Free Movement of European Union Citizens and Employment in the Public Sector

Current Issues and State of Play

Part I – General Report

Report for the European Commission

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Abbreviations

Art.	Article
EEA	European Economic Area (all EU Member States + Iceland, Liechtenstein and Norway)
EEC	European Economic Community
EC	European Community
ECJ	Court of Justice of the European Union (formerly Court of Justice of the European Communities)
EUPAN	European Public Administration Network – informal cooperation of Member States on public administration issues
ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development
SIGMA	Support for Improvement and Management in Government (OECD-EU programme)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Table of Contents

Context and Aims of the Report **7**

Introductory Chapter **9**

1. FREE MOVEMENT OF WORKERS AND THE PUBLIC SECTOR **10**

1a. Free movement of workers and EU citizens' right to free movement and residence

1b. Mutual respect and sincere cooperation between the EU and its Member States **11**

1c. EU citizenship and Member States' citizenship **13**

1d. The prohibition of discrimination and of obstacles to professional freedom in the public sector

1. Prohibition of direct discrimination based on the nationality of EU citizens **14**

2. Prohibition of indirect discrimination based on nationality and obstacles to free movement of workers **15**

3. Free movement of workers in the public sector test **19**

1e. The exemption of 'employment in public administration' in Art. 45 (4) TFEU **20**

1. The meaning of "employment in": nationality as a condition for access to certain posts – three consequences

2. The meaning of "the public service": public administration **21**

3. The meaning of "employment in the public service": functional approach to posts involving the exercise of public authority and the safeguard of general interests **22**

4. Exercising public authority and safeguarding general interests on a regular basis? **24**

5. Free movement of workers in the public sector test

1f. Posts under private employment involving the exercise of public authority and the safeguard of general interests **25**

2. SPECIFIC FEATURES OF MEMBER STATE'S PUBLIC SECTOR

2a. A legal perspective on the public sector and free movement of workers

2ai. Member States as regulators of employment in the public service **26**

1. The duty to give grounds and provide for remedies

2. Liability for breach of EU law

2aii. Member States' public authorities as employers **27**

2b. A public administration/public management perspective on the public sector and free movement of worker **28**

1. Public authorities' freedom of choice in organising their civil service

2. Free movement of workers as an asset for public management **30**

2c. A labour market perspective on free movement of workers in the public sector **31**

1. More than 20 % of total employment

2. A rather stable sector of employment **32**

3. A complex sector of employment with important needs in specialised skills

3. PRINCIPLES FOR THE NTERPRETATION AND APPLICATION OF EU LAW TO THE FREEDOM OF MOVEMENT OF PUBLIC SECTOR WORKERS

3a. The functional approach: looking for effectiveness in applying the principle of free movement and related norms **33**

3b. Restrictive interpretation of the exceptions or limitations to the principle of free movement **34**

3c. Duty of consistent interpretation of national law with EU law

3d. Direct applicability of the principle of free movement and primacy of EU law on national law

3e. Proportionality of national measures having a limiting impact on the principle of free movement **35**

3f. Obligation of public authorities to give reasons and to provide for remedies **36**

Chapter 2 General Data Required for the Assessment of Issues of Free Movement of Workers in the Public Sector 37

1. Date of Applicability of EU Law: The Time to Adapt

2. State Form and Levels of Government: Organisational Autonomy but No Justification for Non Compliance **39**

3. Official Languages: a Union with More Languages than Member States **40**

4. Statistical Data: In Need of Common Indicators **41**

Chapter 3 Legal, Organisational and Economic Aspects to Take into Account for Understanding the Issues of Employment in the Public Sector 45

1. Relevant Legal Sources: the Constitution, Law, Regulations and the Values of the Public Sector

1. 1. Constitution: the relevance of constitutional principles and provisions

1. 2. Legislation and general regulations: comparability of general statuses/staff regulations **48**

1. 3. Values of public sector regulation and scope of general staff regulations in the public sector **50**

2. Public Sector Employers: Facing the Puzzle of Horizontal and Vertical Fragmentation **52**

2. 1. Horizontal fragmentation between levels of government central, regional, local

2. 2. Vertical fragmentation at the same level of government **53**

2. 3. Coordination as compensation for fragmentation **56**

3. Public Sector Workers: Taking Duly into Account Civil Servants, Contract Workers and Others **57**

3. 1. Information is often limited to a category of public workers

3. 2. The content of legal statuses of public sector workers **60**

4. Appeals and Remedies: Tools for Enforcement and Sources of Information on Obstacles to Free Movement **61**

4. 1. The EU law requirement to give reasons and to make judicial review available

4. 2. Specific procedural rules and/or competent bodies for appeal **62**

Chapter 4 Potential Sources of Discrimination and Obstacles to Free Movement of Workers in the Public Sector 65

1. Legislation and General Regulation of Access and Employment Conditions: a Necessary but not Sufficient Parameter of Assessment **67**

1. 1. Legal sources: the difficulties of assessment and comparison

1. 2. Practice: general lack of information and symptoms of misunderstandings 68

2. Special Requirements for Access to Employment and Working Conditions **69**

2. 1. Professional experience: organising mutual recognition **71**

2. 2. Seniority: organising the portability of working periods **75**

2. 3. Language requirements: assessing proportionality 78

2. 4. Other potential obstacles to free movement of workers in the public sector **80**

1. Professional qualifications for regulated professions **81**
2. Specific obstacles to entry in the public service
3. pension rights **83**
4. Family members
5. Residence **84**
6. Formal status
7. Secondment
8. Burden of the Proof **85**

Chapter 5 Posts Reserved to Nationals According to Article 45 (4) TFEU: Understanding the Functional Approach **87**

1. Relevant Laws and Regulations: Assessing the Rigidity of Legal Impediments to Access to Posts 89

1. 1. Constitutional Provisions

1. 2. Legislative provisions **90**

2. Definition of Posts: from Formal Coincidence with EU Law Criteria to Apparent Contradiction with Article 45 (4) TFEU

3. Practice and Monitoring: Misunderstandings and Lack of Information **99**

4. Compliance with EU Law: Few Obvious Cases of Non-Compliance, or Overall Good Compliance?

Chapter 6 Summary of Findings and Recommendations **99**

1. A Tentative Assessment of Issues of Compliance with Free Movement of Workers in the Public Sector

1. 1. Understanding free movement of workers in the public sector

1. 2. Identifying and removing obstacles to free movement of workers in the public sector **102**

1. 3. Understanding the functional approach to posts reserved to nationals according to Article 45 (4) TFEU **104**

2. Reforms and Coming Trends: Public Sector Reform and Free Movement of Workers in the Public Sector **105**

3. Recommendations **106**

3. 1. Summary of recommendations

3. 1. Free movement of workers in the public sector test **109**

References **113**

Context and Aims of the Report

This report has been written at the beginning of 2010 for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities by an independent expert.

The Commission wanted to investigate the current state of play in the national legislation, the reforms undertaken since 2005 and the way the legislation is applied in practice in order to implement the right to free movement of workers in the public sector of EU Member States. The aim was to obtain an overview of the developments, achievements and remaining challenges for Member States, in particular in the public administration, public health and public teaching sectors. The Commission wants to use this information for its monitoring task and for information of EU citizens, public authorities in the Member States, trade unions and other organisations interested in the topic.

The author of the report, Jacques Ziller, is currently professor of European Union Law at the *Università degli Studi di Pavia*. He is a member of the Steering Committee of the *European Group for Public Administration* (*EGPA*). He has been teaching comparative public law, European community law, public administration and public management, and has been doing research, as well as training for senior civil, at the University of *Paris 1 Panthéon-Sorbonne*, at the *European University Institute*, Florence, at the *College of Europe*, Bruges, at the *European Institute of Public Administration* (*IEAP/EIPA*), Maastricht, and at the *Institut International d'Administration Publique* (*IIAP*), Paris.

The report is based upon the information given by Member States' authorities in response to questionnaires addressed to them by the European Commission in 2009; upon the reports written by the Network of experts in the field of free movement of workers established by the European Commission, which are published together with the Member States' comments; upon information collected by Member States' authorities in the framework of the *Human Resources Working Group*, which is a working party of the *EUPAN* [*European Public Administration Network – informal cooperation of Member States on public administration issues*] (see *References*). The report further relies on information gathered by the author in specialised literature (law journals, handbooks and monographs, as well as specialised databases and documents available in research centres and on the Internet).

This report contains the findings and ideas of its author as an independent expert; it does not commit the European Commission.

Introductory Chapter

After that of maintaining peace, the first objective of the European Union, according to the Treaty on the European Union (TEU) as reformed by the Lisbon treaty, is to "*offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured*" (Art. 3 (2)).

Consequently, the Treaty on the Functioning of the European Union (TFEU) is stating that "*citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties*" (Art. 20 (2)). The first of those rights to be mentioned in the TFEU is the right to move and reside freely in the EU (Art. 21 (1)).

According to the Charter of Fundamental Rights of the European Union *"Every citizen of the Union has the right to move and reside freely within the territory of the Member States"* (Art. 45 (1) on Freedom of movement and of residence. The right to free movement is thus a fundamental right of all EU citizens.

Moving and residing freely within the territory of the Member States is further guaranteed through free movement of workers (Art. 45 to 48 TFEU), and, as far as self-employed persons are concerned, freedom of establishment of nationals of a Member State in the territory of another Member State (Art. 49 to 55 TFEU). These freedoms have been established more than fifty years ago by the Treaty of Rome of 1957 establishing the European Economic Community (EEC), as part of the objective – now listed as the second objective of the Union – to establish a common market (now internal market), based on "*a highly competitive social market economy, aiming at full employment and social progress*" (Art. 3 (3) TEU).

The link between citizenship and social market economy established in the treaties has a specific dimension when it comes to employment in the public sector of Member States, due to the special responsibilities of public authorities towards citizens in the good functioning of the EU's internal market and area of freedom, security and justice.

A long experience with free movement of workers has enabled EU institutions and public authorities in Member States to establish a body of rules and procedures aimed at improving the possibilities of employment of EU citizens in the public sector while taking into account the specific role of public administration, on the basis of the relevant treaty provisions.

This *Introductory Chapter* explains the purpose, scope and content of such rules and procedures, in order to make clear how they can be maintained and further developed for the benefit of EU citizens, public authorities and the EU's social market economy. It provides a background for understanding and assessing existing practices, achievements, and progresses that still need to be made in the Member States, which will be presented in the further *Chapter*s of this report.

1) FREE MOVEMENT OF WORKERS AND THE PUBLIC SECTOR

1a. Free movement of workers and EU citizens' right to free movement and residence

A number of provisions of the EU Treaties and Charter of Fundamental Rights make it clear that free movement of workers is a fundamental principle of European Union law, as a corollary to the right to move and reside freely within the territory of the Member States. These provisions are Art. 3 TEU, which states the objectives of the EU, Art. 45 - *Freedom of movement and of residence* of the Charter, as well as Art. 20 and 21 TFEU on EU citizen's rights, and Art. 45 TFEU on the freedom of movement of workers.

Art. 45 TFEU contains two elements: the right of EU citizens to work in any Member State (freedom of profession for dependent workers), and the prohibition of any discrimination between workers based upon the nationality for EU citizens. The concrete meaning of Art. 45 has been established to a large extent by directives and regulations – which may be adopted by the EU institutions – and by the European Court of Justice (ECJ).

Relevant EU legislation includes *Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community*, *Regulations 1408/71* and *574/72*, replaced as of 1 May 2010 by *Regulation 883/2004 on the coordination of social security systems*, and the *Implementing Regulation 987/2009*; and *Directive 2005/36 on mutual recognition of professional qualifications;* they have to be combined with *Directive 2004/38 on the right of citizens to move and reside freely*, which is based upon the treaty clauses about citizenship, non discrimination and free of movement of persons (see *References*).

According to Art. 46 and 48 TFEU, new legislation and amendments to existing legislation may be adopted according to the ordinary legislative procedure, i. e. upon proposal of the European Commission, by agreement between the European Parliament and the Council (with qualified majority voting).

As a consequence of the fundamental character of the freedom of movement of workers, any limitation of, or exception to the principle has to be interpreted in a strict manner, according to well established rules of interpretation of legal documents. Strict interpretation means that the exception or limitation has to be applied in the way which has the most limited effect on the application of the principle. Such rules of interpretation are not specific to Art. 45 TFEU, they are being used for all treaty provisions which foresee limitations or exceptions to the fundamental principles of EU law.

TFEU Article 45

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 45 TFEU has exactly the same wording as formerly Article 39 EC treaty (ex Article 48 EEC treaty).

In the context of EU law, EU institutions and the Member States have to make sure that the application of an exception or limitation does not empty the principle of its meaning. Any exception or limitation to the free movement of workers has to be compatible with the functioning of the internal market and maintaining the EU's area of freedom, security and justice without internal frontiers. It is also indispensable to take into account that according to Art. 21 (2) Charter, and 18 TFEU, "*any discrimination on grounds of nationality shall be prohibited*". Last but not least, in order to achieve the objectives set up in Art. 3 TEU, treaty provisions need to have the same meaning in all Member States.

Therefore concepts like '*employment*', '*remuneration*', '*conditions of work and employment*', '*offers of employment*' or '*grounds of public policy, public security or public health*' need to be defined at EU level, by the institutions acting as legislator, or by the ECJ when called to interpret EU law.

The limitation in Art. 45 (4), according to which its provisions "*shall not apply to employment in the public service"* thus cannot be meant to place the public sector outside of the scope of the freedom of movement of workers and EU citizens' right to free movement and residence. There is however no EU legislation specific to the limitations deriving from Art. 45 (4) TFEU, and the only guidance as how to understand it comes therefore from the ECJ's case law (see *further, under section 1 e*).

The ECJ has been very often called upon by Member States' courts and by the European Commission and thus gave numerous judgements on the interpretation of Art. 45 and the relevant EU legislation. This case law includes a big number of judgements which help defining the notion of worker, what has to be considered as discrimination based upon nationality or an obstacle to the free movement of workers, and the exact meaning of the limitations deriving from Art. 45 (4).

1b. Mutual respect and sincere cooperation between the EU and its Member States

With the entry into force of the Lisbon Treaty on 1 December 2009, special attention is being given in the treaties to the principles of mutual respect and of sincere cooperation between the EU and its Member States.

These principles, as well as the principle of conferral, according to which "*competences not conferred upon the Union in the Treaties remain with the Member States*", were already well established in the framework of the EC treaty and the case law of the ECJ.

TEU Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Particularly important to the issues linked to free movement of workers in the public sector is the combination of the principle according to which the EU "*shall respect national identities*" of Member Stated "*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*" as well as "*their essential state functions*", and the principle that "*Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

A good illustration of how the first of these principles interacts with the freedom of movement of workers in the public sector is given by the ECJ in *Case Groener* 379/87 (see *References*).

The Groener case

Mrs Groener, a Netherlands national, was appealing against the Irish Minister for Education and the City of Dublin Vocational Educational Committee because of the refusal to appoint her to a permanent full-time post as an art teacher after she had failed a test intended to assess her knowledge of the Irish language.

The High Court in Dublin had referred to the ECJ in order to know whether requiring the knowledge of Irish was in line with the requirements of Art. 3 (1) of *Regulation 1612/68* and with what is now Art. 45 TFEU.

In its judgment of 28 November 1989 (case 379/87, point 19), the ECJ said that in the circumstances of the case such a requirement was acceptable because:

"The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language."

The ECJ added: *"However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member State."*

Applying this reasoning to the circumstances of the case, the Court further said (point 20): *"The importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language."*

The ECJ's judgement in the *Groener* case does not mean that a language requirement for access to a post in the public service is necessarily always compatible with Art. 45 TFEU. The purpose of such a requirement may not be to by-pass the principle of free movement of workers, it has to be a genuine and legitimate policy purpose. Furthermore, the proportionality test (see *Section 3*) needs to be applied by the relevant authorities and the courts, taking into account the specific circumstances of each case.

What is particularly worthwhile noting in this judgement is that it shows how it is possible to combine the application of fundamental principles of EU law with the respect of cultural and linguistic diversity - the latter being now guaranteed by Art. 22 Charter - and of the Member States' national identity.

The principle of sincere cooperation, which is central to Art. 4 TFEU, has to be applied in a reciprocal way. The EU has to respect the Member States' national identity, and the Member States have to ensure the fulfilment of EU law and refrain from any measure contrary to the Union's objectives.

As a consequence of a general principle of EU law – which applies for instance for so called '*state aids*', i. e. public subsidies and other measures in favour of specific businesses – the obligations deriving from the principle of sincere cooperation lie not only with the institutions of Member States' central government. They also lie with all public authorities in the Member States, including re-

gional and local authorities, as well as autonomous or independent public bodies. This principle is particularly important when it comes to free movement of workers in the public service of Member States (see *Section 2*).

1c. EU citizenship and Member States' citizenship

As indicated in earlier in *section 1 a*, free movement of workers is a corollary of the EU citizens' fundamental right to move and reside freely within the territory of the Member States. As stated in Art. 9 TEU and in Art. 20 TFEU, "*Citizenship of the Union shall be additional to and not replace national citizenship*".

The wording of Art. 45 (4) according to which its provisions "*shall not apply to employment in the public service*", has to be examined in the light of the dual citizenship – EU and Member State – which has been established by the Maastricht treaty of 1992.

TFEU Article 20

1. *Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
2. *Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*
(a) the right to move and reside freely within the territory of the Member States;
[…]
These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 20 TFEU corresponds in content to Article 17 EC treaty which had been adopted in 1992 with the Maastricht treaty.

When the text of Art. 45 TFEU was written in the EEC treaty in 1957, all Member States had provisions in their law, by which their citizenship or nationality was a condition of access to their civil service or public administration; sometimes such provisions were enshrined in their constitution; this easily explains why they agreed on the limitation to free movement of workers as expressed in Art. 45 (4) TFEU.

In most Member States, access to the civil service or public administration is being considered as a political right linked to citizenship, in the same way as electoral rights. With the Maastricht treaty, Member States decided to extend electoral rights to EU citizens by giving them the right to vote at local elections in other Member States than their own one. They did not suppress the limitation expressed in Art. 45 (4) TFEU, for which principles for interpretation had been established in the case-law of the ECJ.

The principles for the interpretation of Art. 45 par 4 TFEU have been developed in 1982; they were not contradicted by the innovations linked to the establishment of EU citizenship. On the contrary, the principles are being confirmed by the concept of dual citizenship introduced by the Maastricht treaty. Indeed the principles set by the ECJ illustrate the idea that EU citizenship does not replace national citizenship, while it guarantees the right to move and reside freely in the Union and especially the free movement of workers.

1d. The prohibition of discrimination and of obstacles to professional freedom in the public sector

The public sector of Member States is not exempted from the application of rules and principles ensuring free movement of workers. As mentioned earlier, every national of an

EU Member State has, as a matter of principle, the right to work in another Member State (with the exception in some very specific cases of transitional arrangements in the years following accession of new Member States).

The concept of '*worker*' is not defined in the Treaty, which uses it in *Chapter* I of its Title III (*Free movement of persons, capitals and services*), Art. 45 to 48. It has been interpreted by the ECJ as covering any person who (i) undertakes genuine and effective work (ii) under the direction of someone else (iii) for which he/she is being paid. Civil servants and employees in the public sector are workers in the sense of Art. 45 TFEU, hence the rules on free movement of workers in principle apply also to them.

The provision of Art. 45 (4) TFEU, according to which it "*shall not apply to employment in the public service*" only means that certain posts in the public sector may be reserved to the nationals of the relevant Member State. The ECJ has developed a jurisprudence which includes principles for the application of Art. 45 (4) (see *Section 1 e*).

The biggest part of posts in the public sector cannot be reserved to nationals; there are also many posts which a given Member State opens by own decision to others than its nationals. For all these posts, the rule is that no discrimination may be made in recruitment, working conditions and human resource management, which would be based upon the nationality of a candidate to a post or of the holder of the post. Furthermore there should be no obstacle to the free movement of workers due to legislation, regulation or practice, unless it is duly justified by imperative grounds of general interest and in conformity with the principle of proportionality.

Detailed rules for the application of free movement of workers in the public sector are to be found in EU legislation on free movement of workers – especially *Regulation 1612/68* – and free movement of persons – especially *Directive 2004/38* – and in the ECJ's case law on the interpretation of EU legislation and of the relevant treaty provisions.

The following is a summary of rules and principles.

1. *Prohibition of direct discrimination based on the nationality of EU citizens*

Any discrimination based upon the nationality of EU citizens is prohibited by the treaty and relevant legislations, with the exception of the possibility to reserve some posts to its own nationals by a member State (see *Section 1 e*).

This means that any EU citizen has a right to:

- take up and pursue available employment in the public sector of another Member State than his(her) own, with the same priority as nationals of that State (see *Regulation 1612/18* Art. 1 (2) and Art. 3)

- be treated in the same way as nationals of the Member State in the public sector of which they are working.

As a consequence (see *Regulation 1612/68* Art. 7) EU law forbids any legislation, regulation or practice reserving specific aspects of remuneration – including supplements of any kind –, promotion, advantages linked to working conditions, access to vocational training, or social benefit or tax advantages linked to work etc., to the nationals of a specific Member State, or giving priority to nationals of one member State.

