the European Union, Article 13 of which provides that arts and scientific research are to be free of constraint and that academic freedom must be respected. From that perspective […] in order for entities such as the universities to be eligible for the in-house exemption, it cannot be required that control should be exercised over their teaching and research activities also, since the autonomy of the universities in relation to those activities is an expression of values of a constitutional nature common to the legal systems of the Member States and enshrined in the Charter. […] It follows from the foregoing considerations that […] the similar control exercised must extend to all of the

[123] Ibid, paras 31-33; emphasis added.

contractor's activities, except for the special rights and powers which the universities enjoy in the areas of teaching and research[124].

It therefore seems sensible to revise the *Datenlotsen* judgment in its entirety and relax the control requirement in the sense that the Advocate General suggested, which would still mean that universities would have to be controlled in all other areas except teaching and research. With the change in legislation there seems scope for this. Since the new Directive has extended significantly the scope for public-public cooperation and relies on arguments of a nature different than in-house as traditionally conceptualised by the Court, the Court could interpret Article 12(2) of Directive 2014/24 as not necessarily encompassing only the sort of control that Article 12(1) consolidates. In that regard, the control exercised over universities as described by the Advocate General may well suffice in 'new' scenarios of the in-house exemption. Once more, new case law will be necessary to shed light on the issue.

Nevertheless, even the control requirement as established by the Advocate General does not seem to be the present in all university systems. In England, universities are legally independent entities[125] over which government influence is mainly exercised through steering through funding and issuing general legislation rather than any form of direct control. They 'are exceptionally autonomous', ranking in the top three of the European University Association's *University Autonomy Tool*[126]. Accordingly, they are entirely free from an organisational point of view, and able to decide completely

[124] Opinion of the Advocate General Mengozzi of 23 January 2014 in *Datenlotsen*, C-15/13, EU:C:2014:23, para 73.

[125] D Palfreyman, 'The English chartered university/college: how 'autonomous', how 'independent' and how 'private'?' (2003) 15 Education and the Law 149.

[126] European University Association, 'United Kingdom' (2015) <http://www.university-autonomy.eu/countries/united-kingdom/> accessed 21st August 2015.

independently upon structure, dismissals, creation of governing boards, etc. Except for the cap on fees and the requirement of approval before taking a large loan, they are equally free financially and as regards staffing they only need to negotiate salary for certain categories of staff with unions, but there are no requirements from the government[127]. In such as system, it seems likely that the control element is not given even if the broader approach suggested by the Advocate General was to be followed.

4.B. Universities as buyers

When it comes to the subjection of universities as buyers to compliance with the EU public procurement rules (§2), alternative organisational decisions could also provide a secondary opportunity to avoid direct compliance with EU public procurement rules by means of public-public cooperation or in-house arrangements (for example when purchasing services from a wholly owned spin-off which the university controls). This would, of course, depend on the individual case and an assessment of the extent to which the university exercises a control that is similar to the one it has over its own units would be required. For example, control might be limited if a holding company is involved[128].

In addition, the generous exemptions in the new Research Framework also seem to largely exclude research transactions with spin-offs or in public-private partnerships (PPPs) from State aid control if all profits are reinvested or the cooperation is genuine respectively. This seems to underline the Commission's decision in *Sarc*[129] in which it followed a very generous approach towards the low royalties a spin-off paid their parent university. On a

[127] Ibid.

[128] Janssen (n 120).

[129] See Judgment of the General Court of 12 June 2014 in *Sarc v Commission*, T-488/11, EU:T:2014:497.

complaint by a competitor, the General Court denied the competitor standing, though it would have seemed likely that on substance this could have constituted State aid. One might interpret this as the General Court (and the Commission) showing some restraint in an area where, despite the shared competence due to the caveat in Article 4(3) TFEU, the Member States remain largely responsible for the establishment and implementation of research policies. A more cynical interpretation, however, might be that the General Court simply did not want to conduct a complicated economic analysis if not backed by the Commission and rather dismiss the claim on procedural grounds than opening proceedings for un-notified aid.

Generally, the new rules in the public procurement Directive 2014/24 as well as in the Research Framework seem to indicate that the Union legislator wanted to give more leeway to universities for alternative organisational arrangements such as spin-offs and PPPs. This might be due to the fact that, at least as regards research, these are explicitly encouraged by EU policy[130]. In addition, the affected policy areas are (often) of primary responsibility of the Member States and a certain discretion is therefore envisaged. Yet, it was realised that such arrangements bear the possibility of contradicting directly applicable EU law, as they become increasingly market-oriented. Member States then feel the EU rules on, inter alia, procurement and competition have interfered too much with areas of primary responsibility which they wish to protect, which is why the legislator introduced increasing exemptions. For example, the Commission had initially suggested that 90% of activities of a controlled entity needed to be conducted for the controlling entity to make use of the in-house exemption, but during the legislative process this went down to 80%[131]. It could be asked whether this approach is not potentially simply more complicated, still leaves the possibility of tensions with primary law and, once a service has reached a certain degree of marketization, disadvantages competitors. However, as the law stands, it seems

[130] Gideon (n **Errore. Il segnalibro non è definito.**) with further references.

[131] Janssen (n 120).

that universities have significant leeway to enter into in-house provision arrangements with spin-off companies they control, especially if profits are reinvested, which may be an area susceptible of attracting significant attention by universities in their strategic plans in terms of promotion of innovation and its commercial exploitation by universities.

5. CONCLUSIONS

This paper has assessed the extent to which universities are bound to comply with EU public procurement and State aid rules, both as purchasers (§2) and providers (§3). The analysis has included a consideration of public-public cooperation and in-house provision exceptions to the general rules (§4). It has carried out this analysis on the basis of the regulatory framework applicable to English universities as a case study, as well as by means of a critical assessment of recent legislative modifications and new strings of case law of the CJEU. Our main findings and conclusions are as follows.

When universities act as buyers, they are bound to comply with EU public procurement law if they are classified as 'contracting authorities'. Following the test in the *University of Cambridge* case, universities will be regarded as contracting authorities when they are bodies governed by public law and this will fundamentally depend on whether they receive more than 50% of their funding from public sources. Our assessment of the English reform of higher education funding arrangements has shown that despite the introduction of significant student fees, the funding channelled to universities by the Department of Business, Innovation and Skills through the Students Loan Company does not detract from its public nature. Thus, if together with other sources of public funding, the funding received from the SLC exceeds 50% of their overall revenue, English universities remain bound to comply with EU public procurement rules in their role as buyers and this situation is likely to remain in the future. This case study is interesting for other EU Member States considering changes in the way they fund their universities. In simple terms, our analysis shows that unless they take a full arms' length approach and make universities bear commercial risks derived from the lack of public guarantee for the payment of student fees,

universities will remain bound to comply with EU public procurement rules. This can be perceived as a disadvantage where the provision of higher education services is opened to competition by alternative providers, including for-profit providers, which may support the possibility to create a mechanism of exception for activities exposed to competition similar to the one existing under the special EU rules applicable to utilities procurement. If the funding from commercial income (e.g. funding for economic services provided to the public, private or third sector income, or income from student fees paid directly by home or international students) outweighs the public funding received through the SLC and other public income, universities would, on the other hand, not be bound by public procurement law anymore.

When universities act as providers of teaching and research services, our analysis has indicated that they can only be directly entrusted with the provision of teaching or research activities that can be conceptualised as services of a non-economic nature. Conversely, where these activities are of an economic nature because they are provided under conditions of market competition—and, in the case of research, the contracting authority retains all value derived from specific research projects—their entrustment to universities need to comply with the EU public procurement rules. In the case of higher education teaching activities in England, we have shown that these, in our opinion, could be classified as economic in nature and that the funding arrangements amount to contractual relationships. Consequently, HEFCE should subject the award of teaching funding through grants to the light touch regime created by Directive 2014/24. Even if our assessment of the contractual nature of the relationships was inaccurate and such light touch regime was not applicable, HEFCE would still need to comply with the general principles of transparency and non-discrimination, which would complicate certain aspects of the organisations of those arrangements, such as the imposition of an absolute exclusion of non-English universities—and would need to be assessed under the rules applicable to State aid and, in particular of State aid for SGEIs (as discussed below). As regards research activities we submit that most publicly funded research will be of a non-economic nature since it is conducted 'for more knowledge and better understanding'. Yet, if a more clearly defined piece of research which could be conducted on a market by a private provider is commissioned by the state, it does constitute an economic activity regardless of how it is

labelled. In these that cases, the assessment could thus become a more complicated endeavour. If the assessment established that the activity is economic in nature it would need to comply with the Procurement Directive or the alternative arrangements under the Research Framework. Research procurement that does not fall under these instruments can still be assessed under the Pre-commercial Procurement Communication.

We have restricted our State aid analysis to the cases where state aid law and public procurement rules overlap, which is mainly in the framework applicable to services of general economic interest (SGEI). Where teaching and research services can be conceptualised as non-economic services of general interest, we have submitted that State aid control does not apply. Under the SGEI framework, we have stressed that the high safe harbour threshold of €15 million in the *Altmark II* package comes to leave most awards for economic research activities outside the remit of control of the State aid rules. Where that threshold is exceed, which we assume is the case with most awards connected to teaching activities, at least in England, our analysis has shown how compliance with the applicable procurement rules becomes a key element for the assessment under the State aid rules as well. Following Altmark, unless there has been a procurement exercise for the selection of the undertaking providing the SGEI, it is necessary to prove that there is no excessive compensation. This may be difficult to do, thus creating a risk of infringement of EU State aid rules in the way HEFCE funds English universities. Nonetheless, even though a strict interpretation of *Spezzino* would probably not include universities because they are not strictly non-profit and provide a vast range of activities, we have considered that, in the light of recent CJEU case law more generally, there may be scope to discuss if a relaxation of this strict assessment is possible, so as to consider compliance where the way the SGEI is procured is able to ensure 'sufficient permanent access to a balanced range of high-quality [higher education services] and, secondly, […] the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources'. This may also feed back into the interpretation of the requirements derived from the light touch regime we consider applicable to economic teaching activities.

Finally, we have explored whether exceptions based on public-public cooperation or in-house provision could be used to create flexibility for universities. Our analysis has

shown how universities as providers are unlikely to qualify for either of these exceptions. Looking in particular to the in-house exception, the current interpretation by the CJEU seems to exclude this possibility due to the academic freedom inherent in the status of universities. Moreover, even if, as we advocate, a more nuanced approach defended by Advocate General Mengozzi was adopted, this would be ineffectual in the case of English universities, which score amongst the top three most independent in the European Union. The reverse situation seems to arise where universities are buyers and seek to commission services or supplies from spin-off companies under their control. In this case, we have seen that the applicable rules create significant leeway by shielding universities from public procurement as well as state aid rules, which may well influence the use of such spin-off companies for the purposes of channelling and commercially exploiting the results of university research.

Overall, when it comes to the case of English universities as buyers, our analysis shows that the question whether they are bound by public procurement rules depends on the amount of commercial income they receive. As summarised above, the funding received from the SLC is, in our opinion, to be regarded as public. In contrast, given that, according to our analysis, the teaching funding from HEFCE needs to be subjected to the public procurement rules' light touch regime—and in case such procurement exercise is carried out by HEFCE in the future—this can be considered as commercial income. Equally, tuition fees which are actually directly paid by students (home and international) are to be considered commercial income. As regards research, funding provided for non-economic research activities is public, while we argue that funding for economic research activities is commercial income; even if the purchaser is a public body. In addition, most other income by universities, for example through the provision of accommodation services, or the direct or indirect exploitation of shops and hospitality premises will equally be commercial income. Ultimately, thus, the subjection of English universities to EU public procurement rules as buyers depends on an exact calculation of all these income streams, so as to determine whether public funding outweighs their commercial income or not. This may well differ between universities depending on the significance of the individual funding streams.

Universities and HEFCE are also bound to comply with the light touch regime in Directive 2014/24 in the provision of higher education services, as well as with the full-fledged procurement regime or the alternative provided in the Research Framework in the provision of economic research activities. Thus, we have identified a risk of on-going infringement of EU procurement rules if a strict approach is adopted. A similar risk has been identified regarding EU State aid rules, at least as funding for teaching is concerned. We have also raised the point that this risk is difficult to assess and its actualization will crucially depend on the interpretation by the CJEU, which has recently signalled in *Spezzino* a clear lack of willingness to interfere with Member States' organisation of public services if it can find a way to accommodate soft compliance or approximate compliance with their goals. Thus, this is an area where only future case law can clarify the doubts that may remain in our analyses.

More generally, when it comes to the applicability of EU public procurement and State aid rules to universities, the paper has shown how decisions concerning the way universities are funded and the degree of competition between providers of higher education services that a Member State allows or facilitates are the two key elements for the analysis. Thus, Member States seeking to establish a framework where universities are not subjected to procurement and State aid rules in any specific way may want to reconsider the interaction between funding decisions and legal frameworks for universities market activities. In the country of our case study, England, this has recently gained even more significance with the issuing of a new green paper[132] during the time of writing which attempts to continue the path towards marketization of universities. Our analysis can thus inform any further future reforms of the way in which English universities are funded and the interaction between their funding status and their subjection to EU public procurement and State aid rules.

[132] BIS, *Fulfilling our Potential - Teaching Excellence, Social Mobility and Student Choice* (Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office 2015).

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APLICACIÓN DEL PRINCIPIO DE IGUALDAD DE TRATO A LAS RELACIONES TEMPORALES DE TRABAJO EN EL ÁMBITO DE LA FUNCIÓN PÚBLICA

Josep ALDOMÀ BUIXADÉ

ÍNDICE

INTRODUCIÓN

El presente trabajo tiene su origen en un estudio[1] más amplio realizado por encargo del CEMICAL.[2] Su objeto es analizar la aplicación del principio de igualdad de trato regulado en la Directiva 1999/70/CE del Consejo, de 28 de junio (la Directiva), relativa al Acuerdo Marco (AM) sobre el trabajo de duración determinada, a los empleados públicos con una relación temporal sujeta a un régimen de función pública: funcionarios interinos y personal eventual.

Según la cláusula 1 del AM su objeto es doble: por un lado, mejorar la calidad del trabajo de duración determinada –o temporal- garantizando el respeto del principio general de igualdad de trato entre las relaciones laborales de duración determinada y las indefinidas; por otro, el establecimiento de un marco legal para evitar abusos en los contratos temporales renovables o sucesivos. El presente trabajo se centra materialmente y exclusivamente en el primer objetivo: el análisis y la aplicación del principio de igualdad a las relaciones laborales temporales en el ámbito público.

[1] J. *Aldomà Buixadé, Aplicación del principio de no discriminación al personal temporal al servicio de la Administración pública*, Diputación de Barcelona, Estudios de Relaciones Laborales, núm. 8, febrero 2015. Puede consultarse el texto íntegro en: http://cemical.diba.cat/es/publicaciones/libros_castellano.asp.

[2] El Consorci d'Estudis, Mediació i Conciliació a l'Administració Local, está adscrito a la Diputación de Barcelona. Tiene por objeto intervenir en la solución extrajudicial de conflictos laborales en el ámbito de las entidades locales y promover el estudio, la formación y el progreso en las relaciones del personal al servicio de la Administración local.

Tradicionalmente, el empleo público español se ha nutrido de personal sujeto a dos ordenamientos distintos.[3] En primer lugar, y con carácter preferente, los empleados sujetos a un régimen de derecho administrativo, los funcionarios públicos en sentido amplio; en segundo lugar, los empleados sujetos al derecho privado o trabajadores en sentido estricto. En ambos casos, la relación laboral puede ser de carácter permanente o fijo y de carácter temporal o duración determinada. Los funcionarios permanentes son los funcionarios de carrera, mientras que los temporales pueden ser funcionarios interinos o personal eventual. A su vez, el personal laboral puede tener la condición de trabajador fijo o la de trabajador temporal con contrato de duración determinada.[4] El trabajo se limita al ámbito de las relaciones laborales de naturaleza funcionarial. Y, dentro de estas, se limita a los funcionarios interinos y al personal eventual, dado que son las clases de personal temporal en régimen funcionarial, comunes en todas las administraciones públicas.[5]

De principio, cabe indicar que es habitual, en la legislación general de función pública española, la discriminación en las condiciones de trabajo de los funcionarios temporales en relación con las de los funcionarios de carrera; pero también se introducen

[3] Actualmente, las clases de empleados públicos están reguladas en el art. 8 y siguientes del Real Decreto Legislativo 5/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público (LEBEP).

[4] Cuando el art. 8.2.c LEBEP habla de personal laboral por tiempo indefinido no se refiere a una clase de personal laboral, sino a un colectivo concreto de trabajadores que se incorporó al empleo público por una vía excepcional. También cabe advertir que la figura del trabajador indefinido no fijo de las administraciones públicas no responde a la existencia de un contrato de trabajo específico, sino que se trata de un trabajador temporal que ha adquirido a título personal esta condición, definida jurisprudencialmente.

[5] El personal eventual en régimen funcionarial de todas las instituciones públicas responde a un único tipo. En cambio, los funcionarios interinos no tienen la misma denominación e identidad absoluta de régimen jurídico en los servicios públicos de salud y en el caso de los Magistrados, Jueces y Fiscales del Poder Judicial. También debe ponerse de manifiesto que en el ámbito de la docencia universitaria existen, además, otras categorías distintas de personal temporal. En cualquier caso, la Directiva es aplicable a todo tipo de personal temporal.

diferencias significativas a través de los instrumentos negociados entre la Administración y los representantes de los empleados públicos. En cambio, es menos frecuente que se produzca en la legislación laboral, porque se transpuso la Directiva al Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (ET), puntualmente en el año 2001; por ello, para el personal laboral, las diferencias de trato entre trabajadores temporales y indefinidos se producen generalmente a través del convenio colectivo de trabajo de cada administración pública.

Debe ponerse de relieve que los poderes públicos, en general, se han mostrado reacios a la aplicación de la Directiva a las relaciones de función pública, aun con posterioridad a diversas resoluciones del TJUE contrarias a la posición de diversas administraciones españolas. No es de extrañar, pues, que la Comisión Europea resolviera incoar el procedimiento de infracción 2014/4224, por considerar que el Estado español ha incumplido reiteradamente las obligaciones que le corresponden con arreglo a la cláusula 4 del AM. Con fecha de 23 de marzo de 2015 dirigió la correspondiente Carta de emplazamiento al Gobierno español en la que relaciona diversas posibles infracciones al principio de igualdad de trato en el ámbito de la función pública por parte de diversas administraciones.

La intervención comunitaria parece que empieza a producir algún tímido efecto en los tribunales de justicia. Así, en la reciente STC 232/2015, de 5 de noviembre de 2015, recurso de amparo núm. 1709/2013,[6] afirma que las circunstancias del caso le permitirán "*valorar si procede mantener o matizar nuestra doctrina acerca de la proyección del derecho*

[6] Esta STC versa sobre una reclamación de sexenios por un funcionario interino docente; sobre un supuesto similar ya se pronunció el ATJUE de 9 de febrero de 2012, asunto C-556/11en sentido favorable a la igualdad de trato del funcionario interino. En esta ocasión, el TC estima el recurso de amparo no en base al principio de igualdad, sino con el argumento procedimental que la no aplicación de la Directiva, en este caso, supone la vulneración del principio de primacía del derecho comunitario, seleccionando de forma irrazonable y arbitraria la norma aplicable y vulnerando así el derecho a la tutela judicial efectiva del recurrente establecido en el art. 24.1 CE.

a la igualdad entre situaciones funcionariales, y en concreto entre los funcionarios de carrera y los funcionarios interinos, establecida desde la STC7/1984, de 7 de enero". Pero, posteriormente, la sentencia omite cualquier consideración sobre esta cuestión y resuelve el recurso en base a otros argumentos.

1. CONSIDERACIONES GENERALES SOBRE EL PRINCIPIO DE IGUALDAD DE TRATO DEL PERSONAL TEMPORAL EN LA DIRECTIVA 1999/70/CE Y EN EL DEERECHO ESPAÑOL

La cláusula 4 AM, bajo el título de «Principio de no discriminación», en su versión en español, establece:

"*1. Por lo que respecta a las condiciones de trabajo, no podrá tratarse a los trabajadores con un contrato de duración determinada de una manera menos favorable que a los trabajadores fijos comparables por el mero hecho de tener un contrato de duración determinada, a menos que se justifique un trato diferente por razones objetivas.*

2. Cuando resulte adecuado, se aplicará el principio de prorata temporis.

3. Las disposiciones para la aplicación de la presente cláusula las definirán los Estados miembros, previa consulta con los interlocutores sociales, y/o los interlocutores sociales, según la legislación comunitaria y de la legislación, los convenios colectivos y las prácticas nacionales.

4. Los criterios de antigüedad relativos a determinadas condiciones de trabajo serán los mismos para los trabajadores con contrato de duración determinada que para los trabajadores fijos, salvo que criterios de antigüedad diferentes vengan justificados por razones objetivas".

Puede observarse, pues, como el principio de no discriminación de las relaciones laborales temporales aparece formulado en dicha cláusula con dos versiones. La primera, en el apartado 1, es de carácter general y, seguramente, la más relevante, porque se aplica a todas las condiciones de trabajo y, para cada una, se establecen los términos de comparación entre

las de los trabajadores temporales y las de los trabajadores indefinidos. La segunda, formulada en el apartado 4, tiene un carácter más particular y limitado a la valoración de la antigüedad o servicios prestados en la Administración; de ésta segunda cabe destacar que ha posibilitado ampliar el ámbito objetivo de aplicación del principio de no discriminación, porque permite comparar los servicios prestados con la condición de trabajador temporal, cuando ya se ha perdido por haber pasado a indefinido.

