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COMMISSION STAFF WORKING DOCUMENT

Free movement of workers in the public sector

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1. INTRODUCTION

The principle of free movement of workers is one of the fundamental freedoms that the European Union (EU) guarantees its citizens. Every national of a EU Member State has the right to work[1] and live in another Member State (Article 45 of the Treaty on the Functioning of the European Union (TFEU))[2]. These migrant workers[3] must be treated in the same way as nationals of their host country in relation to access to employment, working conditions as well as social and tax advantages.

The public sector[4] accounts for around 20.3% (varying from 12% to 33.9%)[5] of total employment in the Member States. EU-wide mobility occurs also in the public sector, in particular in the fields of public health, education[6] and research.

The Commission recently adopted the 'EU Citizenship Report 2010 – Dismantling the obstacles to EU citizens' rights'[7], describing obstacles that citizens encounter when they seek to exercise their EU rights across national borders and outlining measures to enable them to enjoy their rights. The Commission also adopted the Communication 'Reaffirming the free movement of workers: rights and major developments'[8]. The rights, definitions and case law presented in this Communication are equally relevant for migrant workers in the public sector.

However, there are a number of issues surrounding employment in the public sector which may cause problems which do not occur in the same way in the private sector. These include:

- posts reserved for nationals according to Article 45(4) TFEU;
- recognition of professional qualifications;
- language requirements;
- recruitment procedures;
- recognition of professional experience and seniority for access to posts and for determining working conditions;
- taking account of qualifications and training measures for access to posts and for determining working conditions;
- other issues like residence, status and coordination of social security schemes.

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1 Temporary restrictions may apply until 30.04.2011 at the latest to nationals of the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia, and until 31.12.2013 at the latest to nationals of Bulgaria and Romania.

2 Pursuant to the Agreement on the European Economic Area, EU law on free movement of workers also applies in relation to Iceland, Norway and Liechtenstein. In relation to Switzerland, the Agreement on Free Movement of Persons grants the right to work and live and protection against discrimination on the basis of nationality.

3 "Migrant worker" in this document refers to EU citizens working in another Member State, not covering third-country nationals.

4 For the purpose of free movement of workers, the public sector has to be defined on the basis of employers' identity. It is composed of all public authorities of a Member State – i.e. the public administration and autonomous public bodies set up by the State; regional and local authorities as well as public enterprises – enterprises owned or controlled by public authorities.

5 For source and more information see section 2.3.

6 For more information see section 2.3.

7 COM(2010)603 final of 27.10.2010

8 COM(2010)373 final of 13.07.2010 – hereinafter 2010 Communication http://ec.europa.eu/social/main.jsp?catId=457&langId=en.

During the past 10 years the Commission has dealt with numerous complaints, petitions and parliamentary questions and has pursued infringement procedures concerning these issues. This shows that migrant workers in the public sector still face specific problems and obstacles when they seek to exercise their right to equal treatment as regards access to jobs and working conditions.

The aim of this document is to:

- inform citizens, Member States' authorities, social partners and other stakeholders about how the Commission understands the most important aspects of free movement of workers in the public sector[9], and
- supplement the Commission's 2010 Communication on this topic.

2. INITIATIVES OF THE COMMISSION AND OF THE MEMBER STATES

2.1. The Commission

In 1988, the Commission launched an action[10] aiming at monitoring the application of the case law of the Court of Justice of the European Union (hereinafter 'CJ') on the interpretation of Article 45(4) TFEU. The action focused on nationality conditions for access to posts in the civil service in four sectors[11].

In 2002, the Commission set out its position on the most important legal obstacles to the free movement of public sector workers in section 5 of its 2002 Communication 'Free movement of workers – achieving the full benefits and potential'[12].

Obstacles to free movement in the public sector highlighted in the 2002 Communication

In 2002, the most common problem for migrant workers in the public sector was the recognition of professional experience and seniority. Many infringement procedures on this issue were initiated against the Member States concerned, which consequently undertook broad reforms. The 2002 Communication also contains information about other important issues, in particular nationality conditions for access to posts in the public sector and the recognition of qualifications.

In 2006, the Commission established a network of experts in the field of free movement of workers. The network monitors the application of EU law in national legislation, case-law and administrative practices, including in the field of free movement of public sector workers[13].

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9 The Commission Staff Working Document does not deal with the issue of portability of supplementary pensions. This will be addressed in the framework of the follow-up to the Green paper towards adequate, sustainable and safe European pension systems: see COM(2010)365 of 07.07.2010.

10 'Freedom of workers and access to employment in the public service of Member States — Commission action in respect of the application of Article 48 (4) of the EEC Treaty' OJ C-72/2 of 18.03.1988.

11 For more information see section 3.4.2.

12 'Free movement of workers – achieving the full benefits and potential' (COM(2002)694); hereinafter 2002 Communication http://ec.europa.eu/social/main.jsp?catId=465&langId=en.

13 The reports of the network are published together with the Member States' comments under http://ec.europa.eu/social/main.jsp?catId=475&langId=en.

In 2009, the Commission initiated a systematic investigation of the national provisions in the field of free movement of public sector workers and their application. The aim was to obtain an overview of the developments, achievements and remaining challenges for Member States on several issues, in particular in the areas of public administration, public health and education. The investigation was based on a questionnaire[14] addressed to the Member States within the framework of the Technical Committee on Free Movement of Workers[15].

The Commission asked Prof. Jacques Ziller[16], as an independent expert, to summarise and analyse the information provided by Member States in their replies to the Commission questionnaire and by the Network of Legal Experts. The Report 'Free Movement of European Union Citizens and Employment in the Public Sector'[17] (hereinafter 'Ziller report') contains a first general part on the state of play of free movement of workers in the public sector and a second part with country files on each of the 27 EU Member States. This working document builds on the findings of the Ziller report.

In the 2010 Communication, the Commission presented an overall picture of the rights of all EU migrant workers. It also reaffirmed its main positions on free movement of workers in the public sector. This document supplements the 2010 Communication by providing more in-depth and additional information.

2.2. The Member States

For several years, the Member States' authorities have been dealing with free movement of public sector workers in the framework of the European Public Administration Network (EUPAN)[18], in which the Commission has played an advisory role. In 2006 the Austrian Presidency took the initiative to update the information previously collected from the EU-15 Member States and to include information provided by the EU-10 Member States and the EU-2 accession countries in a Study on 'Cross-Border Mobility of Public Sector Workers'[19]. In 2008 the Slovenian Presidency produced a report on this issue[20].