The right to equal treatment in accessing and pursuing employment applies not only to EU citizens, but also to their spouse and children under the age of 21 (see *Directive 2004/38* Art. 23 and 24) even if they are not EU citizens.

The only exceptions are the possibilities to reserve certain posts to its own nationals by a Member State for recruitment or promotion (Art. 45 (4) TFEU and *Regulation 1612/68* Art. 8, (see *Section 1 e*) and to exclude non nationals of participating in management structures of public bodies (*Regulation 1612/68*, Art. 8).

It is also forbidden to apply any preference based on nationality for dismissal, as well as reinstatement or re-employment.

2. Prohibition of indirect discrimination based on nationality and obstacles to free movement of workers

The principle of non discrimination on grounds of nationality applies not only to direct discrimination, i. e. to legislation, regulations and practices which are based upon the nationality of a candidate to a post or the holder of a post in the public sector, which are necessarily linked to a characteristic of the worker indissociable from his/her nationality.

The principle of non discrimination also applies so-called 'indirect discrimination', i. e. measures instituting or maintaining a differentiation according to Member States which is not linked to the nationality of the relevant person.

As a consequence of the principle of non discrimination, a condition to accessing or pursuing employment constitutes an indirect discrimination if the fact that this condition has not been fulfilled in the Member State which imposes it can place a candidate to a post or the worker at a particular disadvantage with respect to a another candidate or worker who has been able to fulfil the condition within the Member State itself.

Indirect discrimination

The concept of indirect discrimination is used in EU law in many different fields. It derives from the prohibition of discrimination by Art. 18 TFEU.

In the field of free movement of workers, it has been defined by the ECJ in the following terms, in its judgment in *Case O'Flynn* C-237/94, points 20 and 21:

"It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded ***as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage***.

"It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective. "

The case law of the ECJ, as well as EU legislation on discrimination often distinguishes between 'overt' and 'covert' discrimination, a distinction which seems to overlap very often with that between 'direct' and 'indirect' discrimination. As indicated by Advocate General Sharpston in her opinion of 25 June 2009 in *Case Bressol C-73/08*, the distinction between direct and indirect discrimination lacks precision. She therefore proposed (under point 53) that "*as regards discrimination on grounds of nationality, discrimination can be considered to be direct where the difference in treatment is based on a criterion which is either explicitly that of nationality or necessarily linked to a characteristic indissociable from nationality*".

Whereas the existence of a direct discrimination is easy to establish, as it relates openly to the nationality of the candidate or worker concerned, the existence of indirect discrimination may be far more difficult to assess. This difficulty is however of little relevance in the light of the ECJ's interpretation

of Art. 45 (3). As stated by the ECJ, for instance Court in *Case Bosman C-415/93* (emphasis added): "***Provisions which preclude or deter a national*** *of a Member State* ***from leaving his country of origin*** *in order to exercise his right to freedom of movement therefore* ***constitute an obstacle*** *to that freedom* ***even if they apply without regard to the nationality of the workers concerned***".

The prohibition of indirect discrimination and of obstacles to free movement of workers is not only protecting EU citizens from other Member States than the host Member State: it also protects a Member State's own citizens who make use of the right to free movement and later return to their country of origin.

The prohibition of indirect discrimination and of obstacles to free movement of workers applies to conditions for accessing or pursuing employment in a Member State, as well as to conditions for benefiting of a level of remuneration – including supplements of any kind –, promotion, advantages linked to working conditions – like holiday entitlements –, access to vocational training, or social benefit or tax advantages linked to work, etc..

Language requirements

According to *Regulation 1612/68* on freedom of movement for workers, Art. 3 (1):
"*Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:*
"*- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or*
"*- where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.*
"*This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.*"

In *Directive 2005/36* on the recognition of professional qualifications, according to Art. 53: - *Knowledge of languages*:
"*Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State.*"

Such provisions do not mean that Member States are free to impose whatever kind of language condition for access to employment in the public sector or for promotion, or access to levels of remuneration or other advantages linked to employment, etc.

As stated by the ECJ in *Case Groener 379/87* (see *above, section 1 c*) language requirements "*must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States.*"

It is not the language requirement as such which is a prohibited obstacle to free movement, but only the manner in which a language requirements is applied. For instance, a Member State's national should not be automatically exempted to demonstrate his or her knowledge of a language – for instance through a degree or diploma – if nationals of other Member States have to do so. Furthermore, the level of language required should not be higher than necessary for exercising the functions of a given post.

A special mention has to be made of language conditions. A language requirement cannot be considered as necessarily linked to a characteristic indissociable from nationality, in other words, a language requirement cannot be the source of a direct discrimination. It might however be an indirect discrimination or an obstacle to free movement, as there are more than 23 different official languages in the EU member States.

Contrary to other potential obstacles to free movement, language requirements are taken into account expressly in EU legislation, which considers them as legitimate under certain conditions.

No difference should be made according to the Member State where a given condition has been fulfilled – such as the acquisition of professional qualification, professional experience, seniority and the like.

If a condition is easier to fulfil for nationals than for EU citizens of other Member States, it may to be qualified as an indirect discrimination or obstacle to free movement. If a given condition is more difficult to fulfil for somebody who has moved to another Member State – or intends to do so – than for somebody who permanently stays in the Member State where employment is sought or pursued, it also constitutes an obstacle to free movement.

As a matter of principle, professional qualifications an skills, professional experience, seniority and the like, which have been acquired in another than host Member State, have the same value as those acquired in the host Member State, if they are equivalent in content.

As far as equivalence is concerned, two situations may occur.

First, there may exist EU legislation that has to some extent harmonised conditions the for access to employment or to advantages or benefits having a link with employment, or which have set rules for the recognition of qualifications as for instance *Directive 2005/36 on the recognition of professional qualifications*. In such a situation, the relevant provisions of the directive have to be applied, which, in most cases, implies a comparison of curricula and content of training. In some cases recognition of qualifications obtained in another Member States is automatic and in others recognition is first subject to compensation measures. The transposition and application of *Directive 2005/36* is not specific to the public sector and will not be dealt with in this report as far as mutual recognition of diplomas and qualifications are concerned. Issues linked to recognition of diplomas and professional qualifications will be dealt with only in so far as they play a particular role in access to public employment or in working conditions in the public sector.

If an EU directive has not been transposed into national legislation albeit the date for its transposition has expired, it suffices that the relevant provisions of the directive be sufficiently clear, precise and unconditional to render them immediately applicable by Member States' public authorities, notwithstanding diverging rules of the Member State's Law.

Second, if there is no relevant EU legislation for the type of employment sought or pursued – such as for instance employment in the sectors of transport or general administration – Member State's authorities are required to assess in an objective way whether the seniority, professional experience, skills or other, which have been acquired in another Member State correspond to what is required by its national legislation or regulations. A mere formal aspect, like for instance the denomination of a function, may not be taken into consideration in order to conclude to the absence of equivalence between what has been acquired abroad and what is needed according the host Member State's law.

It is possible for the Member State's authority to require the candidate or holder of employment to demonstrate that he/she has acquired the missing experience, knowledge or skills before taking service or obtaining a change in his/her working conditions; this is only admissible if the person's qualification or experience does not correspond with the content of relevant national legislation or regulations, or corresponds only partially to them.

In many Member States, access to, and working conditions in the public sector, are set in detail in laws and regulations, without necessarily taking into account the fact that conditions of access or working conditions might be an obstacle to free movement.

Professional experience and/or seniority is often either a formal condition for access to a recruitment competition in the public sector,

or additional merit points are awarded for it during such a procedure (which places candidates at a higher position on the final list of successful candidates).

Professional experience and seniority

The ECJ has been asked to judge whether such conditions are admissible (see amongst others C*ases Scholz* C-419/92, *Schöning* C-15/96, *Commission v. Greece* C-187/96; *Österreichischer Gewerkschaftsbund* C-195/98; *Köbler* C-224/01, *Commission v. Italy* C-278/03, *Commission v. Spain* C-205/04, *Commission v. Italy* C-371/04).

According to these judgements, previous periods of comparable employment acquired in another Member State must be taken into account by Member States' administrations in the same way as applies to experience acquired in their own system.

When taking into account professional experience and seniority, previous periods of comparable employment completed in the public service of another Member State must be equally taken into account.

Salaries, grades, right to promotion etc. are often determined on the basis of previous professional experience and/or seniority.

If the professional experience and/or seniority acquired in another Member State is not correctly taken into account, these workers consequently either have no access or less favourable access to the other Member State's public sector or must restart their career with a lower salary or at a lower grade.

Guidelines of the European Commission for the assessment of conditions of seniority and professional experience

(Communication 694 of 2002 point 5. 3)

The following guidelines at least have to be respected when adapting national rules/administrative practice:

- Member States have the duty to compare the professional experience/seniority; if the authorities have difficulties in comparing they must contact the other Member States' authorities to ask for clarification and further information.

- If professional experience/seniority in any job in the public sector is taken into account, the Member State must also take into account experience acquired by a migrant worker in any job in the public sector of another Member State; the question whether the experience falls within the public sector must be decided according to the criteria of the home Member State. By taking into account any job in the public sector the Member State in general wants to reward the specific experience acquired in the public service and enable mobility. It would breach the requirement of equal treatment of Community workers if experience which, according to the criteria of the home Member State, falls into the public sector were not to be taken into account by the host Member State because it considers that the post would fall into its private sector.

- If a Member State takes into account specific experience (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 the 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 (in cases where the national system takes into account in a different way the professional experience/seniority of civil servants and employees) may not be used as criterion of comparison.

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

The complaints and Court cases so far have only concerned the taking into account of professional experience acquired in the public sector of another Member State. Nevertheless, the Commission wants to point out that due to the very varied organisation of public duties (e. g. health, teaching, public utilities etc) and the continuous privatisation of those duties, it cannot be excluded that comparable professional experience acquired in the private sector of another Member State also has to be taken into account, even if private sector experience is in principle not taken into account in the host Member State. If an obstacle to free movement is created by not taking into account such comparable experience, only very strict imperative reasons could justify it.

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. The prohibition of indirect discrimina-

tion or obstacles to free movement is not an absolute one – unlike the prohibition of direct discrimination based upon nationality for access to posts other than those covered by the exemption of Art. 45 (4) TFEU.

It results from Art. 45 (3) TFEU that indirect discrimination or obstacles to free movement are admissible if they result from "*limitations justified on grounds of public policy, public security or public health*".

As indicated earlier, such limitations are subject to the application of the principle of proportionality: they have to be appropriate in order to secure the specific Member States' interest of public policy, public security or public health; they have to be necessary in order to secure the said interest, and there should not be another way to secure the same interest while having a lower impact on free movement.

Furthermore, when such a limitation is being applied, the relevant Member State's authority has a duty to give grounds and the decision must be subject to judicial review. As indicated by the ECJ in *Case Kraus C-19/92*: "*any refusal of authorization by the competent national authority must be capable of being subject to judicial proceedings in which its legality under Community law can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken with respect to him*".

As far as professional experience and seniority conditions are concerned, the ECJ has not accepted until now any of the justifications put forward by Member States in the framework of references for preliminary ruling submitted by national courts or infringement procedures against

Member States have been presenting arguments relying on the specific characteristics of employment in their public sector, such as the fact that recruitment was done as a matter of principle by open competition; the wish to reward loyalty; differences in teaching programmes; differences in career structures; reverse discrimination that would harm their own nationals; difficulties in making a comparison; the principle of homogeneity of civil service regulations. In the relevant cases, the justifications either were not presented according to a clear, coherent and convincing argumentation, or they did not meet the requirements of the principle of proportionality.

In some cases the ECJ considers that the policy purposes put forward by a Member State are not covered by the concept of imperative grounds of public interest, which summarizes the indications of Art. 45 (3) and 52 (1) (on the freedom of establishment), i. e. "*grounds of public policy, public security or public health*". It has to be taken into account that most language versions – to start with the Dutch, French, German and Italian versions, which were the first original versions of the EEC Treaty where they first appeared –, use a more restrictive wording than the apparent meaning of '*public policy*', namely '*public order*' (*openbare orde, ordre public, öffentliche Ordnung, ordine pubblico*), hence the notion of "*imperative*" grounds used by the ECJ.

3. *Free movement of workers in the public sector test*

This report contains recommendations as how to apply the principles for the interpretation of Art. 45 (4) and the principles of EU law applicable to free movement of workers in the public sector (see *Chapter 6: Recommendations*).

The report proposes a '*Free movement of workers in the public sector test*' for the use of Member States' legislators and regulators, officials in charge of recruitment and human resource management in public administration and public sector agencies, as well as for courts, tribunals and ombudsmen.

1e. The exemption of 'employment in public administration' in Art. 45 (4) TFEU

As indicated earlier, Art. 45 (4) TFEU is stating that "*The provisions of this Article shall not apply to employment in the public service*".

Regulation 1612/68 on freedom of movement for workers refers only partially and indirectly to the provision of the Treaty, in its Art. 8 which states that a worker from another Member State "*may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law*".

In the absence of any specific directive or regulation that would have established a common understanding of what the Treaty mentions as "*employment in the public service"*, the ECJ had eventually to set criteria in this respect.

In order to understand the case law relating to Art. 45 (4) TFEU, it is indispensable to keep in mind the principles of interpretation which are normally being used in EU law in order to ensure the homogeneity of its application in all Member States and the effective application of the obligations it contains.

Furthermore, it is necessary to take into account that EU law is written in 23 languages and that all language versions have the same legal value.

The English language wording of Art. 45 (4) can be misleading, due to the words "*employment*" and "*public service*". The other language versions, to start which French, German and Italian, as well as Dutch, which were the official languages of the EEC Treaty in 1957 make this wording clearer, but only to some extent.

1. *The meaning of "employment in": nationality as a condition for access to certain posts – three consequences*

"*Employment in*" has the same meaning as the German "*Beschäftigung in*", but the French version says "*emplois dans*", and the Italian version "*impieghi nella*" which would be better translated by "*posts in*". EU institutions, applying the principle that exceptions to the rule have to be interpreted in a strict way, have always understood 'employment in' as meaning 'posts in', as such an interpretation is limiting the scope of the exception.

The ECJ has indirectly faced this issue for the first time in its judgement of 12 February 1974 in *Case Sotgiu* 152/73. The German Federal Court of Labour had asked the ECJ whether having regard to the exception provided for in Art. 45 (4) "*workers employed in the public service of a member state by virtue of a contract of employment under private law, may be excluded from the rule of non-discrimination*".

The ECJ replied (in point 6 of its judgement) that the provision of Art. 45 (4) was "*to be interpreted as meaning that the exception made by this provision concerns only access* ***to posts forming part of the public services*** *and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect*". The first part of the quoted sentence showed that the ECJ understood indeed '*employment in*' as meaning '*posts in*', as indicated by the French and Italian versions of the treaty.

Furthermore the ECJ recalled in the same judgement (under point 11) that "*the rules regarding equality of treatment, both in the treaty and in Article 7 of Regulation no 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.* "

a. As a logical consequence, in order to decide whether a nationality condition may be applied by a Member State for accessing employment in the public service, **Art. 45 (4)**

needs to be applied in a post by post analysis, not to the public service considered as a whole.

b. If a post in the public service is not being reserved to its nationals by a Member State, either on the base of a choice of the public authorities, or because it is not a post covered by the limitation of Art. 45 (4), the provisions of Art. 45 (1 to 3) and the whole of **EU law on free movement of workers** (directives, regulations and ECJ case-law) **are fully applicable to the said post.**

The principle of non discrimination would prohibit opening a post to citizens of some Member States only – with the exception of specific transitional measures foreseen under the accession treaties for new Member States.

Regulation 1612/68 guarantees access to employment in host Member States to spouses of EU citizens or their children who are not themselves EU citizens. If the EU citizens are not dependent workers *Directive 2004/38 on the right of residence and free movement of persons* provides for derogation to the principle of equal treatment of their family members only as far as social assistance and maintenance aid for studies are concerned. It seems therefore that family members of an EU citizen should in any case also be granted access to posts which are not reserved to its own nationals by a Member State.

The legislation or regulations of some Member State only provide for the opening of posts in public employment to EU citizens, whereas others extend it to their family members. It seems that no complaint has been submitted so far to the European Commission, and no national court has referred the question to the ECJ.

2. *The meaning of "*the public service*": public administration*

Where the English version says "*the public service*", the French, German and Italian version all use the wording '*public administration'* (*administration publique*, *öffentliche Verwaltung*, *pubblica amministrazione*).

In the United Kingdom, the expression '*civil service*' is being used as a synonym to public administration, but it is never used for local government, whereas in Ireland and Malta the expression '*public service*' is being used for public administration, both for national and local government.

In many Member States, the concept of "*public services*" is not applied to public sector workers, but to organisations carrying out specific public functions (even in the form of public enterprises).

Insofar as the concept of '*public service*' might have a broader scope than the concept of public administration, the already mentioned rules for interpretation require thus to use the concept of public administration.

The problem which the European Commission and the ECJ had to face is that what is conceived as being part of either the '*public service*' or '*public administration*' varies quite considerably from one Member State to another, and has already been varying quite a lot over time.

If the EU were to accept that each Member State applies its own definition of employment in the public service, the meaning of Art. 45 (4) and thus the scope of application of Art. 45 would vary considerably from one Member State to another. Such a variation would be contrary to the principle of equality between Member States of Art. 2 (2) TEU. It would also be contrary to the principle of uniform application of EU law which is inherent to the system of the treaties.

Furthermore, if the EU were to accept that each Member State apply its own defini-

tion, some might be tempted to use the definition of employment in the public service in order to reserve a significant part of the employment market to their own nationals, in contradiction with the objective of Art. 3 (2 and 3) TEU which is the basis of the free movement of workers.

3. *The meaning of "employment in the public service": functional approach to posts involving the exercise of public authority and the safeguard of general interests*

In the context which has been explained in the previous sections, there is nothing astonishing in the fact that the ECJ formulated its own criteria of the concept of "*employment in the public service*" in order to be applied in all Member States in the same way and to restrict as much as possible the limitation to the principle of free movement of workers which follows from Art. 45 par. 4.

***Case* 149/79 Commission v. Belgium: Criteria for the application of Art. 45 (4) TFEU**

Judgment of 17 December 1980, point 10:

The provision of Art. 45 (4) "*removes from the ambit of Article [45] (1) to (3) a series of* ***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****. 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***".

a. The ECJ is basing its interpretation of Art. 45 (4) on what is the purpose of the limitation to free movement of workers: the presumption that there are posts in the public service which are based on "*a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality*". This is in line with the concept according to which citizenship of the Union shall be additional to and not replace national citizenship.

b. In order to define the posts in question, the ECJ then followed the reasoning given by Advocate General Mayras in his opinion on case 149/79.

On the basis of a comparative examination of the legislation and practice reserving access to public administration to national of the Member States, Mayras proposed as a synthesis two characteristics of the functions exercised by the holders of such posts: they involved
- the exercise public authority,
and
- the safeguard general interest.

Mayras was applying to Art. 45 (4) the usual functional approach to the interpretation of community law which had been developed since the early 1960s by the ECJ.

The ECJ says posts which involve '*direct or indirect participation*'. It means that participation is not only the result of decision making powers formally exercised by the holder of a post, but may also result from the influence he/she may have, for instance, in advising decision makers.

c. Where the English translation of the judgement says '*exercise of powers conferred by public law*' the French language version, following Mayras' opinion says "*exercice de la puissance publique*". The German language version uses a concept which is well known in German law, of "*Ausübung hoheitlicher Befugnisse*", which is equivalent to the French "*exercice de la puissance publique*".

These different wordings rather correspond to the idea of '*exercising public authority*' as a function, whereas '*powers conferred by public law*' wrongly seems to refer to the formal source of those powers.

As a matter of fact in many documents of the EU institutions, '*public authority*' is being preferred to '*powers conferred by public law*'.

d. The ECJ says "*duties designed to safeguard the general interests of the state or of other public authorities*". This makes it clear that the posts which may fall under the definition of Art. 45 (4) are not limited to state public administration or the administration of central government, but may also be posts in local or regional government or in autonomous public bodies.

e. Subsequent judgements of the ECJ have eventually made it clear that these two criteria are not alternative (exercising public authority *or* safeguarding general interests) but cumulative (exercising public authority *and* safeguarding general interests).

f. In order to understand how to apply these criteria to a given case, it is necessary to always keep in mind the purpose of the exception, i. e. the need of "*a special relationship of allegiance*".

The case law of the ECJ is helpful in order to have an idea of the posts which may correspond to the definition and those which do not, but it should be handled with care. Indeed the ECJ always takes into account the specific circumstances in order to say whether the exception of Art. 45 (4) applies or not, i. e. the nature of the tasks which are incumbent to the holder of a post in a given Member State at the time of the case.

In each of the cases decided by the ECJ, the circumstances of the case play a determining role. A list of posts which may be reserved to nationals, or on the contrary of posts which may not be reserved to nationals, might therefore be misleading; it could only have an illustrative nature, but there would be a danger that it be considered as a sort of exhaustive list. Furthermore, a list of posts might become the major parameter for practitioners, instead of the post by post analysis which is required by the functional criteria established by the ECJ.

g. The European Commission adopted a sector by sector approach to the review of Member States' practices for employment in the public sector in the late 1980s.