Cabe advertir que el TJUE, en ocasiones, ha ido más allá y ha formulado una segunda versión del principio de no discriminación, según la cual, éste también exigiría que no se traten de manera idéntica situaciones diferentes, a no ser que se justifique objetivamente.[7] No parece muy correcto este planteamiento, pues aunque dos posiciones jurídicas sean distintas entre sí, como las de un trabajador temporal y otro fijo, parece evidente que pueden tener el mismo trato en relación con determinadas condiciones de trabajo –jornada, horarios, permisos, retribuciones, etc.–, cuando ambos cumplan con todos los requisitos para disfrutarla. Lo coherente sería pensar que el ordenamiento jurídico –comunitario y estatal– no pretenden regular el principio de discriminación entre situaciones diferentes, sino que regulan el de no discriminación entre situaciones comparables. Es decir, no prescriben la discriminación cuando existe alguna diferencia, sino la no discriminación entre situaciones comparables a pesar de presentar diferencias en su régimen jurídico. Dicho de otra manera, el ordenamiento puede dar el mismo trato a dos situaciones o supuestos distintos si lo considera conveniente, sin que esto se pueda considerar discriminatorio.

Trasladando la afirmación anterior al campo objeto de análisis, se puede afirmar que el solo hecho de la temporalidad no obliga en general a tratar de manera diferente las relaciones temporales y las indefinidas simplemente con fundamento en esta característica

[7] Como ejemplo puede verse la STJUE de 8 de septiembre de 2011, asunto C-177/10, en que afirma: *"[...] cabe recordar que, según reiterada jurisprudencia, el principio de no discriminación exige que no se traten de manera diferente situaciones comparables y que no se traten de manera idéntica situaciones diferentes, a no ser que dicho trato esté objetivamente justificado*".

distintiva. Es lógico, pues, que en los asuntos en que ha intervenido el TJUE nunca se haya planteado un supuesto en tal sentido. Además, en ocasiones, el propio TJUE ha afirmado que el AM no se opone a que los Estados miembros introduzcan un trato más favorable para los trabajadores temporales que el dispensado por la Directiva;[8] trato más favorable que solamente puede traducirse en una mayor equiparación con los trabajadores fijos. En cambio, no se puede afirmar lo mismo del ámbito judicial español.[9]

En otro orden de consideraciones, es importante destacar que la formulación del principio de no discriminación de la Directiva no puede ser interpretado de forma restrictiva dado que sus disposiciones constituyen normas de Derecho social de la Unión de especial importancia de las que debe disfrutar todo trabajador, al tratarse de disposiciones protectoras mínimas.[10] Esta interpretación no restrictiva debería aplicarse tanto para concretar cuándo nos encontramos ante una condición de trabajo en el sentido de la Directiva, como para determinar el ámbito de aplicación y cual sea el trabajador indefinido comparable; asimismo, debería aplicarse en cada caso particular como una mayor exigencia para apreciar cuando una determinada circunstancia pueda considerarse una razón objetiva que pueda justificar una diferencia de trato. A saber, no solamente será necesario aportar una motivación que justifique la excepción que supone una determinada causa objetiva, sino que la apreciación de las causas a considerar debería hacerse restrictivamente.

[8] STJUE de 12 de diciembre de 2013, asunto C-361/12.

[9] Buen ejemplo de ello se encuentra, entre otros, en la STSJ de Andalucía de 15 de abril de 2013, recurso 61/2013, en que el tribunal anuló la modificación de las bases de una convocatoria de provisión de puestos de trabajo porque incorporaba una valoración idéntica de los méritos por antigüedad de los funcionarios interinos y de los funcionarios de carrera, con el argumento que existen unas diferencias entre estos dos colectivos por lo que se refiere a su cualificación y a las tareas que ejercen.

[10] Esta es la posición adoptada de manera sistemática y repetida por el TJUE; como ejemplo, puede verse la STJUE de 9 de julio de 2015, asunto C-177/14.

También estaría a favor de una interpretación no restrictiva el hecho de que la Directiva formula una regla general de no discriminación, de manera que lo que deberá justificarse e interpretar restrictivamente serán las excepciones a dicha regla general.

En el mismo sentido de mejorar las relaciones temporales, la cláusula 8.1 AM incorpora una regla sobre el carácter de mínimos de las medidas que incorpora la Directiva para hacer efectivo el principio de igualdad de trato y para evitar el uso abusivo de contrataciones temporales sucesivas con el mismo trabajador. Según dicha cláusula: "*Los Estados miembros y/o los interlocutores sociales podrán mantener o introducir disposiciones más favorables para los trabajadores que las previstas en el presente Acuerdo*".

Dado que no se ha transpuesto la Directiva al ordenamiento español, es muy importante para la defensa del personal temporal el efecto directo vertical de la cláusula 4 AM, según el cual, los particulares pueden invocar directamente una norma europea ante un Tribunal nacional aunque no se haya efectuado la transposición de la Directiva, así como ante el propio TJUE. Además, para su aplicación en los Estados miembros no es necesario adoptar ningún acuerdo adicional por parte de las instituciones comunitarias. Es cierto que el AM establece una reserva relativa a las justificaciones basadas en razones objetivas, pero la aplicación de esta reserva es susceptible de control jurisdiccional por el propio TJUE y no impide considerar que la cláusula 4 AM confiere a los particulares derechos que puede invocar directamente delante de los tribunales estatales, derechos que éstos están obligados a salvaguardar. Tampoco puede constituir un impedimento la previsión de la cláusula 4.3 AM, que confiere a los Estados miembros la facultad para dictar las disposiciones de aplicación del principio de no discriminación en el ordenamiento interno, porque las normas internas no pueden referirse de ninguna manera a la definición del contenido de este principio, condicionar su existencia o limitar su alcance. En conclusión, como afirma la STJUE de 15 de abril de 2008, asunto C-268/06, «*la cláusula 4, apartado 1, del Acuerdo marco es, desde el punto de vista de su contenido, incondicional y lo suficientemente precisa para poder ser invocada por un particular ante un tribunal nacional*».

Como se ha dicho anteriormente, el Estado español efectuó la transposición oportuna de la Directiva al campo del Derecho del Trabajo a través de la Ley 12/2001, de 9

de julio, de medidas urgentes de reforma del mercado de trabajo para el incremento del empleo y la mejora de su calidad, que modificó el art. 15 del Estatuto de los Trabajadores (ET) relativo a los contratos de duración determinada; ello ha evitado muchos conflictos de alcance general, y los que se producen tienen habitualmente un carácter particular, como consecuencia de previsiones discriminatorias establecidas en los convenios colectivos, los contratos de trabajo o las prácticas empresariales. También se ha producido la equiparación del nivel de protección ofrecido por el Derecho interno y el Comunitario.

Por el contrario, en el ámbito de las relaciones funcionariales, aún hoy no se ha hecho la transposición de la Directiva –a pesar de que han transcurrido más de dieciséis años desde su aprobación–, con la excepción de la defectuosa previsión del art. 25.2 de la Ley 7/2007, de 12 de abril, del Estatuto Básico del Empleado Público (LEBEP), en relación con los trienios de los funcionarios interinos. Esto, unido al carácter esencialmente legal y reglamentario del estatuto funcionarial, implica que los conflictos sobre la diferencia de trato entre las relaciones temporales y las permanentes tengan su origen principal y su proyección en todas las funciones públicas: estatal, autonómicas y locales. Sin olvidar las que se producen a través de los acuerdos de condiciones de trabajo de funcionarios fruto de la negociación colectiva en cada administración.

La situación expuesta ha conllevado que el nivel de protección ofrecido por la Directiva a los funcionarios temporales sea superior al obtenido a través del Derecho interno. Esto no tendría que ser así necesariamente, dado que el principio de igualdad del art. 14 CE podría ser interpretado de manera que se equiparara su protección con la ofrecida por la Directiva. Así lo confirmarían los presupuestos sentados por la doctrina constitucional para apreciar una potencial vulneración del derecho a la igualdad ante la ley, a saber: a) que la norma cuestionada haya introducido directa o indirectamente una diferencia de trato entre grupos o categorías de personas; b) que las situaciones subjetivas que quieran traerse a la

comparación sean homogéneas o equiparables (o, en ocasiones, idénticas).[11] Presupuestos semejantes a los utilizados para la aplicación del principio de igualdad de trato de la cláusula 4 AM.

La divergencia entre ambos ordenamientos se produce cuando el mismo TC aplica dichos presupuestos al distinto régimen establecido legalmente para los funcionarios de carrera en relación con los de los funcionarios interinos y el personal eventual. En primer lugar, el TC ha venido sosteniendo que la igualdad o desigualdad entre estructuras, como las situaciones funcionariales, que son -prescindiendo de su sustrato sociológico real- creación del Derecho, es resultado de la definición que éste haga de ellas; esto es, de su configuración jurídica que puede quedar delimitada por la presencia de muy diversos factores. Por tanto, al amparo del principio de igualdad no es lícito tratar de asimilar situaciones que en origen no han sido equiparadas por las normas jurídicas que las crean.[12] En otros términos, el TC afirma también que las situaciones subjetivas que sean objeto de comparación no son efectivamente homogéneas o equiparables cuando existen diferentes tipos de vínculos entre los empleados públicos y la Administración en función de las distintas categorías legales existentes dentro de la función pública. El diferente trato se establece en función del distinto vínculo entre los empleados públicos y la Administración (funcionarios y personal laboral) o en función de las distintas categorías en que se clasifican los funcionarios (funcionarios de carrera y funcionarios interinos).[13]

Se observa, pues, que el TC ha abandonado explícitamente el sustrato sociológico y ha adoptado un criterio formalista basado en las diferencias conceptuales introducidas por el ordenamiento de función pública entre las distintas clases de personal al servicio de la

[11] STC 104/2015, de 28 de mayo de 2015.

[12] Afirmación de la STC 7/1984, de 25 de enero, posteriormente reproducida reiteradamente en otras resoluciones del Tribunal.

[13] STC 104/2015, de 28 de mayo de 2015.

Administración. La aplicación de este criterio formalista lleva a confundir colectivos distintos –funcionarios de carrera y funcionarios interinos o personal eventual- y colectivos no comparables; cuando en realidad, se trata de comparar situaciones homogéneas o equiparables de colectivos no idénticos. La consecuencia de exigir un esquema de coincidencia plena o total identificación, frente a otro de confluencia, similitud u homogeneidad de las situaciones de hecho, supone vaciar de sentido un derecho de fundamento y conformación relacional[14] y justificar la legalidad de cualquier diferencia de trato.

2. APLICACIÓN DE LA DIRECTIVA A LAS RELACIONES DE EMPLEO PÚBLICO

La cláusula 2.1 AM, al fijar su ámbito de aplicación, se limita a establecer que alcanzará a los trabajadores con un trabajo de duración determinada cuyo contrato o relación laboral estén definidos por la legislación, los convenios colectivos o las prácticas vigentes en cada Estado miembro. Así pues, no especifica si se aplica solamente a las relaciones laborales en el ámbito de la empresa privada o si también se aplica en las administraciones públicas y, dentro de éstas, si afecta solamente a las relaciones laborales de derecho privado o si también se aplica a las relaciones de función pública sujetas al derecho administrativo.

Por lo que se refiere a la aplicación de la Directiva a las relaciones laborales de derecho privado en el seno de la Administración española se resolvió desde el primer momento, incluso con anterioridad a la entrada en vigor de la normativa de transposición.[15] La jurisprudencia comunitaria confirmaría posteriormente la aplicación de la Directiva en el

[14] Como indica el voto particular formulado por varios magistrados en la STC 8/2015, de 22 de enero de 2015.

[15] STS Sala de lo Social, de 7 de octubre de 2002, recurso 1213/2001, que reconoce el derecho a la percepción de trienios al personal laboral al servicio de la Comunidad Autónoma de las Islas Baleares.

ámbito de las administraciones públicas. El primer pronunciamiento, la STJUE de 4 de julio de 2006, asunto C-212/04, sobre la aplicación de la cláusula 5 AM a una relación contractual en el seno de una entidad del sector público –la Agencia Helénica de la Leche-, afirmó que la Directiva y el AM se aplican a los contratos de duración determinada celebrados por los órganos de la Administración y otras entidades del sector público, porque: *a*) sus disposiciones no contienen ninguna referencia que permita deducir que su ámbito de aplicación se limita exclusivamente a las empresas privadas; *b*) la cláusula 2.1 AM define el ámbito de aplicación con amplitud; *c*) la definición del concepto de *trabajador con un contrato de duración determinada* de la cláusula 3.1 AM engloba a todos los trabajadores, sin establecer distinción alguna en función del carácter público o privado del empleador para el cual trabajan; y, *d*) la cláusula 2.2 AM no los excluye. Posteriormente, el TJUE ha reiterado su doctrina en asuntos relativos a las administraciones territoriales.[16]

A partir de aquí, quedaba por ver si se aplicaba también a las relaciones temporales sujetas al derecho administrativo o funcionariales en sentido amplio, a lo cual se oponían algunos Estados como el español, al considerar que no hacía referencia expresa a las mismas. Es cierto que la cláusula 2.1 AM se refiere literalmente a *los trabajadores* –tal como hacen la Directiva y el AM en todo su contenido–, pero no cierra el paso a su aplicación al personal temporal en régimen de derecho administrativo. Al contrario, cuando se refiere a que el trabajo temporal puede ser fruto de una relación contractual o de otra modalidad de relación laboral[17] nos lleva a considerar que, en el caso del Derecho español, las relaciones laborales no contractuales serían las de función pública o estatutarias. Además, también establece que

[16] Así, la STJUE de 15 de abril de 2008, asunto C- 268/06, sobre relaciones contractuales con diversos ministerios de la Administración estatal irlandesa.

[17] Esta referencia a una dualidad de relaciones laborales se confirma por partida doble en la cláusula 3 AM.

la relación laboral puede estar configurada legalmente, atributo que nos conduce de nuevo a las relaciones estatutarias o funcionariales.

Sobre esta cuestión, se debe partir de que ni la lógica ni la terminología propia del Derecho de la UE tienen un encaje fácil con el derecho público español. La lógica de nuestro sistema jurídico parte de la existencia de un ordenamiento administrativo que se aplica a las relaciones laborales que mantienen con los funcionarios públicos. Según esta lógica, acentuada por una interpretación rígida y formal del principio de legalidad, la falta de previsión legal expresa de la Directiva al ámbito público se traduce en considerar que no le es aplicable.

Para la interpretación de la cláusula 2.1 AM es esencial el papel desempeñado por la jurisprudencia del TJUE. De su doctrina, en cuanto incide sobre el tema tratado, se pueden destacar los puntos siguientes:

a) Dado que las nociones jurídicas no tienen necesariamente el mismo contenido en el Derecho comunitario y en los diversos derechos estatales, una disposición de Derecho comunitario que no contenga una remisión expresa al derecho de los Estados miembros para determinar su sentido y alcance, debe ser objeto de una interpretación autónoma y uniforme en toda la UE, que debe realizarse teniendo en cuenta el contexto de la disposición y el objeto que persigue.[18]

b) Las nociones de *trabajador* -y de *funcionario*- no son comunes a todos los derechos estatales; por lo tanto, a los efectos de la Directiva, no sería correcto interpretar el concepto de *trabajador* en el sentido reductivo que tiene en el ordenamiento español, sino que debe interpretarse por igual en todos los Estado miembros.

[18] STJUE de 9 de noviembre de 2000, asunto C- 357/98.

c) En relación con el contexto de la Directiva, cabe destacar que pone sus fundamentos legales en las disposiciones del Acuerdo sobre política social, incorporadas posteriormente a los arts. 136 a 139 TCE (actualmente, los arts. 151 y ss. TFUE) y en el punto 7 de la Carta Comunitaria de los Derechos Sociales Fundamentales de los Trabajadores; normas que son aplicables a todos los trabajadores en sentido amplio, sea cual sea la naturaleza del empresario y de la relación laboral que les une.

d) Finalmente, insiste en que el objeto de la Directiva es dar una mayor protección a los trabajadores con una relación laboral temporal, por lo cual, no se puede interpretar restrictivamente.

2.1. Aplicación a los funcionarios interinos

Concretando las líneas generales expuestas, el TJUE declara[19] que la Directiva se aplica al personal en régimen funcionarial, en concreto, al personal estatutario temporal[20] de los Servicios Públicos de Salud. Posteriormente, hizo la misma declaración en relación con los funcionarios interinos.[21] La doctrina sentada en estas sentencias se puede resumir en los apartados siguientes:

a) El ámbito de aplicación de la cláusula 2.1 AM está concebido de manera extensiva, ya que se refiere con carácter general a los trabajadores con un trabajo de duración

[19] STJUE de 13 de septiembre de 2007, asunto C-307/05.

[20] El personal estatutario temporal de los servicios públicos de salud se puede considerar, en este ámbito sectorial, el equivalente a los funcionarios interinos. Según al art. 9 de la Ley 55/2003, los nombramientos de este personal puede ser de interinidad, de carácter eventual o de sustitución, en función de la causa por la que son nombrados.

[21] STJUE de 22 de diciembre de 2010, asuntos acumulados C- 44/09 y C-456/09.

determinada cuyo contrato o relación laboral está definido por la legislación, los convenios colectivos o las prácticas vigentes en cada estado miembro.

b) La definición del concepto de *trabajador con contrato de duración determinada* formulado en la cláusula 3.1 AM engloba a todos los trabajadores, sin diferencia alguna en función del carácter público o privado del empresario para el que trabajan.

c) Dada la importancia de los principios de igualdad de trato y de no discriminación, que forman parte de los principios generales del derecho de la UE, las disposiciones de la Directiva tienen un alcance general, ya que constituyen normas de Derecho social de la Unión de especial importancia, de las que debe disfrutar todo trabajador, puesto que se trata de disposiciones protectoras mínimas.

d) La simple circunstancia de que una posición sea calificada como *de plantilla* según el Derecho nacional y presente alguno de los elementos que caracterizan la función pública de un Estado miembro carece de relevancia en este aspecto, si no se quiere desvirtuar gravemente la eficacia de la Directiva así como su aplicación uniforme en los Estados miembros, reservando a estos la posibilidad de excluir, a su arbitrio, a determinadas categorías de personas del beneficio de la protección de la Directiva.

Por otro lado, el AM establece expresamente cuales son las relaciones que se excluyen de su ámbito de aplicación, fijando dos niveles. El primero, el de los contratos temporales celebrados con la intermediación de una empresa de trabajo temporal (ETT), como indica el preámbulo del AM al afirmar que «se aplica a los trabajadores que tienen un contrato de duración determinada, con excepción de los puestos a disposición de una empresa usuaria por una agencia de trabajo temporal».[22] El segundo, agrupa unas excepciones de

[22] Esta modalidad de relaciones laborales ha sido regulada por la Directiva 2008/104/CE del Parlamento Europeo y del Consejo, de 19 de diciembre de 2008, relativa al trabajo a través de empresas de trabajo temporal. Esta directiva, a diferencia de la Directiva 1999/70/CE, no fue objeto de acuerdo entre los interlocutores sociales,

carácter facultativo que, para ser efectivas, requieren ser reguladas por el ordenamiento interno; están previstas en el apartado 2 de la cláusula 2 AM y se refieren a:

a) Las relaciones de formación profesional inicial y de aprendizaje, que se traducen en nuestro ordenamiento en los contratos formativos del art. 11 ET.

b) Las relaciones de trabajo concluidas en el marco de un programa específico de formación, inserción y reconversión profesionales, de naturaleza pública o sostenido por los poderes públicos. Se refiere a las acciones y medidas incluidas en los planes de políticas activas de empleo para las cuales, en nuestro país, se prevé la contratación laboral.

Ahora bien, el hecho de que las relaciones laborales de naturaleza funcionarial sin distinción estén incluidas dentro del ámbito de aplicación de la Directiva no significa que deba afectarles con la misma extensión y profundidad. Porque la Directiva ya prevé, tanto por lo que se refiere al principio de no discriminación como por lo relativo a las medidas destinadas a evitar la utilización abusiva de sucesivos contratos o relaciones laborales temporales, la posibilidad de modular su aplicación cuando existan razones objetivas que justifiquen un trato diferenciado. Razones objetivas que se podrán fundamentar en algunas particularidades de las relaciones de trabajo sujetas al derecho administrativo con respecto a las de derecho laboral y, dentro de las primeras, en las singularidades respectivas de los funcionarios interinos y del personal eventual con respecto a las de los funcionarios de carrera.

Una consideración particular merece la figura conocida como *interinidad de larga duración* o *interinidad estable*. Esta modalidad de interinidad no tiene un reconocimiento legal, sino que responde a una creación jurisprudencial y doctrinal que se fundamenta en

que no consiguieron resultados positivos en sus negociaciones. Así queda reflejado en el considerando 7 de la Directiva aprobada.

sendos pronunciamientos del TC,[23] en los que se reconoce al personal estatutario interino que llevaba más de cinco años de servicio a la Administración con esta condición, el derecho a la igualdad de trato con los funcionarios de carrera para disfrutar de una excedencia para tener cuidado de hijos. Es preciso resaltar que en ambos casos el argumento de la temporalidad es complementario del de discriminación indirecta por razón de sexo. Además, el TC también pone de relieve que estas situaciones de interinidad no comportan una igualdad de derechos generalizada con los de los funcionarios de carrera, sino, simplemente, que pueden requerir un trato igual en atención a las circunstancias de cada caso.

En la práctica, la figura del interino estable ha adquirido una gran importancia porque su número no ha parado de incrementarse en muchas administraciones públicas como consecuencia de la reducción o congelación de las ofertas de empleo público durante los últimos años, superando en muchos casos el veinte por ciento de la plantilla funcionarial. Por ello, no sería de extrañar que los Tribunales de justicia, a partir de la puerta entreabierta por el TC, adoptaran una línea jurisprudencial favorable a la ampliación de los derechos de dichos funcionarios para aproximarlos a los de los funcionarios de carrera. De hecho, esta línea ha sido explicitada por el TS[24] al afirmar que estos interinos ejercen las mismas funciones o de análoga naturaleza que el personal estatutario fijo y lo hacen con cierta estabilidad temporal –más de cinco años-, siempre que se trate de la misma plaza o de otra con un contenido funcional equivalente dentro del mismo servicio de salud. Por esta razón, el trato distinto con respecto al personal estatutario fijo no tendría justificación objetiva y razonada, según requiere la jurisprudencia del TJUE sobre la Directiva.

[23] STC 240/1999, de 20 de diciembre y STC 203/2000, de 24 de julio.

