



*Committee on Legal Affairs
The Chair*

22.6.2018

Mr Thomas Händel
Chair
Committee on Employment and Social Affairs
BRUSSELS

Subject: Opinion on the legal basis of the European Centre for the Development of Vocational Training (Cedefop) (COM(2016)0532 – C8-0343/2016 – 2016/0257(COD))

Dear Mr Chair,

By letter of 29 May 2018 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 20 June 2018.

The legal basis proposed by the Commission is Articles 166(4), 165(4) and 149 of the Treaty on the Functioning of the European Union (TFEU).

In its General Approach, the Council amended the legal basis by deleting the references to Articles 165(4) and 149.

During the course of trilogue negotiations, the legal services of the three institutions have all taken the informal position that Articles 166(4) and 165(4) TFEU constitute the appropriate joint legal basis for the proposal.

I - Background

The proposal aims at revising the Founding Regulation of the European Centre for the Development of Vocational Training (Cedefop) from 1975¹ by means of, first, aligning certain provisions of the existing Regulation governing Cedefop with the Common Approach on Decentralised Agencies and, second, update the objectives and tasks of Cedefop in view of societal, institutional and economic developments and emerging trends in European policies, in particular technological developments.

The most recent external evaluation carried out by the Commission, finalised in 2013, recommended to amend the Founding Regulation to reflect the Agency's work on skills and qualifications as one of its tasks and to integrate more clearly the work on policy reporting and common European tools and initiatives.

The Commission therefore stresses in the explanatory memorandum to the proposal that Cedefop's current activities go beyond vocational education and training and in particular include work on qualifications, most notably the European Qualifications Framework, on skills analysis and forecasting, and the validation of non-formal and informal learning. The new objectives and tasks would consequently, according to the Commission, be adjusted to better reflect these developments.

II - The proposed legal basis

In the proposal, the Commission justifies its choice of legal basis as follows²:

“The proposed legal basis is article 166(4) with references to a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training, article 165(4) with references to the contribution of the Union to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and article 149 of the Treaty on the Functioning of the European Union, referring to adoption of incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment.”

The articles of the TFEU referred to by the Commission have the following wording (emphasis added):

Article 166
(ex Article 150 TEC)

¹ Regulation (EEC) No 337/75 of the Council establishing a European Centre for the Development of Vocational Training (OJ L 39, 13.2.1975, p. 1). The legal basis of that Regulation was the flexibility clause as it then stood in Article 235 of the EEC Treaty.

² COM(2016)0532, p. 3.

1. *The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.*

2. *Union action shall aim to:*

- *facilitate adaptation to industrial changes, in particular through vocational training and retraining,*
- *improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,*
- *facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people,*
- *stimulate cooperation on training between educational or training establishments and firms,*
- *develop exchanges of information and experience on issues common to the training systems of the Member States.*

3. *The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.*

4. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.*

Article 165

(ex Article 149 TEC)

1. *The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.*

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. *Union action shall be aimed at:*

- *developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States,*
- *encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,*
- *promoting cooperation between educational establishments,*

- *developing exchanges of information and experience on issues common to the education systems of the Member States,*
 - *encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe.*
 - *encouraging the development of distance education,*
 - *developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.*
3. *The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.*
4. *In order to contribute to the achievement of the objectives referred to in this Article:*
- *the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,*
 - *the Council, on a proposal from the Commission, shall adopt recommendations.*

Article 149
(ex Article 129 TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects.

Those measures shall not include harmonisation of the laws and regulations of the Member States.

III - Case-law on legal basis

It is settled case law of the Court of Justice that "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure"¹. The choice of an incorrect legal basis may

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] ECR I-9097; Case C-411/06 *Commission v. Parliament and Council*

therefore justify the annulment of the act in question.

In this context, an institution's wish for more active participation in the adoption of a given measure, the circumstances in which a measure was adopted as well as the work that has been done in other aspects within the scope of action covered by a given measure are irrelevant for the identification of the correct legal basis.¹

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.² However, where a measure has several contemporaneous objectives or components, which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases,³ if procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament.⁴

IV - Aim and content of the proposed regulation

The revision of the Founding Regulation aims at updating Cedefop's objectives and tasks, to reflect the developments within the Agency and in the context in which it operates, notably in shaping and implementing vocational education and training, skills and qualifications policies.

Furthermore, the revision aims at providing for anti-fraud measures, conflict of interest policy, evaluation and review, and the establishment of a headquarters agreement. It would also harmonise the provisions on programming and reporting as well as modify and align the appointment procedure of the Executive Director with the procedure provided for in the Common Approach. The proposal moreover sets out the procedure for the appointment by the Council of the Management Board members representing employers' and employees' organisations from each Member State.

Recitals 1-4 set out the need for updating the Founding Regulation to the developments which have taken place in the last 40 odd years, notably underlining that implementation of a vocational education and training policy will require a focus on the interface between education and training and the world of work.

Recitals 5-6 clarify that the Founding Regulation should be repealed in the interest of clarity and replaced by a Regulation which is aligned with the Common Approach on Decentralised Agencies.

[2009] ECR I-7585.

¹ Case C-269/97 *Commission v Council* [2000] ECR I-2257, para 44.

² Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

³ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-178/03 *Commission v European Parliament and Council* [2006] ECR I-107, paras 43-56.