In 1988 the Commission launched an action which was focussed on access to employment in four sectors: bodies responsible for administering commercial services, public health care services, teaching sector, research for non-military purposes. It was followed by numerous infringement procedures and had the effect that the Member States undertook reforms opening their public sectors. Only three infringement procedures eventually had to be referred to the Court, which confirmed its previous jurisprudence, in 1996.

Such an approach was not contradicting the 'post by post' analysis inherent in the criteria set by the ECJ. It was based on the assumption that in a number of sectors, like health services, education and transport, the likelihood of a post to involve the exercise of public authority and safeguarding general interests was much lower than in general public administration. In these sectors, posts which may be reserved to nationals if they involve the exercise of public authority and safeguarding general interests are much less numerous than in general public administration.

Conversely, posts in general public administration may not be reserved to nationals if they do not involve the exercise of public authority and safeguarding general interests.

4. Exercising public authority and safeguarding general interests on a regular basis?

Whereas Art. 45 (4) on free movement of workers excludes "*employment in the public ser-*

vice" from the application of the principle of non discrimination, Art. 51 on the freedom of establishment excludes "*activities which in that State are connected, even occasionally, with the exercise of official authority*". It might thus seem logical to apply the criteria for the definition of "*employment in the public service*" without making any distinction between posts where the exercise of public authority and the safeguard of general interest happen in a permanent way and those where it only happens occasionally.

In its judgement on *Cases Colegio de Oficiales de la Marina Mercante Española* C-405/01 and *Anker* C-47/02, the ECJ admitted that in some circumstances, the principle of non discrimination might also not be applicable to (private) employment involving the exercise of public authority and the safeguard of general interest (see *Section 1 f*).

The judgement includes a very interesting statement (under point 44): "*It is still necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities.* "

There has been no opportunity yet for the ECJ to say whether the condition that functions be exercised "*on a regular basis*" and do not represent "*a very minor*" activity applies only in cases where such functions are exercised in private employment, of if they are to be extended to employment by public authorities.

Given that the Court says (further under the same point) that "*safeguarding the general interests of the Member State concerned, which cannot be imperilled if rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States*", one might assume that the same reasoning could be deemed valid for employment by public authorities. On the other hand, the indication of Art. 51 "*even occasionally*" could be used in order to support the contrary opinion.

At any rate, it seems worthwhile recommending to take the permanent or occasional character of exercise of public authority and safeguard of general interest into consideration when deciding to reserve a post in public administration to national of its Member State.

5. *Free movement of workers in the public sector test*

As already mentioned under *section 1* d, this report contains recommendations as how to apply the principles for the interpretation of Art. 45 (4) and the principles of EU law applicable to free movement of workers in the public sector.

This report proposes a *Free movement of workers in the public sector test* (see *Chapter 6: Recommendations*) for the use of Member States' legislators and regulators, officials in charge of recruitment and human resource management in public administration and public sector agencies, as well as four courts, tribunals and ombudsmen.

1f. Posts under private employment involving the exercise of public authority and the safeguard of general interests

The post by post analysis explained in *section 1*e applies without any doubt to employment by all public authorities in a Member State. The functional approach adopted by the ECJ could lead to consider that the public law status of the authority is not necessarily relevant, in the same way as the public law or private law nature of the contract of employment was deemed irrelevant by the ECJ in *Case Sotgiu* 152/73. In its judgment on *Case Italy v. Commission* C-28/99, the ECJ has however stated (under point 25) that "*the concept of employment in the public service does not encompass employment by a private natural or legal person, whatever the duties of the employee. Thus, it is undeniable that sworn private security guards do not form part of the public service. Consequently, Article 48(4) of the Treaty is not applicable.* "

In more recent case law of the ECJ – known as the "captains" case law that followed *Case Colegio de Oficiales de la Marina Mercante Española* C-405/01, the ECJ examined whether the posts of captains of merchant marine were corresponding to the criteria of exercising public authority and safeguarding general interest. Captains of merchant marine are in most cases employed by private companies.

In the first of those judgements, on case *Colegio de Oficiales* C-405/01, the ECJ says (under point 43) that "*the fact that masters are employed by a private natural or legal person is not, as such, sufficient to exclude the application of Article 39(4) EC since it is established that, in order to perform the public functions which are delegated to them, masters act as representatives of public authority, at the service of the general interests of the flag State.* "

Some doubts remain therefore as to the fact that Art. 45 (4) TFEU is only applicable to public employment and "*does not encompass employment by a private natural or legal person, whatever the duties of the employee*".

As this report is focusing on public sector employment, the question whether and to what extent some posts in the private sector could be exempted from the principle of non discrimination will not be further discussed, with the exception of the consequences of the judgement in *Case Colegio de Oficiales* C-405/01 on the legislation of Member States (see *Chapter 4*).

2) SPECIFIC FEATURES OF MEMBER STATE'S PUBLIC SECTOR

2a. A legal perspective on the public sector and free movement of workers

The issues of free movement of workers in the Member State's public sector differ from the more general issues of free movement of workers in EU law, as a result of the dual nature of Member States. In EU law, Member States have a specific position due to the fact that they are the parties to the EU treaties. As such, Member States have specific duties and rights – especially under the principle of sincere cooperation of Art. 4 TEU (see *Section 1*) –, which they have negotiated, signed and ratified, whereas private persons are simply the addressees of duties and rights which the Member States agreed to set down in the treaties and EU legislation.

For EU law, as already mentioned, the concept of Member States is not limited to state authorities in the formal sense of constitutional law, but extends to all public authorities, including regional and local authorities as well as autonomous public bodies. For the purpose of free movement of workers, Member States' authorities have furthermore a dual function.

First, public authorities have the powers to act as regulators of employment in the public service according to the Member States' constitutional rules, through the adoption of legislation and regulations applying to workers in the public sector as well as in the private sector.

Second, public authorities also act as employers. In both functions they are bound by the duties of Member States, especially by the duty of sincere cooperation.

2ai. Member States as regulators of employment in the public service

Member State's authorities, acting as regulators of employment in the public service on the basis of the competence they have according to their Constitution, have a number of duties deriving especially from Art. 45 TFEU on free movement of workers and the EU legislation that implements it (see *Section 1*).

More generally Member States have duties on the basis or Art. 4 TEU on sincere cooperation, on the basis of the Charter of fundamental rights and on the basis of the provisions of the TFEU, especially those relevant to free movement and the right of residence of EU citizens.

The duties of Member States can be summarised in the obligation to eliminate sources of direct and indirect discrimination between their own nationals and other EU citizens – with the proviso of Art. 45 (4) (see *Section 1*), the duty to protect EU citizen's rights deriving from the treaties and the Charter, and the duty to ensure enforcement of EU law by all the public authorities.

1. The duty to give grounds and provide for remedies

According to the case law of the ECJ following its judgement in *Case Heylens* 222/86, if a decision by public authorities has a negative impact on the right to free movement of EU citizens, such a decision has to "*be made the subject of judicial proceedings in which its legality under community law can be reviewed, and [it must be possible] for the person concerned to ascertain the reasons for the decision*". In other words decisions impacting on the rights of EU citizens have to be motivated and judicial review of these decisions has to be available. These rights have been restated in art. 19 (1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fielrs covered by Union law") and Art. 41 (2) c of the *Charter of fundamental rights* on the right to good administration.

If necessary, Member States have to amend their legislation in order to provide for the possibility of judicial review and the obligation to motivate decisions.

2. Liability for breach of EU law

Furthermore, as Member States are responsible to ensure enforcement of EU law, they may be subject to infringement procedures initiated by the European Commission or another Member State – under Art. 258 and 259 TFEU. Eventually these infringement procedures may end up with a condemnation of the Member State by the ECJ, and in case the Member State does not take the necessary measures to comply with the judgement of the Court, a lump sum or penalty may be imposed by the Court on the Member State.

This liability of Member States eventually rests upon central government, as it is the Member State's central government to which the Commission will address communications and reasoned opinions in the framework of the infringement procedure of Art. 258 TFEU. It is the Member State's central government who will stand in court under Art. 259 TFEU and will have to pay a lump sum or penalty if the ECJ so decides under Art. 260 TFEU.

Central government has therefore a specific duty to monitor the way in which Art. 45 TFEU and the EU legislation on free movement of workers is being applied by regional and local government as well as specialised autonomous public authorities. In exercising its monitoring duty, central government clearly remains bound by the principles and procedures which may be foreseen by the Member State's Constitution. Central government has however the duty to inform the Commission of what is going on in regional and local or autonomous authorities even if the latter are independent from central government on the basis of the Constitution.

Regional and local authorities as well as specialised autonomous public authorities have also the duty to comply with EU law. A failure to comply on their part could lead to a condemnation of their Member State resulting in an obligation for central government to undertake the necessary steps to ensure compliance.

In practice, a good exercise of its monitoring duty by central government is usually enough to ensure that regional and local, or autonomous authorities are aware of the necessity to comply with EU law and how to do so. Involving the said regional and local, or autonomous authorities in the exchange of views with the European Commission is helpful in this respect.

Furthermore, it has to be stressed that the principle of sincere cooperation of Art. 4 TEU implies not only that Member States respect EU law (they "*shall refrain from any measure which could jeopardise the attainment of the Union's objective*") but requires a proactive attitude as they have to "*facilitate the achievement of the Union's tasks*".

2aii. Member States' public authorities as employers

There is a specific feature of employment in the public sector: contrary to private employers, which are not an authority of the Member State, public authorities are considered as an expression of the Member State not only when acting as regulators, but also as employers. As mentioned earlier, even if a failure to fulfil the obligations imposed upon Member States by EU law is to be attributed to an autonomous public authority, the Member State is liable. This is also true if the public authority acts as an employer, not as regulator.

EU law is neutral with respect to the internal organisation of Member States: on the basis of the Treaties, EU institutions consider that the choice of internal structures of the state and public authorities is a matter only of Member States' competence, and that a Member State can never escape responsibility for the action or inaction of public bodies in shielding behind its constitutional rules.

The neutrality of EU law towards the internal organization of Member States is usually known as the principle of '*organizational and procedural autonomy of the Member States*'. This principle is not indicated in express words in the Treaty, but it is clearly a consequence of the principle of conferral, according to which "*competences not conferred upon the Union in the Treaties remain with the Member States*" (Art. 4 TEU). Indeed the treaties do not confer any competence to the EU in the organization of and procedures applicable by public authorities in the Member States, with the sole exception of some procedural rules in sectorial policy legislation.

The principle of organizational and procedural autonomy means, for instance, that public authoritieshave the right to choose freely between a career system or post based system for their civil service; to choose between different recruitment systems; to make policy choices in order to ensure attractiveness of public sector employment; and to

make policy choices when using the exemption of Art. 45 par 4 TFEU etc. (see *Section 2 b*).

The principle of organisation and procedural autonomy does not imply however that Members States and their authorities are entirely free in their choices on organisation and procedure: they have to take into account the principles of EU law such as non discrimination, the duty to give reasons and to provide for judicial review, and the right to free movement and residence of EU citizens.

The fact that public authorities as employers are considered as an expression of the Member States places a special duty of care on their officials: they are also responsible for the correct enforcement of EU law rules on employment in the public sector.

Furthermore, the liability of Members States for breaches of EU law and the principle of sincere cooperation also mean that central government of Member States has to monitor practice of public employers as regards free movement of workers, irrespective of the degree of independence of the relevant authorities.

2b. A public administration/public management perspective on the public sector and free movement of workers

1) Public authorities' freedom of choice in organising their civil service

Member States' public authorities have been making different choices in the organisation of their civil services, not only when it comes to reserving the posts in public administration to their nationals. As already mentioned, this latter choice is limited by the principles for the interpretation of Art. 45 (4) (see *Section 1*).

The legislation and regulations applicable to public sector employment vary from a Member State to another when it comes to the legal nature of public employment. In some cases, employment rests upon specific concepts and tools of public law, in other cases civil and labour law are applicable to contracts between public employers and their personnel. In most countries, there is a mix between both solutions: some categories – or posts – are under a public law system and others under a private law system. The solutions or mix of solutions have also often changed over time in the same country.

As indicated by the ECJ in *Case Sotgiu* 152/73 (see *Section 1*), EU law is indifferent with respect to applying public or private law in public sector employment. EU law requires however from Member States' authorities to undertake the necessary in order to ensure the compatibility between the content of the legal status of public workers – be it under public or private law – and free movement of workers as results from Art. 45 TFEU and the relevant EU legislation and ECJ case-law.

Member States also have made and are making different choices in their organisation of career progression of public workers. In some cases, the system, known as '*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 for instance the traditional system in France and Germany.

The career system is also the traditional system in and Belgium and Luxembourg, and it is thus not astonishing that the EU civil service – which was set up in the 1960s – is

based on the career system. In other cases, the system, known as '*post based system*' or '*employment system*', is based upon the idea that the public authority is mainly interested in filling a specific post trough 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. The principle of organisational autonomy means that Member States authorities are not constrained in any means by EU law to chose between one system and the other.

More specifically, the principle of organisational autonomy means that the post by post analysis which has to be done in order to decide whether a nationality condition is admissible under Art. 45 (4) TFEU (see *above Section 1*) does not require to opt for an '*post based system*'.

As a matter of fact, the ECJ had to consider this aspect in the above-mentioned judgement in *Case Commission v. Belgium* 149/79. It indicated at point 22 that the discrimination in career terms that would derive from reserving certain posts in the public service to nationals was acceptable in a career system as the ensuing restriction to free movement would be in line with what "*is necessary to ensure observance of the objectives of the provision"* of Art. 45 (4).

The systems of civil service employment also differ from one country to another in so far as careers are organised on the basis of service with one single employer in some cases – as very often happens in the private sector –, whereas in some other cases, careers are organised on the basis of the public service as a whole – a solution which is sometimes similar in the private sector for big consortia. This is often the case for careers in the central government's public administration, or for careers involving mobility between different local authorities, for instance.

The choice between a career based on a single employer or on a broader concept of the public service may derive from a policy designed to ensure the attractiveness of the civil service to young and talented candidates; or from the idea that mobility between different employers is an asset for a well managed civil service; or even it may be considered as a necessity in order to have the right skills present in public administration.

As for the choice between a career system or a post based system, the choice to organise careers in the public sector as a whole or in a large part of the public sector is not conditioned by EU law. Whatever the choice made, what must be ensured is that no direct or indirect discrimination is made on the basis of nationality – apart from reserving certain posts to nationals in application of Art. 45 (4) TFEU.

This freedom of choice explains why the ECJ, when asked whether taking into account previous experience or seniority is compatible with EU law, insists that acquiring the relevant experience or seniority may not be restricted to the host Member State, but has to take into account experience or seniority acquired in other EU Member States.

Last but not least, public authorities have also a specific position due to the fact that their task is usually to implement Member States' as well as regional or local authorities' policies. Public authorities may therefore place specific requirements on recruitment or careers of their employees. The specific requirement may be a condition of nationality if deemed that the posts to be filled imply "*a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality*" in application of Art. 45 (4) TFEU (see *Section 1*).

One of the specific issues which has been submitted to the ECJ is the issue of language

requirements, in the framework of a policy to maintain and develop an national or regional language. As already indicated, the ECJ has admitted such a requirement in its judgement on the *Groener* case (see *Section 1*).

In making policy choices, Member States have however to take into account the impact that the resulting legislation or regulations might have on free movement. Limitations to free movement of workers are considered admissible only if they correspond to "*limitations justified on grounds of public policy, public security or public health*" as foreseen in Art. 45 (3), provided they are based on objective, stable and transparent criteria, and if there are no other less restrictive means of pursuing the same objectives (see *Section 1*).

2) Free movement of workers as an asset for public management

The consequences of Art. 45 TFEU and of EU legislation on free movement of workers are often being presented as a series of constraints for public authorities, especially in specialised literature (academic writing as well as so-called 'grey literature', i. e. more or less official reports and recommendations).

Experience since the second half of the 1980s shows that the principle of free movement of workers and its consequences has also been an important asset for public management, as it pushes public authorities in the Member States to think further about existing legislation, regulations and practices impacting upon employment in the public service.

The principle according to which a condition of nationality can only be required for a given post and not on a sector basis, or on the basis of the legal nature of employment, has led a number of authorities of Member State to undertake a post by post screening of employment in their civil service and public administration. Such a screening had not been deemed necessary previously, under the regulations applying to their career system; this did not mean that Member States therefore changed from a career system to a post based system, but they took the opportunity to review the traditional type of links between access to specific positions and career.

In the same way, the necessity to remove discriminations based on grounds of nationality in the legislation, regulations and practice of public employment led a number of public authorities to review the rationale for existing regulations and practices which had discriminatory consequences.

As for obstacles to free movement other than those involving discrimination on the basis of nationality, the need to be able to justify them on imperative grounds of general interest has also triggered similar screening exercises.

To summarise, one may say that the functional approach taken in EU law far better fits the needs of public management than a formal approach to law, as is often applied in the practice of public administration. The functional approach indeed prompts public authorities to think about the purpose of regulations and practice and to link them to policy choices and the guarantee of fundamental rights.

2c. A labour market perspective on free movement of workers in the public sector

The importance of public sector employment in EU the labour market is indicated by statistics on the importance of the public sector in Member States: the public sector covers from 12 % to more as 33 % of the total employment in EU member States.

1) More than 20 % of total employment

The relevant statistics are not easy to handle, as there is no common definition for statistical purposes of employment in the public sector, employment in public administration, employment in the civil service, etc. This is due mainly to two factors. First, national statistics tend to be assembled in most countries on the basis of formal legal definitions of the civil service, public administration and the public sector. Second, the methods used in different Member States to compile and aggregate statistics on public employment also differ, and are often not updated on a yearly basis (see *Chapter 2*).

These two reasons make it difficult to compare data from one Member State to another, and it is therefore advisable to refrain from such comparison in assessing compliance to EU law. It is also advisable to be extremely cautious in using 'best practices' on a comparative basis for policy recommendation.

With these proviso in mind, it is however useful to look at statistical data in order to get an idea about the impact of limitations to free movement of workers in the public sector on the whole of the EU labour market.

The table is based upon employment statistics of the International Labour Organisation (ILO), which the author of this report has used in order to have country by country indications (see *Country files*).

Public employment in EU *Member States*

	Public	*% of total*
Belgium	905 500	20,6%
Bulgaria	627 600	26%
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%
Cyprus	67 100	17,60%
Latvia	320 100	31,90%
Lithuania	430 800	33,30%
Luxembourg	37500	12%
Hungary	822 300	29,20%
Malta	46 900	30,70%
Netherlands	1 821 600	27%
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%

The column '*Public*' contains in most cases the total number of workers in the entire public sector, including public enterprises, or in some cases only the government sector: ILO data are not the same from one country to another. Most of the data are for the year 2008, but for some countries, only older data are available.

In most Member States the share of employment by public enterprises is very limited; thereforethe percentage of total employment indicated for public sector employment is representative of the importance of the sector in the labour market.

More details are given in *Chapter 2* and in the *Country files* of Part II of this report, in order to enable the reader to understand what is the respective share of employment by central government as opposed to regional and local government.

On the basis of the somewhat approximative data assembled here, it is possible to say that the public sector in the EU represents on average about 20,30 % of total employment (42 330 800 out of a total of about 209 500 000). It is therefore important that free movement of workers be at least as easy to accomplish in the public sector as in the private sector.

2) *A rather stable sector of employment*

Whereas there has been a tendency to decrease of public sector employment during the two last decades of the XXth century, due to privatisations and budgetary constraints, the public sector labour market has since then become much more stable. The following comments were made by the *European Foundation for the Improvement of Living and Working Conditions* in a report of 2007 on *Industrial Relations in the Public Sector* (on p. 4, see *References*).

"*[...] the trend of decreasing employment in central government [...] and public sector employment, which existed throughout western Europe in the 1980s and 1990s, appears to have ceased in the years under examination, or to at least have developed in a more diversified fashion across the countries. In only 10 of the 26 countries surveyed – Austria, Denmark, Finland, France, Hungary, Italy, Malta, the Netherlands, Romania and Spain (data for Portugal were not available, while Sweden was not included) – has there been a decrease in the number of employees in central government, usually of between just 1% and 3%. The two notable exceptions in this instance are Austria and the Netherlands, where reductions of 28% and 7% respectively were recorded. In the case of Austria, the sharp decrease from 2003 to 2004 can be attributed to the privatisation of postal and telecommunications services, which in several other countries occurred in the late 1980s or in the 1990s; in other cases, it can be attributed to decentralisation processes or simply to budgetary constraints. Conversely, central government employment increased in 16 countries: in four of these (Belgium, Estonia, Lithuania and Poland), an increase of more than 10% was recorded, while an even higher increase of over 20% was observed in two countries (Bulgaria and Latvia). It is worth noting that among the 10 new Member States (NMS), together with the then two acceding countries Bulgaria and Romania, only Hungary registered a decline, albeit a modest one. The 'older' EU15 Member States (excluding Portugal and Sweden) are more equally divided between those that registered a decline in central government employment (seven countries) and those in which an increase was recorded (six countries).* "

3) *A complex sector of employment with important needs in specialised skills*

There seem to be no EU wide studies of the public sector labour market. Public sector labour market seems also to be a topic which is only rarely addressed in a systematic way in handbooks of labour economics. It is therefore difficult to make useful scientifically based statements.