[24] STS de 30 de junio de 2014, recurso 1846/2013, relativa al derecho a la carrera profesional del personal estatutario interino al servicio de las instituciones sanitarias. El TS, tomando como referencia la citada STC 203/2000, institucionaliza esta figura y configura este interino como el que ocupa una plaza vacante y mantiene una relación de servicios con la Administración que supera los cinco años.

Sin embargo, la construcción de esta figura, a medio camino entre el funcionario de carrera y el funcionario interino, no era indispensable para resolver los casos concretos en el mismo sentido que lo hicieron los respectivos pronunciamientos judiciales y, en cambio, genera una mayor inseguridad jurídica sobre cuáles son los derechos de los funcionarios interinos. Porque existen derechos que requieren expresamente un plazo distinto, más corto o más largo, para poder ser disfrutados, de manera que no se producirá una adecuación con el período de cinco años indicado.

Tampoco la Directiva distingue las relaciones temporales en función de su duración. Ello no significa que el personal temporal tenga entre sí una igualdad absoluta de condiciones de trabajo, con independencia de la antigüedad; simplemente, significa que, con carácter general, sus condiciones serán las mismas que las de los funcionarios de carrera y será en el momento de justificar las diferencias respecto de determinadas condiciones de trabajo cuando los requisitos establecidos por el TJUE –para que se considere una situación comparable o para justificar una razón objetiva– podrán situar en una posición diferente al personal temporal en función de su mayor o menor antigüedad. Así, por ejemplo, si para adquirir el derecho a un ascenso de grado o escalón, según el modelo de carrera horizontal de una administración determinada, se requiere un plazo mínimo de cuatro años, este sería el período de servicios que actuaría como elemento diferenciador; pero si el modelo de carrera requiere un período mínimo de seis años para el ascenso, este será el que marcará la diferencia entre los distintos empleados de carácter temporal.

Dicho de otra manera, la antigüedad o la duración de los servicios prestados es una característica o requisito más entre los que configuran y delimitan determinadas condiciones de trabajo o su ejercicio; para poder disfrutar de un derecho en igualdad de condiciones lo que se debería requerir es que cada empleado, temporal o permanente, reuniera dicha característica o requisito temporal. Es decir, que son las características del propio derecho –entre ellas, un tiempo determinado de antigüedad o de servicios prestados– las que actuarían como elemento de diferenciación en cada caso concreto. Parece innecesario, pues, que en función de una antigüedad concreta, se clasifique al empleado temporal en una modalidad de interinidad de larga duración que lleve incorporada el reconocimiento de un conjunto de

derechos. Derechos que no se reconocerían a los funcionarios interinos con menor antigüedad aunque superaran la exigida a los funcionarios de carrera para poder disfrutarlo.

2.2. Aplicación de la Directiva al personal eventual

En relación con esta clase de empleados públicos, las dudas planteadas sobre si les es aplicable el principio de igualdad de trato del AM han sido mayores que en el caso de los interinos. En parte, porque en la práctica se ha convertido en un colectivo heterogéneo en cuanto a las causas por las que se produce su nombramiento y las funciones que desempeña. Todo ello, a pesar de un tratamiento legal unitario establecido en sus reglas básicas en el art. 10 LEBEP, según el cual, la naturaleza del personal eventual se caracteriza por cuatro elementos definidores: *a*) se incorpora a la Administración en virtud de un nombramiento; *b*) tiene carácter no permanente; *c*) solamente realiza funciones expresamente cualificadas de confianza o de asesoramiento especial; *d*) es retribuido con cargo a los créditos presupuestarios de personal. De estas características, tres son compartidas con otras clases de empleados públicos, quedando como elemento diferenciador, la tipología de las funciones ejercidas. Éste puede considerarse el elemento o característica singular y más relevante en la configuración del personal eventual, y el origen de su particular régimen jurídico.[25]

No se ha desarrollado un régimen jurídico específico para el personal eventual, pues el art. 12.5 LEBEP se limita a establecer que, como regla general, "*se le aplica, en aquello que sea adecuado a la naturaleza de su condición, el régimen general de los funcionarios de carrera*". Esta regla general se ha interpretado en el sentido que el Estado dispone de la facultad absoluta para decidir cuándo un determinado derecho de los funcionarios de carrera se aplica al personal eventual por considerarlo adecuado a «la naturaleza de su condición» y cuándo se aplica un régimen distinto a un determinado derecho. Por lo general, se ha entendido que la falta de un régimen específico unido a la simple invocación de una relación

[25] Afirmación que parece coincidir con lo que establece el art. 89 de la Ley 7/1985, de 2 de abril, reguladora de las bases del régimen local.

con características diferentes a las del funcionario de carrera, justificaba cualquier diferencia de trato. De ser realmente así, sería contradictorio con su inclusión en el ámbito de la Directiva.

Se observa que entre los elementos que definen la relación laboral del personal eventual no figura su régimen de nombramiento y cese, que son libres y no se someten a los principios de igualdad, mérito y capacidad (arts. 23.2 y 103.3 CE). Nombramiento y cese que no constituyen el origen o causa de un determinado régimen jurídico, sino que son parte de dicho régimen y la consecuencia y efecto de que se trate de puestos definidos materialmente como de confianza o asesoramiento especial. Por lo tanto, esto no debería afectar a su inclusión en el ámbito de aplicación de la Directiva, sin perjuicio de su consideración en el momento de determinar la comparabilidad con el funcionario de carrera y si tales elementos pueden constituir una razón objetiva excluyente del principio de igualdad de trato.[26]

Por otro lado, que las funciones sean de confianza no desvirtúa que, como empleados públicos que ocupan un puesto de trabajo catalogado en la relación de puestos de trabajo (RPT), los puestos de personal eventual estén previstos legalmente para ejercer unas funciones necesarias dentro de la Administración y encaminadas como cualquier otra al servicio de los intereses generales, tal como lo requiere el art. 103.1 CE. Previsiones legales que no pueden ser modificadas o alteradas con el argumento de una práctica político-administrativa desviada que, en ocasiones, utiliza el personal eventual con finalidades y criterios distintos, al ponerlo al servicio de los intereses del partido o grupo político proponente.

Las características expuestas pueden ser un buen argumento para considerar que los puestos de personal eventual ejercen funciones esencialmente profesionales, con el añadido

[26] En relación con esto, el art. 12.4 LEBEP establece dos excepciones expresas a la aplicación del régimen de los funcionarios cuando dice que no podrá constituir mérito para acceder a la función pública ni para la promoción interna.

de que su titular será una persona que goza de la confianza de quienes ostentan el poder superior de decisión política.[27] El argumento de la profesionalidad se refuerza por el hecho de realizar unas tareas equiparables a las del mercado y por percibir una contraprestación a cambio de las mismas,[28] con independencia de que su estructura retributiva no sea imperativamente la misma que la de los funcionarios de carrera y de que no se haya aprobado con carácter general para todas las administraciones públicas. Es de señalar, por ejemplo, que en el caso de la Administración General del Estado (AGE), las retribuciones del personal eventual reguladas en la Ley de Presupuestos Generales del Estado de cada ejercicio, tienen la misma estructura que las de los funcionarios de carrera; incluso tienen derecho a percibir el complemento de productividad, lo cual no deja de ser un indicio de que sus tareas se pueden evaluar porque contribuyen a conseguir los objetivos de la Administración con eficacia y eficiencia, característica que les acerca a la *normalidad* definida para las funciones propias del resto de empleados públicos.

Ahora bien, la naturaleza del personal eventual no se altera por el hecho de reconocerle unos determinados derechos o condiciones de trabajo, como el derecho a la percepción de trienios o del complemento de productividad en igualdad de condiciones que a los funcionarios de carrera. Solo hace falta que el legislador lo establezca. De manera que es compatible con dicha naturaleza el que, sobre el fundamento de una norma interna o de Derecho comunitario –en este caso, la Directiva–, se otorguen al personal eventual unos derechos en los términos que establecen estas normas.[29]

[27] STS de 17 de marzo de 2005, recurso 4245/1999.

[28] Auto de 31 de enero de 2014, recurso 526/2012. También es interesante la argumentación de la STSJ de Valencia de 9 de julio de 2014, recurso 480/2012.

[29] En este sentido, la STS de 19 de octubre de 2012, recurso 359/2011, afirma que no altera la naturaleza del puesto desempeñado el reconocimiento de antigüedad al personal eventual que realizó el CGPJ eventual amparándose en su inclusión en el ámbito personal de la Directiva.

Sin embargo, cabe señalar que la inaplicación de la Directiva al personal eventual había sido una cuestión pacífica en la Administración española. La situación empezó a cambiar en dos órganos constitucionales de gran relevancia; primero, el Consejo General del Poder Judicial (CGPJ) reconoció a su personal eventual el derecho al complemento por antigüedad percibido por los funcionarios de carrera del Consejo y, posteriormente, utilizó el mismo argumento para reconocerle su percepción con efectos retroactivos;[30] luego, los pasos del CGPJ fueron seguidos por el TC en relación con su personal eventual, al que ha reconocido su derecho al complemento de antigüedad en las mismas condiciones que los funcionarios de carrera de la institución, si bien, en este caso, sin hacer ninguna referencia a la Directiva.[31]

El TS ha tenido ocasión de pronunciarse en diversas ocasiones en relación con la aplicación de la Directiva al personal eventual al servicio del CGPJ,[32] aunque no lo ha hecho de manera clara y definitiva. Posteriormente, se le planteó la misma cuestión en relación con el personal eventual al servicio del Consejo de Estado, máximo órgano consultivo de la AGE; en concreto, sobre si la omisión por la legislación española del derecho a la percepción de los trienios por dicho personal es contraria al principio de no discriminación de la Directiva; el TS optó por elevar una cuestión prejudicial al TJUE.[33] La respuesta de éste ha sido afirmativa: el personal eventual está incluido en el ámbito de aplicación de la cláusula 3.1

[30] Acuerdos del Pleno del CGPJ de 21 de junio de 2010 y de 28 de abril de 2011.

[31] Acuerdo del Pleno del TC de 27 de mayo de 2014, que modificó parcialmente el régimen de retribuciones del personal a su servicio establecido por Acuerdo de 19 de diciembre de 2002.

[32] SSTS de 19 de octubre de 2012, recurso 359/2011; de 13 de junio de 2012, recurso 60/2012 y de 13 de noviembre de 2012, recurso 364/2011.

[33] Auto de 31 de enero de 2014, recurso 526/2012.

del AM. En su resolución,[34] a los argumentos de carácter general sobre el alcance y amplitud del concepto de trabajador a efectos de la Directiva, el Tribunal añade que:

a) El mero hecho de que se clasifique a un trabajador de eventual en virtud del Derecho nacional o de que su contrato de trabajo presente algunos aspectos particulares como su carácter temporal, su nombramiento y cese libres o el que se considere que dicho trabajador desempeña funciones de confianza y asesoramiento especial, carece de relevancia a este respecto, so pena de desvirtuar gravemente la eficacia de la Directiva y el AM y su aplicación uniforme en los Estados miembros, al reservar a éstos la posibilidad de excluir a su arbitrio a determinadas categorías de personas del beneficio de la protección requerida por estos instrumentos de la Unión.

b) Debe considerarse que un contrato o una relación de servicio como la del personal eventual, que finaliza automáticamente cuando se produzca el cese de la autoridad para la que se desempeñen las funciones, tiene un plazo cuyo final lo determina "la producción de un hecho o acontecimiento determinado", en el sentido de la cláusula 3.1 AM.

Finalmente, cabe reproducir en este punto, las consideraciones hechas anteriormente en relación con los funcionarios interinos: que se les aplique la Directiva no significa que deba producirse una equiparación total de las condiciones de trabajo con las de los funcionarios de carrera. Es evidente que sus características particulares pueden comportar que su situación no sea comparable con la de los funcionarios de carrera en relación con determinada condición de trabajo o que, en caso de serlo, se den razones objetivas que justifiquen un trato diferente. Para dilucidarlo, el análisis deberá hacerse caso por caso, teniendo en cuenta las características que configuran cada condición de trabajo en particular en contraposición con las características del personal eventual.

[34] STJUE de 9 de julio de 2015, asunto C-177/14.

2.3. Aplicación de la Directiva a los funcionarios de carrera vinculados previamente por una relación temporal con la Administración

De lo expuesto hasta ahora se desprende que la Directiva y el AM se aplican solamente a las relaciones temporales. A pesar de esta claridad, surge la duda sobre si se puede invocar el principio de no discriminación por parte de los funcionarios de carrera respecto de los servicios prestados anteriormente como funcionario interino, al amparo de la cláusula 4.4 AM. De hecho, con frecuencia una relación temporal en calidad de funcionario interino o de contratado temporal constituye un paso previo para adquirir posteriormente la condición de funcionario de carrera o trabajador indefinido.

Cabe indicar que la legislación de función pública permite que los servicios prestados como funcionario interino no se tengan en cuenta o se valoren con criterios desfavorables en comparación con los prestados en la condición de funcionario de carrera. Uno de dichos supuestos se planteó ante el TJUE;[35] en concreto, se trataba de una convocatoria de promoción interna en la que se exigía un requisito de antigüedad como funcionario de carrera exclusivamente. En contra de la posición defendida por el Gobierno español y la misma Comisión Europea, el TJUE declaró que el simple hecho de que el empleado hubiese adquirido la condición de funcionario de carrera y que el acceso a un proceso selectivo por el sistema de promoción interna estuviese sujeto a la posesión de dicha condición, no excluía la posibilidad de que este pudiera aplicar, en determinadas circunstancias, el principio de no discriminación enunciado en la cláusula 4 AM, dado que la discriminación contraria a dicha cláusula se refería a los períodos de servicios prestados como funcionario interino y que el hecho de que mientras tanto el interesado hubiera tomado posesión como funcionario de carrera no tenía relevancia. De la jurisprudencia citada se pueden deducir las consecuencias siguientes:

[35] STJUE de 8 de septiembre de 2011, asunto C-177/10.

1ª) La consideración del tiempo de servicios prestados en la condición de temporalidad puede tener una vertiente cualitativa y otra cuantitativa: no solo debe valorarse todo el tiempo, sino que se ha de valorar de la misma manera.

2ª) Se puede invocar la existencia de discriminación cuando el tiempo de servicios prestados actúa como requisito para obtener un determinado derecho y cuando actúa como mérito en un procedimiento de selección, de provisión de puestos, de carrera, etc.

3.ª) La consideración de los servicios prestados, por sí sola y al margen de su evaluación cualitativa, es independiente del hecho de que se haya accedido como funcionario de carrera o trabajador fijo a una plaza de la misma escala o subescala o de la misma categoría laboral que la ocupada como temporal, y de que el acceso se haya producido sin solución de continuidad o transcurrido un tiempo desde la extinción de la relación temporal. Simplemente, debe atenerse al sistema y condiciones de evaluación establecidos en cada caso para el personal permanente.

3. CRITERIOS GENERALES PARA LA APLICACIÓN DEL PRINCIPIO DE IGUALDAD DE TRATO

Una vez delimitado el significado del principio de no discriminación de la Directiva, es preciso analizar las reglas que con carácter general deben permitir determinar cuándo se ha vulnerado el principio de igualdad de trato entre los funcionarios temporales y los de carrera. La jurisprudencia del TJUE ha fijado los pasos que deben seguirse para alcanzar dicho objetivo, así como una serie de criterios aplicables a cada uno de ellos. Los pasos de este proceso serían:

1º) Verificar la existencia de una condición de trabajo en el sentido de la Directiva.

2º) Determinar el trabajador indefinido comparable.

3º) Concretar las razones objetivas que pueden justificar una diferencia de trato.

3.1. Condiciones de trabajo sujetas a la no discriminación

La prohibición de discriminación formulada por la cláusula 4.1 AM se sitúa en el ámbito de las condiciones de trabajo, de manera que si una medida no tiene dicha consideración no se le aplicará la prohibición de discriminación. Por lo tanto, este es el requisito que se debe acreditar en primer lugar.[36] Aunque puede suceder, en ocasiones, que no sea necesario entrar en el debate sobre esta cuestión, dada su obviedad, como sucede en el caso de condiciones como las retribuciones, la jornada y el horario de trabajo, los permisos, etc.

En todo caso, hay cierta dificultad para determinar *a priori* el alcance del concepto de *condiciones de trabajo*, dado que no tiene por qué coincidir en el derecho interno y en la Directiva. Concretamente, por lo que se refiere a los funcionarios, en el orden estatal se ha considerado habitualmente que el acceso a la función pública y la selección de los empleados públicos corresponden a un estadio previo al nacimiento de la relación laboral, de manera que no integrarían las condiciones de trabajo. De forma similar sucedería con la extinción de la relación de los funcionarios interinos y, más aun si cabe, del personal eventual, que se han vinculado al régimen de incorporación.

Por su parte, el AM tampoco precisa qué debe entenderse por *condiciones de trabajo* y cuáles son, cometido que en primera instancia deben llevar a cabo los Estados miembros. Pero el TJUE ha debido pronunciarse en algunas ocasiones sobre la inclusión de determinados supuestos en los que el Estado miembro implicado defendía que la reclamación planteada no se refería a una condición de trabajo en sentido estricto. Según el TJUE, el criterio decisivo para determinar si una medida está incluida en el concepto de condición de trabajo en el sentido de la cláusula 4 AM es precisamente el del empleo, es decir, la existencia de una relación laboral entre un trabajador y su empresario.[37] No pasa inadvertido que este

[36] STJUE de 13 de marzo de 2014, asunto C-38/13.

[37] En este sentido pueden verse las SSTJUE de 13 de marzo de 2014, asunto C-38/13; de 12 de diciembre de 2013, asunto C-361/12; y de 10 de junio de 2010, asuntos C-395/08 y C-396/08.

criterio general es impreciso e insuficiente para resolver los casos concretos; de ahí que, frecuentemente, el TJUE utiliza el criterio de la finalidad protectora y de mínimos de la cláusula 4 del AM, que no puede ser interpretada restrictivamente, para resolver dicha cuestión; de manera que no sería admisible la exclusión de una condición o medida del concepto de condiciones de trabajo cuando ello equivaldría a reducir el ámbito de la protección concedida a los trabajadores temporales contra las discriminaciones. De acuerdo con estos criterios, todos los derechos y obligaciones que surjan con el nacimiento de una relación laboral y hasta su extinción, quedarían incluidos dentro de la noción de condición de trabajo a los efectos de la Directiva.

El TJUE[38] da un paso más en la defensa de una interpretación amplia del concepto al considerar aplicables, por analogía, los de la Directiva 2000/78/CE, de 27 de noviembre, relativa al establecimiento de un marco general para la igualdad de trato en el trabajo y el empleo (en particular, el art. 3.1.c), y la Directiva 2006/54/CE del Parlamento y del Consejo, de 5 de julio, relativa a la aplicación del principio de igualdad de trato entre hombres y mujeres en asuntos de trabajo y empleo (en particular, el art. 14.1.c). Tampoco en estas Directivas se define cuáles son las condiciones de trabajo, pero contienen un listado más amplio en el que figuran las condiciones de acceso, incluidos los criterios de selección, y las condiciones de contratación y promoción.

A partir de los diversos pronunciamientos del TJUE se puede ir confeccionando una relación cada vez más extensa. El número más importante de pronunciamientos sobre esta cuestión se ha producido en los aspectos retributivos referentes a los funcionarios interinos, a pesar de que las retribuciones estaban excluidas de las competencias de la UE para dar soporte y completar la acción de los Estados miembros para conseguir los objetivos de política social comunitaria (art. 153.5 TFUE, antiguo art. 137.5 TCE).

[38] STJUE de 13 de marzo de 2014, asunto C-38/13.

En relación con la selección de los funcionarios de carrera, el TJUE ha tenido ocasión de pronunciarse sobre el cómputo de los servicios prestados como funcionario interino para cumplir con el requisito temporal exigido para poder participar en un proceso selectivo por el turno de promoción interna.[39] Asimismo, ha considerado que las normas nacionales relativas a los períodos de servicio que se han de cumplir para poder ser clasificado en una categoría retributiva superior o con la finalidad de calcular períodos de servicio requeridos para ser objeto de un informe de cualificación cada año y, en consecuencia, poder beneficiarse de una promoción profesional forman parte integrante de las condiciones de trabajo.

Otro supuesto sobre el que también ha tenido ocasión de pronunciarse el TJUE es la carrera profesional en la función pública, concretamente sobre la modalidad de carrera horizontal, afirmando que los sexenios del personal docente no universitario deben considerarse una condición de trabajo en el sentido de la cláusula 4 AM.[40] Este concepto retributivo constituye un complemento salarial que se otorga en función de la duración de los períodos de servicios prestados y de haber cursado determinado número de horas de formación en el marco de un régimen de carácter obligatorio para el conjunto del profesorado que presta servicios a la comunidad autónoma implicada.

Por lo que se refiere a la extinción de las relaciones temporales, el TJUE ha considerado que se trata de condiciones de trabajo en dos supuestos particulares:

[39] Véase la STJUE de 8 de septiembre de 2011, asunto C-177/10.

[40] ATJUE de 9 de febrero de 2012, asunto C-556/11.

a) La posibilidad de aplicar un plazo de preaviso para la resolución de los contratos de duración determinada, diferente y perjudicial para los trabajadores temporales en comparación con el establecido para los trabajadores indefinidos.[41]

b) La indemnización que debe satisfacerse a un trabajador temporal con una cláusula ilícita incorporada a su contrato de trabajo, de cuantía inferior a la que debe satisfacerse a los trabajadores fijos.[42]

Un caso singular, pero muy frecuente, es el de la exclusión del personal temporal del ámbito personal de aplicación del acuerdo de condiciones de trabajo de funcionarios y del convenio colectivo del personal laboral, lo cual les sitúa en peores condiciones que a los empleados fijos. Sobre esta cuestión se han pronunciado los tribunales estatales del orden social, con argumentos que podrían trasladarse al contencioso. Según el TS,[43] a pesar de que el convenio colectivo no se refería directamente a las condiciones de trabajo del personal temporal, indirectamente, la exclusión del ámbito del convenio comportaba la inaplicación de todas las condiciones de trabajo de que gozaba el personal indefinido comparable, vulnerando así el principio de no discriminación del art. 15.6 ET, que recoge la transposición de la cláusula 4 AM al derecho interno.

