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COMMERCIALIZATION AND COMPETITION IN EDUCATION**

**“Competition in education in Spain”  
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**COMPETITION IN EDUCATION AND TRAINING**

To talk of competition applied to the education sector in general requires a differentiation of the various fields comprised within education and training systems.

In Spain, we must make an initial basic distinction between teaching provided within the national education system and the non-regulated teaching that it is provided outside the national system, in the different areas of life-long learning, training for employment, occupational training.

The other major distinction lies in the body providing the education. Accordingly, we have publicly and privately-own schools, although among these are schools funded with public money, which, together with state-owned schools, make up the public education service as described by the latest education act.

It is in the framework of these distinctions where we can start to analyze to what extent competition among schools can exist, in a context of a certain liberalization of services. To do so, we have established the following classification.

1. The national education system: Publicly-owned schools, Subsidised private schools, Privately-owned schools
2. Non-formal education
3. University education

Now in this study we focus on the first point: the national education system. We must analyze to what extent, the following criteria for competition is met:

1. Freedom of establishment: Capacity of being able to carry out the activity, to set up the establishment.
2. Regulatory framework: Whether a variety of educational projects can be implemented within a flexible regulatory framework that encourages educational autonomy of schools.
3. Mobility of persons: Whether freedom is given in access to education according to the diversity of projects. Whether there exists autonomy in contracting people and in training management teams.
4. Economic framework: Possibility of freely establishing prices. Of entering a market with a competitive offer that generates a free demand of services.

5. Freedom of choice: Capacity to freely choose the school or type of education that one prefers.

I will not deal with these five points extensively and systematically for reasons of space. But I will offer some considerations about how these criteria are present in the Spanish educational system.

## **THE NATIONAL EDUCATION SYSTEM AND NON-FORMAL EDUCATION.**

The first basic distinction is the one that arises between the national education system and non-regulated education. It is clear that in the latter, on-going or life-long training presents a broad offer, and not so regulated, with the possibility of competing in prices. However, we must mention a particular situation in Spain that arises from regulation through the Fundación Tripartita of occupational training oriented towards employment, organized by trade unions and companies and paid by the social security system or by European funds. On the whole, a system is created where it is difficult to compete because it is largely subsidized.

As regards publicly-owned schools, the first point that arises is to know to what extent Directive 2006 is applicable to education. In its note 34<sup>1</sup> it seems to indicate that the characteristic of the remuneration of the service is absent in the case of activities carried out by the State, or on behalf of the State, in the context of its educational, judicial, cultural and social duties, such as the courses given under the national education system. It states that payment of some amounts such as enrolment fees does not mean they are not considered services financed with public funds. Accordingly, these services are not included in Article 50 of the treaty and are therefore excluded from the Directive's scope of application.

The rest of notes and articles do not seem to suggest that education as a service is generally excluded.

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<sup>1</sup> (34) According to the case-law of the Court of Justice, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a 'service' has to be carried out on a case by case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The Court of Justice has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition of service in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.

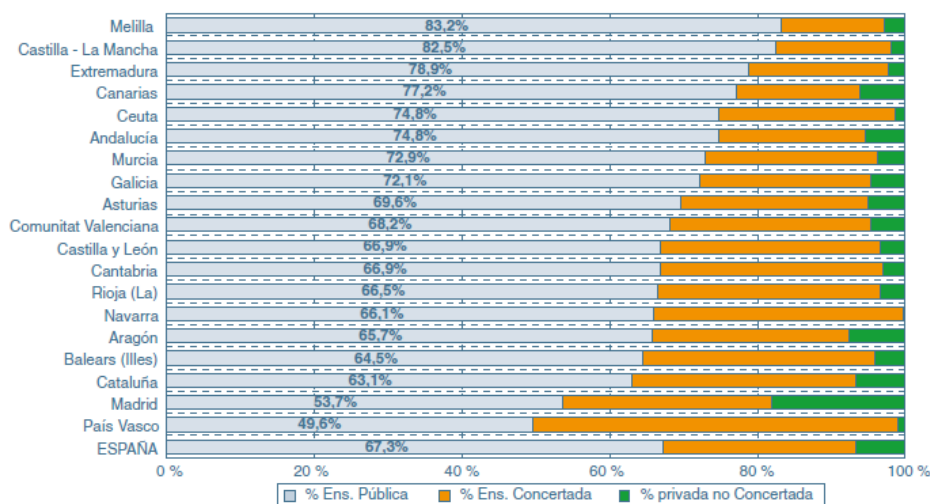
## Publicly or privately-owned regulated education

In Spain, “basic education is mandatory and free” (art. 27.4 EC). This basic education is given between the ages of six and sixteen, although the current Minister of Education has just presented the possibility of extending it up to eighteen. This measure does not seem too feasible in the short term due to the evident financial problems posed by a context of economic crisis like the current one.