It is however possible to rely on some experience, from various Member States, which shows that they are benefiting from free movement of workers in order to recruit nurses, medical doctors and teachers, which enables them to compensate the lack of candidates for these posts in some regions or even in the whole country. In the sector of research and university education, most Member States are trying to attract foreign researchers and professors and to give incentives to their own researchers and professors to get experience abroad.

Furthermore, it is generally acknowledged in public management literature – as well as in public administration reform programmes – that mobility in public administration is an important factor in promoting innovation and better services. In the framework of European integration, getting experiences from other Member States' public services through mo-

bility of workers should be an even more important asset for public administration.

In border regions, local administration would probably derive immediately relevant benefits from employing foreign workers, as indicated by the experience of Denmark (see *Country files*).

3) PRINCIPLES FOR THE INTERPRETATION AND APPLICATION OF EU LAW TO THE FREEDOM OF MOVEMENT OF PUBLIC SECTOR WORKERS

The author of this report deems it worthwhile to summarise here the principles that have to be followed for the interpretation and application of EU law to the freedom of movement of public sector workers.

It has to be underlined that these principles are not specific to the issues of free movement of workers in the public sector, or to the issue of free movement of workers more as a whole. They apply more generally to the implementation of EU policies, especially in the perspective of EU citizenship and of the internal market.

This report contains furthermore recommendations as how to apply the principles for the interpretation of Art. 45 (4) and the principles of EU law applicable to free movement of workers in the public sector (see *Chapter 6: Recommendations*).

The report proposes a '*Free movement of workers in the public sector test*' for the use of Member States' legislators and regulators, officials in charge of recruitment and human resource management in public administration and public sector agencies, as well as for courts, tribunals and ombudsmen.

3a. The functional approach: looking for effectiveness in applying the principle of free movement and related norms

When applying EU law, the primary question to be asked about any norm, whether contained in the treaties, in EU legislation (directives, regulations or decisions) or expressed in the case law of the ECJ, is the question of its purpose.

The purpose of EU norms derives from the objectives which are set in the treaties – in the first line the objectives of Art. 3 EU Treaty –, and in the more detailed objectives which a set in treaty clauses relevant to the matter at stake and in EU legislation.

If there seem to be different options in the way a norm of EU law can be interpreted or applied, the option which needs to be adopted is the one which ensures the best possible correspondence with the purpose of the norm.

This way of reasoning has been first developed in the case law of the ECJ, where it is known as the '*effet utile*' (effectiveness) approach: the idea is that in applying the norm one has to look for the impact such an application has, in order to ensure that the norm be effective according to its purpose.

3b. Restrictive interpretation of the exceptions or limitations to the principle of free movement

There are clauses in EU law which are an exception to a more general principle: for instance, in Art. 45 TFEU, the principle of freedom of movement of workers is limited by a special clause in par. 4 on employment in the public service.

If there seem to be different options in the way an exception to a general principle can be interpreted or applied, the option which needs to be adopted is the one which has the lesser impact in limiting the application of the principle.

3c. Duty of consistent interpretation of national law with EU law

There are often norms in national law (in legislation, regulation, in the case law of courts, or even in the Constitution) which deal with the same matter as EU law norms or have an impact on their application: labour law and the law of public service employment have an impact on free movement of workers.

If there are different options in the way national law can be interpreted or applied, the option which needs to be adopted is the one which is in line with the content of the EU norm, and which ensures that the purpose of the EU norm be attained.

3d. Direct applicability of the principle of free movement and primacy of EU law on national law

There are often norms in national law which deal with the same matter as EU law norms, or which have an impact on their application. If the EU norm (in the treaties or in EU legislation) is sufficiently clear, precise and unconditional to be applied to a given situation, it has indeed to be applied by public authorities, even if there is a norm of national law which says the contrary.

For instance, a norm in a Member State's legislation which would reserve to its own nationals posts which do not by any means only involve the exercise of public authority and the safeguard of general interest, may not be applied, because Art. 45 TFEU – with the relevant case-law of the ECJ – is deemed sufficiently clear, precise and unconditional in prohibiting a discrimination based on nationality for such posts.

According to the principle of direct applicability a norm which is sufficiently clear, precise and unconditional has to be directly applied by public authorities and courts in the Member States.

In case of conflict with a national norm the EU norm prevails over the national norm; this in turn is known as the principle of primacy. The difference with the duty of consistent interpretation is that there is no possibility to interpret the national norm in conformity with EU law. On the other hand, the duty of consistent interpretation applies for all EU law norms, even if they are not sufficiently clear and precise to be directly applicable.

3e. Proportionality of national measures having a limiting impact on the principle of free movement

There are cases where the treaties or EU legislation provide for the possibility of national legislation, regulations or practice to limit the effects of a norm of EU law. For

instance, Art. 45 (3) TFEU provides for the possibility to limit the rights it establishes for the implementation of free movement of workers "*on grounds of public policy, public security or public health*".

In such a case, in line with the principle that exceptions have to be interpreted in a strict sense, the proportionality of the national norm or practice needs to be tested by the public authority or court in charge of applying the relevant norm.

The same proportionality test would be applied by the European Commission or the ECJ when assessing the conformity of the national legislation, regulation or practice with EU law.

The so-called '*proportionality test*' consists in three steps, if one follows it systematisation by German legal practice, which inspires the case law of the ECJ and many other EU Member States.

First, the appropriateness of the norm or practice needs to be assessed: is the legislation, regulation or decision an appropriate means in order to secure the said Member States' policy objectives?

Second, the necessity of the norm or practice has to be assessed: is it necessary for the Member States' authorities to adopt a legislation, regulation or decision in order to secure a specific Member States' interest of public policy, public security or public health?

Third, it has to be checked if there could be a different wording of the Member State's law or if a decision could be adopted by Member States' authorities that would secure the said interest while having a lower impact in limiting free movement of workers.

A good example of the application of the proportionality test is given by the reasoning of the ECJ in the *Groener* case (see *Section 1*).

Irish authorities, wanting to secure a public policy of development of the use of the Irish language, decided to impose the knowledge of Irish as a condition to access the public education service. Note that as such this is not a discrimination based on nationality, as a big number of Irish citizens do not speak fluently Irish and as they also have to demonstrate their knowledge of Irish.

The language requirement was deemed necessary because the Irish government had decided to adopt a policy to ensure that the Irish language be known by its population.

It was deemed adapted because speaking Irish in public schools contributes to the development of the practice of Irish language.

The last question to answer was if another measure, less limitative for Mrs Groener, could be adopted. As it seems that the level of knowledge of the Irish language that was requested corresponded to the level needed in order to speak Irish in the framework of professional education, there existed no alternative measure in order to achieve the same goal as well.

What is always central in the proportionality test is to keep in mind the purpose of a given measure.

3f. Obligation of public authorities to give reasons and to provide for remedies

Art. 19 TEU says that "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*". This principle had already been deducted by the

ECJ from the application of the '*effet utile*' approach to enforcement of community law. In its judgement in the *Heylens* case (see *above section 2*, the ECJ indicated that, in order to ensure effective legal protection of the free movement of workers, authorities in Member State had the duty to give reasons if they adopted a decision that would limit the exercise of that freedom; and that they had the duty to ensure that judicial review of the decision was accessible to the person affected.

The duty to give reasons, such as the ECJ understands it, has a clear link with the functional approach to EU law: public authorities need to explain why their decision is adapted to the purpose they are pursuing with a national policy.

As the ECJ has repeatedly said, the decisions by Member States authorities are admissible only if justified by imperative requirements in the general interest based on objective, stable and transparent criteria – and if there are no other less restrictive means for pursuing the same policy goals. The objectivity and transparency of such criteria are best guaranteed by the systematic application of the duty to give reasons.

The reasons why Member States have to provide remedies for the persons affected by decisions restricting their rights are twofold.

First, it is the consequence of the fundamental *Right to an effective remedy and to a fair trial* guaranteed by Art. 47 of the Charter.

Second, it is only in the framework of a judicial action that the ECJ can be asked to give the exact interpretation of EU law if there is a doubt about its meaning or its conformity to the treaties, in the framework of an application form preliminary ruling under Art. 267 TFEU.

National authorities which are not independent courts or tribunals cannot make such an application and they are thus not in a position to get a binding explanation when there are doubts about the exact meaning of a provision of EU law or about the fact that such a provision complies with the requirements of the treaties.

Chapter 2

General Data
Required for the Assessment of Issues of
Free Movement of Workers in the Public Sector

As mentioned in the *Introductory Chapter*, this report has been established on the basis of, amongst others, information provided by responses to the questionnaires sent by the Commission to Member States, as well as information provided in the yearly reports of the Network of experts in the field of free movement of workers. It also relies upon the information provided in the documents established by EUPAN (see *References*) especially the report "*Cross-Border Mobility of Public Sector Workers*", which was established for the Austrian Presidency of the EU in 2006.

To the view of the author of this report, these different responses and reports are very representative of how the issues of free movement in the public sector are perceived by practitioners and by experts of free movement of workers in the Member States. It seems therefore necessary to make some general comments on data relating to Member States, because they are especially relevant and have to be taken into account in order to understand the state of play in each specific Member State and to enable some comparison between Member States.

This *Chapter* follows the same structure as the first Section of each *Country file* and contains a number of comments which aim at facilitating the use of the information contained in the *Country files* of Part II of this Report.

1. Date of Applicability of EU Law: The Time to Adapt

The date of applicability of EU law has to be kept in mind in order to assess existing legislation, regulations and practice in Member States. Two dates are particularly relevant as far as free movement of workers in the public sector is concerned.

First. *Adoption, on 15 October 1968, of Regulation 1612/68 on free movement of workers within the Community.*

Regulation 1612/68 was much more far reaching than the previous community Regulation (38/54 of 25 March 1964). It entered into force immediately after adoption, and was followed a year later by the end of the transitional period for the establishment of the common market, on 1 January 1970, as provided in the EEC treaty. The end of the transitional period led to the multiplication of references for preliminary ruling submitted by national courts to the ECJ, which soon indicated that Art. 48 EEC Treaty (now 45 TFEU) was directly applicable in Member States, even to situations that were not covered by *Regulation 1612/68*.

The early seventies may thus be considered as a starting point for the development of common rules and principles for free movement of workers for the first nine Member States - Greece became a Member State on 1 January 1981, but a transition period of 7

years was foreseen for the application of free movement of workers.

Member States adapted incrementally their general legislation, regulations and practices relating to free movements of workers. Art. 8 of *Regulation 1612/68* provides that "*A worker who is a national of a Member State and who is employed in the territory of another Member State [...]may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law [...]*". They could thus take into consideration the exception contained in what is now Art. 45 (4) TFEU. The wording of *Regulation 1612/68* was nevertheless indicating that free movement was the principle in the public sector, as it only envisaged "*holding an office governed by public law*".

The reference for preliminary ruling case *Sotgiu* 152/73, which was introduced by a German court in 1973, was answered by the ECJ on 12 February 1974 (see *References*). The Court confirmed that no discrimination on the basis of nationality was allowed between holders of offices in public administration, be they governed by public law or by private law. Nevertheless, information from all 27 EU Member States shows that in many instances this principle is not yet fully understood (see *Chapter 4*).

Second, the first judgement of the ECJ in *Case* 149/79 *Commission v. Belgium* on 17 December 1980.

From this date onwards, the criteria for application of Art. 45 (4) TFEU were clearly spelt out, i. e. the criteria to be followed by Member States which want to reserve posts in public administration to nationals.

Previously to December 1980, it is most probable that public authorities in Member States thought that the definition of posts in public administration was a purely internal matter and that there was only a limitation relating to the legal nature of the working relationship (public law). At any rate they thought that their existing legislation, which was usually reserving access to the civil service to their citizens, was not contrary to Community law.

The Commission, however, was already convinced of the need of common criteria for all Member States, as demonstrated by the fact that it took the initiative of the infringement which lead to *Case* 149/79 *Commission v. Belgium.*

It took until the end of the 1980s before awareness of the necessity to apply the common criteria indicated by the Court was achieved in all Member States (twelve at that time). This lead to incremental reform of the existing legislation, starting with the Netherlands in the 1988, where taking into account the criteria set by the court in December 1980 coincided with new orientations in immigration policy and civil service management .

Differently from the twelve first Member States, the other fifteen, which acceded to the EU since 1995, were in a position to have a clear picture of the significance of what is now Art. 45 TFEU since the beginning of their membership of the EU, including the exception provided by paragraph 4.

Confronting the evolution of legislation and regulations in Member States with these two dates, it clearly appears that adapting national law to the requirements of Art. 45 TFEU is very often a lengthy process. Questions of policy, the action of trade unions, and technical legal problems often delay the process of adaptation – even when the relevant authorities' good faith cannot be questioned.

In legal terms, the obligation to comply with EU law starts on the day of accession – or at the end of the transition period, if relevant. Nevertheless, the fact that the necessary legislative and regulatory reforms have not

been undertaken in time does not mean that they will not be in future. Understanding the way the issue of free movement in the public sector has been handled in other Member States may be very useful for the governments which still have to adapt their legislation and regulations.

Since at least the second half of the seventies, attention to the different specific issues of free movement of workers in the Member State's public sector which are discussed in this report has been constant in the Commission, and especially in DG employment. Also the European Parliament has given attention to the issue of free movement in the public sector, as there have been referrals by the public to its Committee on Petitions.

The picture seems to be somewhat different when it comes to the public authorities in Member States, as well as academia. It seems that their attention has focused more on the limitations of access to certain posts for nationals. Attention was high just after the ECJ's judgement in *Case* 149/79 *Commission v. Belgium*, after the Commission's *Communication on free movement of workers and access to employment in the public administration*, which was addressed to Member States' governments on 5 January 1988, and published in the Official Journal of the EEC n° C 72 of 18 March 1988, and after *Communication 694 of 2002*, which contained a specific section about the public sector, including guidelines (see *Chapter 4*).

Since then, attention to the issues of free movement of workers in the public sector by practice and academia has seldom be shared at the same moment throughout the EU, as it has usually been triggered by a either a judgement of the ECJ, or a legislative or regulatory reform in one or the other Member State. An exception to this general trend is the work of *Human Resources Working Group*, a working party of *EUPAN* (*See References*).

To the view of the author of this report, the variations in attention given the different issues relating to the free movement of workers in public sector is a factor which contributes to explain the important differences which can be noticed from one Member State to another.

2. State Form and Levels of Government: Organisational Autonomy but No Justification for Non Compliance

As indicated in the *Introductory Chapter* of this report, the internal organisation of Member States is a matter of their competence only. The only limitations stemming from EU law are not impacting on the existence of this competence, which exclusively remains with Member States. It impacts, only marginally, on the way Member States exercise their exclusive competence.

Member States have therefore full discretion in organising their State in a more or less centralised form, or as a federation or, any other choice. One should not be mislead by the fact that some Member States have reformed their internal structure in view of accession to the EU, e. g. Malta which has set up local councils in order (amongst other reasons) to be able to normally participate in the functioning of the Committee of the Regions.

It is however necessary to point to an important issue, which is not well perceived in many Member States, by practice and by part of academia. The internal structure of a Member State is never acceptable as a justification for non compliance. This principle has been repeatedly expressed and applied by the ECJ, but it is worthwhile to stress that the ECJ's position is by no means original: it coincides with the general principles of international

public law, according to which States are liable for the action of any organisation or individual which can be ascribed to public authorities, notwithstanding internal law rules about their independence. As indicated in the *Introductory Chapter*, all public authorities inside Member States are equally obliged to take into account the duty of sincere cooperation with the EU, whatever their degree of independence vis-à-vis the Member States' central government.

When it comes to assess Member State's compliance with EU law and to monitoring practice, the questions of state form and levels of government should never be forgotten. All Member States have at least two levels of government – central and local – and most have more levels of government. The formal question of being a federation or not has no relevance,;even in a unitary state, the distribution of regulatory competences amongst government bodies may lead to the fact that the relevant legally binding rules, if any, are not expressed in a single document – e. g. an Act of Parliament or a government decree. On the other hand, the degree of constitutionally guaranteed independence of public authorities vis-à-vis central government often has a negative impact on the possibility to have useful and relevant data on practice – and sometimes on regulations – and this may generate problems of transparency and accountability, which in turn, may impact on the free movement of workers. EU law obligations are often perceived by central government as well as by regional or local government as uneasy constraints; they should rather be considered as an opportunity to face issues of transparency and accountability which go well beyond the application of EU law.

3. Official Languages: a Union with More Languages than Member States

As indicated in *Chapter 4*, language issues have a very specific standing in the law of free movement of workers. It is clear that the diversity of languages in the EU is a natural limitation of free movement of workers – as opposed to what happens in countries with a common language.

Since 1 January 2007, with 27 Member States, the EU has 23 official languages. The difference between the number of Member States and the number of official languages is due to two factors. Dutch, English, French, Greek, Italian and Swedish are official languages in more than one Member States. On the other hand a number of languages have an official status within a Member State without being an EU language, as is the case for Basque, Catalonian, Galician, Lëtzebuergesch, Turkish and Valencian. Quite logically knowledge of the official language(s) has a special significance in the public sector, and especially in public administration, due to the importance of possible relevant language policies, to the importance of drafting documents in the original language and to the needs for communicating with the public.

A special mention has to be made of minority languages: in some Member States, some languages have the status of a minority language, i. e. citizens have a right to use them in communicating with administration. This obviously may impact on the free movement of workers, as in the relevant services, a minority language requirement could be legitimate, if it respects the principle of proportionality.

4. Statistical Data: In Need of Common Indicators

It goes without saying that statistical data are essential both for the purpose of monitoring and understanding administrative practice and for the purpose of comparison. Statistical data have little or no influence on the solution of legal issues relating to the free movement of workers. It suffices of one clause in a specific regulation, or one case of administrative practice, to be constitutive of a breach of EU law and to imply the relevant Member States liability. This being said, quantitative aspects are obviously an important factor, along qualitative aspects, when it comes to understanding whether there is a persistent non compliance with EU law.

As already indicated in the *Introductory Chapter* to this report, there are very important problems with statistics relevant for the issues of free movement of workers in the public sector.

There are no standard common statistics assembled and published on a regular basis by Eurostat for a number of essential indicators, i. e. :

- the number of workers in the public sector as a whole and in percentage of total employment;
- the number of workers in public administration as a whole and in percentage;
- the number of workers in public administration according to the different levels of government, as a whole and in percentage;
- the number of workers in public administration according to their direct employment by government (central, regional or local) or by autonomous bodies, as a whole and in percentage;
- the number of workers employed under specific public sector or public administration law and regulations, as opposed to workers employed under standard labour law and collective agreements, as a whole and in percentage.

Finding common denominators for the criteria used for these statistics is a very difficult task, which partly explains the absence of specific Eurostat statistics. However establishing common denominators is the standard work of Eurostat, and the author of this report sees no reason why it should not apply to the statistics mentioned above.

The absence of Eurostat figures for the previous topics is also most probably due to the fact that many, if not most, of the EU Member States' authorities do not have the relevant data available. The author of this report thinks however that the data needed for statistics on the listed topics, which are necessary to assess the possible impact of obstacles to free movement of workers in the EU, coincide with data that are necessary in Member States to assess the need for marginal or fundamental reform in the government and public administration structure.

In the absence of Eurostat statistics, there are second best statistics, e. g. of the International Labour Organisation, and of the OECD. It has however to be pointed out immediately that only 19 of the 27 EU Member States are at present members of the OECD. Furthermore, there are no institutional reasons in the framework of the ILO or OECD competences that might be sufficient in order to overcome the resistance from some Member States to provide data – often due to the fact that these data are simply not yet available – and neither the ILO nor the OECD have an organisational structure and internal skills comparable to Eurostat.

The following comment, quoted from a report of 2007 on *Industrial Relations in the Public Sector* (p. 2-3) by the *European Foundation*

for the Improvement of Living and Working Conditions in (see *References*), are very instructive of the difficulties encountered with statistics.