En todo caso, la interpretación amplia del concepto de condiciones de trabajo efectuada por el TJUE no significa que cualquier diferencia de trato entre trabajadores temporales y trabajadores indefinidos tenga como consecuencia automática la existencia de discriminación y la vulneración de la cláusula 4 AM. Deberá darse un paso más para determinar cuál ha de ser el trabajador fijo que se utilizará como término de comparación.

[41] STJUE de 13 de marzo de 2014, asunto C-38/13.

[42] STJU de 12 de diciembre de 2013, asunto C-361/12.

[43] STS de 7 de diciembre de 2011, Sala de lo Social, recurso 4574/2010.

3. 2. La determinación del funcionario de carrera comparable

La cláusula 3.2 AM define el trabajador indefinido comparable en los siguientes términos:

"[…] un trabajador con un contrato o relación laboral de duración indefinida, en el mismo centro de trabajo, que realice un trabajo u ocupación idéntico o similar, teniendo en cuenta su cualificación y las tareas que desempeña.

En caso de que no exista ningún trabajador fijo comparable en el mismo centro de trabajo, la comparación se efectuará haciendo referencia al convenio colectivo aplicable o, en caso de no existir ningún convenio colectivo aplicable, y de conformidad con la legislación, a los convenios colectivos o prácticas nacionales".

De la definición anterior se desprende que el trabajador fijo comparable se determinará a partir de dos elementos: la identidad o similitud de las funciones ejercidas y el ámbito físico de referencia, que inicialmente será el centro de trabajo. Además, el grado de exigencia de los elementos citados deberá ponerse en relación con la condición de trabajo objeto de debate en cada caso concreto. Finalmente, la dualidad de régimen jurídico en el empleo público español obliga a considerar la posibilidad de que el trabajador comparable pueda ser un empleado público con un régimen distinto al del empleado temporal, de modo que se cruzarían los dos regímenes de personal, el funcionarial y el laboral.

El primer elemento requerido –y, seguramente, el más relevante– introduce un criterio sustantivo: el de las funciones desarrolladas por los empleados que se comparan; es decir, se tratará de comprobar en cada caso si el trabajo realizado es sustancialmente coincidente. Este requerimiento es coherente con la posición poco formalista de la normativa comunitaria.

Traduciendo este criterio a la terminología propia de la función pública española, *a priori* se podría afirmar que entre los funcionarios interinos y los funcionarios de carrera pertenecientes al mismo cuerpo o escala y ocupando un puesto de trabajo idéntico o similar, la posibilidad de comparación debería estar garantizada con carácter general dada la identidad

de funciones. De manera parecida, se puede afirmar que si las funciones que ejercen los funcionarios de carrera que superan un proceso selectivo son las mismas que ejercían con anterioridad cuando tenían la condición de funcionarios interinos, no cabe duda que se trataría de situaciones comparables.[44]

En cuanto al personal eventual, parece que no habría ningún impedimento legal para aplicar la comparación en aquellas condiciones de trabajo que solamente están en función de prestar servicios en la Administración, sin otro requisito, como sería el caso de los trienios, vacaciones, determinados permisos o mejoras sociales, etc.; en cambio, no sería fácil la comparación a los efectos de una posible discriminación de ciertas condiciones de trabajo ligadas con la permanencia en la función pública o con la movilidad funcional para pasar a ejercer tareas de carácter permanente en cada administración, como la promoción interna, la provisión de puestos de trabajo o las situaciones administrativas.

Cabe destacar que, con el mismo criterio antiformalista, el TJUE ha aceptado la comparación entre trabajadores de diferentes categorías profesionales al observar que las funciones ejercidas en ambos casos eran sustancialmente las mismas y que la cualificación requerida no era significativamente distinta.[45] En concreto, se plantea la comparabilidad entre dos categorías laborales diferentes según la Ley Orgánica 6/2001, de 21 de diciembre, de Universidades, y el RD 1086/1989, de 28 de agosto, sobre retribuciones del profesorado universitario: la del profesor ayudante doctor con un contrato temporal por tiempo no inferior a un año ni superior a cinco y la del profesor contratado doctor por tiempo indefinido. El TJUE interpreta el concepto de *trabajador comparable* desde un punto de vista material afirmando que, según el Tribunal estatal al plantear la cuestión prejudicial, las dos categorías tenían la misma cualificación académica (título de doctor), se requería una experiencia

[44] STJUE de 18 de octubre de 2012, asuntos acumulados 302/11 a 305/11, sobre un proceso selectivo de estabilización de personal temporal.

[45] ATJUE de 18 de marzo de 2011, asunto C-273/10.

similar (tres y dos años, respectivamente) y las dos tenían asignadas funciones docentes e investigadoras. Ante esto, considera que se da una situación comparable en cuanto al derecho a percibir el concepto retributivo por antigüedad.

Asimismo, el TJUE ha puesto en evidencia que la determinación del trabajador indefinido comparable debe ser flexible; de manera que, en ocasiones, la situación subjetiva del trabajador –la identidad de funciones– será insuficiente por sí sola y será necesario comprobar también la identidad del supuesto fáctico o condición de trabajo objeto de comparación.[46] Así lo ha considerado el TJUE a la hora de determinar si la posición de los funcionarios interinos docentes era comparable con la de los funcionarios de carrera docentes a los efectos de la percepción del complemento conocida como "sexenios" de carrera profesional; en este caso, además de aludir a la naturaleza del trabajo y a las condiciones de formación, se refiere a condiciones laborales como la experiencia adquirida y al sometimiento a las mismas obligaciones, en particular, en materia de formación permanente.[47] En definitiva, pues, cuál deba ser el trabajador comparable dependerá de las funciones ejercidas, en relación con la condición de trabajo objeto de discusión en cada caso; es decir, la condición de trabajo en juego delimitará el ámbito personal en que deberá situarse el trabajador indefinido comparable.

Así, por ejemplo, cuando se reclame el derecho a una condición de trabajo común a todos los funcionarios –como el derecho a la percepción de trienios o a las vacaciones–, el trabajador comparable será cualquier funcionario de carrera, siendo irrelevantes las diferencias funcionales que puedan existir por el hecho de realizar unas tareas distintas; mientras que si se reclama la percepción de trienios de una determinada cuantía unitaria, lo será cualquier funcionario de carrera del mismo subgrupo o grupo de titulación. No será lo mismo cuando se reclame una cuantía del complemento específico, puesto que en este caso

[46] STJUE de 12 de diciembre de 2013, asunto C-361/12.

[47] ATJUE de 9 de febrero de 2012, asunto C-556/11.

lo será el funcionario de carrera que ocupe un puesto de trabajo con el mismo contenido funcional.

En cambio, no sería aceptable que la Administración ofreciera como argumento para considerar que las situaciones no son comparable una justificación genérica y formal basada simplemente en la propia temporalidad de la relación laboral o en un elemento vinculado legalmente con esta y no relacionado con la condición de trabajo,[48] como sería el caso habitual de utilizar el argumento de la mayor simplicidad de los procesos selectivos de los funcionarios interinos o que su acceso a la función pública ha obedecido a razones de urgencia y necesidad.

Por lo que se refiere al centro de trabajo como ámbito físico de referencia, ciertamente es el ámbito donde con mayor probabilidad van a coincidir trabajadores temporales e indefinidos que pertenecen a las mismas categorías profesionales y realizaban trabajos idénticos o similares, aplicándoseles las mismas normas legales y el mismo convenio colectivo. No obstante, el AM flexibiliza esta referencia hasta situarse en el polo opuesto, el de mayor amplitud posible, porque, de lo que se trata, en definitiva, es de encontrar el ámbito territorial, personal o material donde esté regulada una condición de trabajo concreta entre trabajadores comparables. [49]

Pero cabe recordar que se trata de un concepto extraído del derecho laboral que resulta excesivamente limitado y rígido para trasladarlo al campo de la función pública, donde ni tan siquiera existe. Como se ha dicho anteriormente, los derechos y las obligaciones de los funcionarios se establecen en gran medida a través de la legislación básica estatal (idénticos para todos los funcionarios públicos) y de la legislación de desarrollo (los mismos

[48] STJUE de 18 de octubre de 2012, asuntos acumulados 302/11 a 305/11 y ATJUE de 9 de febrero de 2012, asunto C-556/11.

[49] En este sentido, la STS de 12 de julio de 2011, Sala de lo Social, recurso 4574/2010.

para los funcionarios autonómicos y los de todas las entidades locales de la comunidad correspondiente). Es decir, en el caso de la función pública, juega un papel relevante la determinación del ordenamiento territorial aplicable para determinar el trabajador comparable. Más allá, para las condiciones de trabajo que deben ser aprobadas por cada administración, el funcionario de carrera comparable debería salir del acuerdo de condiciones negociado o de las normas internas de la misma.

Otro aspecto a determinar es qué tipo de trabajador indefinido –funcionario de carrera o personal laboral fijo– es el que deberá ser utilizado como categoría comparable, ya que las condiciones de trabajo son o pueden ser diferentes entre los dos colectivos dentro de la misma Administración. Pero las posibles diferencias de trato entre los funcionarios y el personal laboral no están incluidas dentro del ámbito de aplicación del principio de no discriminación consagrado por el AM, porque éste no tiene por objeto armonizar todas las normas nacionales relativas a las relaciones temporales. Más bien, se trata de un asunto de derecho interno.[50]

En el caso español, la posición expuesta concuerda con la separación y la incomunicación predicadas del ordenamiento laboral y el de función pública; de aquí se puede deducir que en el caso de funcionarios interinos y personal eventual, el trabajador indefinido comparable será con carácter general un funcionario de carrera.

El planteamiento expuesto podría ser distinto, al menos, en tres supuestos. Primero, en el caso de la Administración con un convenio colectivo del personal laboral que regula ciertas condiciones de trabajo por remisión a lo establecido legalmente o convencionalmente para los funcionarios de la misma Administración[51] o, cuando se negocian conjuntamente y se aprueba un instrumento único para ambos colectivos o se aprueban dos instrumentos con

[50] STJUE de 7 de marzo de 2013, asunto C-178/12.

[51] En este sentido, la STS de 12 de julio de 2011, Sala de lo Social, recurso 4574/2010.

un contenido idéntico. En segundo lugar, en el caso de una Administración con una plantilla funcionarial, en su totalidad o mayoritariamente, que acude a la contratación laboral solo para cubrir necesidades temporales. Finalmente, en aquellas administraciones en las que funcionarios y personal laboral ocupan el mismo puesto de trabajo o un puesto equivalente o similar parecería admisible la comparación cruzada entre funcionarios y personal laboral.[52]

De las puntualizaciones efectuadas sobre el trabajador indefinido comparable puede deducirse que la Directiva y el AM utilizan un concepto amplio de esta figura. De manera que la inexistencia en el entorno inmediato de puestos de trabajo idénticos o similares, adscritos a funcionarios del mismo cuerpo o escala o a personal laboral del mismo grupo o categoría profesional, no debería comportar necesariamente la imposibilidad de aplicar el principio de no discriminación; la configuración de cada condición de trabajo que haga la legislación de función pública y su extensión a un colectivo más o menos amplio, acabará por determinar la situación de comparabilidad en cada caso concreto.

3.3. Las razones objetivas que pueden justificar una diferencia de trato

Una vez que se ha confirmado que hay un trato diferente entre un empleado temporal y otro fijo comparable con respecto a una misma condición de trabajo, se debería comprobar si existen una o más razones o causas objetivas que justifiquen que la condición o condiciones de trabajo objeto de discusión sean diferentes para los trabajadores temporales.

La Directiva deja la puerta abierta a cuáles puedan ser las razones objetivas y qué grado de concreción, extensión y profundidad pueden tener; posición lógica si se tiene en cuenta que las excepciones al principio general de igualdad serán establecidas en la normativa nacional y, por lo tanto, serán los actores internos los que deberán explicitar las razones que las justifiquen en cada caso.

[52] En este sentido, la STS citada en la nota anterior.

En España, para su determinación, los Tribunales internos han aplicado los criterios interpretativos establecidos por la doctrina constitucional sobre el principio de igualdad del art. 14 CE. Pero debe reconocerse que no han sido muy exigentes a la hora de fundamentar las diferencias de trato entre el régimen de los funcionarios interinos o del personal eventual y el de los funcionarios de carrera; de manera que se han justificado las diferencias de trato en el simple hecho de la temporalidad, y en que el personal temporal es seleccionado por un procedimiento más flexible y con menores exigencias de mérito y capacidad y para ocupar un puesto concreto, o en que la excepción está prevista en la normativa de función pública.

En cualquier caso, los argumentos expuestos han sido considerados inadecuados por el TJUE, que ha venido desarrollando una doctrina específica al respecto, a partir de las cuestiones prejudiciales que le han sido planteadas por los tribunales estatales; doctrina que ha construido de forma progresiva y acumulativa, y que solo muy lentamente y de manera reactiva -como respuesta a las declaraciones del TJUE-, se van incorporando en algunas sentencias de los Tribunales de lo contencioso españoles.

De un lado, el TJUE ha fijado repetidamente unos criterios de delimitación en sentido negativo, indicando que no constituye una razón objetiva:[53]

a) que la diferencia esté prevista en una norma general y abstracta, como una ley, un reglamento o un convenio colectivo o acuerdo de condiciones de trabajo; y,

b) el simple hecho de la naturaleza temporal de la relación de empleo es insuficiente, por sí solo, para introducir diferencias de trato en las condiciones de trabajo del personal

[53] Pueden verse, entre otras, las SSTJUE de 8 de septiembre de 2011, C-177/10; de 22 de diciembre de 2010, asuntos acumulados C-444/09 y C-456/09 y ATJUE de 18 de marzo de 2011, asunto C-273/10.

temporal;[54] de lo contrario, se legitimaría cualquier diferencia de trato que se introdujera entre los dos colectivos.

Y es lógico, porque ambas circunstancias forman parte del presupuesto de hecho sobre el que se establece la prohibición de discriminación; constituyen el punto de partida, no la consecuencia. Es decir, forma parte de la premisa mayor del silogismo lógico, como un elemento necesario e indispensable que no puede ser parte, al mismo tiempo, de su conclusión. Por lo tanto, sería un contrasentido considerar que si el supuesto de hecho y las consecuencias jurídicas están previstos en el derecho interno no puede haber trato discriminatorio, puesto que se eliminaría toda posibilidad de discriminación.

A las anteriores circunstancias se sumarían las razones generales y comunes a todas las condiciones de trabajo que, con carácter general, son invocadas habitualmente en el orden interno, como serían: *a*) argumentar la menor intensidad con que se exigen los principios de mérito y capacidad en la selección del personal temporal; *b*) las razones de necesidad y urgencia para el nombramiento de funcionarios interinos; *c*) la menor capacitación del personal no permanente, afirmada con carácter general y sin acreditación alguna; *d*) que la experiencia adquirida con la prestación de servicios de carácter temporal es de menor valor que la adquirida en la condición de funcionario de carrera, cuando es evidente que la experiencia no depende de un simple factor formal, sino de las funciones ejercidas y de las capacidades individuales.

Por otro lado, el TJUE ha desarrollado progresivamente la noción de *razones objetivas* que pueden justificar la diferencia de trato a los efectos de la Directiva. Así, en la STJUE de 8 de septiembre de 2011, asunto C-177/10, construye una formulación global y de conjunto con los distintos criterios que ha ido manejando en sus pronunciamientos anteriores, en los términos siguientes:

[54] Como ejemplo, entre otros muchos, el ATJUE del 18 de marzo de 2011, asunto C-273/10.

"*[...] el concepto de razones objetivas requiere que la desigualdad de trato observada esté justificada por la existencia de elementos precisos y concretos, que caracterizan la condición de trabajo de que se trata, en el contexto específico en que se enmarca y con arreglo a criterios objetivos y transparentes, a fin de verificar si dicha desigualdad responde a una necesidad auténtica, si permite alcanzar el objetivo perseguido y si resulta indispensable al efecto. Tales elementos pueden tener su origen, en particular, en la especial naturaleza de las tareas para cuya realización se celebran los contratos de duración determinada y en las características inherentes a las mismas o, eventualmente, en la persecución de un objetivo legítimo de política social por parte de un Estado miembro*".

Debe reconocerse que la fórmula acuñada por el TJUE tiene cierta complejidad y es difícil de sistematizar. Para hacerlo, es indispensable analizar los argumentos que ha ido vertiendo en los asuntos que se le han planteado; a partir de los mismos, se considera conveniente agruparlos para su análisis y comprensión, en tres apartados: a) los elementos diferenciales respecto de la condición de trabajo sujeta a debate deben tener su origen en la naturaleza especial de las tareas o en un objetivo de política social; b) la diferencia introducida debe responder a una necesidad real, debe permitir alcanzar el objetivo perseguido y ser indispensable para ello; c) todo ello debe justificarse mediante criterios objetivos y transparentes.

3.3.1. *Causas originarias que pueden justificar la discriminación en las condiciones de trabajo*

Como se ha visto anteriormente, la desigualdad de trato consiste en introducir elementos diferenciales en una condición de trabajo según afecte al personal permanente o al personal temporal. Lo que exige la jurisprudencia del TJUE[55] para considerar que existe una razón objetiva con entidad para justificar dicha desigualdad, es que estos elementos diferenciales tengan su origen en alguna de las dos causas siguientes:

a) La naturaleza especial de las tareas objeto de la relación temporal y las características inherentes a las mismas.

b) Eventualmente, un objetivo de política social.

Con carácter general, la causa deberá fundamentarse en la naturaleza y las características de las funciones o tareas desempeñadas por los sujetos comparables. Aunque la jurisprudencia comunitaria no ha concretado el significado de la *naturaleza* y las *características de las tareas*, debe descartarse que se refiera a la temporalidad de las mismas, porque esta circunstancia está expresamente excluida como razón objetiva, como ya se ha expuesto. En positivo, dichos conceptos deberían indicar cuál es el contenido material, la tipología y las condiciones de entorno en que se llevan a cabo las tareas desempeñadas.[56] Además, el razonamiento deberá poner en relación las tareas desempeñadas con *los elementos precisos y concretos* que caracterizan cada condición de trabajo, debiendo considerarse injustificada, por insuficiente, una referencia en términos generales o globales.

[55] Pueden verse, entre otras, las SSTJUE de 8 de septiembre de 2011, asunto C-177/10; y de 13 de septiembre de 2007, asunto C-307/05.

[56] Sobre esta cuestión resulta ilustrativa la STJUE de 13 de marzo de 2014, asunto C-190/13, relativa a la contratación de especialistas de reconocida solvencia como profesores asociados por las universidades públicas españolas, para el ejercicio de tareas docentes específicas que comportan la aportación de conocimientos y experiencia prácticos.

Frente a los elementos sustantivos citados, será difícil justificar con carácter general una posición diferente de los funcionarios interinos con respecto a los de carrera, cuando coincida el cuerpo o escala de ambos y los puestos desempeñados sean los mismos y su ejercicio exija los mismos requisitos. En cambio, en el caso del personal eventual es más probable que sus funciones puedan tener algunas características distintas de los cometidos asignados a los funcionarios de carrera y que se llevan a cabo en un contexto específico; lo cual podría justificar una diferencia de trato en relación con determinadas condiciones de trabajo.

La segunda causa que puede dar lugar a exceptuar la aplicación del principio de igualdad de trato es la persecución de un determinado objetivo de política social. Esta causa de partida sería, a la vez, la finalidad última o resultado a conseguir con la introducción de ciertas medidas discriminatorias. El TJUE no indica cuáles pueden ser estos objetivos, porque son imprevisibles *a priori* y con carácter general; por lógica, debe ser una cuestión abierta a las necesidades reales que se vayan planteando en cada administración y, en consecuencia, la concreción debe surgir de las instancias nacionales. Pero de la jurisprudencia comunitaria pueden extraerse algunas orientaciones o criterios para poder valorar la adecuación de las discriminaciones introducidas con el objetivo de política social proclamado.

Así, deberían rechazarse los objetivos que pretenden reservar determinados derechos a los funcionarios de carrera en exclusiva y los que se fundamentan en elementos como la propia temporalidad de la relación laboral, la modalidad o el grado de exigencia del proceso selectivo o un nombramiento más o menos discrecional. En este sentido, como ha puesto de manifiesto el TJUE, [57] no era aceptable como razón objetiva la pretensión del Gobierno español de aplicar una distinta valoración de la antigüedad por los servicios prestados a la Administración según hubiera sido en la condición de funcionario de carrera o de funcionario interino, en un procedimiento selectivo por promoción interna; porque no

[57] STJUE de 8 de septiembre de 2011, asunto C-177/10.

puede considerarse como legítima política de personal, favorecer el derecho a la promoción de los funcionarios de carrera.

En cambio, el TJUE[58] considera que las renovaciones contractuales sucesivas de profesores asociados por las universidades sin límite legal alguno se justificarían por la necesidad de confiar a especialistas de reconocida competencia que acrediten un ejercicio profesional dilatado en el ámbito privado, el ejercicio de tareas docentes específicas, para que aporten sus conocimientos y experiencia a la universidad, estableciendo de esta manera una asociación entre el ámbito universitario y el profesional.

El TJUE también ha aceptado que las medidas tendentes a proteger el embarazo y la maternidad y la conciliación laboral y familiar, entre otras, pueden constituir un objetivo de política social legítimo.[59] Este objetivo podía justificar una normativa nacional que permite la renovación de las relaciones temporales en un servicio público -de salud, docente, etc.- en el cual, a pesar del aparente carácter permanente a lo largo del tiempo, se apreciaba en la práctica que las necesidades de personal se presentaban de forma eventual, progresiva e imprevista, con unas características temporales distintas en cada ocasión.

La descripción de los elementos que fija el TJUE para determinar cuándo un objetivo de política social se puede considerar una razón objetiva que justifique un trato diferente del personal temporal puede parecer excesivamente compleja si la contrastamos con la simplicidad con la que la Administración y los tribunales españoles resuelven habitualmente los conflictos sobre potenciales discriminaciones del personal temporal. Pero, en realidad, se trata de un proceso lógico y coherente para demostrar la excepcionalidad y necesidad de una medida discriminatoria.