2.3. Information available for assessment

The Member States' replies to the Commission questionnaire, as well as the reports of the Network of Legal Experts and the EUPAN, have proven how arduous it is to collect information about the legal provisions applicable to the various levels of the public sector and to the different categories of workers. It appears even more difficult to gather information

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14 The Questionnaire did not cover the coordination of social security schemes or the recognition of qualifications for the right to exercise a profession in another Member State.

15 The Technical Committee on Free Movement of Workers comprises the representatives of all EU Member States.

16 Professor of European Union Law, Università degli Studi di Pavia; European Group for Public Administration (EGPA).

17 http://ec.europa.eu/social/main.jsp?catId=465&langId=en.

18 Human Resources Working Group (which developed out of the so-called Mobility Working Group) which is a working party of the EUPAN [European Public Administration Network]– informal cooperation of Member States on public administration issues; for more info see http://www.eupan.eu/3/26/).

19 http://ec.europa.eu/social/main.jsp?catId=465&langId=en.

20 'The Promotion of Cross-Border Mobility of Civil Servants between EU Member States Public Administration' http://www.eupan.eu/3/92/&for=cat&pid=9&jsid=9&pid2=Reports.

about how these national provisions are applied in practice. Due to the complexity and the fragmentation of the public sector, only part of the relevant information was available for assessment.

No standard common statistics are currently compiled or published at EU level as regards the absolute numbers of public sector workers, the distribution between different levels of the public sector and the percentage of public sector employment in the Member States. Furthermore, no comprehensive and comparable data are available at EU level about the number of EU citizens working in the public sector of another Member State or who have applied for such posts. However, some sector-specific data are available.

The Ziller report[21] refers to employment statistics of the International Labour Organisation[22] to show the overall extent of public sector employment in the various EU Member States. They show that in many Member States public sector employment is an important part of the labour market. The following table presents these data.

Public employment in EU Member States

	Public	% of total
Belgium	905 500	20.60 %
Bulgaria	627 600	26.00 %
Czech Republic	1 003 900	19.90 %
Denmark	922 900	32.30 %
Germany	5 699 000	14.30 %
Estonia	155 500	23.70 %
Italy	3 611 000	14.45 %
Ireland	373 300	17.70 %
Greece	1 022 100	22.30 %
Spain	2 958 600	14.60 %
France	6 719 000	29.00 %

[21] Ziller Report Part I p. 31.

[22] ILO data are not the same from one country to another: in most cases, the column 'Public' refers to the total number of workers in the entire public sector, including public enterprises; in some cases the figures only cover the government sector. Most of the data are for the year 2008, but for some countries, only older data are available.

Cyprus	67 100	17.60 %
Latvia	320 100	31.90 %
Lithuania	430 800	33.30 %
Luxembourg	37500	12.00 %
Hungary	822 300	29.20 %
Malta	46 900	30.70 %
Netherlands	1 821 600	27.00 %
Austria	476 900	11.80 %
Poland	3 619 800	26.30 %
Portugal	677 900	13.10 %
Romania	1 723 400	18.40 %
Slovenia	263 400	31.10 %
Slovakia	519 200	22.80 %
Finland	666 000	26.30 %
Sweden	1 267 400	33.90 %
United Kingdom	5 850 000	20.19 %

Some sector-specific data illustrate the amount of mobility in certain fields. The following data, taken from a 2006 study on the mobility of teachers and trainers[23], show the proportion of teachers (who are often employed in the public sector) who have come from another EU country.

Non-national teachers (2005)[24]			
Country	**EU-25 Nationals (%)**	**Country**	**EU-25 Nationals (%)**
Luxembourg	25.0	**Poland**	0.7
Cyprus	5.6	**Portugal**	0.7
Belgium	3.9	**Greece**	0.4
Austria	3.6	**Czech Republic**	0.0
Ireland	3.4	**Italy**	0.0
Denmark	3.3	**Latvia**	0.0
Sweden	3.2	**Lithuania**	0.0
Germany	3.1	**Malta**	0.0
Spain	2.8	**Slovakia**	0.0
UK	2.5	**Slovenia**	0.0
Netherlands	1.8	**Estonia**	0.0
Hungary	1.2	**Bulgaria**	0.0
Finland	0.8	**Romania**	0.0
France	0.7	**TOTAL EU 27**	1.7

[23] Study on Key Education Indicators on Social Inclusion and Efficiency, Mobility, Adult Skills and Active Citizenship, Lot 2: Mobility of Teachers and Trainers; http://ec.europa.eu/education/more-information/moreinformation139_en.

[24] Source: LFS 2005. Total population includes all teaching professionals. Zero denotes no reported non-national teachers, It should be noted that the LFS reports figures in '000s so it is possible that countries reporting zero may have fewer than 500 non-national teachers.

3. LEGAL ISSUES RELATED TO FREE MOVEMENT OF WORKERS IN THE PUBLIC SECTOR

3.1. General aspects

There is no specific EU legislation on employment in the public sector that develops the general rules on free movement of workers laid down in Article 45 TFEU and in secondary legislation (in particular Regulation 1612/68[25], Directive 2004/38[26] and Directive 2005/36[27]). The role of the CJ is therefore decisive in the interpretation of EU law in this field.

The definition of worker[28] in the sense of Article 45 TFEU includes civil servants[29] and public sector employees with a work relationship under public law and public sector employees with a private law contract. As a matter of fact, the nature of the legal relationship between the employee and the employer is of no consequence[30] in determining worker status.

It is important that returning migrant workers can also invoke the rights of migrant workers towards their Member State of origin[31]. According to the available information, it appears that many workers in the public sector have exercised their right to free movement and have then returned to work in their country of origin.

In a number of Member States, the obligation to adapt national law to the developments of EU law has led to reform and modernisation of the public sector (e.g. in relation to posts reserved for nationals under Article 45(4) TFEU or in relation to the recognition of professional experience and seniority).

3.2. Particularities of the public sector

Free movement of workers in the public sector remains intrinsically different from free movement of workers in the private sector because of a number of legal aspects, summarised below.

– Article 45(4) TFEU makes an exception to the general right to free movement of workers. It states that 'The provisions of this Article shall not apply to employment in the public service.' However, this exception is of limited scope: the CJ[32] has ruled that it only covers restrictions of access to certain posts in the public service to the nationals of the host Member State. For any other aspect of access to a post (e.g. recognition of qualifications) or determining working conditions (e.g. taking into account professional experience and

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25 Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968.

26 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.04.2004.

27 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.09.2005.