"*Comparing employment and labour relations in the public sector, and more specifically in central government, is not an easy task. Compared with the private sector, employment relations in the public sector are deeply rooted in country-specific legal, normative and institutional traditions, which make comparisons difficult. Moreover, problems emerge in the conceptual definition and statistical identification of central government and the public sector. For instance, their boundaries and size can vary significantly depending on the analytical perspective from which they are classified.*

"*A study, coordinated by the Public Governance and Territorial Development Directorate of the Organisation for Economic Cooperation and Development (OECD) and concerned with the development of comparative country data and indicators for good governance and efficient public services, emphasises that:* 'Government is a particularly slippery term presenting many difficulties in classification'*, where the common assumption that* 'it comprises all the agencies that provide public services' *involves several complexities [...]. Such complexities are, among other things, related to the fact that many services can be* 'publicly funded but provided by private agencies' *and that local governments can be major providers of public services. These two features point to difficulties in drawing precise boundaries between the public and private sectors on the one hand, and between central government and other levels of government within the public sector on the other. Such difficulties are not entirely overcome by the classification put forward by the System of National Accounts, which distinguishes public activities in two ways: that is, by institutional unit or by function.*

"*In relation to the first option – classifying public activities by institutional unit – problems arise about whether or not to include in the definition non-governmental organisations (NGOs) with dominant or relevant public funding, or even private enterprises with a distinctive and statutorily privileged market position. The inclusion of these organisations within the boundaries of government, or of the wider public sector, may be justified from the point of view of national accounting – such a position is often adopted by economists and public finance researchers interested in public expenditure – but its efficacy is debatable from an industrial relations perspective. For example, it would mean including in the public sector the employees of those public enterprises which have been legally transformed into joint stock companies and 'privatised', thus operating under market conditions and subject to private and commercial laws, although the state or local government remain the exclusive or main shareholder. Such a scenario is quite common for postal services, railways, certain banks, public utilities and national or local public transport. Moreover, non-profit organisations indirectly financed by public funds, as well as concessions and legal monopolies, would also have to be included [...]. Although the involvement of public funding is certainly a relevant factor for the functioning of employment relationships, this criterion would be too wide for the purposes of this report, as the resulting boundaries of both central government and the public sector would be too large. Similar problems would arise from adopting the criterion often applied by public policy researchers, which suggests the inclusion of all organisations managed by personnel appointed by central or local government. Although the fact that the public employer has a political legitimation – and is therefore sensitive to considerations of political consensus – is by no means irrelevant for the concrete functioning of labour relations, this criterion would once again be too inclusive in this context.*

"*The second option – that is, classifying public or publicly funded activities by function – would also raise some problems for the purposes of this comparative report: namely, in relation to the distribution of sectorial functions across levels of government, which often depends on the constitutional structure (unitary versus federal structure) and the administrative tradition of each country. As another, less recent OECD survey on public sector pay and employment trends underlined, countries differ widely in how these functions are organised [...]. While the defence and police*

forces, with few exceptions, typically constitute elements of central or federal government functions, education, health and social services are often assigned to regional or local administrations, or both, particularly in federal countries. For example, according to the 2002 OECD survey, in the late 1990s and early 2000s responsibility for education was assigned to the regional or local level administration in Germany, Spain, Ireland, Finland, Greece, Hungary and the Czech Republic (the United Kingdom was not included in this study). The same was true of public health services in Germany, Spain, Ireland, Finland, the Czech Republic, Greece, Hungary and, in part, France (Table 1). *However, this picture may have changed slightly as a result of political or administrative decentralisation processes in several countries in recent years, with more functions being moved from central to lower levels of government.*"

As there are no systematic common statistics on the topics listed above, it is not astonishing that in most Member States there are no statistics on the number of foreign applicants to posts in the public sector as a whole, to public administration, let alone to posts reserved to nationals. The latter data should however be acquired in all Member States, in order to help government decide about policies to attract foreigners so as to to supplement the lack of skills on the national labour market, and also in order to help assessing compliance with EU law.

Chapter 3

Legal, Organisational and Economic Aspects to Take into Account for Understanding the Issues of Employment in the Public Sector

As mentioned in *Chapter 2*, to the view of the author of this report, the different responses to Commission questionnaires and reports are very representative of how the issues of free movement in the public sector are perceived by practitioners and by experts of free movement of workers in the Member States. They indicate that it is necessary to insist not only on general data relating to Member States as commented upon in Chapter 2, but also, and even more, on legal, organisational and economic aspects, i. e. the relevant legal sources, the composition, structure and legal specificities of public employers and public employees, and the issues of appeals and remedies in Member States.

1. Relevant Legal Sources: the Constitution, Law, Regulations and the Values of the Public Sector

1. 1. Constitution: the relevance of constitutional principles and provisions

Most EU Member States have provisions in their Constitution which are relevant to the issues of free movement of workers.

Provisions which embed the principle of non discrimination on the basis of origins and/or nationality may be useful to consider, but only insofar as they are not restricted or contradicted by other provisions, e. g. a provision that limits access to public offices to the State's own nationals. The presence of the principle of non discrimination in the Constitution, if not limited or contradicted, is important mainly in two respects: it may be a parameter for the review of constitutionality of legislation or regulations, and for their interpretation by courts in specific cases (see *Section* 2. 4 of this *Chapter*); and it may be the basis for a specific body in charge of enforcing non discrimination, the *Cyprus Equality Body* under the *Commissioner for Administration,* for instance, is playing an important role in reviewing decisions that encroach upon equal treatment of EU citizens; the same can be said about the Dutch *Commission for Equal Treatment* (*Commissie Gelijke Behandeling*) (see *Country files*, see also section 2. 4 of this *Chapter*).

Provisions on access to public employment are always relevant to free movement of workers. The way in which they are worded varies according different patterns, which impact especially upon the question of limitation of certain posts to nationals (see *Chapter 5 section 1*). Apart from being a possible source of limitation of posts accessible to citizens from other Member States, provisions on access to public employment are usually embedding the merit principle, which goes way beyond the sole issue of recruitment. As further explored under *Chapter 4 section 1*, the legal consequences of the merit principle are not always the same from country to country and from one historical period to another. The merit principle may lead to strong regulation of public service personnel management, in order to counter favouritism, nepotism or politicisation of the civil service, as well as impeding arbitrary decisions. The merit principle may on the contrary be the basis for deregulation of personnel management if

existing rules are perceived as being the source of inefficiencies in the public service. Caution is therefore recommended in referring to constitutional clauses embedding the merit principle, as they may as well favour free movement as, on the contrary, be a the root of legislation or regulations, or even practice which in the end maintain or create obstacles to free movement.

Provisions on the competence for regulating public sector employment, and especially the civil service, are extremely important. They obviously have to be accounted for when it comes to establishing or amending general rules on public sector employment.

A first point to consider is whether the Constitution provides, explicitly or implicitly, for a competence of the legislator for the establishment of staff regulations for the public service or public sector. This is the case in Austria, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Germany, Greece, Finland, France, Greece, Hungary, Ireland Italy, Latvia, Lithuania, Poland, Portugal, Romania, Spain, Slovakia, Slovenia and Sweden. In some Member states, the Constitution allows for the government, acting through general regulation, to establish staff regulations, as is the case in Belgium, in the Netherlands, Malta and the United Kingdom. In the latter case, there is no impediment however for the existence of an Act of Parliament that regulates some aspects of public sector employment, like in Belgium and the Netherlands, or most aspects, as for instance in Malta since 2009.

A special mention has to be made of the United Kingdom, which has no written constitution. One of the main constitutional principles in UK law, next to the principle of sovereignty of Parliament; is that the organisation and running of the Civil service comes under the Royal prerogative, i. e. in practice is of the competence of the Cabinet. From the 1920s to the 1980s, the absence of need of Parliamentary Acts for the regulation of the Civil service authorisation had as consequence that working conditions and most of the elements which usually appear in staff regulations were the results of agreements between government and trade unions, in the so called *Whitley councils*. As a result of the fragmentation of the civil service, due to the creation of executive agencies (see *Section* 2), and with the loss of power of trade unions UK wide, *Whitley councils* lost their relevance. Consequently, Cabinet made more use of binding regulations and even resorted to presenting bills for adoption by Parliament in order to lay down some aspects of staff regulations. This being said, even if the UK were to adopted a *Civil service Act*, as announced in March 2008 by the Brown Cabinet, it would still mean that all the matters related to the organisation and management of the Civil service which would not be dealt with in the Act would remain in the realm of the Royal prerogative, i. e. of the Cabinet acting without previous legislative authorisation.

If the Constitution provides for the competence of the legislator, it remains to be checked whether this may be enacted by delegated legislation, such as e. g. in Italy, and if so, what is the impact of ex-ante and ex-post controls by Parliament. If the Constitution provides for the competence of government, it remains to be checked whether the adoption of general government regulations is mandatory or not, and what impact the absence of general regulations may have on administrative practice and its review by courts.

A second point to consider is, in federal states or states where regions have a legislative or a general regulatory competence, whether the competence for regulating public sector employment is a matter of central institutions (central parliament and/or government) as in Spain or Austria, or whether the sub-central

level have competence for the regulation of their own civil service through regional legislation or regulations, or local authorities' regulations, as in Germany and in the UK (for Northern Ireland and Scotland). In a number of Member States, there are some general laws or regulations which apply to all levels of governments even though the biggest part of staff regulations is adopted at regional level, as in Belgium. This is where rules on the powers and organisation of regional and local authorities may directly impact upon the legal sources relevant for free movement of workers in the public sector. Even in unitary states, there may be different sources of regulations, i. e. a general law or regulations which applies only to the state public service, while local authorities are more or less free to adopt their own staff regulations, like in the Czech Republic, Latvia, Malta and the United Kingdom (for England).

A third point to consider, which is the most delicate one, is whether, and to what level of detail, the relevant constitutional provisions allow for complementing legislation by regulations, or even by collective agreements.

For instance, the French Constitution, Art. 34, establishes that the rules "*governing the fundamental guarantees granted to civil servants and members of the Armed Forces"* are in the realm of Parliament. This means that matters which are not considered as *"fundamental guarantees*" may be regulated by government without the necessity of a legislative basis.

In the case of Italy, since 1994, most of the staff regulations for the public sector are embedded in sectorial collective agreements. Until 2009, these collective agreements could derogate to principles laid down in a law or in delegated legislation, as long as such derogation was not explicitly forbidden by law. With the recent reform of public employment, the principle has been reversed: collective agreements may not derogate to law, unless there is a specific clause which permits derogation. In order to understand the respective scope of law and collective agreements, a very specific expertise is needed, which implies examining not only laws and delegated legislation, but also collective agreements.

Generally speaking, there has been a tendency over the two last decades to give a more and more important role to collective agreements in the public sector. According to the report of 2007 on *Industrial Relations in the Public Sector* by the *European Foundation for the Improvement of Living and Working Conditions* in (see *References*): "*In about half, or just fewer, of the EU27, collective negotiations represent the only or the main method of regulating the terms and conditions of employment of the vast majority (or all) of central government employees (wages and salaries included). This group includes Cyprus, Denmark, Finland, Ireland, Italy, Malta, the Netherlands, Norway, Slovakia, Slovenia and the UK, with qualifications in several cases*" (p. 24). "*In a similar number of countries (maybe even more), on the other hand, either the right of collective bargaining is denied to career civil servants (which in some cases are quite a large proportion of central government employees, as in Germany and Austria), or it has a weak and uncertain status, not leading to real, legally binding collective agreements, at least on pay issues (which is the case in France, Belgium and elsewhere). In other cases, even if it is formally allowed, it is rare or not practiced at all because unions are too weak or totally absent, as in most former communist countries of central and eastern Europe*" (p. 25).

The three points which have just been mentioned are crucial in order to understand to what extent, in a given Member State, relying upon an analysis of legislation or general central regulation is a sufficient indicator of the exact content of the law applicable to public sector employment, or whether it is needed to go further in detailed regulation adopted for or by different public employers (see *Section* 2). Furthermore, the locus of regu-

latory competence (legislator or government) is important in order to understand the procedural hurdles and the possible interference of unforeseen interests in regulation. While, generally speaking, it seems easier to amend government regulations than legislation, the opposite may be true, especially if the government of the day may count on party discipline in parliament or if on the contrary, use of government regulation is linked to obligations to consult different bodies and organisations.

A fourth point to consider is the possible presence in the Constitution of principles or rules which limit the choices in regulation and legislation, such as the principle of non discrimination, the merit principle, or more specific principles such as e. g. the principle of Art. 33 (5) of the German Basic Law, according to which "(5) *The law governing the public service shall be regulated with due regard to the traditional principles of the professional civil service.*"

Understanding the nature and solidity of constitutional prohibitions or procedural hurdles, and possible interferences linked to constitutional provisions, is extremely important when it comes to assess a Member State's authorities' readiness to reform legislation and regulations, and especially in view of a possible infringement procedure.

1. 2. Legislation and general regulations: comparability of general statuses/ staff regulations

Most Member States have one or more legislative Acts (laws) or general regulations (decrees, ordinances etc.) embedding the general staff regulations for the public service.

The name of this act (*Act, Law, general, code* etc.) is of little relevance to the issues of free movement of employers. It has however to be pointed out that the diversity of denominations may give rise to misinterpretations in discussions or exchanges from a country to another, or in exchanges between Commission services and Member States' authorities, especially as there are no standard rules for the translation (especially into English) of the national vocabulary. A few indications might be useful in this respect.

In some countries, the general staff regulations are called '*status*' or '*general status*', as well for civil servants as for employees of specific authorities or enterprises; whereas the name '*status'* does not have any different meaning in legal terms than '*staff regulations*', its perception is culturally determined, and in some countries, or periods, a special symbolical meaning is given to the notion of '*general status*'.

In the British and Commonwealth tradition (also in Ireland and Malta), the word '*code*' usually correspond to collections of written statements of practices without legal binding force, whereas in other European countries, the word '*code*' (*codice, codigo, Gesetzbuch*) on the contrary usually correspond to a legally binding collection of rules. In Italy, recent codes of the latter sort are usually called 'single text' (*testo unico*). Understanding exactly the legal significance of codes is even more complex due to the fact that, in recent Commonwealth tradition, courts may attach a legal consequence to a non binding code through the use of the concept of legitimate expectations; whereas in other European countries a recent tendency has developed, to adopt 'codes of ethics' and other instruments of the same type which are not legally binding.

Furthermore, in many European countries, public administration heavily relies on circulars, guidelines and other documents – theoretically non binding – by which government explains the law and how it has to be applied. The issue of binding force is not always per se important for free movement of workers, as non binding rules could be in certain context linked to moral persuasion.

The issue of binding force is however of uttermost importance when it comes to examining the relevant national legal framework: if a directive has to be transposed, the ECJ has always insisted that it had to be done through legally binding instruments. More generally legally binding documents usually allow for judicial review, whereas non binding documents do not (see *Section* 4).

All what has just been explained shows how complex a task it is to identify the general legal provisions which might be obstacles to the free movement of workers. This is worsened due to the existence of sector specific regulations, which might contain different rules for different public employers (see *Section* 2) or different public workers (see *Section* 3).

It has further to be reminded that general staff regulations are not necessarily the same for central government and for regional and/or local government. In most countries, the examination of the legal framework for free movement is often restricted to central legislation and regulations, sometimes complemented by the indication that similar rules apply to regional and/or local government. The responses to the questionnaires of the Commission, and most reports of the Network of experts on which this report is primarily based were most often limited to state legislation and regulations. Such a limited analysis does not permit to have a fully accurate view of relevant rules in a country, especially as in many countries the number of regional and/or local government employees is much higher than that of central governmental employees. In Belgium, Denmark, Germany, the Netherlands, Sweden and the United Kingdom, for instance, up to two thirds if not 80 % of government employment is with regional and/or local government and their autonomous bodies (see *Country files*). In France, for instance, about one third of government employment is with local government; the number extends to more of two thirds if one does not take into account teachers, who are state civil servants.

Labour legislation and the civil code (if existing) are also relevant in all countries for the issues of free movement of workers of the public sector. Furthermore, as already indicated, collective agreements may be a very important legal source of working conditions, especially for employment under labour legislation and the civil code, but not only. With the exception of countries where the biggest part of public administration employees are employed under labour/civil law contracts, the examination of the legal framework for free movement given by the documentation which was accessible for this report was usually restricted to special civil service legislation and regulations. Furthermore, even if employment in the public sector is under labour law, the civil code and collective agreements, it would have to be checked whether the same rules have the same consequences with private and public sector employers.

The mere fact of being a public sector employer, besides its implications under the principle of sincere cooperation of Art. 4 TEU, has legal implications in most if not all Member States. The most typical example is that of Italy, where the general public law staff regulations which existed since 1921 have been abolished in 1993 and the biggest part public employees submitted to civil and labour law, but where the constitutional principle of recruitment by means of open competition continues to apply, with consequences on the relative competences of ordinary and administrative courts (see *Italy file*, 2. 1).

The responses to the questionnaires of the Commission, and most reports of the Network of experts on which this report is primarily based were often limited to State legislation and regulations. Such a limited analysis gives only a partial answer to the

question of potential obstacles to free movement, especially as in a number of countries the number of public sector employees whose working conditions are determined by the application of labour legislation, the civil code and collective agreements far outnumbers the number of civil servants in the strict sense who are employed under a specific public law status. The latter situation is the case of e. g. the Czech Republic, Denmark, Germany, Italy and the UK.

1. 3. Values of public sector regulation and scope of general staff regulations in the public sector

Examining the information provided by government departments of EU Member States and by experts of free movement of works has convinced the author of this report to insist on two series of considerations that are linked with the existence and content of general staff regulations in the public sector.

First, in order to understand the existing rules and regulations and the reforms which have been adopted or might be adopted in the future for public sector employment, it is necessary to be aware of a tension between two sets of possibly conflicting values.

On the one hand, the importance of politics and of citizenship for public sector regulation have led – and often continue to lead – to the adoption of general civil service legislation in order to give a solid legal grounding to values such as the merit principle, equality before the law and public burdens, equal opportunities, neutrality with respect to political, philosophical and religious orientations and, last but not least, a professional civil service.

The concept of a professional civil service corresponds to the idea that professions in the public sector are by nature different from the apparently similar professions in the private sector. The values of a professional civil service generally correspond to a tradition of career civil service which goes back to the XVIIIth century in countries such as Germany (especially the Prussian tradition) and France. Career civil service has been taken over in Great Britain in the second half of the XIXth century, and has gained solid ground not only in Europe, but also in the United States and progressively worldwide.

On the other hand, there are traditions which are more based on the content of work done than on the context in which it is done, and which tend to consider that there are only few peculiarities of public administration professions as opposed to private sector professions. Such traditions often lead to looking with suspicion at career systems, which are considered as a disincentive for efficient administration. The impact of seniority on career progression is seen as negative, because it does not take individual merit into account – as opposed to the tradition of professional civil service, where the role of seniority is seen as a guarantee of independence of civil servants from party politics.

In more recent times the second type of traditions are often linked with a suspicion towards legally binding general staff regulations, which are considered as too little flexible to be adapted to the needs of employers. Typical of this approach in Europe have always been the Netherlands, where the law on the civil service of 1929 only dealt with establishing special civil service courts. The tradition of so-called '*open civil service'* – or '*post based civil service*' (*function publique d'emploi*) as opposed to '*career civil service*' has gained more and more ground in the 1980s, as an important element of public management reform. Typically, the UK civil service, which was one of the typical models of career civil service, has been turned into a civil service mainly based on posts in the 1990s; the same has happened in Italy in

the same period, and more recently in Portugal.

Some specialists, in practice and literature, tend to see a convergence of the two traditions – the tradition of professional civil service and the tradition of professionalism without consideration of the public or private environment. Such a convergence is evidenced for instance by the Netherlands, who have started to implement a career system for their highest executives in public administration in the nineteen nineties. Some other specialists see on the contrary a permanent opposition between the two types of values, where one of the sets of values takes over at a certain moment, and another set of values takes at another moment. This discussion is of little relevance to the issues discussed in this report. What is relevant, is the difference in culture and prejudices which lay behind those different sets of values when it comes to assess legislation and regulations in the framework of free movement of workers.

Career civil service is often linked to civil service legislation, albeit not being a necessary consequence thereof. Even with a civil service based on posts, the importance of a specific legislation for the public sector has often led to special civil service legislation, as for instance in Sweden. The SIGMA programme of the EU and OECD in Central and Eastern European Countries has been pushing towards the adoption of civil service legislation as one of the important tools of government modernisation since the middle of the 1990s, whereas it did not show ex ante preference for a career or for a post based civil service. Typically, even the United Kingdom's government, after having made a turn from career to post based civil service – both without using a legislative or general regulatory framework – has come to consider under the New Labour governments of the last thirteen years that a Civil Service Act would be needed in order to give "statutory ground" to the merit principle.

Second, when it comes to free movement of workers in the public sector, attention of an important part of literature and sometimes of Member States' authorities, seems to be mostly focused on the existence and content of staff regulations in the public sector and not enough on practice.

Two factors converge in focusing attention on existing or planned legislation and regulation as main factor of obstacles to free movement of workers. First, legislation and regulations, even if numerous and dispersed, are far more easy to identify than practice, for which evidence often appears only in the occasion of court disputes or with petitions to - or questions from – the European Parliament, or complaints to the European Commission. Second, when it comes to free movement of workers in the private sector, the duties of Member States are only those of a regulator, i. e. adopting the rules necessary to grant freedom of movement (including, to some extent, establishing appeal systems and monitoring) and amending or abolishing the rules which hinder this freedom. As far as private employers are concerned, they are not in the public sphere and thus they are independent from the State from a legal point of view.

The combination of both these factors has a logical consequence: some specialists of free movement of workers tend naturally to focus mainly on legislation and regulations, and secondly on case law, while they do not enquire on practice in the absence of case law of courts or specialised equal opportunities agencies. When dealing with public sector employers, the focus should be equally on regulation and practice, due to the dual function of public authorities as regulators and employers (see *Introductory Chapter, section 2*).

A point which seems not to be taken enough into consideration is that the absence of legislative or regulatory rules on public sector employment is not necessarily in favour of free movement of workers. On the contrary, the absence of legislation and/or regulations – or at least of non binding but general and rather precise 'codes' – means a lack of transparency. Lack of transparency makes it more difficult for potential candidates to assess their opportunities of getting a post, a position, or a specific benefit or advantage linked to working conditions.