[58] STJUE de 13 de marzo de 2014, asunto C-190/13.

[59] STJUE de 26 de enero de 2012, asunto C-586/10.

3.3.2. Requisitos relativos a la desigualdad de trato

Para estimar cuándo se da una razón objetiva en un caso concreto, el TJUE no se limita a exigir que haya una causa de origen para justificar la diferencia, sino que considera indispensable que dicha diferencia de trato cumpla los tres requisitos siguientes:

1) debe responder a una necesidad auténtica,

2) debe permitir lograr el objetivo perseguido y,

3) debe ser indispensable para alcanzar el objetivo perseguido.

En definitiva, se trata de conocer las características de la condición de trabajo en juego y de la diferencia de trato entre los funcionarios de carrera y los temporales para comprobar si, efectivamente, la diferencia introducida es necesaria y posibilita conseguir el objetivo perseguido. De modo que no haya otra alternativa para lograr el mismo resultado sin necesidad de causar un perjuicio al personal temporal, exclusivamente o con una mayor intensidad que para el personal fijo comparable.

Un ejemplo esclarecedor de los requisitos referidos se encuentra en la citada STJUE de 13 de marzo de 2014, asunto C-190/13, en la cual se considera justificado el objetivo de enriquecer la educación universitaria en áreas específicas mediante la experiencia de reconocidos especialistas; el TJUE considera adecuada, para lograrlo, la contratación de profesores asociados, que responde, por lo tanto, a una necesidad auténtica y que permite conseguir aquel objetivo. Por esta vía se pueden cubrir las necesidades de las universidades de contar con profesionales con una experiencia práctica en cada materia, sin que exista una alternativa viable para responder a dicha necesidad con el profesorado ordinario permanente.

Tomando un ejemplo del ámbito español, podría considerarse un objetivo de política social adecuado la reducción de los gastos de personal para contribuir a la consecución del equilibrio presupuestario, en un momento en que la crisis económica ha provocado una disminución de los ingresos públicos. Dicho objetivo se ha pretendido conseguir por algunas administraciones adoptando unilateralmente una medida de reducción de la jornada de

trabajo acompañada de la reducción proporcional de las retribuciones, aplicada solamente a los empleados públicos con una relación temporal.[60] En primer lugar, la Administración debería justificar la situación de necesidad a través de la documentación presupuestaria correspondiente. En segundo lugar, explicar de qué manera y en qué medida la modificación de dichas condiciones de trabajo del personal temporal permitiría alcanzar los objetivos propuestos. Y, en tercer lugar, que se trata de unas medidas indispensables para conseguir el objetivo perseguido al no existir la posibilidad de aplicar otras medidas alternativas de reducción del gasto público o que, dentro de los gastos de personal, fueran plenamente respetuosas del principio de igualdad de trato al no penalizar, exclusivamente, al personal temporal.[61]

Sobre el hecho de que se considere una razón objetiva que en el ingreso del personal temporal en el empleo público se apliquen con menor intensidad los principios de igualdad, mérito y capacidad, no puede olvidarse que la exigencia de estos principios es predicable para todos los funcionarios interinos, no así del personal eventual. Por su parte, la menor intensidad o exigencia para la selección del personal temporal responde a una opción voluntaria de la Administración; y no parece razonable convertir en negativos, con carácter general, los efectos de su decisión y trasladar las consecuencias al personal afectado. Por otro lado, es ilustrativo el ejemplo del sector privado, respecto del cual no se plantea que dicho argumento pudiera constituir una razón objetiva justificativa de la diferencia de trato; y no

[60] Estas medidas, con las particularidades aprobadas por cada administración, afectaban tanto a personal funcionario como laboral. Los conflictos jurisdiccionales que se plantearon han sido resueltos de manera contradictoria, en ocasiones entre la jurisdicción social y la contenciosa, otras dentro de la misma jurisdicción entre distintos Tribunales Superiores de Justicia. Como ejemplo de lo sucedido en la Jurisdicción de lo contencioso, pueden verse la STSJ de Cataluña de 11 de abril de 2014, recurso 243/2012 y la STSJ de Valencia de 9 de julio de 2014, recurso 480/2012.

[61] Como hizo en su momento el Real Decreto-ley 8/2010, de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público, al reducir las retribuciones de todos los empleados públicos, funcionarios y laborales, permanentes o temporales.

debe olvidarse que los criterios fijados por el TJUE se aplican por igual en los sectores público y privado. Todo ello, sin perjuicio que estos hechos diferenciales puedan actuar como causa justificativa a la vista de los elementos concretos de una particular condición de trabajo, pero deberá justificarse de forma objetiva y transparente.

3.3.3. La justificación objetiva y transparente de los elementos que configuran una razón objetiva

El TJUE también señala que la justificación aportada por los poderes públicos estatales debe cumplir con unos requisitos formales; en concreto, que se fundamente en criterios objetivos y transparentes.[62] En cuanto a la objetividad, implicaría la necesidad de acreditar una conexión lógica y coherente –racional, en definitiva– entre los elementos o criterios justificativos y la desigualdad de trato introducida en relación con la condición de trabajo objeto de debate en cada caso. Por su parte, la transparencia impone, como mínimo, que se exterioricen y hagan públicos los elementos y criterios utilizados, de manera que los interesados –y, en su caso, los Tribunales de justicia- puedan comprobar si la argumentación ha sido construida correctamente y si la razón alegada es adecuada para justificar las diferencias de trato.[63] Parece evidente que el expediente construido para la aprobación de la propia norma discriminatoria podría y debería proporcionar una justificación del trato discriminatorio del personal temporal, pero esto no es habitual en la legislación española, ni en el texto de las normas ni en las memorias e informes que las acompañan. En cualquier caso, la Administración tendrá que suplir los déficits de justificación normativa.

Es importante señalar, para terminar, que la falta de exteriorización objetiva y transparente de las razones objetivas que quizás podrían justificar, en su caso, una diferencia

[62] Como afirma la STJUE de 26 de enero de 2012, asunto C-586/10, el Estado miembro debe establecer criterios objetivos y transparentes con el objeto de comprobar si la renovación de los contratos responde efectivamente a una necesidad real, puede conseguir el objetivo pretendido y era necesaria a tal efecto.

[63] STJUE de 8 de septiembre de 2011, asunto C-177/10.

de trato, debe suponer el rechazo de las mismas y la declaración de que la medida es contraria a la cláusula 4 del AM.

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LE RECRUTEMENT DU PERSONNEL ACADÉMIQUE UNIVERSITAIRE EN BELGIQUE ET AUX PAYS BAS

Alexander DE BECKER

INDEX

1. INTRODUCTION

La présente étude propose une comparaison des systèmes de recrutement des universitaires belge et hollandais. Afin de mieux cerner cette comparaison, il convient de présenter en premier lieu les cadres juridiques de ces systèmes des deux pays.

Tout d'abord, une différence sépare le système belge du système hollandais s'agissant du rôle de la constitution en matière de l'enseignement. En Belgique, le droit constitutionnel joue un rôle crucial dans le domaine du droit de l'enseignement, alors qu'aux Pays-Bas, le cadre constitutionnel n'a pas une pareille influence même s'il peut être utile de s'interroger sur le caractère constitutionnel de certaines réglementations.[1] Cette question, certes intéressante en soi, sera toutefois abordée de façon restrictive compte tenu du sujet de cette contribution.

Nos propos se concentreront donc à une analyse de la règlementation relative au recrutement du personnel académique au sein des universités belges et des universités néerlandaises. Les membres du personnel académique sont en principe nommés dans leurs grades. Le terme «nomination» n'est cependant pas dépourvu de certaine ambiguïté en droit de l'enseignement belge. La nomination est normalement un acte administratif unilatéral par des autorités administratives. Les parlements communautaires ont adopté des décrets qui disposent que les membres du personnel académique du côté flamand et du côté francophone sont nommés par les universités communautaires aussi bien que par les universités libres. Néanmoins, les membres du personnel académique des universités libres ne sont pas soumis à un régime relevant du droit administratif mais à celui du droit du travail. Les décrets disposent qu'en principe, le contrat de travail exclut la nomination. Les universités libres ne sont pas considérées comme des autorités administratives vis-à-vis à leur personnel.

[1] R. G. LOUW, *Het Nederlands hoger onderwijsrecht*, Leiden, Leiden University Press, 2011, 5.

Il convient de présenter successivement la situation belge (en distinguant les espaces flamand et francophone) et la situation néerlandaise, laquelle présentation permettra de comparer les systèmes des deux pays en soulignant leurs convergences et divergences.

2. LE CADRE CONSTITUTIONNEL EN BELGIQUE

La Belgique a évolué d'un Etat unitaire vers un Etat fédéral entre 1830 (l'année de l'indépendance de la Belgique) jusqu'à 1993. Depuis 1993, issue de la révision constitutionnelle de 1993[2], l'article 1er de la Constitution belge dispose que la Belgique est un Etat fédéral qui se compose des communautés et des régions, sans pour autant donner de précision sur la notion de "fédéralisme".[3]

Or, les réformes de l'Etat, entamées depuis 1970, avaient d'ores et déjà créé les Communautés, lesquelles étaient compétentes en matières culturelles. Depuis, les compétences des Communautés ont été élargies aux autres domaines tels que l'enseignement et le bien-être public (loi spéciale du 8 août 1988).

Actuellement, la Belgique possède, conformément à l'article 2 de la Constitution, trois Communautés (la Communauté flamande, la Communauté française et la Communauté germanophone). Les Communautés sont liées à un certain territoire (voir les cartes ci-après). La Communauté flamande comprend la partie nord du pays :

[2] Cette révision institutionnelle a été instaurée avec la loi spéciale du 16 juillet 1993.

[3] F. DELPEREE, "La Belgique est un Etat fédéral", *JT* 1993, 637-646.

[4]

La Communauté française comprend le territoire sud du pays :

[4] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

[5]

Le territoire de la Communauté germanophone se trouve dans l'est de la Belgique. La position géographique de la Communauté germanophone s'illustre de la manière suivante :

[5] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

[6]

Depuis la réforme de l'Etat en 1988, la Belgique comprend aussi trois régions qui possèdent des compétences, par exemple, en matière d'urbanisme et d'économie. Les territoires des régions diffèrent des territoires des communautés.

Le territoire de la Région flamande n'est pas identique au territoire de la Communauté flamande car il ne comprend pas le territoire de la Région Bruxelles-Capitale.

[6] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

[7]

Le territoire de la Région Wallonne se compose des territoires de la Communauté française et de la Communauté germanophone.

[8]

[7] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

[8] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

La Région de Bruxelles-Capitale exerce les compétences régionales au sein du territoire de Bruxelles-Capitale. Cette région se compose de 19 communes au milieu du pays.

[9]

Les communautés et régions sont des personnes morales de droit public et possèdent une « parcelle » de la souveraineté.[10] Elles sont toutes dotées d'un parlement et d'un gouvernement.

Depuis 1988, les communautés sont compétentes, de manière exclusive, en matière d'enseignement, y compris l'enseignement supérieur.

Ainsi, il existe deux droits universitaires en Belgique : le droit de l'éducation universitaire flamande et celui de la Communauté francophone. Ces législations sont parfois

[9] Cette image peut être trouvée sur le site web suivant : http://www.belgium.be/nl/over_belgie/overheid/federale_staat/Kaart/

[10] J. VELAERS, *De Grondwet en de Raad van State: afdeling wetgeving*, Malines, Maklu, 1999, 39.

légèrement différentes, même si les grands principes régissant les recrutements du personnel académique universitaire sont identiques.

En outre, il est important de souligner que le système constitutionnel belge ne prévoit en principe pas de compétences concurrentielles. Chaque compétence devrait normalement être exclusivement exercée par une autorité (dans le cas de l'enseignement : la communauté).[11]

L'enseignement représente l'une des compétences les plus importantes pour les communautés, en ce qu'elle absorbe la plus part de leurs budgets. À ce titre, deux aspects cruciaux sont à considérer : d'un côté, la Constitution détermine explicitement le contenu de l'exercice de la compétence d'enseignement ; de l'autre, la Cour d'Arbitrage (devenue la Cour Constitutionnelle depuis 2003) a reçu en 1988 le pouvoir de contrôler la conformité des décrets (les actes législatifs des parlements communautaires) par rapport aux règles constitutionnelles notamment au regard de la liberté d'enseignement et la neutralité de l'enseignement communautaire.

2.1 L'ampleur de la compétence des communautés sur l'enseignement

Etant l'une des rares compétences explicitement déterminées par la Constitution, la compétence des communautés en matière d'enseignement a été considérablement élargie.

[11] Le principe des compétences exclusives doit en réalité être nuancé, vu (entre outre) la jurisprudence de la Cour Constitutionnelle concernant les compétences implicites. Voyez pour un ouvrage très intéressant sur ce sujet est J. VANPRAET, *De latentestaatshervorming*, Brugge, die Keure, 2011.

L'article 127 § 1, alinéa 2, de la Constitution prévoit que les Conseils de la Communauté française et de la Communauté flamande règlent par décret l'enseignement à l'exception :

a) de la fixation du début et de la fin de l'obligation scolaire

b) des conditions minimales pour la délivrance des diplômes

c) du régime des pensions.

La Cour Constitutionnelle (dénommée encore la Cour d'Arbitrage à cette époque) a considéré que cette compétence comprend "la fixation des règles relatives aux régimes administratifs et pécuniaires de l'enseignement, à l'exclusion de son régime de pension".[12] Cela implique aussi que la loi du 3 juillet 1978 relative aux contrats de travail ne s'applique pas le domaine de l'enseignement, laquelle loi a été votée par le Parlement belge et non pas par les parlements communautaires qui sont compétents pour régler la situation juridique du personnel des universités (communautaires et libres).[13]

A la question de savoir si la notion d'"enseignement" couvrait aussi l'enseignement supérieur, la Cour d'Arbitrage a répondu, dans sa décision du 2 février 1999, que l'enseignement supérieur incluait l'enseignement académique, y compris la recherche scientifique comme compétence liée à l'enseignement supérieur.[14]

[12] Cour d'Arbitrage, n° 74/92, 18 novembre 1992.

[13] Cour de travail de Liège, 15 janvier 2001 cité par R. DOHOGNE, *Annuaire de jurisprudence en droit de l'enseignement,* Waterloo, Kluwer, 2011, 19.

[14] Cour d'Arbitrage, n°23/99, 24 février 1999.

Prévue à l'article 24 de la Constitution, la liberté d'enseignement constitue un principe fondamental :

« *L'enseignement est libre ; toute mesure préventive est interdite ; la répression des délits n'est réglée que par la loi ou le décret.*

« La communauté assure le libre choix des parents.

« La communauté organise un enseignement qui est neutre. La neutralité implique notamment le respect des conceptions philosophiques, idéologiques ou religieuses des parents et des élèves.

« Les écoles organisées par les pouvoirs publics offrent, jusqu'à la fin de l'obligation scolaire, le choix entre l'enseignement d'une des religions reconnues et celui de la morale non confessionnelle.

« § 2. Si une communauté, en tant que pouvoir organisateur, veut déléguer des compétences à un ou plusieurs organes autonomes, elle ne le pourra que par décret adopté à la majorité des deux tiers des suffrages exprimés.

« § 3. Chacun a droit à l'enseignement dans le respect des libertés et droits fondamentaux. L'accès à l'enseignement est gratuit jusqu'à la fin de l'obligation scolaire.

« Tous les élèves soumis à l'obligation scolaire ont droit, à charge de la communauté, à une éducation morale ou religieuse.

« § 4. Tous les élèves ou étudiants, parents, membres du personnel et établissements d'enseignement sont égaux devant la loi ou le décret. La loi et le décret prennent en compte les différences objectives, notamment les caractéristiques propres à chaque pouvoir organisateur, qui justifient un traitement approprié.

« § 5. L'organisation, la reconnaissance ou le subventionnement de l'enseignement par la communauté sont réglés par la loi ou le décret. »

Cette liberté renvoie à des notions différentes. D'abord, il s'agit de la liberté des personnes privées de déterminer librement le projet pédagogique de leur établissement d'enseignement (université) et de régler librement les prestations de leur personnel.[15] Cette liberté n'est pourtant pas illimitée. Les parlements communautaires peuvent voter des décrets (qui possèdent une valeur législative en Belgique) limitant la liberté des établissements d'enseignement si ces mesures sont raisonnables et si ces mesures sont en proportion avec le but et les conséquences des buts à atteindre.[16]

En effet, les parlements communautaires prévoient des règles applicables aux universités libres, en ce qui concerne tant l'organisation que le fonctionnement et en matière de tutelle. Les règles pour les universités communautaires et les universités libres sont, par conséquent, largement identiques.[17] Il importe par ailleurs de souligner que les universités sont dotées de personnalité juridique autonome.

S'agissant de la situation juridique du personnel, il subsiste néanmoins une grande différence entre universités communautaires et universités libres. Au moment où la compétence d'enseignement a été transférée aux communautés, les documents préparatoires du Sénat prévoyaient explicitement :

« *La position juridique du personnel, qui signe un contrat de travail auprès d'un pouvoir organisateur libre, ne pourra jamais être identique au statut du personnel de l'Etat ni à celui des provinces et des communes*. »[18]

[15] Ceci a été décidé par la Cour d'Arbitrage dans un arrêt du 4 mars 1993, 18/93.

[16] Cour d'Arbitrage, n° 34/98, 1 avril 1998.

[17] J. VELAERS, *De Grondwet en de Raad van State: afdeling wegeving*, Malines, Kluwer, 1999, 179.

[18] *Doc. Parl*., Sénat, sess. extr. 1988, n° 100-1/1, 6.

Les différents parlements communautaires ont adopté des décrets régissant la situation juridique du personnel des universités. Force est de constater que ces décrets ont établi un ensemble de règles similaire à un statut des fonctionnaires. Ceci vaut aussi bien pour les enseignants dans des écoles primaires et secondaires que pour les professeurs d'université.[19] Les décrets prévoient une nomination unilatérale du personnel et un système clos de licenciement. Cela implique que les membres du personnel académique peuvent être licenciés que dans le cadre de ces décrets.

Au niveau de la règlementation, les situations du personnel des universités libres et du personnel des universités communautaires sont comparables, toutefois, étant donnée la distinction juridique de leurs situations (des contrats de travail d'un côté, un statut de fonctionnaire de l'autre), exil convient de constater une divergence en matière de compétence juridictionnelle en cas de contentieux. Pour trancher les litiges entre le personnel et les universités communautaires, le Conseil d'Etat (la juridiction administrative la plus haute) est compétent tandis que pour ceux entre les universités libres et leur personnel, la compétence relève du juge judiciaire. La Cour Constitutionnelle a confirmé que la différence de protection juridique offerte au personnel académique des universités libres par rapport à celle des universités publiques ne découle pas d'un statut inégalitaire, mais bien d'une différence de statut juridique.[20]

[19] P-P. VAN GEHUCHTEN, "L'école comme service public: quelle(s) distinction(s) entre les réseaux quant aux statuts des enseignants" in H. DUMONT et M. COLLIN (dir.), *Le décret du 24 juillet 1997 définissant les missions prioritaires de l'enseignement,* Bruxelles, Publications FUSL, 1999, 412-413; P. VANDERNOOT et J. SOHIER, "Le décret "missions" de la Communauté française du 24 juillet 1997: de la liberté de l'enseignement à la liberté dans l'enseignement" in H. DUMONT et M. COLLIN (dir.), *Le décret du 24 juillet 1997 définissant les missions prioritaires de l'enseignement,* Bruxelles, Publications FUSL, 1999, 159.

[20] Cour Constitutionnelle, n° 120/2000, 16 novembre 2000.

Dans cette contribution, nous analyserons d'une manière générale les décrets de la Communauté flamande et de la Communauté française. La Communauté germanophone ne possédant pas d'université, aucun décret en la matière n'existe au sein de celle-ci.

La Communauté flamande comprend trois universités communautaires :

- l'Universiteit Antwerpen (L'Université d'Anvers)
- l'Universiteit Hasselt (L'Université d'Hasselt)
- l'Universiteit Gent (L'Université de Gand)

La Communauté flamande possède également deux universités libres :

- Katholieke Universiteit Leuven (Université Catholique de Leuven)
- Vrije Universiteit Brussel (Université Libre de Bruxelles – néerlandophone)

La Communauté française possède deux universités communautaires :

- L'Université de Liège
- L'Université de Mons.

La Communauté française comprend aussi quatre universités libres :

- L'Université catholique de Louvain
- L'Université libre de Bruxelles
- L'Université de Namur
- L'Université Saint-Louis de Bruxelles

La qualification d'une université de libre ou de communautaire implique, comme mentionné, des conséquences importantes pour le personnel.

2.2 La réglementation de la situation juridique du personnel des institutions académiques dans les communautés flamande et française

Le Code de l'enseignement supérieur, adopté le 11 octobre 2013 par la Communauté flamande, a en quelque sorte réuni les règles existantes relatives à la vie académique, et notamment en ce qui concerne la situation juridique du personnel des institutions académiques.

En particulier, la nomination et le recrutement du personnel académique autonome sont régis par les dispositions allant de l'article V. 20 jusqu'à V. 32 dudit code.

La Communauté française a également adopté un décret du 7 novembre 2013 encadrant l'enseignement supérieur et l'organisation académique des études. Les dispositions concernant le recrutement du personnel académique des universités se trouvent dans un autre texte législatif. En effet, le statut du personnel des universités est organisé par la loi du 28 avril 1953 qui a été modifiée à plusieurs reprises par la Communauté française mais dont quelques dispositions restent encore en vigueur. Dans le cadre constitutionnel belge, des lois fédérales restent en vigueur jusqu'au moment où elles sont formellement abrogées.

Les réglementations flamandes et francophones divisent le personnel académique en plusieurs catégories.