Regulated non-university education is given by three types of education institutions: private schools, subsidized private schools (which have public financing) and public schools. In these last two groups (publicly-owned schools and private schools with public financing), education is free, so their activity lies outside any mercantile or commercial environment, and does not seem to involve competition in any economic sense. Some degree of competition only exists to the extent that there is a plurality of schools with different educational projects and that families can request a place in the school of their choice. However, the education authorities directly control admission to public schools and indirectly to subsidized private schools.

Private non-subsidized education could be considered a mercantile activity provided in an environment of competition and affected by the scope of application of the Directive regarding services, to the extent that prices are established according to the cost of the services and it has no public financing. In any event, private schools represent a small percentage within education as a whole and are subject to precise regulation in order to provide official regulated education with a view to obtaining a qualification.

The following table shows the weight that the different types of education have in the current education system, according to their ownership.



## State school and private school

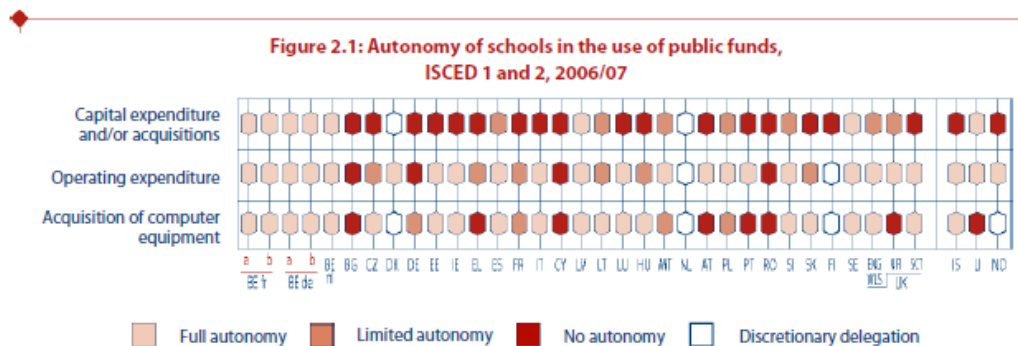
Distribution of students in general, not university, educational system by provider, finance and autonomous community. Course 2008-2009.

## Economic Autonomy in the Education System

The relative competition that may exist in the education system should be analyzed from the point of view of the financing models and the economic autonomy granted to schools.

In recent years, there has been a growing international movement towards establishing a framework of greater autonomy for schools. This would lead to greater capacity to set up differentiated projects and greater autonomy in economic administration, beyond the mere management of a budget provided. The reality in Europe is that progress is slow and is basically limited more to educational autonomy within the standards laid down by the authorities than autonomy in managing people and in economic administration. As observed in the Eurydice report on Autonomy in Europe regarding economic aspects the position of Spain and of European countries in general is very limited, practically restricted to managing the public funds received. Although the new 2007 Act allows them to receive donations, they cannot be applied to personnel expenses regarding both academic and administration staff.

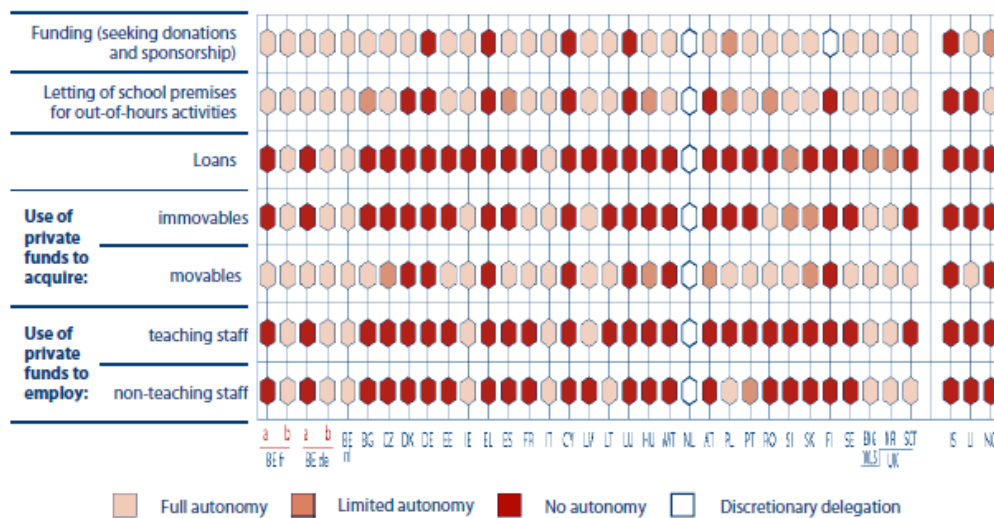
This limited autonomy in schools' economic management represents an obstacle to a system of competition arising among schools.