Compliance with EU law is not necessarily based on the existence of legislation or regulations about access to public sector employment and about working conditions in the public sector. However, in the absence of general legislation and regulation, the author of the present report thinks that Member States' authorities would be well advised to establish and maintain solid monitoring systems, which are indispensable in order to ensure compliance with EU law. Whether monitoring systems have to be established by central government or in some other ways – for instance by agreements between regional governments – is of the exclusive competence of the Member States. What is indispensable is that the public and the European Commission have easy access to information on practice, and guarantees to get accurate information if they ask for it.

Needless to say, monitoring systems are not only indispensable in the absence of general legislation and regulation; they are also indispensable in order to know how legislation and regulations are enforced when they exist.

2. Public Sector Employers: Facing the Puzzle of Horizontal and Vertical Fragmentation

Public sector employers are highly fragmented in all Member States, and the level of fragmentation has increased in the last decades. There are two types of fragmentation of public sector employers, in all Member States: horizontal and vertical. As a third element, some organisational forms that compensate fragmentation have to be taken into account.

2. 1. Horizontal fragmentation between levels of government (central, regional, local)

Horizontal fragmentation has already been considered in *Chapter 2* section *2*. Horizontal fragmentation has increased in many Member States, due to decentralisation, devolution, regionalisation etc.

In the case of horizontal fragmentation, the main issue to deal with, when analysing possible obstacles to free movement of workers, is that staff regulations are often based upon different legislation and regulations according to the level of government they apply to.

Furthermore, there are countries like for instance Estonia, France, Greece, Ireland, Poland or Spain, where the regulations applicable to local government are adopted by the central state, or by regional level legislation or regulations, like Belgium or Germany; while in other countries, staff regulations for local government are adopted by local government itself, like for instance Cyprus, Malta, the Netherlands or the United Kingdom. If staff regulations for regional or local government are adopted at the level of central state, the Member States' government institutions are more likely to know where to find them, and

what is their content. It is not easy to assess for all Member States to what extent their central government institutions have precise information about staff regulations for regional or local government if they are not embedded in central legislation or regulations. In this second case, assessing the state of the play for free movement of workers is especially difficult, and furthermore comparisons between Member States become almost impossible to make on a sound basis.

Staff regulations are not only formally different from one country to another, they are also different in content, even though some differences are considered as marginal.

An example of marginal difference which is highly relevant to free movement of workers in the public sector is the regulation of open competitions (see also *Chapter 4 section 1. 2* and *Chapter 5 section 1. 2*). In France, the tradition of open competitions (*concours*) for state civil servants is that the winners of a competition are immediately appointed in public administration, and that it is for the candidates to choose their assignments on the basis of ranking in the results of the competition. In some other Member States, the tradition of open competition is that the employers chose their new staff amongst the winners: it has been a long-standing tradition in Italy – which has also been taken up in the 1960s in the European Community Institutions' staff regulations. In France however, this latter system, whereby employers chose their staff, rather than winners of competition their assignment, has been the traditional form of open competition for local government. When it comes to free movement of workers the system of choice by the public employer leaves far more room for discrimination based directly or indirectly on nationality than the system where the winners of the competition chose their assignment.

The responses to the questionnaires which were sent by the European Commission for the preparation of this report are in most cases limited to staff regulations applicable to central state employment. For some Member States, this might be due to the lack of accessibility of information which results from horizontal fragmentation. It is also difficult to assess to what extent the consequences of the duty of sincere cooperation are taken into account by all public authorities in Member States.

EU law does certainly not require the Member State to break their internal constitutional or legislative rules on the distribution of competences between levels of government, and it can neither require nor authorise central government to fail to recognizing local and regional autonomy. This being said, it is probably easier for Member States to cooperate with the Commission when monitoring and reporting systems are established, which enable the relevant authorities to be accurately informed about the rules and practice at all government levels. Whether such a monitoring system is organised by the central state institutions or by voluntary cooperation between regional and local governments is a matter for each Member State to decide on the basis of its own constitutional rules.

What has just been mentioned for legislation/regulations and practice also applies for the establishment and transmission of statistics.

2. 2. Vertical fragmentation at the same level of government

Vertical fragmentation is a normal consequence of the functional specialisation of public sector employers. There are various forms of vertical fragmentation.

Fragmentation within the overall public sector appears in a differentiation between the

functions of public administration and those of public enterprises.

In some Member States, this type of fragmentation has been acknowledged by law since a century or more. In France, for instance, public law is only applied to so called "*administrative public services*", whereas private law – including labour law and the civil code – is applied to so called "*industrial and commercial public services*", on the basis of case law dating back to 1921, which has usually been followed also by the legislator. In countries as different in their traditions as Belgium, France, Germany, Italy, the Netherlands or the UK, state intervention in the economy has taken the form of creating, buying or nationalising business corporations with a variable share hold (including minority in capital but with a so-called 'golden share').

Public enterprises are rarely considered nowadays in documents relating to free movement of workers in the public sector. It seems taken for granted that the issues of free movement of workers are very similar with public enterprises and private enterprises. Nevertheless, it should not be forgotten that the duty of sincere cooperation also applies to public entreprises. Vertical fragmentation between public law authorities and private law corporations has increased in the last decades, due to the will to apply private sector law to the management of government units dealing with the delivery of products or service; in many countries this phenomenon has more than compensated a decrease of vertical fragmentation due to handing over activities to the private sector.

In the view of the author of this report, when it comes to sincere cooperation, the formal legal nature of a corporation (i. e. private law) cannot in any way limit State liability of the said corporation if government (at whatever horizontal level) has control over a corporation. The criteria used by the ECJ in order to determine whether EU law on public procurement or on state aids applies to a corporation under private law could be a good indicator in order to determine whether there is government control over a private law corporation.

Within non commercial government activities a second type of fragmentation is due to the existence of bodies which are formally separate from the State or the government of the level they are pertaining to.

In Sweden and Finland, the implementation of all government policies are traditionally carried out since more than two centuries by autonomous bodies which are usually called agencies in English language documents and literature – sometimes executive agencies.

In countries like France and Italy, there are traditionally several hundreds of autonomous public bodies (*établissements publics*, *enti publici*) with separate legal personality. In others, like e. g. Germany the overall number of those autonomous public bodies (*öffentliche Anstalt*) with separate legal personality may be somewhat smaller, but the phenomenon is also widespread. In the UK, where the commonly accepted vocabulary is nowadays that of 'non-departmental public bodies' (NDPBs), there is a tendency to increase the number of autonomous public bodies, which were traditionally far less numerous than in Germany, France or Italy.

The range of activities covered by these legally autonomous public bodies is extremely variable from one country to another. As an example, universities have such a status of autonomous public bodies in most EU Member States; secondary schools or primary are autonomous public bodies of the state or of other levels of government in some Member States, while in others they are considered as a local structure of the relevant ministry (central or regional).

The fields of health and transport are very often also dealt with by autonomous public bodies, but not in all countries, and, to add a complicating factor, transport is sometimes carried out by corporations under private law, sometimes by autonomous public bodies.

This second type of vertical fragmentation has increased over the last decades in many EU Member States – very significantly in France and in the UK – with the exception maybe of Sweden, where on the contrary accession to the EU in 1995 has led to reduce the number of government agencies and to try and increase interagency coordination.

Close to this second type of vertical fragmentation, a third type has developed over the two last decades, with the establishment of so called '*regulatory agencies*', or '*independent administrative authorities*', which has in some sectors been due to the adoption of EU legislation (e. g. competition, energy, telecommunications, transport). Contrary to the second type of vertical fragmentation, this third type usually involves only a reduced number of staff. It should be noted that, however reduced their staff is, regulatory agencies and independent administrative agencies are not outside of the scope of free movement of workers in the EU.

What has been said about the consequences of the duty of sincere cooperation with respect to vertical fragmentation fully applies also to these second and third types of horizontal fragmentation.

A fourth type of vertical fragmentation is due to the development of so called "*executive agencies*", a trend which started in the UK in the late 1980s and was taken over in many other Member States over the two last decades, e. g. the Netherlands and Italy – as well as with EU Institutions on the basis of the 2003 *Financial Regulation* and the *Regulation on executive agencie*s. Although they are usually not formally separate from government departments in the sense of having legal personality, '*executive agencies*' are highly relevant to the issue of free movement of workers, as they enjoy a high degree of autonomy in staff management – as high, if not even higher, as the organisations mentioned under the second or third type of vertical fragmentation.

A fifth type of vertical fragmentation is due to the traditional separation of ministries and government agencies according to policy specialisation. In some countries, there is a constitutional principle that guarantees the autonomy of ministries with respect to one another, but also with respect to the Head of Government; this is typically the case of the so called '*Ressortprinzip*' in German constitutional law. This type of principle is sometimes translated into English as '*ministerial sovereignty*', a wording which – to the view of the author of this report – amounts to an abuse of language, while being very symptomatic of a government culture. From the point of view of EU law, it is quite clear that this type of principle can only be considered as totally irrelevant: whatever '*ministerial sovereignt*y' means, it cannot amount to exempt the relevant authorities from complying with EU law, and the Member State remains liable for the possible breaches of EU law which would be due to these authorities.

Much more than for horizontal fragmentation or for vertical fragmentation of the second and third type, vertical fragmentation of the fourth and fifth type should not be impeding central monitoring in the relevant member State, irrespective of the constitutional status of the sources of fragmentation. To the view of the author of this report, a government office in charge of communicating with the Commission should never be hindered by management autonomy of executive agencies or by sectorial autonomy of gov-

ernment departments when assembling information.

This being said, management autonomy of executive agencies, and sectorial autonomy of government departments, accounts for much of the existing lack of information about administrative practice relevant to free movement of workers in the public sector, and even sometimes about regulations which are specific to an employer or a sector. As explained in the *Introductory Chapter*, from a legal perspective, the Member State is liable for all public authorities, whatever their degree of independence.

2. 3. Coordination as compensation for fragmentation

The consequences of vertical fragmentation, or even of horizontal fragmentation, may be compensated by different kinds of bodies or procedures dealing with the management of human resources in the public sector.

Typically, the British tradition of a *civil service Commission* has had as central purpose to avoid that fragmentation in government be an impediment to the application of the merit principle in recruitment, promotion and some other aspects of working conditions. This was a typical reaction against favouritism, nepotism or politicisation of the civil service in the second part of the XIXth century. The same system has been taken over for the same reasons by Belgium in 1937, with the establishment of a *Secrétariat permanent au recrutement* nowadays replaced by *Selor* and *Jobpunt Vlaanderen* (see Belgium file, section 2. 2).

The most achieved form of this type of body in the EU is nowadays the Maltese *Public Service Commission* (see Malta file, section 2. 2). Not astonishingly, Malta is – to the view of the author of this report – the EU Member State for which information on relevant legislation, regulation and practice is the most easy to get. The fact that Malta is a small country in terms of population also impacts upon monitoring, but it is not enough as an explanatory factor. Usually, however, the functions of a civil service commission do not extend to public enterprises.

In many member States, sometimes as a complement to a civil service Commission, a department of public administration – or of the civil service –, has a monitoring function which could easily extend to all factors relating to free movement of workers.

However, there are two serious limitations to the functionality of such bodies: they do not deal with public enterprises, and very often their competence are limited to state government, leaving thus more or less big gaps when it comes to regional and local government.

This report does not intend to suggest that EU law imposes the establishment of a civil service commission and/or a centralised department of public administration. It does not either intend to suggest that a civil service commission is the best or only model in order to help fostering free movement of workers in the public sector. This being said, knowledge of the methods used by civil service commission and/or a centralised department of public administration could be of great help to government departments or contact points in charge of monitoring free movement of workers in the public sector. It seems that an effort in the direction of mutual information has been accomplished in the framework of EUPAN especially with the report "*Structure Of The Civil And Public Services In The Member And Accession States Of The European Union*", which was published in a second edition for the Austrian Presidency of the EU in 2006 (see *References*).

To sum up, in the view of the author of this report, the problems deriving from the

fragmentation of the public sector should not be underestimated when it comes to free movement of workers. When it comes to monitoring practice and, more generally, to getting data relevant to free movement in the public sector, is seems that many Member States do not have a fully functional system.

Establishing procedures and organisation for the sole purpose of facilitating free movement of workers and ensuring compliance with EU law might appear as having a high cost for Member States. It should however be taken into consideration that such procedures or organisations are certainly worthwhile establishing in a Member State also for more general purposes, beyond the issues of free movement of workers, in order to try and ensure effectiveness of public sector reform which aims at increasing the cost-effectiveness of spending public money.

Furthermore, none of the grounds which generate and/or justify fragmentation of public sector employers should impede central government of Member States to communicate with all public sector employers, in order to raise consciousness of the issues relating to free movement of workers. Amongst the possible tools to be used, communication towards public sector employers could effectively underline the advantages of free movement for better management, the obligations of employers which stem from EU law principles on free movement of workers, and possibly a free movement of workers test to be applied to regulations and practices (see *Chapter 6*).

3. Public Sector Workers: Taking Duly into Account Civil Servants, Contract Workers and Others

Public sector workers in Member States have specific characteristics which make them distinct from private sector workers, and which have an impact on the way issues of free movement of workers in the public sector are being handled and have to be handled.

A first specific feature is that public sector workers are not only employees of the body which is their employer in legal or practical terms (see *section 2*). They are also, albeit in some instances indirectly, employees of government (at central, regional or local level). This double relationship explains in formal terms the existence of general principles or staff regulations which go beyond, and are different from, general labour law in a given country. Furthermore, there are specific values applicable to public sector employment which impact upon the existence and content of these general principles and staff regulations (see *section 1*. 3).

The problem, when it comes to free movement of workers in the public sector, is that there are differences from a Member State to another, and sometimes from one historical period to another, in the way these values and the double relationship of public workers impacts upon the existence and content of applicable legislation and regulations, as well as practice. These differences have two consequences which need to be underlined.

3. 1. Information is often limited to a category of public workers

In an important part of the documents which were available to the author of this report, as well as in literature on public sector employment, information is mainly limited to the legal status of public sector workers and on practice in applying this legal status; in other words, it is mainly dealing with the workers whose position is under a specific legal relationship, most often a public law relationship.

Even if concentrated on a single country, an outsider's assessment of obstacles to free movement of workers in the public sector is at risk to be biased towards a limited part of public sector employment, of even to a very marginal part, due to the fact that the special public law relationship does not apply to all public sector workers.

When it comes to make comparisons, or to assess a given country's system from outside, the differences between Member States may generate extremely important misunderstandings as to what is meant in a given country. Misunderstandings are anyway a daily problem in assessing the implementation of EU law, due to the use of a language (most often English) which is not the original language of the relevant laws and regulations. In the case of free movement of workers in the public sector, the potential for misunderstandings is increased due to the fact that similar concepts bear different names, and different concepts bear similar names in different countries, but also within a country, according to whether they are used with their current meaning or with their legal meaning.

To start with the concept of '*civil servant*' which corresponds to e. g. '*fonctionnaire*' in French or '*Beamter*' in German, it has to be underlined that common use, literature, and sometimes even legal instruments are not always clear as to their meaning. In some cases the expression civil servant is used as a synonym of public sector employee; in some cases it is a synonym of government employee; in some other cases it is a synonym of public administration employee.

Even in the English language, there are different legal significations of the words *civil servant* and *civil service*. In the UK *civil servants* are '*Crown servants*', i. e. employees of central government, or regional government as far as Northern Ireland, Scotland and Wales are concerned. In Ireland, there is a difference between *civil servants*, which are central government employees, and *public servants*, which include civil servants, local government employees – including teachers – and the police. In Malta, only the term *public servant* is being used. Hence using the words civil servants or public servants may raise very different interpretations.

In German law, '*Beambte*' have to be opposed to '*Angestellete und Arbeiter der öffentlichen Dienste*' (employees and workers of public services). Members of the first category are employed under a special public law relationship, whereas members of the second category are employed by contract under ordinary civil and labour law. In France, in legal terms, only civil servants with tenure are *fonctionnaires* whereas other employees are under special relationship, usually a contract. However, contracts with public administration in France are by definition contracts under administrative law, subject to the exclusive competence of administrative courts, which means that contract employees are not under ordinary civil and labour law.

The issue is even more complicated due to the fact that the scope of the special (public law) relationship as opposed to contract (labour/civil law) employment varies from country to country and from period to period.

In order to try and put some order in the different types of government employment relationship (i. e. excluding public enterprises where usually only civil/labour law applies to employment), one may distinguish three types of systems.

A first system, which could be called 'German system' for the sake of simplicity, is based upon the idea that it is not the nature of the employer, but the functions to be exercised by the employee, which are at the root of the difference of status. The civil service relationship is normally applied to persons

who have decision making powers relating to public authority, whereas other functions are exercised under a labour law relationship.

This 'German system' is traditionally the system not only in Germany, but also in Austria, Denmark, Luxembourg, It also used to be the system of French administrative law until the second half of the XIXth century and the system in use in Italy until 1921. More recently, the 'German system' has been introduced in most Central and Eastern European Countries like for instance in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania and Poland, and to a very limited extent again in Italy since 1993.

One of the problems with the definition of civil servants in the 'German system' is that it is not coherently applied. There are usually workers who do not exercise decision making powers relating to public authority but have nevertheless the status of civil servant (especially in Germany and Luxembourg) and vice-versa there may be workers exercising these type of powers who are employed under civil/labour law (typically in Austria, Denmark, or nowadays in Italy).

Furthermore, in a number of countries, there has been a shift from the civil servants status to contract employment for a very important number of positions, which had very little to do with the nature of functions, but was due either to pressure from trade unions, who more easily co-determine working conditions under contract employment, or from public employers seeking more flexibility than permitted by existing civil service rules.

A second system, which could be called 'French/Nordic system' for the sake of simplicity, is based upon the nature of the employer: government employees, irrespective of the fragmentation of public sector employees, are normally under a special (public law) relationship, with the sole exception of employees of public enterprises.

This 'French/Nordic system' is traditionally the system applied in France since the end of the XIXth century, but also in Belgium, Finland, the Netherlands, and Sweden, as well as in Greece, Portugal, Spain , and in Italy from 1921 to 1993. The 'French/Nordic system' has also been taken up by some Central and Easter European Countries, like Romania.

Two issues need to be considered. In many countries, government have been using contracts – sometimes in a formally illegal way – in order to fill temporarily unexpected vacancies, or to by-pass the rules of recruitment. Hence, even though in principle applicable to the whole of government employment, the civil servants status does not cover all government relationship. Furthermore, the content of rules applying to contracts vary: in some Member States, it is established by law that they are submitted to ordinary labour law, or on the contrary – as in France – to special legislation and courts case law; in other countries or periods, as the contracts are by definition illegal, there are not submitted to any legal rules.

A third system, which could be called 'British system' for the sake of simplicity, is again based upon the nature of the employer: civil servants are State servants, whereas employees of local government or other corporations which are not part of the private sector are not considered as civil servants. It does not necessarily mean that the non civil servants are employed under ordinary labour law, as demonstrated in the UK by the specific employment relationships of teachers or of members of the National Health service. Cyprus, Malta and Ireland have a related but somewhat simpler system, if one considers the scope of their public service. Instead of having basically two sets of rules to consider like

in the 'German system', there may be three or more sets of rules.

3. 2. The content of legal statuses of public sector workers

Irrespective of the formal legal status, the content of staff regulations applying to civil servants and contract employeesmay be very different or very similar according to different Member States or periods.

Very typically, in countries like France, Germany, Italy or Spain, for instance, there is a tendency to equate civil service relationship with career systems, and contract employment with post based systems. This link is absent in the tradition of Finland, the Netherlands and Sweden, which have a post based civil service system, where formal appointment is complemented by a contract (on the basis of the public law staff regulations) which is related to collective agreements.

When it comes to obstacles to free movement of workers that might be connected to taking into account professional experience and seniority, what matters is not the public law or private law nature of the relationship, but the application or not of career system mechanisms.

There is no necessary link between a public law status, a career system and a given system of open competition. In France, there is a tendency to equate civil service relationship not only with a career system, but also with regulated open competition for the purpose of access to career, and sometimes promotion. In Germany, on the contrary, the civil servants' status implies a career system – a feature which is considered part of the "*traditional principles of the civil service*" of Art. 33 Basic Law –, but recruitment is not based upon a formal open competition. In Italy open competition is mandatory as a rule for all public employment on the basis of Art. 97 of the Constitution, without any regard to the public law or private law employment relationship. It has to be added that, as explained in *Chapter 4 section 3*, the notion of open competition (*concours, concorso*) may be implemented according to very different methods from one country to another and from one period to another.

Apart from understanding which rules apply to whom, one of the major problems linked to the differences in legal status is due to the fact that in many countries, the public or private nature of employment is used as major criterion for statistics on public sector employment. It would not be a serious problem if the public law status coincided to a very large extent with government employment, but this is not the case. Furthermore the scope of each of the legal statuses varies greatly from one Member State to another, to the extent that statistics become impossible to compare.

To take only two examples: teachers and university professors are normally employed as civil servants in France and in Germany, not in the United Kingdom; regional and local government employees are employed as a rule as civil servants in France, for the biggest part as contract workers in Germany, whereas they are not considered as civil servants in the UK – with the exception of the Northern Ireland, Scottish and Welsh parliamentary assemblies and government employees. It takes little to understand that comparing the employment under civil service status only makes no sense for these three countries of approximately the same size.

To sum up, the differences of status between public sector workers are extremely variable in space and time, and they add to the complexity analyzed under *section 2*, which is stemming from the fragmentation of public sector employers.