La Communauté flamande connaît deux catégories de personnel au niveau académique : le personnel académique et le personnel académique autonome. Dans le cadre de la présente étude, nous nous intéressons principalement à la situation du personnel académique autonome. L'article V.3 du Code de l'enseignement supérieur prévoit qu'il existe quatre niveaux à l'intérieur du groupe du personnel académique autonome : les chargés de cours, les chargés de cours principaux, les professeurs et les professeurs ordinaires.

La loi du 28 avril 1953 de la Communauté française connaît, quant à elle, trois types de personnel (article 11 § 2) : le personnel académique, le personnel scientifique et le

personnel administratif, technique et ouvrier. Parmi le personnel académique nous trouvons les professeurs ordinaires, les professeurs extraordinaires, les professeurs et les chargés de cours[21]. Ces trois groupes constituent aussi un groupe de personnel académique autonome.

Notre analyse se limite aux questions relatives au recrutement du personnel académique autonome tant pour la Communauté flamande que pour la Communauté française. Dans les deux communautés ce groupe de personnel doit assurer des activités d'enseignement, de recherche, et servir la communauté.

Chacun entame sa carrière comme membre du personnel académique autonome en tant que chargé de cours. La procédure de recrutement est réglementée à des nombreux niveaux différents.

Tout d'abord le décret du Parlement flamand dispose que les membres du personnel académique autonome peuvent seulement être recrutés sous les conditions suivantes :

- Ils doivent posséder un diplôme de doctorat ou un diplôme à valeur équivalente conformément à une règle de l'Union européenne ou d'un accord bilatéral avec des pays en dehors de l'Union européenne.

- Exceptionnellement, l'autorité universitaire peut, sur l'avis de l'organe dont relève la charge et sur la base d'une motivation détaillée, nommer ou désigner des personnes qui font preuve soit d'un mérite scientifique exceptionnel, soit de leur compétence spécifique, comme membres à temps partiel du personnel académique autonome avec dispense du diplôme de doctorat ou d'un diplôme équivalent.

Cette dernière exception n'est pas utilisée très souvent sachant que le code dispose que les universités doivent donner une motivation détaillée indiquant les raisons pour

[21] M. EL BERHOUMI et L. VANCRAYEBECK, *Droit de l'enseignement en Communauté française*, Bruxelles, Bruylant, 2014, 373.

lesquelles ils ont adoptées de se servir de cette la possibilité. Le nombre de recrutement en utilisant cette procédure est très limitée, ce qui est d'ailleurs confirmé par l'inexistence de jurisprudence concernant cette procédure.[22].

Quant à la Communauté française, la loi du 28 avril 1953, encore en vigueur, ne prévoit pas de dérogation à l'obtention du diplôme de doctorat.

À cet égard, le Parlement flamand donne les universités flamandes une plus grande liberté en matière de recrutement Bien que la Communauté française prône aussi la liberté académique, certaines règles décrétales peuvent consister à limiter cette liberté[23].

En effet, et en Communauté flamande, et en Communauté française, la liberté de l'enseignement supérieur ne pourrait pas être totale. Selon l'article V. 26 du Code de l'enseignement supérieur de la Communauté flamande, avant chaque nomination ou recrutement, l'autorité universitaire demande l'avis d'un organe facultaire ou d'un autre organe désigné pour exercer cette compétence. Cela implique que les universités doivent installer et/ou entendre pour chaque recrutement académique une commission d'avis. Aucune université flamande ne peut recruter du nouveau personnel académique autonome sans qu'une offre d'emploi ne soit rendue publique. Cette exigence procédurale assure la possibilité pour chaque individu qui satisfait aux qualités requises d'être candidat au recrutement et garantit, par conséquent, le principe d'égalité. Des dispositions similaires peuvent être trouvées dans la Loi du 28 avril 1953 (article 23 *bis*) appliquée en Communauté française. Le conseil d'administration nomme seulement après avis d'un organe désigné.

Le recrutement du personnel académique autonome est donc décidé par le conseil d'administration dans les deux communautés, mais le conseil d'administration doit chaque fois solliciter l'avis d'un organe désigné pour rendre un avis motivé. Dans les deux

[22] Nous n'avons pas rencontré d'arrêts concernant des abus de cette exception.

[23] Cour Constitutionnelle, n° 167/2005, 23 novembre 2005.

communautés, le conseil d'administration qui effectue le recrutement doit motiver sa décision.[24]

À titre d'illustration il convient dès lors de concentrer notre analyse sur les grands principes qui sont partagés par les deux communautés relatifs au recrutement du personnel académique autonome en Belgique.

2.3. Les grands principes partagés par les deux communautés

Les grands principes de recrutement sont identiques les deux communautés. Deux grands principes fondamentaux ont été concrétisés en droit belge : le principe d'égalité d'accès aux fonctions et le principe de motivation des décisions concernant le recrutement. A part ces principes, les principes généraux de droit administratif ont une influence sur la jurisprudence qui contrôle les recrutements pour les universités libres et pour les universités communautaires.

2.3.1 Le principe d'égalité

Le principe d'égalité joue un rôle fondamental pour toutes les nominations (cela implique des désignations unilatérales donc des actes administratifs) auprès d'une université communautaire. Ce principe est consacré par l'article 10 de la Constitution belge qui prévoit :

« *Il n'y a dans l'État aucune distinction d'ordres.*

[24]M. EL BERHOUMI et L. VANCRAYEBECK, *Droit de l'enseignement en Communauté française*, Bruxelles, Bruylant, 2014, 374-375.

« Les Belges sont égaux devant la loi ; seuls ils sont admissibles aux emplois civils et militaires, sauf les exceptions qui peuvent être établies par une loi pour des cas particuliers.

« L'égalité des femmes et des hommes est garantie »[25].

L'arrêt *Van Hooydonck* indique clairement l'obligation d'opérer une comparaison neutre et spécifique des candidatures à fin de respecter le principe d'égalité. [26] Le Conseil d'Etat se limitant à l'exercice d'un contrôle restreint, juge qu'une comparaison neutre et spécifique sur la base du dossier tenant les candidatures est suffisante. La motivation formelle et matérielle du conseil d'administration lors du recrutement doit se baser sur cette comparaison neutre et spécifique. Le Conseil d'Etat ne contrôle que marginalement la décision du conseil d'administration. Cela implique que seulement une décision manifestement déraisonnable conduira le Conseil d'Etat à annuler la décision de nomination. Un exemple est rendu par l'arrêt Guillite dans lequel le Conseil d'Etat annule une nomination parce que les pièces de la commission d'avis ne donnent aucune indication concernant un classement possible lors des interviews et/ou des analyses des dossiers. Vu que le dossier contenait seulement les résultats d'un candidat (sans note écrite), la nomination ne trouve pas de fondement dans le dossier. Par conséquence, le Conseil d'Etat a jugé la décision manifestement déraisonnable.[27]

[25]Il est important de souligner que cette condition de nationalité a été élargie à une condition de nationalité belge ou de l'EEE (sauf en cas de participation directe ou indirecte à l'exercice des prérogatives de la puissance publique conformément à l'article 48 (4) TFUE comme interprété par la Cour de Justice. Voyez sur ce sujet A. DE BECKER, "De invloed van de rechtspraak en de regelgeving van de Europese Unie op de rechtspositie van het Belgische overheidspersoneel", *CDPK* 2010, 503-521 et B. LOMBAERT et S. ADRIAENSSEN, "L'influence du droit européen sur le droit de la fonction publique belge", *TSR* 2015, 211-264.

[26] CE, Van Hooydonck, n° 224.260, 4 juillet 2013.

[27] CE, Guillite, n° 162.276, 5 septembre 2006.

En outre, les titres et mérites de chaque candidat doivent être analysés d'une manière approfondie. Dans l'arrêt Tsiporkova, le Conseil d'Etat décidait que le principe d'égalité était violé quand les critères d'évaluation (enseignement, recherche et le fait de rendre des services à la société) ne sont pas clairement posés au préalable. Dans cet arrêt, le Conseil d'Etat a fondé sa décision sur les manquements dans la motivation de la nomination du concurrent de Madame Tsiporkova.[28] Il est néanmoins important de rappeler que le Conseil d'État n'exerce qu'un contrôle restreint, et ne se met pas à la place de l'université pour réformer la décision. En effet, le Conseil d'Etat n'annule pas une décision qui pourrait raisonnablement être prise même si une autre institution pourrait prendre une décision différente sur le même dossier.[29]

La conséquence d'une illégalité est la suspension (en cas d'urgence) ou l'annulation de la décision de nomination. Celle-ci a des effets rétroactifs : il faut donc recommencer la procédure de recrutement.[30]

Bien que le principe d'égalité s'applique aux recrutements au sein des universités libres, le juge de travail n'est pas compétent pour annuler une décision administrative de recrutement. Un candidat refusé ne peut réclamer que la réparation des préjudices pour la perte de chance. Or, l'indemnisation au titre de pour la perte de chance est très limitée. Elle est normalement attribuée *ex aequo et bono* par le juge.[31]

[28] CE, Tsiporkova, n° 192.581, 23 april 2009.

[29] CE, Nagels, n° 219.120, 2 mai 2012.

[30] Les conséquences d'une annulation par le Conseil d'Etat sont plus radicales. L'annulation d'une decision de licenciement au sein d'une université communautaire a pour conséquence qu'il faut réintegrer la personne concernée. Les tribunaux de travail n'ont pas la possibilité d'ordonner une réintegration vu la nature contractuelle de la relation de travail. A ce sujet, voyez Cour du Travail de Bruxelles, 8 novembre 2006, cite par R. DOHOGNE, *Annuaire de jurisprudence en droit de l'enseignement,* Waterloo, Kluwer, 2011, 19.

[31] Lisez sur ce sujet J. BOONE, "Het verlies van een kans bij een onzeker causal verband", *RW* 2004-2005, 92-97.

La distinction entre la protection juridique du personnel des universités communautaires et celle des universités libres a suscité de vifs débats. Certains critiquent le caractère discriminatoire (pour le même travail) d'une telle distinction, laquelle pourrait être regardée comme une violation du principe d'égalité et donc de la Constitution.

Toutefois, la Cour Constitutionnelle a jugé que cette différence de traitement est justifiée par la nature contractuelle des relations de travail dans les universités libres et, par conséquent, qu'il n'existe pas d'inégalité au regard de la Constitution.[32]

Quant au Conseil d'État, il a décliné sa compétence en matière de litige opposant un membre de personnel à son université libre –employeur.[33]

2.3.2 Le principe de la motivation : élément clé

La motivation est l'élément clé pour juger si l'université concernée a respecté le principe d'égalité et même pour juger si l'université a respecté les autres principes généraux de droit administratif. Les universités communautaires sont des universités publiques qui sont soumises à la loi du 29 juillet 1991 sur la motivation des actes administratifs. Cette loi oblige une autorité administrative à motiver formellement et matériellement ses actes administratifs. Il ne fait aucun doute qu'une nomination peut être qualifiée d'acte administratif.

Quant aux universités libres, elles doivent aussi motiver leurs décisions formellement et matériellement, en vertu des articles V.27 du Code de l'enseignement supérieur dans la Communauté flamande et des articles 23 à 23 *ter* de la loi du 28 avril 1953.

[32] Cour Constitutionnelle, n° 120/2000, 16 novembre 2000.

[33] CE, Missorten, n° 93.104, du 6 février 2001; CE, Buron, n° 104.642, 13 mars 2002; CE, Mertens, n° 104.644, 13 mars 2002.

En revanche, les autorités administratives ne sont pas tenues de motiver leurs décisions de recrutement ni leurs décisions de licenciement des agents contractuels.[34].

Un manquement dans la motivation de la décision d'un conseil d'administration au sein d'une université communautaire conduit à l'annulation de la nomination. Deux exemples peuvent démontrer l'importance d'une motivation correcte et juste de la décision. Une motivation claire et juste implique que la motivation doit se confirmer au contenu du dossier. En outre, la motivation doit s'accorder avec la teneur générale du dossier. La motivation est donc insuffisante au niveau du contenu quand elle tient compte d'une connaissance que le candidat doit encore acquérir.[35] Il existe aussi un manquement dans la motivation lorsque l'université se base sur l'avis de l'organe désigné mais n'ajoute pas cet avis ou ne le reprend pas.[36]

De nouveau, il n'existe presque pas de jurisprudence qui se prononce sur la question d'une faute précontractuelle possible au moment du recrutement d'un nouveau membre du personnel académique chez des universités libres. Si la motivation d'une décision de recrutement (ou de licenciement) prise par une université libre est illégale, les candidats écartés ne peuvent pas entamer une procédure devant le Conseil d'Etat. Il existe seulement un arrêt de la Cour du travail de Liège (concernant une Haute Ecole) qui estimait que la motivation d'un licenciement d'un contractuel pour raison économique était insuffisante. Par

[34] Cour de Cassation, 12 octobre 2015, www.juridat.be

[35] CE, Tsiporkova, n° 194.654, 25 juni 2009.

[36] CE, Le Roi, n° 229.361, 27 novembre 2014.

conséquent, la Cour a condamné le pouvoir d'organisation à une indemnisation de 20000 euros pour perte de chance d'être recruté.[37]

2.3.3. Le rôle des principes généraux de droit administratif dans le droit de l'enseignement

D'autres principes généraux de droit administratif sont invoqués dans les litiges concernant les recrutements au sein des universités. Ils sont le principe de prudence, le principe *audi alteram partem*, le principe de proportionnalité, et le principe de prendre une décision dans un délai raisonnable. Il importe de souligner que le Conseil d'Etat n'a jamais établi un lien clair dans le cadre d'une procédure administrative avec la Convention européenne des droits de l'Homme. Ces principes s'appliquent aussi bien, pour le Conseil d'Etat dans le cadre d'une procédure judiciaire.

En ce qui concerne le recrutement, il s'agit de discuter du comportement raisonnable de l'université qui recrute. Le Conseil d'Etat a jugé raisonnable que est un avis modifie un paramètre pour des candidats sans que ce classement ait été affecté par la modification d'un paramètre.[38]

Dans le cadre du recrutement du personnel académique la commission joue un rôle crucial de par sa fonction consultative auprès du conseil d'administration. Cette fonction doit être exercée de façon impartiale. L'impartialité est souvent considérée comme s'attachant à l'un des principes généraux de droit administratif. Dans l'arrêt *Dorssemont* par exemple, le Conseil d'Etat a annulé une décision pour violation du principe de prudence dans la mesure

[37] Cour de Travail Liège, 5 septembre 2006 cité par R. DOHOGNE, *Annuaire de jurisprudence en droit de l'enseignement,* Waterloo, Kluwer, 2011, 14-15.

[38] CE, Soyez, n° 219.287, 10 mai 2012.

où un membre de la Commission avait démissionné très tardivement (pour éviter une apparence de partialité) et qu'il n'avait pas été remplacé, Son remplacement étant pourtant obligatoire.[39]

De nouveau, le juge de travail a plus de difficulté à appliquer (ou plutôt à faire respecter) ces principes, même s'il lui incombe de porter attention aux principes généraux de droit administratif dans des litiges opposant un candidat à une université libre[40], obligation qui est prévue dans l'article II. 27, 1° du Code de l'enseignement supérieur pour la Communauté flamande et qui est largement développée par la jurisprudence francophone.[41] La même conclusion peut néanmoins être déduite de cette jurisprudence : le juge de travail ne dispose pas des mêmes mécanismes juridiques pour protéger les candidats irrégulièrement évincés, ne pouvant accorder que des indemnités limitées pour la perte de chance.

2.4. Conclusion pour la Belgique

En comparaison avec le système de recrutement universitaire pour des membres du personnel académique autonome en Italie, le système belge laisse beaucoup plus de liberté aux universités elles-mêmes.

Chaque université peut et doit développer son propre règlement concernant son personnel y compris une procédure de recrutement. Des règles d'encadrement ont été prévues

[39] CE, Dorssemont, n° 201.052, 18 février 2010.

[40] En général, il existe un grand débat concernant l'applicabilité des principes généraux de droit public dans le domaine du droit du travail. Lisez A. DE BECKER, "Kroniek van het Belgische ambtenarenrecht (1999-2008)", *RW* 2008-2009, 1153-1184.

[41] M. EL BERHOUMI et L. VANCRAYEBECK, *Droit de l'enseignement en Communauté française,* Bruxelles, Bruylant, 2014, 262-263.

par les parlements communautaires (respectivement du côté flamand et du côté francophone). Il reste néanmoins dans ce cadre général un pouvoir discrétionnaire dont disposent les autorités universitaires pour établir leurs propres règlements. L'autonomie universitaire garantit aussi que chaque université est responsable de ses propres recrutements. Néanmoins, beaucoup de principes généraux du droit (comme le principe d'égalité, de motivation, de prudence, de proportionnalité) garantissent l'obligation de l'université de sélectionner le candidat qui semble pour eux le candidat le plus pertinent pour exercer le poste.

Il n'en demeure pas moins qu'en matière de protection juridique des candidats, une grande différence existe entre universités communautaires et universités libres. Les candidats au sein d'une université communautaire peuvent engager un recours devant le Conseil d'Etat, qui peut (et doit) suspendre ou annuler la nomination du candidat sélectionné si l'université communautaire a pris une décision illégale. Le candidat qui a postulé au sein d'une université libre doit entamer sa procédure devant les cours et tribunaux communs qui ne peuvent pas suspendre ou annuler les décisions de recrutement des universités libres. Les candidats peuvent seulement essayer d'obtenir des dommages pécuniaires pour la perte d'une chance.

Cette distinction procédurale n'est pas jugée inconstitutionnelle par la Cour Constitutionnelle belge, puisque la Cour voit là une conséquence logique de la différence constitutionnelle entre les établissements universitaires (c'est-à-dire la différence entre les universités communautaires et les universités libres).

Les principes juridiques sont similaires mais les résultats diffèrent profondément. Les principes sont établis pour garantir la mise en place d'une sélection ou d'un recrutement raisonnable de la part des universités.

3. LES PAYS BAS

3.1. Introduction

Les recrutements universitaires en Belgique et aux Pays Bas sont organisés de façon différente. Toutefois, quelques similitudes peuvent être observées. Il convient dès lors de présenter le cadre juridique des universités aux Pays-Bas.

Comme en Belgique, les universités néerlandaises sont divisées en deux catégories. Il existe des universités spéciales (fondées sur initiative privée) et des universités publiques. Les Pays Bas n'étant pas un Etat fédéral, il n'existe pas de différence de systèmes juridiques entre des entités sub-étatiques. Les universités spéciales sont subventionnées par l'Etat, tandis que les universités de l'Etat sont directement organisées par l'Etat.[42]

Les universités de l'Etat sont dotées d'une personnalité juridique autonome. Comme en Belgique, les universités de l'Etat nomment unilatéralement leur personnel et les universités spéciales (qui ne possèdent pas de personnalité juridique autonome) recrutent leur personnel sur la base des contrats de travail. La personnalité juridique au sein des universités spéciales est reconnue aux initiateurs, qui sont des personnes juridiques privées autonomes.

La plupart des étudiants néerlandais étudient s'inscrivent dans une université de l'Etat. Les universités de l'Etat sont :

- Universiteit van Amsterdam (L'Université d'Amsterdam)
- Technische Universiteit Delft (L'Université technique de Delft)
- Technische Universiteit Eindhoven (L'Université technique d'Eindhoven)

[42] R.G. LOUW, *Het Nederlands hoger onderwijsrecht*, Leiden, Leiden University Press, 2011, 44-45.

- Rijksuniversiteit Groningen (L'Université de l'Etat de Groningen)
- Universiteit Leiden (L'Université de Leiden)
- Universiteit Maastricht (L'Université de Maastricht)
- Erasmus Universiteit Rotterdam (L'Université Erasme de Rotterdam)
- Universiteit Utrecht (L'Université d'Utrecht)
- Universiteit Twente (L'Université de Twente)
- Wageningen Universiteit (L'Université de Wageningen)

Les universités spéciales sont moins nombreuses, mais elles comptent néanmoins aussi beaucoup d'étudiants. Il s'agit de trois grandes universités et quatre petites universités qui sont particulièrement liées à une religion. Ces trois grandes universités sont :

- Vrije Universiteit Amsterdam (L'Université Libre d'Amsterdam)
- Radboud Universiteit Nijmegen (L'Université Radboud de Nimègue)
- Universiteit van Tilburg (L'Université de Tilburg)

La distinction juridique entre la qualification comme fonctionnaire pour le personnel des universités de l'Etat et comme employé pour les universités libres a des conséquences importantes. Les relations de travail sont désignées sur la base des négociations collectives. Il est pourtant important de souligner que ces négociations collectives résultent d'une convention collective avec effet contraignant pour les universités spéciales. Par contre, pour les universités de l'Etat, les négociations collectives ne résultent pas dans une convention

collective contraignante, mais d'un protocole qui doit encore été transmis dans le statut unilatéral qui gouverne la position juridique du personnel.[43]

3.2. Les universités d'Etat

Le recrutement dans les universités de l'Etat ne fait pas l'objet de réglementation spécifique. Les articles 4.5.1 et 4.5.4 de la Loi sur l'enseignement supérieur et de la recherche scientifique prévoient que l'administration de l'université de l'Etat est libre de régler la situation juridique de leurs personnels. Cette réglementation inclut aussi des règles concernant la nomination du nouveau personnel. Il n'existe donc pas de cadre juridique général aussi établi qu'en Belgique. Une analyse jurisprudentielle s'avère nécessaire à fin de comprendre l'exercice des prérogatives des universités dans une procédure de nomination.

Les membres du personnel des universités de l'Etat sont considérés comme des fonctionnaires. Pourtant, les candidats pour un poste vacant qui ne sont pas encore membres du personnel ne peuvent intenter de recours en annulation d'un acte de nomination.[44] Les protocoles collectifs ne prévoient pas de règles procédurales pour le recrutement. Même si le principe d'égalité d'accès à la fonction publique est inscrit dans l'article 3 de la Constitution, ce principe n'est pas concrétisé par la mise en œuvre d'une procédure objective et largement contrôlée comme en Belgique. Pour les litiges concernant des candidats, seul le juge civil est compétent. Dans une affaire contre l'Université d'Amsterdam par exemple, la requérante avait demandé des dommages-intérêts pour avoir été discriminée sur la base du sexe : le tribunal a toutefois exclu l'illégalité manifeste de la décision sur la base d'une analyse marginale, qui l'amène à conclure que le dossier semblait d'avoir traité chaque candidat

[43] R.G. LOUW, *Het Nederlands hoger onderwijsrecht*, Leiden, Leiden University Press, 2011, 47.