28 For more information on the definition of worker see 2010 Communication p 4-7.

29 Case C-71/93, *Van Poucke* ECR [1994] I-01101.

30 Case 152/73, *Sotgiu* ECR [1974] 00153.

31 Case C-370/90 *Singh* ECR [1992] I-04265.

32 Case 152/73, *Sotgiu* ECR [1974] 00153; Case C-248/96, *Grahame, Hollanders* ECR [1997] I-06407; Case C-392/05, *Alevizos* ECR [2007] I- 03505.

seniority), equal treatment of migrant workers with national workers must be guaranteed. This means that once a post is open to migrant workers[33], or if a returning migrant worker is applying for or occupying a post reserved for nationals, no different treatment can be justified by invoking Article 45(4) TFEU.

– Member States' authorities have a dual role in the field of free movement of workers in the public sector. They are regulators as well as employers and in both functions they have to comply with EU law.

– EU law is neutral with respect to the internal organisation of Member States. This is usually known as the principle of 'organisational and procedural autonomy of the Member States'. It means that public authorities, for instance, have the right to choose freely between a 'career system'[34] or 'post-based system or employment system'[35] for their civil service; to choose between different recruitment systems; to make policy choices in order to ensure that public sector employment is attractive; and to make policy choices when using the exemption of Article 45 (4) TFEU. However, Member States must comply with EU rules when deciding on the organisation of their public sector.

– The free movement of workers concerns all levels of the public sector in the Member States. There is strong fragmentation of the national public sectors: there are different levels of government (e.g. central government; regions; local authorities); different functions ascribed to the public administration and public enterprise; bodies which are formally separate from the State or the government, the so-called regulatory agencies; independent administrative authorities and executive agencies as well as the traditional separation of ministries and government agencies according to policy specialisation[36]. In many Member States a great variety of provisions apply to employment of staff at these different levels of the public sector.

– There is also great variance between and within Member States as regards the provisions applicable to the different categories of public sector workers. They are usually employed as civil servants or public sector employees, with an employment relationship under either public law or private law including collective agreements.

– Several Member States do not have statutory rules on certain aspects pertaining to free movement of workers, e.g. on taking into account professional experience or seniority for giving access to posts or for determining working conditions such as grade and salary. However, in practice, prior professional experience and seniority may play a role in the recruitment decision: it is very important that in such cases the public sector employers guarantee that migrant workers are not treated less favourably than nationals.

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33 even if a Member State opens up a post which it could reserve to its nationals.

34 Career system is organised in order to ensure civil servants' loyalty and expertise through an organised set of rules on their career, in order to attract good young candidates and to keep them in the service — this is e.g. the traditional system in France and Germany; Ziller Report Part I p. 28.

35 Post-based system or employment system is based upon the idea that the public authority is mainly interested in filling a specific post through the recruitment of a candidate who has the best profile for that post – this is the traditional system in the Netherlands and in most Nordic countries; Ziller Report Part I p. 29.

36 For more information see Ziller Report Part I p. 52.

3.3. Posts reserved for nationals according to Article 45(4) TFEU

3.3.1. EU law

The most well-known limitation to the free movement of workers is that Member States' authorities are allowed to restrict certain posts to their own nationals. Article 45(4) TFEU states that 'the provisions of this Article shall not apply to employment in the public service'. This is an exception to the general rule of free movement of workers and must therefore be interpreted restrictively.

What is conceived as being part of the 'public service' and 'public administration' (terminology of Article 45 (4) TFEU in several other language versions) has always varied considerably from one Member State to another[37]. If the EU were to accept that each Member State apply its own definition of 'employment in the public service', the meaning of Article 45(4) TFEU, and thus the scope of its application, would vary considerably from one Member State to another. Such variation would be contrary to the principle of equality between Member States and to the principle of uniform application of EU law which is inherent to the system of the Treaties.

The CJ therefore formulated its own criteria for the concept of 'employment in the public service' to be applied in all Member States in the same way and which restrict possible limitations to the principle of free movement of workers.

Employment in the public service, according to the Court of Justice

In its judgment of 1980[38] in case 149/79 (*Commission v. Belgium*) the CJ held that Article 45(4) TFEU covers *"posts which involve direct or indirect participation in the exercise of powers conferred by public law*[39] *and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality'.*

In subsequent case law on Article 45(4) TFEU, the CJ has always confirmed this first interpretation[40] and made it clear that both criteria are not alternative but cumulative (exercising of powers conferred by public law and safeguarding general interests). The CJ has

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37 Example: In the UK, the expression '*civil service*' is used as a synonym for public administration, but it is never used for local government, whereas in Ireland and Malta the expression '*public service*' is used for public administration, both national and local government. Ziller Report Part I p. 21.

38 Case 149/79, *Commission v. Belgium* ECR [1980] 03881.

39 Where the English translation of the judgment says 'exercise of powers conferred by public law' the French language version says 'exercice de la puissance publique' and the German language version uses the concept of 'Ausübung hoheitlicher Befugnisse', which is equivalent to the French 'exercice de la puissance publique'. These different wordings therefore correspond to the idea of 'exercising public authority'; Ziller Report part I p. 22.

40 Case 152/73, *Sotgiu* ECR [1974] 00153; Case 149/79, *Commission v Belgium* I ECR [1980] 03881; Case 149/79, *Commission v Belgium* II ECR [1982] 01845; Case 307/84, *Commission v France* ECR [1986] 01725; Case 66/85, *Lawrie-Blum* ECR [1986] 02121; Case 225/85, *Commission v Italy* ECR [1987] 02625; Case C-33/88, *Allué* ECR [1989] 01591; Case C-4/91, *Bleis* ECR [1991] I-05627; Case C-473/93, *Commission v Luxembourg* ECR [1996] I-03207; Case C-173/94, *Commission v Belgium* ECR [1996] I-03265; Case C-290/94, *Commission v Greece* ECR [1996] I-03285.

ruled, for example, that jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be reserved for nationals of the host Member State. Criteria must be assessed on a case-by-case basis[41] with regard to the nature of the tasks and responsibilities involved: this is the so-called functional approach. It is important to always bear in mind the purpose of the exception, i.e. whether the post requires 'a special relationship of allegiance'.

In 2001 the CJ held that the exception of Article 45(4) TFEU cannot be applied to private sector posts, whatever the duties of the employee[42]. However, in 2003 the CJ[43] gave an additional interpretation of the application of Article 45(4) TFEU to private sector posts to which the State assigns public authority functions. The judgments concern the posts of captain and chief mate on private sector ships flying the Member States' flags. According to the CJ, a Member State may reserve those posts for its nationals only if the rights under powers conferred by public law on masters and chief mates are actually exercised on a regular basis and do not represent a very minor part of their activities.

It is very important that when a post is reserved for nationals under Article 45(4) TFEU as interpreted by the CJ, this must not mean that EU law on free movement of workers does not apply at all. When a national, after working in another Member State, returns to work in the public sector of his own Member State in a post reserved for nationals, EU law applies in relation to all the other aspects of equal treatment as regards recruitment and working conditions.