When enquiring about free movement of workers in the public sector, government bodies, experts and academics should never rely solely on laws and regulations applying to civil servants – whatever their definition be – but always check whether and to what extent civil/labour law applies to the issues they are examining, not to mention the possibility of sector specific legislation. As indicated in *Chapter 4 section 1*, this is a major limitation to the available information for assessing the existence of obstacles to free movement of workers in the public sector.

In order to be useful, statistics should be assembled not only on the bases of legal status or on the basis of the nature of the employer, but on the basis of a series of criteria allowing as well relevant data decomposition as relevant data aggregation. In order to achieve a better understanding of the possible impact of free movement of workers in the public sector, country by country and in the EU as a whole, as examined in *Chapter 2*, the author of this report thinks it indispensable to establish the relevant criteria in cooperation with Eurostat in order for the latter to assemble and publishe useful data.

4. Appeals and Remedies: Tools for Enforcement and Sources of Information on Obstacles to Free Movement

To the view of the author of this report, issues of appeals and remedies available in case of obstacles to free movement of workers in the public sector have been given too little attention in academic literature, studies, reports, as well as in many of the documents used for the preparation of this report. These issues are particularly important for public sector works, for two reasons.

4. 1. The EU law requirement to give reasons and to make judicial review available

In EU law there is a general requirement for public authorities to give reasons and for Member States to make judicial review available against decisions of public authorities which negatively impact on the free movement of workers.

This general requirement has been first expressed by the ECJ in *Case Heylens 222/86*, (see Introductory *Chapter, section 2*), and has become settled case law. As the court indicated in its judgement, if a decision by public authorities has a negative impact on the right to free movement of EU citizens, such a decision has to "*be made the subject of judicial proceedings in which its legality under community law can be reviewed, and [it must be possible] for the person concerned to ascertain the reasons for the decision*". Such an obligation does not rest on private employers, but it rests on public employers.

Leaving aside the question whether public employers would be necessarily considered in this respect as acting as a public authority under EU law (see above, section 2), it is clear that in many Member States, the decision to recruit or not, or to grant or not a benefit or an advantage linked to working conditions, is equivalent to a decision of a public authority, when it comes to allowing for appeal or impeding it. For the reason which has just been mentioned, the scope of the obligation to give reasons and to make judicial review available is far broader when it comes to applying the principles and rules of free movement of workers in the public sector than in the private sector. It should therefore always be a specific topic of enquiry when monitoring applicable legislation/regulations, as well as practice.

To the view of the author of this report it follows from the principle of sincere cooperation that Member State's competent authorities should encourage public employers to give reasons if they decide not to recruit or not to grant a specific benefit or advantage linked to work. They should insist on applying the rules which the ECJ, as well as many nationals legislation, many national courts and/or ombudsmen indicate as mandatory or good practice.

A very useful wording of these rule is to be found in the *European Code of Good Administrative Behaviour* which has been drafted by the European Ombudsman and approved by the European Parliament, at Art. 18 - *Duty to state the grounds of decisions*:

"*1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*

"*2. The official shall avoid making decisions which are based on brief or vague grounds or which do not* contain *individual reasoning.*

"*3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.* "

4. 2. Specific procedural rules and/or competent bodies for appeal

The procedural rules and/or bodies competent for appeal against decisions regarding staff management in the public sector– including courts – very often differ from the procedural rules and/or bodies competent for appeal regarding private sector workers. From one country to another there are important differences in procedural rules and competent bodies, and it should therefore never be taken for granted that rules are equivalent, or better, or worse when it comes to decide on the existence of obstacles to the free movement of workers.

In some countries, part or all of the relevant court proceedings are with administrative courts, as for instance in Austria, Belgium, France, Germany, Greece, Luxembourg, Poland or Spain; while in others there are no administrative courts, like in Denmark; or they have no competence in the field of working conditions, like in Italy. In some countries, access to administrative courts is easier, and the outcome more predictable, than access to civil or labour courts. In other countries, it is the other way round. In some countries, court appeals are only possible after administrative appeal within the relevant public employers' organisation or to a specialised body, or even limited to some type of decisions. In practice, it may well be that administrative appeals are quicker and more efficient than court proceedings.

A very important question arises with respect to free movement of workers under EU law: only a court or tribunal in the sense of Art. 267 TFEU will be able to ask for the Court's interpretation in cases where interpretation of EU law is not obvious; Such a court or tribunal is a body which responds to the criteria used by the ECJ in order to decide on the admissibility of a reference for preliminary ruling The ECJ case law shows that references in the field of free movement of workers are very frequent, and a very useful source of information on Member States' practice.

There are often specific criteria of standing with administrative courts, or with judicial review of administrative decisions by ordinary courts, which can impede court review, or on the contrary make it more easy for administrative courts than for ordinary or labour courts,

to counteract bad application of national law or bad interpretation of EU law.

As a typical example, decisions on staff recruitment may be challenged in administrative courts in France, Belgium or Italy by any person who has an interest, i. e. by candidates who have not succeeded in an open competition. In other countries, for instance in Germany, unsuccessful candidates can only challenge a decision concerning themselves, or a decision which impacts upon their subjective right. As there is no subjective right to be recruited by a public authority, the only way to challenge the appointment of a competitor is to argue on the ground of discrimination. As specialists of free movement of workers know, also non discriminatory provisions or decisions may be an obstacle to free movement of workers, which will only be admissible under EU law if it is grounded on imperative grounds of general interest. The latter case will not be easy to bring to court in countries where standing is limited to the protection of subjective rights.

In the Netherlands, for instance, there was no effective court remedy at all until the 1980s for a candidate who would not have been recruited, due of a combination of criteria in the law on civil servants courts and the law on judicial review of administrative decisions.

Furthermore the culture of litigation in public sector employment is very different from one Member State to another. The reasons for these differences are to some extent linked to the availability of remedies and to some extent to a perception of public authority as a too powerful body to try and challenged it with a court. The culture of litigation also obviously depends upon the existence and extent of procedural hurdles.

The culture of court litigation on public employment is very extended in France, for instance, due to a combination of factors: actions in annulment with administrative courts are almost free of charge, and there is no obligation to be represented by an advocate; furthermore, trade unions and interested associations are allowed to intervene in the proceedings; therefore the costs linked to litigation may be kept very low for the incumbents. There is no important difference in this respect with litigation with labour courts of first instance. But when it comes to public authorities, the ways and means to obtain enforcement are more extended than with private employers, and the chances that a litigant be exposed to retaliation of some kind lower, due to the high turnover in chief executive's offices.

All the factors which have been mentioned in the three previous paragraphs have to be taken into account when assessing the origin of references for preliminary ruling. It is not surprising therefore – to the view of the author of this report – that so many references for preliminary rulings with respect to access to public sector posts have come from France and from Italy.

Furthermore, when it comes to complaints received by the European Commission, the cultural factor which has been mentioned should also be taken into account. To the view of the author of this report, it is more likely that a national of a country with an extensive culture of litigation in public sector employment, or an EU citizen working in such a country, will lodge a complaint, than a person coming from or working in a country with little or no litigation culture. Typically, there is traditionally very little litigation on civil service in the UK, due to a number of legal impediments which have slowly diminished over time, due to the costs of court litigation and the absence of tribunals with a general competence in civil service disputes. Therefore UK administrative law literature

hardly ever touches upon the topic of civil service relationship, with the exception of very theoretical and to a big extent outdated considerations as to the nature of the civil servants' relationship with the Crown under the common law.

A last point needs to mentioned, which is rarely taken into account in documents and literature on free movement of workers in the public sector. In almost all EU Member States ombudsmen have been created in the last decades, with the exception of Germany and Italy at national level. Ombudsmen are bodies to which one may appeal against decisions of public authorities, in order to get recommendations, which are usually non binding but nevertheless very often help solving individual issues. Appeals to the ombudsman are in most cases far easier and less costly than going to court. In some Member States, issues about civil service are excluded from the realm of the ombudsman; in some others, only questions of access to the civil service might be of their competence, in others again, there are no limitations that would impede appealing to them for any issue linked to free movement of workers. Whatever the limitations of their competence in individual cases, ombudsmen have furthermore very often a broad possibility of addressing general issues in their annual reports. For all these reasons, it seems worthwhile that Member States' authorities try and involve the ombudsmen in monitoring and solving issues free movement of workers in the public sector.

To sum up, more attention should be devoted to the availability and specific features of appeals and remedies relevant to public service employment in the EU Member States, taking into account what has been underlined in the previous two sections about the differences in legal status between categories of public workers and about fragmentation of public employers.

Chapter 4

Potential Sources of Discrimination and Obstacles to Free Movement of Workers in the Public Sector

As mentioned in the *Introductory Chapter*, this report has been established on the basis of, amongst others, information provided by responses to the questionnaires sent by the Commission to Member States, as well as information provided in the yearly reports of the Network of experts in the field of free movement of workers. It also relies upon the information provided in the documents established by EUPAN especially the report "*Cross-Border Mobility of Public Sector Workers*", which was established for the Austrian Presidency of the EU in 2006 (see *References*).

A first indication comes out of the way in which responses to questionnaires are formulated;. a number of these are worded in a way which give the impression that the principles of free movement of workers apply only when citizens of other EU Member States are concerned; orthat if a post may be reserved to nationals, EU law has no impact at all on the workers who hold these posts. It is therefore necessary to insist on a general issue which is extremely important with regard to potential sources of discrimination and obstacles to free movement of workers in the public sector.

It is important to understand the implication of the principles of free movement of workers as laid down in Art. 45 TFEU and further developed by the relevant EU legislation, i. e. in the first place *Regulation 1612/68* EEC on freedom of movement of workers in the Community and *Directive 2004/38* EC *on the right of citizens to move and reside freely*. When having to examine whether a potential obstacle to free movement might exits, in the form of e. g. specific conditions related to seniority or professional experience, it would be wrong to assume that the mere fact that posts are reserved to nationals on the basis of the criteria for the application of Art. 45 (4) TFEU puts these posts totally outside of the scope of free movement of workers.

Already more than forty years ago, Art. 8 of *Regulation 1612/68* only stated that a worker from another Member State "*may be excluded from holding an office governed by public law*"; and more than 35 ago, the ECJ confirmed this in its judgement in *Case Sotgiu* 152/73 (see *Introductory Chapter*, *section 1*e). It should be clear enough that Art. 45 (4) only plays a role in deciding whether a given post may be reserved to a Member State's national; Art. 45 (4) is not relevant when it comes to other decisions granting or refusing a benefit or an advantage linked to working conditions.

There are at least two factors which might lead to a lack of understanding of the implications of the principles of free movement of workers.

First, when writing about free movement of workers in the public sector, academic literature and official documents very often start with explaining the criteria of application of Art. 45 (4). Even if the introductory sentences of a document start with the principle of Art. 45 (1 to 3) and follow with the derogation or exception of Art. 45 (4) , attention focuses first on the latter when it comes to more detailed explanations. Furthermore many authors write about the strict interpretation of Art. 45 (4) by the ECJ in wordings that are technically true, and are probably driven by the wish to insist upon the binding charac-

ter of the criteria established the judgement of the ECJ in *Case Commission v. Belgium* 149/79. However, if they agree with this interpretation, the authors of chapters, articles or documents relating to Art. 45 (4) should avoid giving the impression that they are not fully endorsing it. Especially, with the exception of academic comments of jurisprudence, it would be useful to avoid giving the impression that the author of a document is not convinced by the reasoning of the ECJ, according to which Art. 45 (4) does not mean that "*employment in public administration*" is not exempted from the principles laid down in Art. 45 (1 to 3), but only that access to the posts that might be considered under EU law as posts in public administration may be restricted to nationals (see *Introductory Chapter*, *section 1*e).

In the view of the author of this report, explaining the consequences of freedom of movement in the public sector should start with stating the principle, i. e. the content of Art. 45 (1 to 3) and examine what are the obstacles to its effective application. One should proceed with the examination of limitations to the principle of free movement of workers which may be implied by treaty provisions, EU legislation and case-law only as a second step. And only once all the issues relating to potential obstacles to free movement have been dealt with, one should proceed, as at third step, with explaining the derogation to the principle, i.e. examining with which posts are reserved to nationals of a Member State and if such reservation comply with the relevant criteria for the interpretation of Art. 45 (4).

Second, one should never forget that citizens of EU Member States may leave their own country in order to reside and work abroad, and return afterwards. Having made use of their right to free movement, they are and remain in the field of application of the principle of free movement.

The wording of *Regulation 1612/68*, which only insists upon wordings such as "*the worker who is a national of a Member State [may or may not...] in the territory of another Member State*", is clearly outdated. *Directive 2004/38 on the right of citizens to move and reside freely*, which consolidates and complements previous directives on the free movement of persons and the case-law of the ECJ, starts – after definitions – with the '*right of exit*' (Art. 4). Although this provision specially applies to the right of citizens to leave their home country's territory provided they are in possession of a valid identity document, the provision reflects a more general principle of EU citizenship law, i. e. the right to make use of the free movement of workers and of the freedom to reside in another Member State.

One also should not forget that a growing number of candidates to public employment, or public sector employees have made use of their freedom of movement and will make use of this freedom in the future. These citizens are eligible to work in all posts in the public sector of their home Member State, including the reserved posts taken into account by Art. 45 (4). One should also take into account persons who have recently acquired nationality of their host Member State: they also are eligible to work in all posts in the public sector, including the reserved posts taken into account by Art. 45 (4).

If these citizens of the Member State where they are working or want to work have resided or worked in another EU member State, it is more than probable that they will not have had the opportunity to acquire skills or other qualities – such as e. g. experience or seniority – in their home public services. Hence, if the public employers apply working conditions without duly taking into account previous work or residence abroad of the

citizens of their own Member State, their behaviour is constituting a discrimination on grounds of nationality, prohibited by Art. 18 TFEU.

The general issue that just has been explained, together with the considerations of the previous *Chapter*s about fragmentation of public employers and differences of status of public employees amount to a general proviso to what will be explained in this *Chapter*. Even though the documentation examined in order to prepare this report does not reveal the persistence an important number of obstacles to free movement, it does not mean that such obstacles do not exist. It is more than probable that new references for preliminary rulings and complaints to the Commission, as well as petitions to the European Parliament will in the coming years reveal the existence of obstacles which had not yet been taken into consideration.

1. Legislation and General Regulation of Access and Employment Conditions: a Necessary but not Sufficient Parameter of Assessment

Each of the *Country files* of Part II of this Report tries to give an overview of general legislation and regulations applicable to access to employment and employment conditions in the public sector. They also try to give some account of the practice. At any rate, it should be kept in mind that the *Country files* have not been written with the purpose of being a base for an action in infringement initiated by a Member State.

The purpose of the *Country files* is only to help in giving guidance to experts in charge of monitoring compliance with EU law within Member States and outside of Member States, and in finding possibly new ways to increase the knowledge of EU citizens who wish to make use of their right to free movement in the public sector.

1.1. Legal sources: the difficulties of assessment and comparison

The legal sources mentioned in the *Country files* are indicated in a general form. They are neither precise – e. g. they do not indicate where the quoted texts may be found – nor comprehensive. In order to keep enough homogeneity between *Country files* the author of this report had to take into account that the degree of precision of the sources used varies considerably from one country to another; so does his knowledge of the relevant languages. Even when a translation into English is available, experience with comparative law warns us that much substance of legislation and regulation gets "lost in translation".

The information in the *Country files* has to be read with caution, taking into account what has been explained in the two previous *Chapter*s about fragmentation of public employers and differences of status of public workers. Maximum caution has to be applied when deducing from legislation and regulation that practice indeed complies with the principles and rules of free movement of workers.

One recurring issue needs to be pointed out: understanding legislation and regulations only too often needs skills which are only mastered by a limited number of specialists in practice and academia. Ideally, in order to fully understand the implications of the relevant legislation and regulation, one would need a good education in EU law, as well as in the relevant Member State's administrative law and constitutional law; labour and civil law; not to forget civil and administrative procedure. This means that a really thorough examination of a Member States' legislation

and regulations would need a team of experts from different fields, to be possibly complemented by experts in public management. This is most often not feasible; therefore experts who master only one or a few of the relevant skills should be cautious in drawing conclusions from legislation and regulations.

Furthermore, differences from a Member State to another as far as legislative and regulatory techniques are concerned make it difficult to assess legislation and regulations for an outsider; these difficulties are increased by translation. Two specific points may be mentioned here.

First, the existence of a given legislation in a country does not mean that it is indeed applicable. As demonstrated by e. g. the Czech legislation on civil service (see *Country files*), a piece of legislation might not be applicable – although formally in force – due to the existence of transitional provisions which amount to defer the applicability of some clauses, even of the majority of them.

Second, the techniques used in amending existing legislation make it often very difficult to have a quick and complete overview of applicable legislation. Only few countries use the technique know in Germany as "*Novellierung*", by which the amended legislation is being readopted in its new wording; in most countries amending legislation refers to articles and paragraphs of existing legislation, and there is not always a "consolidated" version of the texts that have been amended. Furthermore, as illustrated by Art. 5 of the Italian *Law 2008 n° 101 Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ* (see *Country files*), legislation may set general principles that contradict previous existing legislation, without repealing the provisions which should not any more be applied.

More generally, in many Member States, the effective applicability of legislation is often subordinated to the adoption of complementing regulations, in the form of government decrees or agency specific regulations. Understanding if and to what extent legislative provisions are applicable in the absence of complementing regulations needs a good knowledge of the relevant country's case law, mainly that of supreme courts and constitutional courts. Uttermost caution must therefore be exercised in reviewing legislation.

1. 2. Practice: general lack of information and symptoms of misunderstandings

As mentioned in the two previous *Chapters* and at the beginning of this *Chapter*, this report has been established on the basis of, amongst others, information provided by responses to the questionnaires sent by the Commission to Member States, as well as information provided by a network of experts. There is a limitation in most of these documents, i. e. the scarcity of information on practice. This scarcity is probably due mainly to the fragmentation of public employers which has been mentioned in the previous *Chapter*, and – in many Member States – to the lack of procedures and organisational tools in charge of monitoring the good application of free movement of workers in the public sector.

Furthermore, it is not clear whether and to what extent experts and officials from Member States' authorities who are involved in the assessment of free movement of workers in the public sector take fully into consideration the purpose of applicable legislation and regulations. Taking into account the purpose of legislation and regulation, and also the purpose of exercising discretion in their application is directly linked to the question of compliance with EU law. This is especially

true when it comes to applying the proportionality test, which enables to understand whether a rule or practice, which might constitute an obstacle to free movement in the public sector may be legitimate under EU law because it would be justified by "*the protection of imperative grounds of general interest*" (See *Introductory Chapter, section 1*).

The scarcity of information on practice in the documents which were available to the author of this report means that one should avoid to rely on the information given in the annexed *Country files* in order to asses globally the existence of potential sources of discrimination and of obstacles to free movement of workers in the publics sector in a given Member State. Even if a Member State's legislation and regulations are wholly complying with EU law, it does not mean that the legislation and regulations are properly applied by all public employers. It should be remembered that, as explained in the *Introductory Chapter* and in *Chapter three*, Member States are liable for the mistakes made by public employers which result in an infringement to EU law.

2. Special Requirements for Access to Employment and Working Conditions

Cases brought to the ECJ by references for preliminary ruling from national courts, or brought to the attention of the European Commission by way of complaints, or to the European Parliament by way of petitions, have shown that legislation and regulations applicable to public sector employment often embed requirements that may impact negatively upon the exercise of free movement of workers. This is especially the case of professional qualifications and skills, professional experience, seniority, language requirements and, last but not least, access to pension rights.

For reasons explained in section 2. 5, the Commission's questionnaire which was sent out for the preparation of this report, and the yearly reports of the Network of experts who monitor the free movement of workers, focus on professional experience, seniority, language requirements. The examined documentation, as well as other sources which have been used for this report, has only revealed few other potential obstacles; it does not mean therefore that such other obstacles do not exist. As explained in *Chapter 3*, fragmentation of public employers and differences of status between public workers might well hide a number of yet unknown obstacles to free movement.

The existence of obstacles for access to employment and working conditions which are due to legislation and regulations – as opposed to obstacles in practice – depends to a large extent upon the employment system adopted in a given country, i. e. career systems v. post based systems, or open v. closed systems. What is specific to the public sector is not the organisational concept of a given employment system, but the fact that the system applies to categories of public employers, and not to single employers separately. In the private sector there are often analogue systems of career progression, which apply to the different plants of a same corporation, or to the different corporations of a same group or holding; the relevant rules may be often found in corporation wide or group wide staff regulations, sometimes in agreements with trade unions. But normally the employment system in the private sector is not based on legislation and regulations, contrary to the public sector.

When it comes to assessing compliance with EU law – or simply compliance with a

Member State's legislation and regulations – it is essential to understand the logic and functioning of the country's recruitment and career mechanisms which apply to the public sector. Often only specialist in the practice of the public sector (e. g. in a department of public administration) and some academics specialised in civil service issues have the relevant knowledge. When it comes to EU wide analysis, there are many misunderstandings due to the fact that the structure and mechanisms adopted to solve similar issues vary in many details from a Member State to another. This is one of the two main reasons of the difficulty of assessing the existence of obstacles resulting from the conditions for employment and access to advantages and benefits linked to employment. The other main reason of this difficulty is the lack of appropriate information about practice.