⁴ Case C-300/89 *Commission v Council* ("Titanium dioxide") [1991] ECR I-2867, paras. 17-25; Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

Recital 7 makes a reference to the so-called tripartite Agencies - Cedefop, the European Foundation for the improvement of living and working conditions (Eurofound) and the European Agency for Safety and Health at Work (EU-OSHA), which all address issues related to the labour market, working environment and vocational education and training and skills, and states that close coordination and synergy among them is required.

Recitals 8-10 deal with the relationship of the proposal to the financial regulation, the staff regulations and rules on the handling of confidential information.

Finally, Recital 11 sets out that there is a need for transitional provisions for certain parts of the proposal.

The enacting provisions of the proposed Regulation consist of 36 articles which are organised in seven chapters dealing with, respectively: the objective and tasks of the Agency; organisation of the Agency; financial provisions; staff; general provisions; transitional provisions and final provisions.

Article 1(2) of the proposal states that the objective of the Agency shall be to assist the Commission in shaping and implementing vocational education and training and skills and qualifications policies.

Article 2(1) of the proposal has the following wording (emphasis added):

Article 2 - Tasks

1. The Agency shall perform the following tasks with respect to the vocational education and training and skills and qualifications policies:

- (a) analyse developments and provide comparative analyses of policies and practices across countries;*
- (b) analyse labour market trends in relation to skills and qualifications;*
- (c) analyse and contribute to developments related to the design and award of qualifications, their organisation into frameworks, and their function in the labour market with a view to enhance their transparency and recognition;*
- (d) analyse and contribute to developments in the field of validation of non-formal and informal learning;*
- (e) undertake or commission studies and carry out research on relevant socio-economic developments and related policy issues;*
- (f) provide forums for exchange of experiences and information between governments, social partners and stakeholders at national level, and support implementation of reforms, and policies at national level;*
- (g) disseminate information as a contribution to policies and to raise awareness and understanding of the potential of vocational education and training in promoting and supporting the employability of people, productivity in companies and lifelong learning;*

(h) manage and make available tools, datasets and services for skills, occupations and qualifications to citizens, companies, policy makers, social partners and other stakeholders.

2. [...]

The EMPL report¹ and the Council's General Approach² do not substantially amend neither Article 1 on the objectives nor the list of tasks in Article 2(1).

V - Analysis and determination of the appropriate legal basis

Whereas the Commission bases its proposal on three pillars, namely education, vocational training and employment, a closer look of the aim and content of the proposal shows that the first two are clearly represented in its provisions, not least in the chapeau of Article 2(1) on the tasks of Cedefop, whereas employment occurs only sparsely and in the few cases that it does, such as in points b and g in that Article, it is always in relation to education and vocational training.

As stated by the legal service, Article 165(4) TFEU on education and Article 166(4) TFEU on vocational training have been previously used as a joint legal basis for the legislative acts establishing the Europass framework and the Erasmus+ programme.³ Given that both education and vocational training policies feature prominently throughout the proposal, not just in the list of tasks in Article 2(1) but also in the recitals and the explanatory memorandum, including in the Commission's justification for the chosen legal basis, it seems clear that both of those policy areas constitute genuine pillars of the proposal, even as amended by the Parliament and the Council ahead of the trilogue negotiations.

While it therefore seems clear that the proposal simultaneously pursues both the objective of developing quality education and implementing a vocational training policy as stated in Articles 165 and 166 TFEU, in order for them to be joined as a legal basis it would have to be demonstrated that they are indissociably linked, without one being secondary and indirect in relation to the other. Against the background of the stated objective in Article 1(2) of the proposal, namely to further vocational education and training as well as skills and qualifications policies, which is also repeated in the chapeau to the list of tasks in Article 2(1), it would be a very difficult task indeed to attempt to claim that one part of this objective is secondary and indirect to the other.

It must therefore be considered that the proposal simultaneously pursues education and vocational training as indissociable objectives without one being secondary and indirect in relation to the other and that Articles 165(4) and 166(4) TFEU may consequently be used as a joint legal basis for the proposal.

Since employment questions only occur very sporadically in the proposal and always in indirect relation to education and vocational training - including in the Commission's own

¹ See A8-0273/2017.

² See Council document 15024/16.

³ See SJ-0736/16, point 25.

justification for the legal basis in which employment is mentioned as the very last word - it must be considered that this component of the proposal is secondary to those two main objectives. Article 149 TFEU, which allows for incentive measures for Member State action in the field of employment, can therefore not be considered a suitable legal basis for the proposal.

VI - Conclusion and recommendation

In light of the foregoing analysis, Articles 165(4) and 166(4) TFEU constitute the appropriate joint legal basis for the proposal at the current state of the negotiations.

All three articles discussed above provide for the use of the ordinary legislative procedure. The proposed joint legal basis does therefore not affect the role or prerogatives of the Parliament on this dossier.

At its meeting of 20 June 2018 the Committee on Legal Affairs accordingly decided, unanimously¹, to recommend that at the current state of the trilogue negotiations you should take the position that Articles 165(4) and 166(4) TFEU constitute the appropriate legal basis of the proposal.

Yours sincerely,

Pavel Svoboda

¹ The following were present for the final vote: Pavel Svoboda (Chair), Lidia Joanna Geringer de Oedenberg (Vice-Chair), Jean-Marie Cavada (Vice-Chair), Joëlle Bergeron, Marie-Christine Boutonnet, Sergio Gaetano Cofferati, Geoffroy Didier, Angel Dzhambazki, Rosa Estaràs Ferragut, Enrico Gasbarra, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Angelika Niebler, Evelyn Regner, József Szájer, Francis Zammit Dimech, Tadeusz Zwiefka.