Third-country national family members of a Union citizen who has the right of residence in another Member State are also entitled to have access to posts in the public sector of the host Member State. Article 23 of Directive 2004/38 guarantees these family members the right to take up employment or self-employment there. Article 24 of Directive 2004/38 provides that Union citizens and their family members resident in the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law. Therefore family members (including those who are nationals of a third country) should have access to posts in the public sector in the same way as the EU migrant workers.

3.3.2. Commission's interpretation

A 1988 Commission action[44] focused on EU migrant workers' access to public employment in four sectors: bodies responsible for administering commercial services[45]; public health care services; teaching in State educational establishments; research for non-military purposes in public establishments. The sector approach was an important starting point for monitoring the correct application of EU law, and was followed by a series of infringement procedures. The Member States consequently undertook extensive reforms, further opening their public

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41 From the *Sotgiu* judgment it could be concluded that in order to decide whether a nationality condition may be applied by a Member State for accessing employment in the public service, Article 45 (4) TFEU needs to be applied in a post by post analysis, not to the public service considered as a whole.

42 Case C-283/99, *Commission v Italy* ECR [2001] I-04363.

43 Case C-405/01, *Colegio de Oficiales de la Marina Mercante Española* ECR [2003] page I-10391 and Case C-47/02, *Anker* ECR [2003] p. I-10447.

44 See fn 10.

45 public transport, electricity and gas supply, airline and shipping companies, post and telecommunications, radio and televisions companies.

sectors. Only three infringement procedures were ultimately referred to the CJ, which fully confirmed its previous findings in 1996[46].

Commission's position on posts reserved for nationals

In the 2002 Communication, the Commission set out its position on the reserving of posts for nationals. In particular, one can recall the following points

– The functional approach is very important, i.e. the criteria laid down by the CJ on Article 45(4) TFEU[47] must be assessed on a case-by-case basis and not on a sector basis.

– There are still national provisions and job offers for posts restricted to nationals which do not seem to fulfil the conditions established by case law (e.g. gardener, electrician, librarian). In these instances the national provisions have either not, or not totally, been adapted to EU law[48] or their application is not correct.

– The derogation in Article 45(4) TFEU as interpreted by the CJ covers in particular specific functions of the State and similar bodies, carried out by the armed forces, the police and other forces for the maintenance of order, the judiciary, the tax authorities and the diplomatic corps. However, not all posts in these fields seem to fulfil the criteria, e.g. administrative tasks, technical consultation and maintenance. These posts may therefore not be restricted to nationals of the host Member State.

– Member States are not allowed to exclude migrant workers from recruitment competitions unless all posts accessible via that competition fulfil the criteria of the case law – e.g. competitions to recruit judges. Subsequently, the hiring authority has a duty to evaluate the fulfilment of those criteria according to the tasks and responsibilities of the post in question.

As regards access to posts of captain and first officer of ships, where the CJ[49] has ruled that Member States may only rely on Article 45(4) TFEU under certain conditions, the Commission has systematically monitored the applicable rules in all Member States[50]. As a result, the rules about the nationality condition for access to those posts have almost completely been brought into line with the case law.

The Court has not yet had the opportunity to rule on whether the relevant case law (i.e. that powers conferred by public law must be exercised on a regular basis and must not represent a

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46 Case C-473/93, *Commission v Luxembourg* ECR [1996] I-03207; Case C-173/94, *Commission v Belgium* ECR [1996] I-03265; Case C-290/94, *Commission v Greece* ECR [1996] I-03285.

47 The CJ ruled that only those posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities may be reserved for nationals.

48 e.g. national framework rules on opening up the public sector have not yet been transposed by adopting the necessary application rules.

49 See footnote 43.

50 In four cases concerning access to posts of captain and chief mate on private sector ships the the CJ confirmed its findings of 2003: Case C-89/07, *Commission v. France* ECR [2008] I-00045; Case C-447/07, *Commission v. Italy* ECR [2008] I-00125*;* Case C-94/08, *Commission v. Spain* ECR [2008] I-00160; Case C-460/08, *Commission v. Greece,* judgment of 10.12.2009 not yet published.

very minor part of the activities of the posts in order to be allowed to reserve such a post for nationals) would also apply to determining the public sector posts which may be reserved for nationals. Nevertheless, the Commission applies the same reasoning for posts in both the private sector and the public sector as the CJ argues that safeguarding the general interests of the Member State concerned cannot be imperilled if rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States[51].

It is crucial that Article 45(4) TFEU is not a requirement, but just a possibility to restrict some public service posts to nationals. Therefore Member States are free to open up their public sectors at all levels as much as they wish in order to boost workers' mobility between Member States. The intake of knowledge and experience from other Member States is an advantage for the receiving Member State and valuable experience is gathered by the migrant worker who can bring that back to his/her system when returning home.

3.3.3. Developments in Member States

The case law of the CJ, the measures taken by the Commission, including infringement procedures, and also the discussions within the EUPAN-Network have triggered reforms in many Member States. Often the need to remove discrimination based on nationality in the national provisions and practices has led a number of public authorities to review the rationale behind existing provisions.

Therefore, EU law has also contributed to modernising Member States' provisions in this field. These developments have led to wider opening of the public sectors to migrant workers in the Member States and in some of them the reform process is ongoing.

The Member States have different approaches when applying Article 45(4) TFEU as interpreted by the CJ. EU law does not require that a prior definition of posts be made by the legislator, government or public employer. What it does require is that, at the end of the process, if a post is being reserved for nationals, it should be on the basis of application of the criteria established by the CJ.

A number of Member States have provisions about access to public sector posts in their constitutions. In almost all Member States there are such provisions in legislation, regulations, collective agreements, etc. In some cases the provisions include exhaustive lists or exemplary lists. In others the rules provide for a general opening of all public sector posts but some posts can still be restricted by additional provisions. In some Member States the posts reserved for nationals are decided on a case-by-case basis and mostly the provisions entail presumptions and/or criteria and/or guidelines on sectors and/or posts reserved, but a case-by-case decision is still necessary.

The situation in the Member States appears to be as follows:

– Some provisions reflect the content or wording of the CJ's case law on Article 45(4) TFEU, i.e. the cumulative criteria of direct or indirect exercise of public authority and safeguard of general interest.

[51] Case C-405/01, *Colegio de Oficiales de la Marina Mercante Española*, point 4

– Other provisions take both criteria into account, but in an alternative way; i.e. in principle it is sufficient for one of the criteria to apply in order to reserve a post for nationals of the host Member State.