Source: Eurydice.

**Spain:** Capital expenditure: schools propose expenditure but the education authority approves and provides finances (local authorities for primary education and the Autonomous Community for secondary schools). Schools are free to make their own decisions regarding the acquisition of computer equipment, but Autonomous Communities usually design the whole network facilities and provide the most important part of the equipment.

**Figure 2.2: Autonomy of schools with regard to fund-raising and the use of private funds, ISCED 1 and 2, 2006/07**



Source: Eurydice.

### Spanish regulatory framework: Organic Education Act

Section 27 of the Spanish Constitution, under Part I, chapter II, regarding Rights and Liberties, regulates the right to education. Its first section lays down that "Everyone has the right to education. Freedom of teaching is recognized." It thus establishes a fundamental right in terms of right to freedom and right to provide services, subsequently stipulating the series of liberties and rights that arise thereof plus other duties and guarantees with regard to other members of the educational community and the State Administration. In this respect, a recent publication <sup>2</sup>, referring to the constitutional framework regulating the Right to Education, highlights the "harmonious coexistence established between everyone's right to education and the freedom of teaching, which are stipulated jointly and with the same effect in the first part of section 27", which has led to the widespread acceptance of a formula <sup>3</sup> establishing the right to education in freedom. The Constitution stipulates a "framework of coincidences", as expressed by the Constitutional Court itself, which allows for a harmonization of freedom and equality, quality and fairness, widespread access and freedom of choice.

Notwithstanding this general constitutional framework, the result of consensus, educational legislation in Spain has undergone continuous change according to the political party in power. At present, the system is regulated at Organic Act level by the LOE (2006) which revokes the previous law LOCE (2002), approved by the foregoing

<sup>2</sup> Gómez Montoro, A. (2003). "Concepto pluridimensional del Derecho a la Educación", in *Libertad, igualdad y pluralismo en educación*, Madrid, Consejería de Educación y Fundación Europea Sociedad y Educación

<sup>3</sup> López Muñiz, José Luis (2003). "Políticas educativas y libertad escolar", in *Libertad, igualdad y pluralismo en educación*, Madrid, Consejería de educación y Fundación Europea Sociedad y Educación.

government, and which never came into effect. The current law has the peculiarity of repealing all previous laws except for the LODE, which remains in force with the necessary amendments laid down in the additional provisions of the LOE. At the present time, we are engaged in applying and implementing this Act.

Another particular aspect of the educational system is the competence framework of the Autonomous Regions, who assume the majority of competencies, so they are responsible for implementing and applying the basic regulations. The different regulatory implementation carried out by the Autonomous Regions has highlighted the need to structure our educational system and revealed the possibility of fragmentation, according to the varying regional regulations, and endangering equal opportunities and the principle of interterritorial solidarity.

We are going to analyse how some articles of the LOE have regulated several aspects relating to competence: autonomy and finance, freedom of promoting and choosing schools, evaluation and ranking. This analysis will show us to what extent there exists some degree of competition in the national educational system.

Article 122.3 of the Organic Education Act allows public educational institutes to obtain complementary resources:

*Public schools may obtain extra resources, following approval from the School Council, under the terms established by the Education Administrations, within the limits set by the regulations in force. These resources cannot derive from activities carried out by parents' and students' associations in fulfilling their aims and must be applied to expenses, according to the regulations established by the Education Administrations*

This regulation, in practice, hasn't undergone a coherent development in the rules established by the autonomous communities. It is a theoretical declaration with little effect on the reality of the school. Actually, schools need specific administrative authorization for unusual expenses and their ability to obtain other funding is very limited

In addition, article 123 adds that they shall have autonomy for their economic management in accordance with the regulations implemented by the education authorities

*Public schools providing education regulated by the present Law will have autonomy regarding their financial management, under the regulations of the present Law and in those determined by each Education Authority*

These authorities have not implemented this possibility and in practice, public schools are limited to managing their budget within the regulations of the Public Sector Contracts Act.