[44] T. VAN PEIJPE, "De ambtenaar toch een mens", *Sociaal maandblad Arbeid*, 2007, 291.

d'une façon objective.[45] Cet exemple illustre la jurisprudence concernant les candidats pour des offres d'emploi du personnel académique.

En général, la procédure à suivre pour un membre du personnel académique chez une université de l'Etat aux Pays-Bas est gouvernée par la loi générale sur le droit administratif (*Algemene Wet bestuursrecht*) qui prévoit trois phases :

- La requête devant l'institution ayant pris la décision initiale
- Le recours devant le juge (relevant du secteur droit administratif) compétent en matière de contentieux de la fonction publique
- L'appel auprès du Conseil Central de la vie professionnelle

A partir du recrutement, des décisions concernant la suite de la carrière d'un membre du personnel académique relèvent du droit public et peuvent être attaquées selon cette procédure Cette procédure n'est pas applicable aux décisions prises par des universités libres. S'agissant de celles-ci (comme dans une affaire contre l'Université Radboud de Nimègue), le juge du secteur droit administratif a décliné sa compétence.[46]

3.3. Les universités spéciales

Les universités spéciales n'ont pas de personnalité juridique autonome. Elles sont toujours crées par l'intermédiaire de la personne juridique qui organise l'université. Comme pour les universités de l'Etat, il n'existe pas de possibilité juridique d'entamer directement

[45] Tribunal d'Amsterdam, 13 mars 2013, JAR 2013, 102 avec note de E. Cremers-Hartman ; RAR, 2013, 78 et NJF 2013, 198.

[46] Tribunal d'Arnhem, 9 mars 2006, RBARN:2006:AV7682

un recours contre des irrégularités procédurales de recrutement. Seule un recours indemnitaire est envisageable pour faute de l'université. Il d'intenter un recours devant le juge civil. Celui-ci peut seulement condamner l'université à réparer les préjudices, si la faute est prouvée par le requérant et elle est imputée à l'université.

Il convient de souligner que, contrairement à la situation en Belgique, le personnel des universités spéciales ne peuvent pas invoquer les principes généraux de droit administratif. La raison est que les universités spéciales doivent respecter les principes d'un bon employeur. Les deux notions sont liées mais différentes. Un employeur dans le secteur privé doit se comporter comme un bon employeur qui respecte ses employés. Le développement de ces principes est lié au développement des principes généraux de droit administratif[47].

3.4. Un élément spécifique : le licenciement

Un élément très spécifique concerne le licenciement potentiel d'un membre du personnel d'une université. La procédure de licenciement dans le secteur privé exige la permission préalable d'une institution administrative ou d'un juge de canton, à la suite d'une réglementation concernant les relations de travail. Concernant le licenciement des personnels universitaires, comme les universités ne sont pas organisées par l'Etat, la procédure n'est pas soumise à cette règlementation. Autrement dit, l'autorisation préalable d'une institution administrative n'est pas requise. En effet, le législateur a voulu éviter que l'autorité centrale puisse influencer la gestion du personnel dans le monde de l'éducation.[48]

[47] Voyez G. J.J. HEERMA VAN VOSS, *Goed werkgeverschap als bron van vernieuwing van het arbeidsrecht*, Alphen aan de Rijn, Samsom Tjeenk Willink, 1993, 113p.

[48] H.L. BAKELS, *Schets van het Nederlands arbeidsrecht*, Deventer, Kluwer, 1998, 116.

3.5. Deux modifications importantes dans le droit néerlandais : le nouveau droit du licenciement et la normalisation

Le droit de licenciement aux Pays Bas a été considérablement modifié par la loi du 14 juillet 2014 du Travail et de la Sécurité, entrée en vigueur le 1er juillet 2015[49]. Le contrôle préalable exercé par une institution administrative sur le licenciement d'un membre de personnel est retenu pour des raisons socio-économiques. La possibilité de demander la permission préalablement à un juge (le juge du canton) est aussi retenue mais seulement pour d'autres types de licenciements. Cette réforme implique que dorénavant les autorités universitaires doivent demander préalablement une autorisation à un juge avant de licencier un membre de personnel. L'importance de cette modification ne peut pas être sous-estimée parce qu'elle implique qu'une université d'Etat comme une université spéciale doit demander l'autorisation préalable au juge pour licencier un membre de l'enseignement supérieur. La question se pose de savoir si cette interprétation est conforme à l'article 23 de la Constitution néerlandaise qui prévoit la liberté d'enseignement et l'obligation du gouvernement de garantir sa mise en œuvre.[50]

Deuxièmement, il est important de souligner que les agents du secteur public pourraient perdre leur statut de fonctionnaire dans un avenir proche. La proposition de loi sur la normalisation de la position juridique des fonctionnaires prévoit que, à l'exception des juges, des fonctionnaires de la police, des fonctionnaires de la défense et des notaires, les employés du secteur public seront recrutés sur contrat de travail. Des contrats de travail seront

[49]Wet van 14 juni 2014 tot wijziging van verschillende wetten in verband met de hervorming van het ontslagrecht, wijziging van de rechtspositie van flexwerkers en wijziging van verschillende wetten in verband met het aanpassen van de Werkloosheidswet, het verruimen van de openstelling van de Wet inkomensvoorziening oudere werklozen en de beperking van de toegang tot de Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers (Wet Werk en Zekerheid).

[50] Lisez A.W.C. AKKERMANS et A.K. KOEKKOEK (dir.), *De Grondwet: artikel 23,* Deventer, Wolters Kluwer, 2000, 354-393.

proposés aux agents en fonction. Cela veut dire que le juge administratif ne sera plus compétent pour statuer sur les litiges opposant les personnels à leurs employeurs publics. Cependant, Le juge civil devrait appliquer les principes généraux de droit administratif en vertu de l'article 3:1 de la loi générale du droit administratif. Les principes généraux de droit administratif joueront encore un rôle dans le contentieux opposant le personnel à leur employeur pour les universités de l'Etat. En ce qui concerne des litiges entre le personnel des universités spéciales et leurs employeurs, les principes d'un bon employeur joueront un rôle. Il est pourtant important de souligner que les universités spéciales entrent dans le champ d'application de la proposition de loi sur la normalisation de la position juridique des fonctionnaires. L'article 1 de cette proposition prévoit que les entités de droit privé dont un organe participe à l'exercice de la puissance publique sont inclues dans le champ d'application. Cela pourrait ouvrir la porte à l'application des principes généraux de droit administratif pour les universités spéciales.[51] La proposition a été votée par la Seconde Chambre le 4 février 2014 et il était prévu qu'elle serait votée par la Première Chambre le 22 septembre 2015. Le vote a pourtant été remis à terme indéterminé pour des raisons politiques. Quelques parlementaires de la majorité invoquaient qu'ils craignaient des démissions abusives en cas de suppression du statut des fonctionnaires. Il semble que le vote est reporté pour une durée plus longue qu'on aurait imaginée. .

Il est évident qu'un élargissement du champ d'application de cette loi aux universités spéciales et le changement de statut du personnel des membres de personnel des universités de l'Etat exerceront un impacte considérable sur le contentieux concernant les personnels universitaires.

[51] Memorie van Toelichting art. 1 Voorstel van Wet van de leden van Weyenberg en van Hijum tot wijziging van de Ambtenarenwet en enige andere wetten in verband met het in overeenstemmign brengen van de rechtspositie van de ambtenaren met die van werknemers met een arbeidsovereenkomst naar burgerlijk recht (Wet normalisering rechtspositie ambtenaren), *Parl. Doc.*, Tweede Kamer,session 2010-2011, n° 32550, 21.

3.6. Conclusion pour les Pays-Bas

Le système néerlandais qui est, *prima facie*, comparable avec celui de la Belgique. En effet, tous les pays connaissent deux types d'université : universités d'Etat et universités spéciales (ou libres dans la terminologie belge). Quant au recrutement de leurs personnels, le régime juridique diverge. Les universités de l'Etat nomment leur personnel, alors que les universités spéciales recrutent leurs personnels sur la base de contrat de travail. De cette divergence découle une question de la compétence juridictionnelle : le juge administratif peut annuler une décision, tandis que le juge civil ne peut le faire.

Il existe toutefois une différence importante entre les systèmes belge et néerlandais : le refus d'engager un nouveau membre du personnel par une université d'Etat aux Pays Bas ne constitue pas un acte administratif que le candidat peut attaquer par un recours en annulation. Il faut démontrer une faute extracontractuelle du chef des universités de l'Etat. Le même raisonnement peut être suivi pour les candidats à un recrutement dans une université spéciale.

Par ailleurs, les réformes législatives à venir compliqueront la situation juridique du personnel des universités. La loi « Travail et Sécurité », entrée en vigueur le 1 juillet 2015, a considérablement modifié la situation du personnel des universités dans la mesure où les conseils d'administration devront demander une autorisation préalable avant de licencier un membre du personnel. Cette nouvelle obligation changera profondément la situation juridique des universités et de leur personnel.

En outre, le projet de la modification du statut des fonctionnaires implique qu'il n'existera plus de statut de droit public pour les membres du personnel dans les universités de l'Etat. Il est évident qu'une telle réforme aura un impacte considérable sur les relations de travail entre les universités et leur personnel.

4. CONCLUSION

Le recrutement universitaire du personnel académique (autonome) en Belgique est fragmenté pour des multiples raisons. En premier lieu, deux Communautés sont compétentes pour rendre des actes législatifs en la matière. De surcroît, la liberté d'enseignement garantit aux universités de déterminer elles-mêmes en détail la procédure de recrutement au sein de leurs propres établissements, bien que la détermination de ces règles soit encadrée par des mesures réglementaires.

Les universités communautaires et libres sont soumises à la même réglementation. Elles possèdent une certaine liberté en matière de recrutement. Dans le cadre de cette procédure, elles doivent surtout respecter les grands principes de droit administratif, comme le principe d'égalité, le principe de motivation et d'autres principes comme le principe de prudence et de proportionnalité. La distinction entre les universités libres et les universités communautaires se manifeste en surtout matière de protection juridique. Les litiges opposant les universités communautaires et les candidats relèvent de la compétence du Conseil d'Etat (qui peut suspendre ou annuler la nomination d'un concurrent). Les litiges opposant les universités libres et les candidats constituent une compétence du juge civil qui ne peut qu'accorder des dommages et des intérêts.

Les universités néerlandaises connaissent une distinction comparable. Elles possèdent aussi une grande liberté de recrutement et d'organisation de la procédure de recrutement. Pourtant, le candidat chez une université de l'Etat ne peut pas intenter un recours administratif contre cette décision. Les candidats doivent, comme dans des litiges d'un candidat contre une université libre, saisir le juge civil qui ne peut qu'accorder des dommages-intérêts. Pour accorder des dommages, les principes d'objectivité et de prudence sont pris en considération par le juge.

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PRINCIPLES FOR ENSURING AN EFFECTIVE REGULATORY ENFORCEMENT AND INSPECTIONS

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SUMMARY

INTRODUCTION

Regulatory enforcement and inspections are crucial aspects for understanding how the regulatory system affects businesses and the economy and for ensuring effective compliance with regulation. Nonetheless, most countries have focused their efforts in analysing the processes of how regulations are designed and developed, and on how to improve them and make them "smarter"[1]. Therefore, enforcement strategies and inspections are relatively new and understudied elements of the regulatory policy.

In the last years, the emergence of new regulatory challenges (such as environmental protection, public corruption, financial stability, and so on), combined with the growing constraints on public budget have raised the governments' concern over how business and the public sector implement regulation. The policy debate has started to revolve around the efficacy of regulation enforcement and inspections in order to achieve a more substantial compliance by regulated entities.

This report provides a short overview on some of the main recommendations issued both at the national and international level on enforcement and inspections. It especially focuses on the 2014 OECD Best Practice Principles and on the key principles for improving the effectiveness and the efficiency of regulatory enforcement and inspections contained in it. Some of these principles stem from national experiences. The UK government, for example, has started tackling some of the problematic issues in relation to enforcement and inspections since the 2005 Hampton Review. The Italian government has also issued in 2012 Guidelines and a Dossier concerning public controls and inspections on private enterprises with the goal of simplifying the procedures and improving the enforcement outcome.

The aim of this report is to examine the recurring problems in the field of enforcement and inspections in the light of the principles recommended by the OECD in order to overcome them. The study shows a common trend of governments attempts of improving the efficiency of controls and achieving better regulatory outcomes.

[1] See R. BALDWIN, *Is better regulation smarter regulation?*, in *Public Law*, 2005, 485 – 511

The report starts with a brief overview on one of the earliest documents regarding the issue, the 2005 UK Hampton Review. It, then, investigates in more detail the OECD Best Practice Principles for Regulatory Enforcement and Inspections. Finally it analyses the Italian Guidelines and Dossier on public controls on business. It concludes with a highlight on the common features of all the above mentioned documents, which all pursue the ultimate objective of reducing the costs of monitoring business and the public sector, while increasing the effectiveness of the enforcement activity.

1. THE UK HAMPTON REVIEW

One of the first governments which have realised the importance of effective inspection and enforcement mechanisms was the United Kingdom, which in 2005 issued the Hampton Review "Reducing administrative burdens: effective inspection and enforcement"[2]. The Hampton Review is part of the broader "New Public Management" programme of the UK government, aimed at simplifying and reducing administrative burdens for business. The review has dealt specifically with the cumulative loads which affect business, particularly the small ones, such as multiple inspections, overlapping data requirements, and inconsistent practice and decision-making between regulators.

Notably, the Hampton Review has stressed the advantages of employing risk assessment in the regulatory process. The development of internal risk management systems in governmental bodies is based on the transposition of private sector risk analysis strategies to the public policy. Risk based regulation, essentially, means targeting the enforcement resources on the basis of the identification and the assessment of the risks that a regulated entity poses to the regulator's objectives[3].

[2] P. HAMPTON, *Reducing Administrative Burdens: Effective Inspection and Enforcement: Final Report* (HM Treasury, London, March 2005) ("Hampton Review"), FSA, NRNM, n.85, available at http://webarchive.nationalarchives.gov.uk/

[3] See J. BLACK, *The emergence of risk-based regulation and the new public risk management in the United Kingdom*, in *Public Law*, 2005, 512 – 549.

One of main reasons for adopting a risk based approach is that it provides a transparent means to prioritise regulatory resources on the firms which pose the highest risk. Proper analysis of risk directs regulators' efforts at areas where they are most needed. It also should enable governments to reduce the administrative burdens of regulation, while maintaining or even improving regulatory outcomes. Moreover, risk assessment provides regulators with information on the nature of businesses and on all external factors affecting the risk the business poses to regulatory outcomes, helping them to avoid unnecessary inspections or data requirements on less risky businesses. For these reasons, the Hampton Review has recommended that all regulatory agencies adopt a comprehensive risk-based approach to regulatory enforcement.

The principles stated in the review are also aimed at securing the accountability of regulators for the efficiency and the effectiveness of their activities, as well as their independence. In order to achieve a greater transparency, it suggests that regulations should be written and drafted having consulted all the interested parties. A further principle stated in the review is to reduce inspections and data requirements, particularly for less risky businesses, and to redirect resources released from unnecessary inspections towards authoritative and accessible advice provided by regulators to improve compliance.

Moreover, the review addresses the need to simplify the forms and to improve co-ordination across regulators' data requirements. It advices regulators to explicitly consider the efficiency of the enforcement mechanisms when designing new regulations. Finally, it states that governments should reduce the number and the size of national regulators.

Many of these recommendations were built on earlier work or established trends. The Health and Safety Executive and the Environment Agency, for example, both published strategy documents focused on risk assessment. Consolidation of regulators around single themes has been common in recent years, such as with the creation of Ofcom and the Financial Services Authority.

2. THE OECD BEST PRACTICE PRINCIPLES FOR REGULATORY ENFORCEMENT AND INSPECTIONS

The design of an effective enforcement model changes according to the institutional framework of each Country. Furthermore, inspections are often considered to be sector-specific. Nonetheless, the OECD has recently provided a general, informal, non-binding guidance, with the aim of helping governments to design more effective, efficient, less burdensome and less resource-demanding inspection mechanisms. The guidelines address the design of the policies, the institutions and the tools for promoting effective compliance and the process of reforming inspection services to achieve results. They are also aimed at the prevention of corruption and at the promotion of ethical behaviour.

The OECD document addresses, in an across sectors and general manner, the way inspections are planned, their targeting, the communication with regulated subjects. The objective of the report is to present a range of key principles on which effective and efficient regulatory enforcement and inspections should be based. The ultimate goal is pursuing the best compliance outcomes and the highest regulatory quality. The report complements the 2012 Recommendation of the Council on Regulatory Policy and Governance[4].

Enforcement activity is defined by the report in a broad sense, as all the activities of public bodies aimed at promoting compliance and reaching regulation's outcomes. Inspections are defined as any kind of visit or check conducted by authorized officials on products, or business premises, activities, documents etc.

The report provides eleven best practice principles, based on the two expert papers, presented to the OECD Regulatory Policy Principles at its 7th meeting in November 2012[5], as well as on an extensive review of practices in OECD and non-OECD countries and on the

[4] The OECD Regulatory Policy Committee, Recommendation of the Council on Regulatory Policy and Governance, 2012, available at: http://www.oecd.org/governance/regulatory-policy/49990817.pdf

[5] J. MONK, *Reform of Regulatory Enforcement and Inspections in OECD Countries*; F. BLANC, *Inspections Reforms: Why, How and With What Results*, available at www.oecd.org

research that has been conducted on this topic over the past three decades. The principles have also been discussed in a public consultation with all the interested parties.

The principle of evidence-based enforcement and inspections

The first principle states that "regulatory enforcement and inspections should be evidence-based and measurement-based: deciding what to inspect and how should be grounded on data and evidence, and results should be evaluated regularly".

The principle of evidence-based enforcement and inspections requires a regular evaluation of inspectorates' actions and their effectiveness, against a set of well-defined indicators, based on reliable and trusted data. This principle requires data collection about the frequency of inspections, the number of entities subject to inspections, the length of inspections and the administrative sanctions that follow, in order to assess the quantity of the resources used and the burdens on businesses.

An essential element of evidence-based enforcement is the reliability of the data employed. The report suggests not using data that is directly the result of an agency's processes in order to assess the compliance levels. This information may be directly influenced by the enforcement agency, and are based on the changes in the enforcement policy. Therefore, it is not considered an "independent" data which creates negative incentives. More broadly, any data that is recorded or produced by the agency should be treated with caution in terms of evaluation, because of the potential for conflict of interest. Indeed, the inspectorate may be incentivised to alter the data in order to improve its apparent performance.

The evidence-based principle stresses that it is crucial for governments to gather information on the main areas of enforcement activities and on the level of resources dedicated to them. It is also important to gain information on the opportunities of considering alternative and light handed approaches to promote compliance, such as civil suits and market mechanisms, on the potential use of risk assessment and management to design enforcement strategies, and on the possibility to remove overlap or duplication across different inspection and enforcement activities.

The OECD recommends a systemic and comprehensive approach for reviewing the way that regulatory enforcement works from the point of view of business in each sector. The governments' review of enforcement activities should draw on international experience to evaluate the merits of different organisational approaches to address common public policy goals. The report stresses that a specific agency should only be set up if there is a demonstrated need for this arrangement. Indeed, a very wide range of topics covered by regulation do not need an inspectorate to enforce the legal requirements and can be enforced through mechanisms of civil litigation, market forces and criminal law enforcement.

Enforcement and inspection agencies should have a clear defined mandate with regards to the outcome indicators that they aim to influence and they should be required to track and report on these regularly. To ensure the reliability of data used for evaluation, as far as possible, data used to evaluate an inspectorate's activities should be collected independently. The performance measurement approaches should balance the use of different indicators from various sources and consider the use of random, statistically representative surveys every few years in order to control the situation of business operators' compliance in critical areas.

Tracking the number of violations identified by inspectors and the value of penalties imposed may be useful for designing the indicators, but should not be used as performance indicators as it cannot reliably correlate with the performance of the agency. It is also necessary to track factors such as the perception of regulated entities on the inspectorates. There should also be strictly defined protocols which should bind the Agencies when collecting the data. In cases when data is produced or collected by the agency itself, it should be regularly cross-checked by independently conducted, representative surveys, or through the comparison with other existing sources of data.

The principle of selectivity

The second principle suggests that governments explore, whenever possible, the potential of market forces, private sector and civil society actions to support compliance and enforcement. It states that "inspections and enforcement cannot be everywhere and address everything, and there are many other ways to achieve regulations' objectives".

This principle denies that every rule issued by the state needs to have a specific enforcement unit following up on compliance by businesses. It stresses that, in a number of cases, there may be alternative mechanisms to ensure compliance, instead of assigning state resources to controls and enforcement actions. In particular, the principle suggests to rely on liability rules for suppliers, combined with adequate insurance requirements for one or both parties, when regulations apply to the provision of services and market relationships.

The document provides a number of criteria which should be followed by governments before deciding upon whether to assign inspection and enforcement resources to a specific regulation or set of regulations.

For example, it should be evaluated whether an ex-post remedy would be sufficient to repair or compensate the damage adequately or, instead, preventive action through inspections is essential to achieve the regulations' ends. Also, the type of action should be chosen according to the irreversibility and the magnitude of harm that the violation of the specific regulation may cause. Governments should consider the possibility to rely on market mechanisms and providers of conformity assessment services. Further factors to be taken into account are the level of asymmetries between market participants and of the convergence between public and private interests. Clearly, if complying with regulation is likely to be beneficial for business in terms of market share, revenue and profits, market-based mechanisms are more likely to be effective.

An alternative means to enforcement might be a mandatory insurance mechanism, which should be able to cover adequately both the potential liability in case of violation of regulations and the subsequent harm. Finally, enforcement of regulations through courts may also have the potential to deter serious violations.