– Some provisions only partially coincide with the wording of the criteria for applying Article 45(4) TFEU or are worded differently from the CJ's criteria.

– In a few Member States, access to *'the civil service'* or similar concepts is reserved for nationals. However, the Member State's definition of 'the civil service' could well coincide with the case law criteria.

In these situations it is important for Member States to check that complementing provisions and practice lead to the result that only those posts which fulfil the case law criteria are reserved for nationals.

In many Member States, the functional criteria established by the case law have been transformed into organisational criteria: what is contained in the national provisions or application rules are lists of posts according to sectors, departments, categories, etc., and no further distinction is made in relation to the different posts. Only if all the posts in a sector, department, etc. involve duties which correspond to the functional criteria of the case law are the provisions in line with EU law.

Which posts do Member States reserve for nationals?

The following examples illustrate the types of posts which are reserved for nationals in many Member States:

– posts in the judiciary, public prosecutors, prison staff;

– posts in the police and border control services, firemen, security guards;

– military and civil posts in the army;

– posts in the intelligence service;

– posts in the diplomatic service.

Several Member States seem to still reserve all posts in specific ministries for nationals: e.g. foreign affairs, budget, defence, economy, interior, justice, finance including tax authorities.

In a number of Member States many posts at high and middle management level of the government and administration are reserved as well.

Several Member States reserve all civil/public servant posts for their own nationals.

Finally, it should be borne in mind that the absence of provisions reserving posts for nationals does not necessarily mean compliance with EU law. It depends whether this means in practice that posts are open, or closed, to non-nationals.

From the available information it appears that more information is necessary in order to fully assess the Member States' situation. In the end, the national provisions and their application

in practice must lead to the result that only posts which fulfil the criteria of the case law of the CJ are reserved for nationals of the host Member State.

3.4. Recognition of professional qualifications

3.4.1. EU law

The issue of recognition of professional qualifications[52] acquired in other Member States is important for access to posts in the public sector.

Directive 2005/36 applies to the recognition of professional qualifications obtained in a Member State with a view to exercising a regulated profession in another Member State. A profession is regulated where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by laws, regulations or administrative provisions.

More general information on this issue can be found in the 2010 Communication[53].

The system of mutual recognition of qualifications and diplomas applies equally to the public sector in relation to regulated professions (e.g. doctors, nurses, teachers). The CJ's stance is that public bodies are required to comply with the directives on recognition of diplomas[54] and that the fact that under national law a particular post in the public service is governed by special public service rules is not relevant for the purposes of determining whether that post is a regulated profession[55].

In 2003 the CJ[56] decided that the final examination of a Government School preparing students for a specific profession[57] can constitute a diploma in the meaning of the Directives on recognition of diplomas (which are now consolidated in Directive 2005/36). Such a diploma does not have to take the form of a formal document and the fact that students are members of the public service for the duration of their training and that passing the final examination also results in their permanent appointment as public servants does not prevent confirmation of passing the final examination from constituting a diploma within the meaning of the recognition of qualification rules.

3.4.2. Commission's interpretation

Directive 2005/36 is only applicable if the diploma required for practising a given profession testifies to training that prepares specifically for the exercise of the profession.

Posts within the public sector of a Member State often call for a different type of diploma, i.e.:

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52 http://ec.europa.eu/internal_market/qualifications/index_en.htm
http://ec.europa.eu/internal_market/qualifications/docs/guide/users_guide_en.pdf.

53 2010 Communication p. 9.

54 See Case C-234/97, *Fernández de Bobadilla* ECR [1999] I-04773 in which the CJ held that public bodies are required to comply with the directives on recognition of diplomas.

55 Case C-285/01, *Burbaud* ECR [2003] I-08219.

56 Ibid.

57 like e.g. the Ecole nationale de la santé publique in France.

– a diploma attesting to a certain level of education without the content being specified (e.g. university degree, school-leaving certificate plus three years' higher education, etc.) or,

– a diploma attesting to a level of education that meets certain content-related criteria without the content in question constituting vocational training within the meaning of Directive 2005/36 (e.g. a requirement to have a diploma in economics, political science, science or social sciences, etc.).

As these cases do not fall within the scope of Directive 2005/36, only Article 45 TFEU may be invoked. To be in line with Article 45 TFEU, the relevant national procedures must comply with the principles set out below.

Diploma awarded on completion of a certain level of education or training without a specific content being required.

When only the *level* of study for which a diploma is awarded is significant, the authorities of the host Member State are not entitled to take the content of the training into account. Only the level of the diploma may be considered.

To evaluate this level, it is advisable to first look at the rules in the Member State of origin. Where a diploma of a certain level gives access to a public-sector post in that Member State or to a selection procedure for a post in a particular category, it should also give access in the same way to a selection procedure for a post in an equivalent category in the public sector of the host Member State.

To decide what an equivalent category is, the nature of the functions to which this category provides access (management, policy-making, policy implementation, etc.) must be taken into account. The actual denomination of the category is irrelevant. As with the general system for mutual recognition of qualifications and diplomas, there can be a safety mechanism to protect against too great a disparity between requisite diplomas, e.g. school-leaving certificate in the Member State of origin and university degree in the host Member State

Diploma attesting to a level of training meeting certain content-related criteria without the content in question constituting vocational training within the meaning of Directive 2005/36.

The level of the diploma has to be evaluated as explained above. With regard to assessment of the actual content of the training, generally, where an academic content is required (e.g. economics, political science, etc.), the basic aim is to recruit somebody with a general knowledge of the field in question, the ability to think critically, adapt to a certain environment, etc. In other words, there will not necessarily be a perfect match between the content of the training received by candidates and the tasks they will be required to perform. As long as the diploma was awarded on completion of education or training in the required subject, the equivalence of the diploma should be recognised.

As far as possible, migrant workers should be able to seek recognition of a diploma at any time, without having to wait for a post to be advertised. The aim is to give them the necessary time to prepare for a selection procedure. A problem that migrant workers frequently encounter is the length of time taken to recognise professional qualifications. It is important that such procedures are completed as quickly as possible, in order to maximise mobility and not endanger the career prospects of individuals.

3.5. Language requirements

3.5.1. EU law

For anyone wishing to work in another Member State the ability to communicate effectively is obviously important and a certain level of language knowledge may therefore be required for a job[58]. The CJ has held that any language requirement must be reasonable and necessary for the job in question and cannot constitute grounds for excluding workers from other Member States[59]. Employers cannot demand a particular qualification as only way of proof[60].

While a very high level of linguistic knowledge may be justifiable in particular situations and for certain jobs, the Commission considers that a requirement to be a mother-tongue speaker could lead to indirect discrimination[61] on grounds of nationality. Also a requirement to have a language competence equivalent to a mother tongue level would in most cases be disproportionate in the light of the case law mentioned above (i.e. a language requirement must be reasonable and necessary for the job in question).