Furthermore, article 88, in order to guarantee free service, prohibits both public and subsidized private schools from charging any complementary amount from parents.

*To guarantee the possibility of schooling for all students without discrimination for socio-economic reasons, in no case can public or publicly-funded private schools receive money from families for education provided free by the state, nor oblige families to make*

*contributions to foundations or associations, nor set up compulsory services associated with school education which require a financial contribution by the students' families. Under Article 51 of the Organic Law 8/1985 of July 3rd which governs the Right to Education, extracurricular and complementary activities and school services, which are all of a voluntary nature, will be exempt from this category.-*

The situation regarding private education is very different. The Constitution establishes the freedom to set up schools (Art. 27) and chapter III of the Organic Education Act dedicates just 2 articles (114 and 115) to private schools, and is limited to addressing their particular nature.

Regarding the freedom to choose a school as a basic characteristic of competence, article 109 regulates the programming of school places: *"1. In the programming of school places the Education Administrations will reconcile the demands arising from the obligation of the authorities to guarantee the right of all to education and the individual rights of students, parents and guardians. 2. The Education Administrations will plan the provision of the education services declared free by this Law, taking into account the existing provision in public and publicly-funded private school and, to guarantee quality education, the appropriate schooling and equal distribution of students with special educational needs. Moreover, the Education Administrations will guarantee the provision of sufficient public places especially in newly-populated areas. 3. The Education Administrations must take into account the existing budgetary allocations and the principle of economy and efficiency in the use of public resources*

As may be seen, the regulation lays down a criterion of demand when establishing the programming of schools. This balance between public and private systems actually encourage a "top-down" programming, in detriment to the genuine freedom to choose a school, found in a system of competence.

In this respect, the prevalence of the public system is significant when it is expressly stated that the Education Administrations will guarantee the provision of sufficient public places especially in newly-populated areas. That is to say, it does not take into account that where new schooling needs arise (new areas) they may be addressed by an offer other than public insofar as this is required by parents as an expression of their freedom in education.

Finally, the articles referring to evaluation expressly prohibit using data for ranking schools. Accordingly, article 140. 2. *The objectives established in the previous item do not allow the use of the results of the evaluations of the education system, regardless of the state-wide or autonomous regional area where these take place, for individual assessments of students nor to establish school rankings. And, article 144.4 It is the responsibility of the Education Administrations to decide how the results of these diagnostic evaluations, as well as the action plans derived from them, will be made public to the education community. The results of these evaluations may never be used in any way to establish school ranking.*

Clearly, our legislation is very far from promoting a competitive atmosphere at school. The equity in the educational system is a fundamental principle but it is not contradictory to diversity in the projects, to permit school choice and stimulate better education through good performance.

## CONCLUSIONS

We may deduce from all this that our national, non-university education system, in the framework of the so-called public education service, does not take into account the principles of a system based on competition. Considering the right to education as a social right by which the State guarantees access to education in conditions of equality for all citizens in mandatory education, distances the idea of liberalizing this educational service, which, however, could be present in other areas of education.

In any event, and excepting the obligations of the State to guarantee this right, the regulatory framework must also take into account that education, as a basic human right, in its fundamental content, is also a right to freedom. It is described this way in our Constitution, whose article 27 states that “*freedom of teaching is recognized*” and “*the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions*”. Accordingly, the education system must open up more to criteria of freedom and co-existence than of planning, always guaranteeing universal, free education as a basic human right, as we have stated above.

Other considerations like criteria of efficiency and quality, autonomy and accountability, which are fostered in a climate of greater liberalization when setting up and managing schools, like some international experiences are showing, have not been included in these comments, as they fall beyond the existing regulations of Spanish legislation. It is nevertheless clear that the new international trends regarding the role of the State and the need for greater strengthening and responsibility of the civil society will lead towards a more open and more flexible system. Fairness and free access for all citizens to education can be guaranteed under conditions of equality, along with encouraging the factors that provide genuine quality to educational services, including competition as a stimulus and consequence of freedom, responsibility and autonomy in education.