In conclusion, all the aforementioned criteria should aim at driving state resources to alternative means, rather than inspections and enforcement, which are less costly and burdensome for regulated entities, such as information to businesses and consumers, and the promotion of voluntary certification schemes, or the use of rating schemes that distinguish best and worst performers. The document stresses that the primary responsibility for compliance lies with the regulated subjects, while inspectors and regulators have the different

role of assisting and promoting compliance, also through strong enforcement actions, if necessary, but not to actually implement regulations.

The report also considers the drawbacks of relying on market forces and court litigation, such as the lack of technical expertise of the courts and the uncertainty of the ex-post decisions. Moreover, it highlights that market mechanisms and direct regulatory enforcement by the government may be combined. For example, schemes such as certification and accreditation may be used to ensure compliance with less direct inspections and enforcement, but with a backstop of state-led enforcement to ensure the effectiveness and credibility of such schemes.

The principle of risk- focus and proportionality

The OECD recommends that all enforcement activities should be informed by the analysis of risks. The frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should aim at reducing the actual risk posed by infractions. Therefore, risk assessment should cover all the activities and businesses.

Prioritisation in the allocation of resources is particularly important in inspection and enforcement actions. Indeed, governments cannot inspect each and every business or object and even attempting to do so would result in massive and unnecessary administrative burden.

The document defines risk as "the combination of the likelihood of an adverse event (hazard, harm) occurring, and of the potential magnitude of the damage caused (itself combining number of people affected, and severity of the damage for each)". It stresses the need for a consistent definition of risk throughout all inspectorates and suggests that all enforcement agencies develops and collects criteria for risk assessment, data on business, planning and resource allocation based on the risk level, updating process, treating consistently-compliant business as correspondingly lower risk.

Governments should adopt legal provisions requiring all inspectorates to develop and implement enforcement policies based on risk-proportionality in order to review, analyse and rank the types of violations according to the potential risk they present and to provide

guidelines to inspectorate staff prescribing to always assess the actual risk level presented by each recorded violation or set of violations before deciding on a sanction. As a consequence, the sanctions should be proportional to the potential magnitude of hazard, ensuring deterrence in the most hazardous situations and, at the same time reducing burden for minor shortcomings.

Proportionality should be respected by governments also when drafting laws and executive orders concerning sanctions. Risk criteria, policies, guidance should be clearly communicated and explained to the public, and regularly reviewed based on results and available data, so that evolutions in hazards and threats are properly addressed.

Risk management should incorporate parameters based on information received by third parties, such as complaints, allegations submitted by workers, citizens, other business, to update the firm's risk profile.

Finally, the report highlights the need for a constant update of risk assessment and risk management resources and expertise, which should be ensured by governments. Every enforcement agency should thus be provided with a dedicated unit or team specifically in charge of risk management, with adequate resources to effectively perform their task.

Responsive regulation

The responsive regulation approach was first theorized in the early Nineties[6] and, generally speaking, it suggests to differentiate the regulatory strategies according to the overall compliance behaviour of the regulated subject. More recently, it has been argued that a really responsive approach should take into account, not only the attitude of the regulated firm, but also the operating and cognitive frameworks of firms, the institutional environment and the performance of the regulatory regime, the different logics of regulatory tools and the interactions of regulatory controls, and the changes in each of these factors[7].

[6] See I. AYRES, J. BRAITHWAITE, *Responsive regulation: Transcending the deregulation debate*, Oxford University Press, Oxford, 1992

[7] R. BALDWIN, J. BLACK, *Really responsive regulation*, in The Modern Law Review, 2008, 71, 59–94.

According to the OECD principles, this approach should be made public in order to provide an additional incentive for businesses to be as much compliant as possible and to cooperate with the regulatory enforcement agencies. A similar approach is the "persuasive enforcement", which is aimed at showing regulated entities that compliance is in the best long term interest of business as it will ensure a positive relationship with the regulator.

In particular, the OECD suggests that a higher risk level is assigned to businesses that show a pattern of systematic and repeated violations[8]. These businesses are also showed no leniency when significant violations are found, and enforcement may immediately escalate to sanctions, and possibly suspension of operations, rather than just giving an improvement notice. Conversely, businesses which have a history of compliance should be rated as lower risk, and gradually inspected less often. By the same token, recently created businesses should be first given a chance to improve, rather than immediately resorting to sanctions, so as to promote a culture of openness on their side.

Enforcement should also be risk-responsive, meaning that, even if a violation is found in a business which is usually compliant, the enforcement should vary according to the seriousness of the hazard and to whether it poses a threat to essential public goods or rights. Lastly, an effective responsive regulation should provide a sufficiently broad and differentiated range of potential penalties in order to treat different behaviour in a proportionate manner and to exert real deterrence.

The principle of long-term vision

The fifth principle aims at designing policies on regulatory enforcement and inspections, setting clear objectives and a long-term road-map. Governments should have an official vision on enforcement and inspections and they should ensure continuity in goals and political support.

The advantages of long-term vision are twofold. On the one hand, it recognizes the similarities between all enforcement functions and structures, regardless of the sector, and thus it allows to address problems and issues in a consistent way, as well as to tackle overlaps

[8] See R. BALDWIN, J. BLACK, *Really Responsive Risk-Based Regulation*, in Law and Policy, 2010, 181 – 213.

and duplications. On the other hand, it can be the basis for all inspection and enforcement reform initiatives in specific institutions and sectors and it helps to mobilise public support for transformations by lending more visibility to the topic.

Therefore, the regulatory enforcement policy should pursue both overarching goals, such as combining safety and economic growth, as well as specific objectives, such as improving efficiency, minimizing burdens, concentrating resources and efforts where they can deliver the most results, improving transparency and responsiveness. In each given jurisdiction the regulatory policies should address the issues that have been identified as particularly problematic, such as duplications of inspections on the same issue, unclear requirements, lack of information sharing, or problems of under-inspection in some sectors.

Governments should ensure that all relevant ministries, agencies and structures (regulators, inspectorates etc.) are involved in a co-ordinated manner and a strong political leadership. The resources should be allocated in a way that allows for long-term planning and are safeguarded from short term political or economic events.

Co-ordination and consolidation

The sixth principle states that "inspection functions should be co-ordinated and, where needed, consolidated: less duplication and overlaps will ensure better use of public resources, minimise burden on regulated subjects, and maximise effectiveness".

The principle aims at removing duplications and suggests to restructure regulatory enforcement agencies. International experience shows that there is only a limited number of different types of risks, that should form the basis for restructuring. The document suggests some possible approaches, such as the "one risk, one inspectorate" model or to establish administrative arrangements to improve co-ordination, to ensure information is shared and inspections are not duplicated, without necessarily merging agencies.

The OECD provides a list of core functions which are deemed to be fundamental in all regulatory regimes that may be employed as foundation for reviewing the institutional structure. These are food safety, non-food products safety and consumer protection, technical and infrastructure/construction safety, public health, medicines and health care, occupational

safety and health, environmental protection, state revenue, transportation safety, banking, insurance and financial services supervision, nuclear safety.

It also stresses the trade-off between consolidation and specialisation, that needs to be taken into account in institutional reforms. The ultimate goal is not only to remove duplications, but also to improve co-ordination and focus, through a review of the resource repartition between enforcement areas. Moreover, in certain regulatory areas the hazard is particularly high and, therefore, an element of redundancy may build more robustness and resilience in the regulatory systems.

Among the approaches which may improve the institutional framework, the OECD suggests to create a unified information system, to merge most inspection structures within a "single inspectorate"; to set up a co-ordination council wherein most inspection agencies meet, harmonize practices and share information; to require all inspection agencies to systematically share with others all relevant data, and inspection plans; to limit re-inspection of the same issue by different inspectorates in the same business within a given time period, except if problems have been identified in the first visit, or if new evidence surfaces that indicates that a new visit may be necessary.

The principle also suggests, as an alternative to merging institutions, introducing "front-line inspectors", with a wide mandate and a specific training who is able to spot issues concerning a number of regulatory fields. It also considers the possibility of concurrent enforcement between regulators and courts.

It is essential that governments pay great attention to clarify the respective responsibilities and mandates and ensure that information is shared effectively among agencies.

The principle of transparent governance

This principle aims at advising governance structures and human resources policies for regulatory enforcement to support transparency, professionalism, and focus on outcomes. Furthermore, it highlights the need for execution of regulatory enforcement to be independent from political influence, and of rewarding compliance promotion efforts.

Professionalism is understood not only as technical competence in the relevant field, but also as "generic inspection skills", meaning the ability to conduct inspections effectively and promote compliance, ethical standards of behaviour, risk management, inter-agency cooperation and operational management. Therefore, human resources and training policies should ensure that management staff is recruited in a way that they have adequate professional management skills and experience, and not just technical competence. Furthermore, staff training should provide personnel a real understanding of what inspections and enforcement aim to achieve, how to interact most effectively with regulated subjects and foster compliance, how to assess and rank risk, as well as all relevant ethical standards.

The document emphasises in particular the need of regulatory enforcement agencies' independence[9]. That is essential to ensure that inspectorates are free to set and follow their work priorities based on their professional expertise rather than on political instances. Agencies also have to pursue their objectives without fear of political interference in operational matters, or politically-driven management changes. Thus, political decision should only intervene at the level of the overall strategy and resource allocation.

In order to ensure the independence of the regulatory agencies, governments may establish mechanisms to ensure the stability of senior management of inspectorates, regardless of changes of the chief executives; the independent appointment of chief executives through an open process, based on appropriate professional credentials, and with the decision subject to a collegial review and open scrutiny; and the institutional distinction between inspectorates and ministerial department.

Moreover, the principle of transparent governance suggests that each inspectorate should develop and adopt human resources performance management policies in order to reflect the overall aims of enforcement activities and the specific goals of each agency.

[9] On the independence of independent regulatory agencies from elected officials see M. THATCHER, *Regulation after delegation: independent regulatory agencies*, in Europe, Journal of European Public Policy, 2002, 954 — 972; See also M. THATCHER, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, in West European Politics, 2002, 125 — 147; M. EVERSON, *Independent Agencies: Hierarchy Beaters?*, in European Law Journal, 1995, 1, 180.

Therefore, the performance should not be based on the number of violations found or the sanctions issued. Conversely, staff that effectively promote compliance and work in line with principles of "responsive regulation" should be given appropriate recognition. The assessment of performance in terms of reaching regulatory outcomes and regulatory compliance should be made across teams or units, rather than individually.

A further factor to be considered is the change in cultures and behaviour of officials, business, operators and the public. Moreover, the OECD stresses how a cooperative approach may lead to regulatory capture and how government revenue that generates by issuing licences may conflict with other goals. Therefore, conflicts of interest should be avoided through institutional separation and a clear mandate to the regulatory enforcement agencies that any licence or permit they may issue are aligned with their general mission and not revenue-generating.

Information integration

The eighth principle states that "information and communication technologies should be used to maximise risk-focus, co-ordination and information-sharing, as well as optimal use of resources".

Information sharing is essential as it allows inspectorates to have a much more accurate and updated assessment of the risk level of each business, without spending additional resources and enables them to avoid duplication of work. Therefore, common databases should be put in place by governments to be used by different enforcement agencies. Exploiting modern technologies in setting up a joint system for several inspection bodies, rather than procuring separate systems with largely similar specifications, is cost-effective and offers considerable benefits in terms of risk-management and co-ordination.

Thus, the OECD recommends that governments support the renewal of information systems for enforcement bodies, aiming at supporting effective risk-management, and give preference to shared systems across several inspectorates whenever possible.

Data sharing may be relatively more difficult in countries that have decentralised regulatory enforcement and inspection structures, or non-state regulators, with third-party

certification bodies, with private businesses. In these cases, it is suggested to gradually build systems which allows for greater data sharing and inter-operability between all these agents.

A problematic issue concerns information gathering in relation to privacy and data security legislation. The document provides some mechanisms to overcome these problems, including the possibility to introduce the principle that data from regulated entities can only be requested once and then state structures have to share it across agencies.

Finally, the document recommends that complaints should not always lead to inspections, but they should rather be integrated in the information system in order to assess the risk level of the product or business.

The principle of clear and fair process

An essential element for ensuring an effective functioning of the enforcement system is the clarity and coherence of rules and process for enforcement and inspections[10]. A good legislation to organise inspections and enforcement needs to be adopted and published, and clearly articulate rights and obligations of officials and of businesses.

The framework for enforcement and inspections, should thus be made clear and accessible by governments through appropriate legal instruments. Also a comprehensive list of bodies authorised to inspect, with their sphere of competence, should be officially published and updated when needed. Moreover, the whole inspection process should be organised according to regulations or legislation.

The document also considers the possible advantages of advance notification in appropriate circumstances (regular inspections, no suspicion of fraud or criminal behaviour). This could push businesses to check and improve their compliance.

Regulated subjects should be aware of their rights and obligations in the inspection process, of the means to challenge the conclusions, and of how to obtain compliance assistance, or report abuses if any. Therefore, governments should issue an official legal

[10] On the importance of the quality of regulation see M. DE BENEDETTO, M. MARTELLI, N. RANGONE, *La qualità delle regole*, Bologna, Il Mulino, 2011.

document which summarises the rights and the obligations of regulated subjects in the inspection process.

The principle of compliance promotion

The last principle states that "transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and check-lists".

The complexity of the language and the "performance-based" way of the requirements' description (i.e. that the process has to be safe, in such and such circumstances) may render difficult for business with less expertise to understand and meet the legal criteria. Therefore, enforcement agencies should develop and publish guidance notes or toolkits that help medium and small enterprises understand the requirements and how to comply in the most widespread situations and sectors.

It is also recommended to adopt tools, such as checklists, to improve consistency and predictability of what is expected by regulated subjects. All the checklists and guidance documents should be published on easily accessible internet portals, possibly unified, where business operators can find all the relevant requirements. These tools should include self-checks instruments to help business to improve their ability to comply. It should be also set up on-line support with trained staff to answer specific issues.

However, the document stresses that such instruments as toolkits or check-lists are often neither appropriate, nor helpful for larger or more complex businesses. These types of businesses require the possibility to request assured guidance from the regulatory enforcement agency, such as a consultation and review of the way the business works or purports to work, and a response on how the regulator considers that compliance can be ensured, which should bound the regulator. These mechanisms should enhance the environment for investment. Governments are thus invited to create the legal conditions for regulatory enforcement agencies to provide assured guidance, and encourage the development of such-schemes.

3. THE ITALIAN GUIDELINES ON REFORMING CONTROLS ON BUSINESS

Italian law has recently mandated the government to put in place measures to simplify and reduce the controls on business, on the basis on six principles[11]. Those principles are: proportionality of controls and of administrative requirements according to the risk which the regulated activity creates to the protected public interest; elimination of unnecessary controls; co-ordination and planning of controls in order to avoid duplications and overlaps; collaboration with regulated entities; digitalisation of data and administrative procedures; rationalisation of controls.

The governmental department for the public administration has then issued a dossier and some guidelines in order to comply with the above mentioned rule.

The dossier[12] takes into account the OECD documents on risk regulation, the recommendations issued by the World Bank[13], as well as the European laws on high risk sectors, such as food security and environment. It also refers to the UK Hampton review and to the Netherlands Inspection Simplification Programme of 2006. With that document, the Dutch government has proposed, *inter alia*, the "Inspection Holiday" principle, which essentially means to strongly reduce the burden of inspections for low-risk firms, for small and medium enterprises, and for firms which pose higher-risk but are consistently compliant. Then, the dossier refers to two pilot cases addressed by the World Bank (Tajikistan and Lithuania) and eventually gives some examples of risk-based regulation in Italy.

The dossier has also highlighted some of the main problematic issues concerning the inspections system in Italy. The fragmentation and the complexity of the normative system and the lack of co-ordination among enforcement authorities create overlaps and duplications in the controls on private enterprises. Simplification and transparency initiatives

[11] Art. 14, Law Decree 9 february 2012 n. 5, "Disposizioni urgenti in materia di semplificazione e di sviluppo".

[12] Dipartimento della funzione pubblica, Ufficio per la semplificazione amministrativa, Dossier: i controlli, 3 settembre 2012

[13] Investment Climate Advisory Services of the World Bank Group, How to Reform Business Inspections: Design, Implementation, Challenges January 2011

have been undertaken in some crucial fields, such as work security, tax, environment and food security.

The Guidelines[14] provide a tool for the local authorities for conforming their enforcement activities to the principles of openness of regulation, proportionality to risk, collaboration, publicity and transparency of the inspections' outcomes. It proposes a modern meaning of "control on enterprise" as the activity aimed at verifying the substantial compliance to the legal duties by the regulated subjects, in conformity with the pursuing of the public interest. It also defines the word "risk" as the dangerousness of an event, calculated with regard to the probability of its occurrence, in relation to the seriousness of the consequences. Moreover, it distinguishes between the objective risk, linked to the type of activity, and the subjective risk, linked to the reliability of the enterprise and its compliance history.

The guidelines provide a number of principles that should drive the controls on enterprises, with the goal of coordinating and rationalizing enforcement tools.

The first principle is clarity of regulation. Information on obligations and duties for enterprises need to be easily accessible and understandable by the addressee. For example, the public administration should publish a checklist of legal requirements that firms have to comply with, as well as the answers to frequently asked questions (FAQ).

The second principle is proportionality to the risk which each activity poses to the public interest, and the probability of the occurrence of harm. The document contains a box which explains the method for risk assessment. The two main factors to be taken into account are the probability of non-compliance by the regulated entity and the potential impact of the violation on the public interest. The steps of risk analysis are: the analysis of the functions attributed to the office by the law; the identification of the probability of non-compliance with the legal duties; risk scoring, with regard to the type of activity undertaken (objective risk) and to the single firm characteristics (subjective risk). Based on this assessment, the administration classifies risks according to the degree of risk tolerance of institutions. Then,

[14] Dipartimento della funzione pubblica, Linee guida in materia di Controlli art. 14, comma 5 del decreto legge 9 febbraio 2012, n. 5 convertito in legge 4 aprile 2012, n. 35, 24 gennaio 2013

there is the control planning and the simplification of legal duties pursuing the proportionality of intervention. Finally, it is suggested to undertake a periodical monitoring of the method adopted and of new risks arising.

The third principle is co-ordination of enforcement and control activities. This principle may be pursued through annual panning, common databases, agreements among administrations and the design of homogenous forms.

The fourth principle suggests a collaborative approach by public officers who exercise enforcement powers. They should attempt to reduce as much as possible the interventions which may interrupt or slow down the firm's business. Some of the tools endorsed to ensure this principle are: setting checklists, transparency of controls, technical equipment in order to immediately transmit the report of the inspection, providing clear indications on how to comply with the rules.

The fifth principle is training and updating of the officers. This should aim at dividing the phase of promoting of compliance to the phase of control.

Finally, the last principle is publicity and transparency of the inspections' outcomes. This should result in incentives for the enterprises to comply and in information available by the administration for further controls.

CONCLUSION

The recent proliferation of official documents on regulatory enforcement and inspections, adopted both at the national and international level, shows the increasing importance of these aspects of public regulation.

The recommendations adopted in the UK, the Best Practices published by the OECD, the piece of legislation and the guidance enacted in Italy, seem to converge in pursuing the ultimate goal of cutting unnecessary enforcement actions and inspections. Many of the principles stated in these documents are related to this issue.

For example, the need for rationalisation of controls, co-ordination among agencies, proportionality of the enforcement to the risk imposed by the regulated entities, are constantly emphasised by these guidance in order to avoid duplications and overlaps in the enforcement actions.

An element which is central in all the above mentioned studies is that of risk assessment. The aim of prioritising public resources on clearly identified objectives, linked to a technical analysis of the risk that each regulated entity poses to the agency's goal, is deemed crucial by all the bodies that issued works on regulatory enforcement.

A further aspect which arise from these works is the need for collaboration and communication with regulated operators. This element is linked with the transparency issue, as it requires public authorities to develop tools to enhance the accessibility and clarity of the rules and the requirements that the enterprises have to meet.

Furthermore, the independence of enforcement agencies from the political power also plays a fundamental role in increasing the quality of regulatory enforcement. As stressed especially in the OECD document, agencies need to be able to plan their activity with a long-term view, not being influenced by the political instability.

Finally, the centralisation and co-ordination of competences is also a factor of improvement of the enforcement mechanism. This principle implies a simplification of the institutional framework, with less specialised bodies, who share among themselves information on enforcement outcomes in order to better plan the future controls.

To sum up, all the principles recommended by national and international bodies aim at improving the regulatory enforcement and inspections tools by a rationalisation and co-ordination of existing mechanisms and institutions. The use of States'resources should be focused only on necessary actions, assessed by a proper risk analysis. Raising governments'awareness on these issues seems to be particularly urgent in times of crisis, when the need to effectively combat violations of regulations which undermine the possibility to achieve public interest goals should be addressed taking into account the limited resources of public administration.

Most of the above mentioned documents, however, take the form of soft-law instruments such as non-binding guidelines and criteria that governments are suggested to follow. These types of measures may not suffice to curb some of the criticisms pointed out by the OECD studies.

In order to give a concrete application to those principles and truly improve the effectiveness of the enforcement mechanisms and inspections at the national level, some hard law intervention seem to be desirable. Not only, principles such as proportionality and risk based enforcement action should be integrated in the relevant legislation, but also some structural reforms are needed. For example, the need for reducing the fragmentation of control responsibilities, improving the coordination and communication among enforcement agents, should be backed by a concentration and centralisation of the control functions. Moreover, precise rules should compel governments to follow an open procedure to identify the goals of the controls, their costs, the mechanisms for selecting who to inspect, and the outcome of the enforcement actions. These reforms seems to be necessary, in order to enhance both the accountability and the efficacy of the enforcement action.

In conclusion, the recommendations and principles for ensuring an effective regulatory enforcement and inspections are an important step towards a broader and substantial reform in the existing enforcement mechanisms at the national level. They should be followed by the adoption of new legislation, or the modification of the existing one, in order to introduce rules and structural reforms in accordance to the best practices emerged from the foreign and international experiences.