3.5.2. Developments in Member States

The information available for assessment shows great diversity between Member States as regards the status of languages and formal language requirements in the public service. In nearly all Member States knowledge of the national language(s) is either a formal requirement or considered as an implicit requirement for recruitment.

What language level do Member States require?

The majority of Member States have provisions on requiring language knowledge for recruitment in the public sector. Some Member States make no such provision, but nevertheless, in practice, a certain level of linguistic ability is necessary. Many Member States require the level of knowledge of one or more national languages which is necessary to perform the work, whereas a few request a level adapted to the qualification requirement (e.g. University degree) or the career level.

The information available for assessment rarely contains precise indications about the level of language required and about the assessment procedure. It is therefore difficult to come to any conclusions on how language requirements are applied in practice.

3.6. Recruitment procedures

If a post is not restricted to nationals of the host Member State, migrant workers must be treated in the same way as nationals during the recruitment procedure.

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58 See Article 3 (1) of the Regulation and Article 53 of Directive 2005/36.

59 Case C-379/87, *Groener* ECR [1989] 03967.

60 Case C-281/98, *Angonese* ECR [2000] I-04139.

61 For definition of direct and indirect discrimination see 2010 Communication p. 11

Case law on recruitment procedures

In the *Burbaud* judgment[62] the CJ dealt with the issue of recruitment of workers for the public sector.

The CJ held that, in general, Member States are allowed to freely decide their methods to recruit staff e.g. by interview or competition. The requirement of passing an examination in order to take up employment in the public service cannot in itself be regarded as an obstacle to free movement of workers.

However, some Member States organise competitions to select persons for specific training with a view to filling posts in a certain field of public-sector activity after the training[63]. Here the CJ has ruled that migrant workers who are fully qualified in the field in another Member State must be exempted from completing the specific training, given the training and professional experience they have already acquired in their country of origin. The CJ therefore decided that a Member State may not require those migrant workers to pass such a competition but must provide for different methods of recruitment for actual posts. Whether the migrant worker has already passed a similar recruitment competition in another Member State is not in itself relevant. However, examinations which select candidates for training do not allow for account to be taken of specific qualifications as, generally, the candidates are not yet supposed to have those qualifications. To require fully qualified migrant workers to participate in such an examination is to deprive them of the possibility of having their specific qualifications in the field recognised. This places them at a disadvantage which may dissuade them from exercising their right to look for employment in another Member State.

Although the specifics of the case seem to be mainly relevant to the Member State involved in the CJ's ruling[64], it appears that other Member States[65] have similar systems and the issue is therefore of wider importance.

Member States do not have to open up internal recruitment procedures to migrant workers, as long as nationals who are not working in the same service of the public sector would also not be allowed to apply for such posts or competitions.

The Commission is frequently asked by public sector workers whether EU law gives an absolute right to be seconded or transferred or to have direct access to the public sector of another Member State. Although this is not the case, for many years the Commission has appealed to Member States' authorities to enhance the mobility of their personnel. Member States' provisions offer numerous opportunities for secondment and exchange of workers between their services[66].

62 Case C-285/01, *Burbaud* ECR [2003] I-08219.

63 here it concerned the entrance exam to the French Ecole nationale de la santé publique which has this dual purpose.

64 France.

65 In particular Spain.

66 EUPAN-Report of 2006 'Cross-Border Mobility of Public Sector Workers' which lists the different possibilities of secondment and exchange programmes provided by the Member States; see footnote 19.

3.7. Recognition of professional experience and seniority for access to posts and for determining working conditions

3.7.1. EU law

Professional experience could be defined as the content of work accomplished; seniority, as the duration of previous working periods. However, as many Member States do not make a clear distinction between professional experience and seniority/working periods, both topics are dealt with simultaneously here.

In several Member States professional experience and seniority play a role in the recruitment procedure (e.g. professional experience or seniority is either a formal condition for access to a recruitment competition or additional merit points are awarded for it during such a procedure, which places people higher up on the final list of successful candidates). In many Member States working conditions (e.g. salary; special length-of-service increments; grade; career prospects; holiday entitlement) are determined on the basis of previous professional experience and seniority.

If comparable professional experience and seniority acquired by workers in other Member States are not taken into account in the same way as professional experience and seniority acquired in the host Member State, the persons concerned will either have no or less favourable access to the host Member State's public sector. They may in fact have to restart their career from the beginning or at a lower level. This is the issue of free movement of public sector workers on which, during the past 10 years, the Commission has received the majority of complaints, petitions and Parliamentary Questions and has initiated numerous infringement procedures.

Case law on professional experience and seniority

The CJ has rendered several judgments on this issue.

– In its first judgment on access to posts in the public sector (*Scholz*)[67] the CJ ruled that '*where a public body of a Member State […] provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to Community nationals, make a distinction according to whether such employment was in the public service of that particular State or in the public service of another Member State'*.

– In its first judgment on determining working conditions, e.g. seniority increment; salary (*Schöning*)[68], the CJ stated that '*previous periods of comparable employment completed in the public service of another Member State'* must be equally taken into account.

– It further ruled in '*Österreichischer Gewerkschaftsbund'*[69] that requirements which apply to periods spent in other Member States must not be '*stricter than those applicable to periods spent in comparable institutions of the Member State'* and that '*such periods must be taken into account without any temporal limitation*[70]'.

– The CJ has confirmed its case law in several judgments relating to the granting of a

[67] Case C-419/92, *Scholz* ECR [1994] I-00505.

special length-of-service increment[71], salary[72], access to posts[73] and determination of working conditions[74].

The CJ has not yet accepted any of the justifications for indirect discrimination put forward by Member States, such as the specific characteristics of employment in the public sector, e.g. recruitment by open competition; differences in teaching programmes; differences in career structures; reverse discrimination; difficulties in making a comparison; principle of homogeneity of civil service regulations. The justifications either are not presented according to a clear, coherent and convincing argumentation, or they do not meet the requirements of the principle of proportionality.

Some Member States have tried to justify different treatment of non-nationals (i.e. only working periods with a national employer being taken into account) by their intention to reward loyalty towards an employer. The CJ[75] has stated that '*it cannot be excluded that an objective of rewarding workers' loyalty to their employers […] constitutes a pressing public-interest reason'*, which may lead to different treatment. However, the provisions judged so far are geared to mobility between different employers in the public sector of the Member States concerned rather than rewarding loyalty to one employer. For example, the provisions leading to entitlement to a 'special length-of-service' increment after 15 years of service at any Austrian university allow mobility of professors between the different universities without losing such increment. The notion of loyalty used is therefore too broad to be accepted by the CJ as a valid justification for different treatment.

3.7.2. Commission's interpretation

According to the CJ's case law, migrant workers' previous periods of comparable employment acquired in other Member States must be taken into account by Member States' public sector employers for the purpose of access to posts and for determining working conditions (e.g. salary, grade) in the same way as professional experience and seniority/working periods acquired in the host Member State's system.

In practice the taking into account of professional experience and seniority causes numerous problems for migrant workers. In order to ensure non-discriminatory application of Member States' provisions in this area, expressions like 'previous periods of comparable employment' must be seen in the context of each Member State's system. If the host Member State has provisions or practices on taking into account professional experience and seniority, these same provisions or practices must be applied equally to periods of comparable employment acquired in another Member State. The case law does not require that new concepts (e.g. on periods of comparable employment) have to be introduced in the Member States' provisions, e.g. if no provisions on recognition of professional experience exist, no changes are necessary.

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68 Case C-15/96, *Schöning* ECR [1998] I-00047 and similar Case C-187/96, *Commission v. Greece* [1998] I-01095.

69 Case C-195/98, *Österreichischer Gewerkschaftsbund* ECR [2000] I-10497.

70 This means that also periods acquired by migrant workers before accession of the host and/or home Member State have to be taken into account.

71 Case C-224/01, *Köbler* ECR [2003] I-10239.

72 Case C-205/04, *Commission v. Spain* ECR [2006] I-00031.

73 Case C-278/03, *Commission v. Italy* ECR [2005] I-03747.

74 Case C-371/04, *Commission v. Italy* ECR [2006] I-10257.

75 Case C-224/01, *Köbler* ECR [2003] I-10239.

However, the Member States must adapt their provisions and administrative practice in order to guarantee equal treatment. Due to the great diversity between Member States' provisions and their organisational and procedural autonomy, the Commission has refrained from proposing rules to be applied identically in all Member States.

Reforming national provisions on professional experience and seniority

The following aspects have to be considered when adapting national provisions and administrative practice.

– Member States have a duty to compare professional experience and seniority. If the authorities have difficulties in doing so they should seek, e.g. via the other Member States' authorities, clarification and further information.

– If working periods in any job in the public sector are taken into account, the Member State must also take into account working periods acquired by a migrant worker in any job in the public sector of another Member State.

– If a Member State takes into account specific professional experience or seniority (i.e. in a specific job/task; in a specific institution; at a specific level/grade/category), it has to compare its system with the system of the other Member State in order to make a comparison of previous periods of employment. The substantive conditions for recognition of periods completed abroad must be based on non-discriminatory and objective criteria as compared to periods completed within the host Member State. However, the status of the worker in his previous post as civil servant or employee[76] may not be used as a criterion of comparison[77].

– If a Member State also takes into account professional experience and seniority in the private sector, it must apply the same principles to comparable periods of experience and seniority acquired in another Member State's private sector.

– A condition of continuity of employment (professional experience and seniority being only taken into account if there has been no career break at all or not longer than a certain period - e.g. 3 months) could constitute indirect discrimination against migrant workers. The move of a worker to another Member State will often result in a career break going beyond what is accepted under national provisions. Therefore migrant workers are much more likely to be negatively affected by this condition than workers whose whole career is in one Member State.

[76] In cases where the national provisions take into account in a different way the professional experience and seniority of civil servants and employees.

[77] See also Case 152/73, *Sotgiu* ECR [1974] 00153, in which the Court held that it is of no interest whether a worker is engaged as employee or as civil servant or even whether the terms on which he is employed come under public or private law; these legal designations can be varied at the whim of national legislature and therefore cannot provide a criterion for interpretation appropriate to the requirements of Community law.

3.7.3. Developments in Member States

There are significant differences between Member States when it comes to the degree of regulation of the recognition of professional experience and seniority/working periods. Some Member States have no formal rules at all. Others have rules on access to posts and many Member States have rules for determining working conditions. Some rules are formulated broadly and still leave the authority concerned a margin of discretion for their application; other rules specify the possibilities for taking into account professional experience and seniority including procedural aspects.

During the past 10 years many Member States have, often within the framework of infringement procedures, made the necessary reforms to their national provisions on recognition of professional experience and seniority. The reforms seem to have reduced the amount of problematic cases. However, there are still cases where provisions seem discriminatory, e.g. where only seniority in the host Member State is taken into account or where only parts of the working periods abroad are taken into account, while the whole working period in the host Member State is.

On the whole, the information available for assessment does not lend itself to making general statements on the existence or absence of obstacles connected with professional experience and seniority. What seems often to be lacking in Member States are provisions that establish or confirm that comparable professional experience and seniority/working periods acquired in other EU Member States have to be taken into account on the same footing as professional experience and seniority acquired in the host Member State[78].

3.8. Taking account of qualifications, skills and training measures for access to posts and for determining working conditions

In several Member States certain qualifications, skills and training measures have an effect on access to posts and on determining working conditions, including career prospects. This is not an issue of recognition of qualifications to exercise a profession in another Member State, but the qualifications, skills or training measures may play a role in the recruitment procedure or for determining the working conditions. For example:

– in the recruitment procedure points are awarded for qualifications acquired in the host Member State which place people higher up on the final list of successful candidates, thus increasing their chances for access to a post. Some national provisions treat comparable qualifications acquired in other Member States differently than qualifications acquired in the host Member State and therefore cause indirect discrimination of migrant workers (e.g. for access to teacher posts);

– certain qualifications give entitlement to a higher salary or enhance career prospects. Some national provisions only take into account qualifications acquired in the system of the host Member State (e.g. higher salary is granted after completion of a Master's degree).

In order to guarantee equal treatment of migrant workers, public sector employers are obliged to take into account comparable qualifications, skills and training measures acquired in other

[78] Ziller Report Part I p. 102.

Member States in the process of recruitment and for determining working conditions, including career prospects, in the same way as qualifications, skills and training measures acquired in the system of the host Member State. In relation to regulated professions, Article 4 of Directive 2005/36 provides that the recognition of professional qualifications by the host Member State allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals[79].

Case law on promotion possibilities

The CJ has ruled in *Commission v. Spain*[80] that national authorities must ensure that holders of a professional qualification obtained in another Member State and recognised by the host Member State for exercise of the profession have the same promotion possibilities as holders of the equivalent national professional qualification. The Member State is not allowed to request academic equivalence in addition to professional recognition.

This concerns also returning migrant workers and in particular citizens who make use of their right to study in another Member State and then return to work in the public sector of their home Member State. They should not be treated less favourably than those citizens who have studied and worked only in the home Member State[81].

3.9. Other issues

It is important to bear in mind that, apart from the right to reserve certain posts for nationals according to Article 45(4) TFEU, Member States' authorities and other public employers have to guarantee equal treatment of migrant workers as regards other aspects of access to posts and determining working conditions.

The following issues concerning equal treatment of migrant workers seem to create additional problems in relation to the right to free movement of workers in the public sector.

– *Residence*

EU law forbids employers to require a person to be resident in the host Member State in order to apply for a post and to be entitled to work; it also forbids employers to grant residents more favourable conditions for recruitment. This is not an issue concerning only employment in the public sector: general information is contained in the 2010 Communication.

Nevertheless, it appears that in some Member States a residence requirement for access to posts in the public sector still exists[82]; there are also national provisions which grant more favourable recruitment conditions (e.g. additional points are awarded to residents during recruitment procedures which improve their chances of being recruited).

– *Status and working conditions*

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79 See also Case C- 180/08/C-186/08, *Kastrinaki* ECR [2008] I-00157.
80 Case C-286/06, *Commission v Spain* ECR [2008] I-08025.
81 Case C-19/92, *Kraus* ECR [1993] I-01663.
82 Ziller Report Part I p. 88.

Member States must not treat migrant workers differently than national workers in relation to the status of employment, such as civil servant status and the associated working conditions.

– *Coordination of social security schemes*

The EU rules on social security coordination do not replace national systems with a single European one. Rather than harmonising the Member States' social security schemes, they provide simply for coordination. This means that all countries are free to decide for example who is to be insured under their legislation, what contributions are to be paid, which benefits are granted and under what conditions. The EU lays down common rules in Regulations 883/2004[83] and 987/2009[84] to protect the social security rights of citizens moving within Europe (EU-27, Iceland, Liechtenstein, Norway and Switzerland). More information on this issue can be found on the Commission's website[85].

Regulation 883/2004 applies to all European citizens who are or have been insured under the social security legislation of one of the EU or EEA Member States or Switzerland. This includes public sector employees and civil servants[86]. Two specific coordination issues can be highlighted here.

Regulation 883/2004 contains a special rule for the legislation applicable to civil servants who work in another Member State than the Member State in which the administration employing him/her is situated. The civil servant remains subject to the legislation of the Member State in which the administration is situated. The actual place of work is therefore not of importance.

In contrast to Regulation 1408/71, Regulation 883/2004 does not contain a specific rule for determining the applicable legislation in the situation where a civil servant works in two or more Member States, one of which has a special scheme for civil servants. Under Regulation 1408/71, both legislations could be applied to the civil servant in question. As under Regulation 883/2004 only one legislation can be applied at any one time, Member States might have differing interpretations on which legislation should be applied. Although not explicitly designed for these situations, an ad hoc solution could be found in the conclusion of a common agreement between the Member States on which legislation to apply.

For persons covered by a special scheme for civil servants the aggregation of periods for invalidity benefits, old age and survivors' pensions is slightly different from the general rule[87]. If the legislation of a competent Member State makes entitlement to benefits under a special scheme for civil servants subject to the condition that all periods of insurance be completed under one or more (equivalent) special schemes for civil servants in that Member State, aggregation is limited to these periods of insurance only.

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83 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.04.2004.

84 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284, 31.10.2009.

85 http://ec.europa.eu/social/main.jsp?langId=en&catId=849.

86 Civil servant in the sense of the EU rules on social security coordination are persons who, according to the national legislation, have a 'civil servant status' in the administration for which they work.

87 The general rule is that whenever certain conditions have to be fulfilled before you become entitled to benefits, the competent institution must take account of periods of insurance, residence or employment under the legislation of other EU countries. This is to guarantee that a person will not lose rights when changing employment and moving to another country.

If the person concerned does not satisfy the conditions for receipt of benefits from the special scheme, the competent Member State has to determine whether the person concerned is eligible for a benefit under the general scheme, or failing that, the scheme applicable to manual or clerical workers as the case may be. This calculation could lead to an amount of benefit different from the amount to be paid under a special scheme for civil servants. Member States that do not have a special scheme for civil servants will aggregate the periods of insurance fulfilled under such a scheme according to the general rules of aggregation.

4. CONCLUSIONS

Following on from the CJ's judgments on posts reserved for nationals (since the 1980s) and on the recognition of professional experience and seniority (since the 1990s), great progress has been made in the free movement of workers in the public sector. However, a number of obstacles still appear to exist, which may limit the scope for citizens to exercise their rights. A joint effort by Member States and all public sector employers as well as by the European institutions is required.

Member States' authorities still have to make the necessary reforms with regard to those national provisions which are not yet in conformity with the EU rules. In addition it is important that public sector employers monitor the application of national provisions so that it leads to practical solutions in line with EU law. It is crucial that Member States provide for possibilities of appeal and remedies[88] and that all pending cases are solved. Migrant workers can rely directly on the EU law on free movement of workers before the national authorities and courts in national proceedings.

Information about these issues, provided by the Member States' authorities to all public sector employers, judges and lawyers, as well as citizens, is very important and will enable individuals to better enforce their rights and thus enhance their opportunities for mobility. Furthermore, it would help if job offers were to include explicit information on whether the position is open to all EU citizens or reserved for nationals[89].

To raise awareness on free movement of workers in the public sector, the Commission will make this working document available to Member States' authorities[90], social partners[91] and other stakeholders concerned[92] as well as to citizens[93].

So that individuals can see what is available, the Commission includes job offers coming from Member States' public sectors in its EURES job database[94]; many of the job offers now listed in this database come from the public health and education sectors. The Commission also hosts the EURAXESS database[95] where job offers for researchers can be found.

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88 Case 222/86, *Heylens* ECR [1987] 04097.

89 The Luxembourg authorities now indicate in their job offers and competition announcements which posts or careers are open to EU nationals.

90 e.g. Technical Committee on Free Movement of Workers, EUPAN.

91 Advisory Committee on Free Movement of Workers comprises the representatives of Member States and social partners at national and European level.

92 e.g. Network of Legal Experts on Free Movement of Workers.

93 http://ec.europa.eu/social/main.jsp?catId=25&langId=en.

94 http://ec.europa.eu/eures/home.jsp?lang=en.

95 http://ec.europa.eu/euraxess/index.cfm/jobs/index.

As announced in the 2010 Communication, the Commission is currently considering how workers' rights, including those of public sector workers, can be better enforced. The Commission will continue to monitor the Member States' provisions and their application in practice and will take the necessary steps to ensure effective compliance with the right of free movement of workers including starting infringement procedures against Member States.