Two examples are given here to illustrate the type of misunderstandings which have to be faced when monitoring free movement of workers for the issues of conditions of employment.

First example: in a recent white book on civil service reform in France, submitted to the government on 17 April 2000, the rapporteur, Mr. Silicani, wrote: "*Of the four countries historically doted with a career public sector system, in other words Spain, Italy, Portugal and France, our country is the only one that has not undertaken any large-scale reform of its public sector in the past twenty years*" (quoted in the report on France of the Network of Experts on free movement of workers). A specialist of comparative civil service knows that the number of relevant countries is far higher, as it includes without any doubt Germany, as well as Austria, Belgium, Greece, Ireland, Luxembourg and, last but not least, the United Kingdom (all are countries "historically doted" with a career system). Such an error maybe does not matter in itself, but it is very symptomatic of a deep misunderstanding about other Member States' systems.

Second example: many of the expert's reports and replies to Commission's questionnaires used for this report contain statements like for instance "*we do not have a 'concours' system for recruitment*". Contrary to the assumption underlying this kind of statement the French word '*concours*' (*concorso* in Italian) does not mean anything different from '*open competition*'. The issue at stake is that there are different ways to organise an '*open competition*': on a post by post basis; or for a series of posts; or for the entry into a career group; or to get a certification that is necessary for recruitment – the latter is the system in use for EU institutions, and was the traditional system of recruitment to the civil service in Italy. Even in France, all these different modalities of open competition exist, and they are all named '*concours'*. Furthermore an open competition may be based on specific selection proofs or on the examination of candidates' files, or on interviews with candidate. Here again, even in France, all these different modalities of open competition exist, and they are all named '*concours'*. In Spain there is a difference between '*opposicion'* which corresponds to the first modality just envisaged (selection proofs), whereas '*concorso'* corresponds to the second (comparative examination of files).

There is no automatic relationship between the existence of possible obstacles to free movement and the different modalities of competition. Highly regulated modalities, which are conceived in order to ensure formal equality between candidates, may well in practice lead to obstacles for candidates having resided or worked abroad; if well designed, the modalities of open competitions may on the contrary be a good tool to avoid not only direct, but also indirect discrimination. On the contrary, systems mainly based upon the examination of files and/or interviews may fa-

cilitate discrimination or hinder it, depending upon the culture and intentions of assessors.

What is typical of an 'open competition', in the countries which use such a system for recruitment or promotion, is the formally organised comparative examination of candidates. What varies from country to country, and sometimes within a country, is the position of the assessor or assessing board with regard to the employer. The assessor may be independent from the employer or dependent from him, or may even be the employer himself. The independence of the assessor is usually conceived as a tool to avoid the influence of party-political, friendship or family bonds of the candidate on the outcome of the selection.

There is no relationship between the existence of possible obstacles to free movement and independence of the assessor. What matters to free movement is mainly that if independence of the assessing body is provided by means of centralised recruitment, as e. g. in Belgium or in Malta, the effects of the fragmentation of the public sector employers may be easily counteracted. In the absence of organisational means of centralisation or coordination of recruitment, the alternative is to have detailed provisions about recruitment in legislation, regulations or non binding but morally persuasive codes or guidelines complemented by solid monitoring.

What has just been explained for recruitment or promotion in the specific case of '*open competitions*' also applies to a large extent for the access to advantages, benefits and rights linked to employment and working conditions.

The comments and analysis which follow have to be complemented by an appropriate examination of the *Country files* annexed to this report, as the existence and importance of potential obstacles to free movement vary very much from one policy sector or type of employer to another, let alone from one country to another. The available documentation did not enable the author of this report to go into a sector by sector analysis, which would be especially useful for the fields of education, health and transport, where the number of posts are important and where types of professional skills which are needed are often common to many if not all Member States.

2. 1. Professional experience: organising mutual recognition

Complaints to the European Commission and petitions to the European Parliament as well as references for preliminary ruling to the ECJ have in the last two decades revealed the existence specific issues of free movement of workers in the public sector, linked to the recognition of professional experience.

Indeed, it has appeared that requirements of professional experience and/or seniority in accessing to posts, advantages, benefits or rights linked to working conditions have created obstacles to the exercise of their right to free movement for EU citizens from other EU Member States, as well as for citizens of the host Member State (see *Introductory Chapter, section 1*). This is why, since a number of years, questionnaires on free movement of workers in the public sector addressed to Member States or to experts include specific questions as to requirements of professional experience and/or seniority in the public sector.

1) Very often, responses to the questionnaires, as well as reports of experts, do not clearly distinguish between professional experience (which could be defined as the content of work accomplished) and seniority (which could be defined as the duration of previous working periods). This lack of distinction is probably due mainly to two reasons. First, many provisions of staff regula-

tions – be they embedded in general or specific legislation and regulations or collective agreements (see *Country files*) – do not distinguish between professional experience and seniority, or they do not define professional experience and seniority in the same way in one Member State and in another. Second, as mentioned in the introduction to this section, professional experience and seniority are often considered as one of the elements of the files of candidates to a post, or of a request of an advantage, benefit or right.

2) Professional experience may be important for access to a specific post. Professional experience is usually not a criterion for access to a career or career group in countries or parts of the public sector which are regulated according to the principles of a career system. The difference between a career system and a post based system has very high relevance to the issue of mutual recognition of professional experience, but as indicated earlier, there are also mixed systems, with elements of a career system and elements of a post based system.

On the basis of available information, it is easy to point out that there are important differences between Member States, as to the degree of regulation of the requirement of professional experience. These differences make it more difficult to compare professional experiences acquired in different Member States that may be relevant for access to posts, advantages, benefits or rights, than to compare diplomas for a regulated profession.

3) In the view of the author of this report a special effort would need to be made by Member States in terms of procedural and organisational means, in order to facilitate mutual recognition of professional experience. Such procedures and/or organisational devices for the purpose of mutual recognition should be defined in legislation and regulations, or at least indicated as a good practice in guidelines produced by Member States' authorities. The procedures and bodies in charge of mutual recognition of diplomas might be a good model for such procedures and organisational devices: the relevant bodies might even be put in charge of the function of mutual recognition.

In the case of France, a special board (*Commission d'équivalence pour le classement des ressortissants de la Communauté européenne ou d'un autre Etat partie à l'accord sur l'Espace Economique européen*) is in charge since 2005 of taking into account the professional experience acquired abroad for integration in the civil service. In some Member States, the comparison of professional experience acquired abroad with the experience acquired at home is done by the civil service commission or an equivalent body when it comes to recruitment or access to certain posts, for instance in Belgium *Jobpunt Vlaanderen*. There are also cases where the *Public Service Commission* has a general function of comparing professional experiences when they are relevant for other purposes than access to posts, for instance in Malta and Cyprus.

In most Member States there is no specific body in charge comparing professional experiences and establish that they are to be considered as equivalent for the entire public sector. The absence of a specific body is not a source of non compliance with EU law, but if combined with the absence of a general monitoring system for issues of free movement of workers in the public sector, the risk that obstacles to free movement arise in individual cases is higher than where a specific body exists.

4) It does not appear in an obvious way from the documentation available for this report whether legislators and regulators have enough conscience of the scope of the obligation of mutual recognition of professional experience in the public sector.

A number of Member States require a certain level of education and/or more specialised training of professional experience, for entry into service and for career purposes. This is indicated either in the general legislation or regulations, or in issue specific or sector specific regulations. Most often, what is missing in legislation and regulations are provisions which explicitly indicate that education, training and professional experience in other Member States have to be treated on an equal footing with education, training and professional experience acquired in the host state. There are cases where in the absence of a diploma or certificate, a special assessment of professional experience is undertaken on the basis of legislative or regulatory provisions, as is the case for instance in France (see *Country files*).

5) A distinction needs to be made between the issue of mutual recognition of diplomas and professional qualifications which are needed in order to be entitled to the exercise of certain professions, and mutual recognition of education, training and professional experience as part of a recruitment or promotion system. The first issue is indistinctly relevant to the private and public sector and as well to dependent workers as to the self employed; it is regulated in EU law by directives on mutual recognition of diplomas and professional qualifications (see *Section 5*). The second issue is specific to the public sector; it depends upon the practice of public employers and the relevant legislation and regulations.

The *Burbaud case C-285-01* has some links with the issue of professional experience, but is more intricate, and will therefore be dealt with in section 2.4 (other potential obstacles).

6) In some Member States, due to judgments of the ECJ, an effort was undertaken in order to eliminate requirements which were contrary to EU law. In the case of Italy, such a provision has been adopted with Art. 5 of Law *2008 n° 101 Emergency provisions for the implementation of community obligations and the execution of judgements of the EC* (mentioned under 2. 1.; see *Country file* on Italy). In the case of France some provisions of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service* have had the same purpose; they have been complemented by a series of decrees adopted in 2006 and 2007 in order to implement the legislation.

Although it does not always appear in the documentation available for this report, a number of Member States have spontaneously undertaken reforms in order to eliminate from their legislation requirements that could create obstacles to the free movement of workers in the public sector. This has especially been the case of candidate States or new Member States, but also some older Member States have done the same kind of efforts.

This being said, legislators and regulators further need to think about the purpose of provisions that result in limiting mutual recognition of professional experience and assess them also in view of the principle of proportionality in order to determine their compatibility with EU law.

7) What seems to be missing in most member States are general guidelines for public sector employers and recruitment bodies indicating that they have to take into account experience abroad in order to avoid creating obstacles to free movement. This is especially important when there are no specific regulations on the way professional experience has to be taken into account. In France, the *Documentation française* has issued information booklets, on these issues, especially in view of the French presidency of the EU in 2008.

General guidelines need to be very explicit about at least two elements: first, the

guidelines have to indicate that the principle is mutual recognition, and that a professional experience abroad should be looked at without prejudice, in order to avoid discrimination; second, the guidelines have to indicate how officials in charge have to handle comparisons of experience acquired abroad with experience acquired in the host country: by which method, on the basis of what documentation and with what type of enquiries with the bodies or authorities where the experience has been acquired.

One example of such guidelines is given by point 5. 3 of the *Guidelines of the European Commission for the assessment of conditions of seniority and professional experience* (*Communication 694 of 2002*). As already indicated in the *Introductory Chapter,* the Communication is stating :

"*The following guidelines at least have to be respected when adapting national rules/administrative practice:*

- Member States have the duty to compare the professional experience/seniority; if the authorities have difficulties in comparing they must contact the other Member States' authorities to ask for clarification and further information.

- If professional experience/seniority in any job in the public sector is taken into account, the Member State must also take into account experience acquired by a migrant worker in any job in the public sector of another Member State; the question whether the experience falls within the public sector must be decided according to the criteria of the home Member State. By taking into account any job in the public sector the Member State in general wants to reward the specific experience acquired in the public service and enable mobility. It would breach the requirement of equal treatment of Community workers if experience which, according to the criteria of the home Member State, falls into the public sector were not to be taken into account by the host Member State because it considers that the post would fall into its private sector.

- If a Member State takes into account specific experience (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 the 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 (in cases where the national system takes into account in a different way the professional experience/seniority of civil servants and employees) may not be used as criterion of comparison.

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

The complaints and Court cases so far have only concerned the taking into account of professional experience acquired in the public sector of another Member State. Nevertheless, the Commission wants to point out that due to the very varied organisation of public duties (e. g. health, teaching, public utilities etc) and the continuous privatisation of those duties, it cannot be excluded that comparable professional experience acquired in the private sector of another Member State also has to be taken into account, even if private sector experience is in principle not taken into account in the host Member State. If an obstacle to free movement is created by not taking into account such comparable experience, only very strict imperative reasons could justify it.

The documentation and literature used for the preparation of this report does not show to what extent these Commission guidelines have been further communicated to public employers by Member States' authorities. It is not clear whether the *Communication 694 of 2002* has originated special guidelines of Member State's authorities for the public sector. It is by any means probable that – to

the extent to which the *Communication 694 of 2002* has been further made known by Member State's authorities – only few Member States have dedicated a special document to the public sector employers.

To sum up, on the whole, the information available for this report does not allow the author of this report to make general statements on the existence or not of obstacles due to the requirement of professional experience. There are some cases where a legal provision is clearly an obstacle to free movement of workers (see *Country files*). What seems most often to be lacking in Member States is a provision in the relevant legislation or regulations that establishes or confirms that professional experience acquired in other EU Member States has to be taken into account on the same footing as professional experience acquired in the host Member State – whether by citizens of other EU Member States or by the host Member State's own nationals.

2. 2. Seniority: organising the portability of working periods

The indications provided about professional experience under section 2. 2. apply to a large extent to seniority, also due to the fact that often no difference between professional experience is made in staff regulations or in practice.

Especially, one may extend to the issues of seniority the indications given in section 2. 2 under the points 3 (special procedures and organisations in Member States), 4 (scope of Member States' obligations), 6 (amendments to existing legislation and regulations in Member States) and 7 (lack of general guidelines in Member States). A number of features specific to seniority have nevertheless to be highlighted.

It is not relevant from the point of view of free movement of workers in the EU whether previous working periods counts for the wage, for a financial accessory of the wage, if it is taken into account only for a part of the wage or if it is taken into account for access to certain posts. What matters is that if a working period in the host Member State is taken into account in the host Member State, a working period acquired in another Member State in organisations or functions similar to that of the host Member State have to be taken into account in the same way. The author of the present report suggests calling this "portability of working periods".

1*)* Seniority is important for wage purposes. Independently from the issue of having a career system or a post based system, many staff regulations take seniority into account for wages. Available documentation indicates that there are basically two types of situations.

First, there are Member States where, according to available documentation, wages are supposed to only depend on performance; very often this is the result of recent reforms of the public sector employment. It has however to be noted that, apart from the principle of merit payment, which may be at the root of the relevant regulations, the situation in the public sector is different from that of private employers due to the public nature of the budget of the relevant employer. This may lead to situations where the rules on remuneration have to be complemented by specific principles or rules of budgetary and financial law. Indications about the latter are missing in the documentation examined for the preparation of this report, and it is not possible to know whether the absence of such indications is due to the fact that there are no relevant principles or rules of budgetary and financial law in a given Member State, or because their existence has not been taken into account

because of the lack of precise questions to this effect.

What is often not indicated in the documentation available for this report is whether in practice performance is really the only element which conditions all wage and financial advantages, or whether a part of the wage and financial advantage system is based on other criteria. It is also difficult to know whether, in a given Member State, there are non binding guidelines – sectorial guidelines, or for categories of authorities – about how to differentiate on the base of merit. If such guidelines exist, it is more than probable that seniority is taken into account in a way or another. If there are no guidelines at all, it remains nevertheless probable that seniority plays a role in setting wages.

This is a very complicated issue. If there are no formal rules about working periods but seniority is nevertheless taken into account for the determination of wages and other financial advantages, it may well mean that in practice seniority acquired abroad is not taken into account. On the other hand, if governments give indications about how to take into account seniority acquired abroad, such indications negate the principle that wages are only based upon performances.

Second, there are however many Member States where seniority is taken into account by regulations for wage purposes. The question here is simpler: do the relevant legislation and regulations only recognise working periods in the host Member State, or is there an implicit or even better an explicit recognition of working periods acquired in other Member States?

2) Seniority is important for career purposes. This is obviously the case in countries which have a career system, such as for instance Belgium, France, Germany, Greece, Luxembourg or Spain. It may also be important in countries which have a post based system like for instance in Denmark, Finland, the Netherlands or Sweden, if seniority acquired is a condition for access to some posts. In many countries, like for instance Austria, the Czech Republic, Italy or Portugal, there is a mix: at least some parts of the public employment such as the diplomatic service and the judiciary are based upon a career system, whereas the rest is based upon a post system. From the point of view of compliance with EU law, there is no difference between both cases. The only situation where the question of portability of working periods has no relevance for career purposes is when seniority is never taken into account for access to posts.

3) There are some Member States where general legislation or regulations on the contrary explicitly provide that working periods in other EU Member State have to be into account if they are similar to those which are taken into account in the host Member State. In the case of Italy, such a provision has been adopted with Art. 5 of Law *2008 n° 101 Emergency provisions for the implementation of community obligations and the execution of judgements of the EC* (mentioned under 2. 1). In the case of France, four *Decrees, of 24 October 2002, 22 July 2003, 24 May 2004,* and *19 June 2006*, as well as some provisions of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service* have had the same purpose – amongst other –, as well as the implementing decrees adopted in 2006 and 2007, for instance *Decree n° 2007-338 of 12 March 2007* and *Decree n° 2007-1829 of 24 December 2007*. There are some indications that this has not been sufficient to eliminate all problems of compliance with EU law, as they may remain some sector specific rules which impede taking working periods abroad entirely into account, or which, while not being discriminatory, have a bigger impact on citizens having made use of their right to free movement: this is for instance the case of a limitation of the working periods which can

be taken into account, in the host Member State or abroad.

Other Member States where there are provisions in legislation or regulations to the effect of recognising the portability of working periods seem to be Belgium (for financial purposes), Bulgaria, Germany (in a general circular – *Allgemeine Verwaltungsvorschrift*) and Luxembourg, in a recent amendment of its civil service legislation (see the relevant annexed *Country files*).

4) In the majority of Member States, there are no provisions in legislation and regulations that impede portability of working periods from other Member States, but there is not either a provision which establishes the principle of portability, let alone organise it. This is illustrated by, for instance, the case of Austria, the Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, the Netherlands Poland, Romania and Spain. What has been indicated under section 2. 2. about mutual recognition of professional experience applies to working periods. This being said, in most cases, it will probably be easier to organise portability of working periods than recognition of professional experience.

5) In some cases, only working periods with the same employer are taken into account. This does not appear usually in general legislation and regulations, but may be the result of employer specific staff regulations. If the employer is a specific unit with organisational and management autonomy, for instance a specific executive or regulatory agency or one hospital, or one university, there is no issue of free movement of workers in such a situation, in the view of the author of this report. On the contrary in a case where the State is considered as the employer, similar working periods in another Member State's services would need to be taken into account.

6) In some Member States, there are specific sector regulations which provide for taking into account working periods in a category of public employers.

This is for instance the issue illustrated by the *Köbler* case C-224/01: the Austrian legislation provided for a specific financial advantage for university professors who had a certain amount of seniority in the Austrian university system, and the relevant authorities refused to grant the same advantage to Mr. Köbler, who had spent a part of his career in German Universities. The ECJ confirmed that in such a case, working periods abroad has to be taken into account in the same way as in the host country, if done in the same category of posts/organisations (university professor positions in other Member States, in the *Köbler* case).

Available information does not give indications on the existence of similar regulations which provide for taking into account working periods in a category of public employers. This is not astonishing as such regulations are by definition applicable to only part of public employers, and maybe not even known to the central offices which prepare replies to the European Commission or to experts working on free movement of workers. As explained in *Chapter 3* of this report vertical fragmentation of public employers is therefore a potential source of persisting obstacles. Only an in-depth scrutiny of the relevant regulations by the members state's competent authorities will enable to find out about the persistence of such provisions.

7) In some Member States, working periods in the public service or in one part of the public service (central, regional, local) are taken into account in other parts of the same level of government's public service. In others member States, working periods "*in the public service*" – without limitations – are taken into account. In cases where working periods

which can be taken into account are limited to the public service of the host Member State, or part of it, working periods in other Member States have to be taken into account in the same way as in the host country, as illustrated by the case law of the ECJ. Available information gives some indications on the existence of such regulations provide for taking into account working periods in a category of public employers. Illustrations of these situations are given for instance in the annexed *Country files* for Greece, Spain or Slovenia – this is not an exhaustive list.

8) Some regulations are worded in such a way that they are by definition creating an obstacle, i. e. because they mention explicitly or implicitly the host states' public service as the only locus for relevant working periods. This is illustrated for instance in the annexed *Country files* for Cyprus, Latvia or Lithuania – this is not an exhaustive list. As long as there is no specific complaint to the European Commission, or referral to the ECJ, it is however difficult to be sure to what extent the wording of a regulation is really a source of infringement, or whether there is room for an interpretation in practice which allows for compliance.

9) Some regulations provide that only a part of the working period abroad will be taken into consideration, while the whole working period in the host Member State is taken into consideration. Such provisions are clearly in breach of EU law; this happened for instance in the past in France and Italy in the education sector, but reforms have been undertaken in order to remedy to the situation. Available information gives very little information about the existence of similar provisions in other sectors or Member States. This is not astonishing as such regulations are by definition applicable to only part of public employers, and maybe are not even known to the central offices which prepare replies to the European Commission or to experts working on free movement of workers. As explained in *Chapter 3* of this report, vertical fragmentation of public employers is therefore a potential source of persisting obstacles. Only an in-depth scrutiny of the relevant regulations by the members state's competent authorities will enable to find out about the persistence of such provisions.

Furthermore, there may be cases where regulations provide that only part of previous working periods will be taken into consideration without discrimination as to where the work has been accomplished. Such a regulation might impact more on citizens who have made use of their right to free movement and therefore be contrary to EU law.

The documentation examined for the preparation of the present report does not clearly indicate whether public employers are enough aware of the fact that such regulations, which limit the amount of the of working periods that may be taken into account, may constitute a breach of EU law because of their impact on free movement.

10) There are also regulations which provide that working periods will only be taken into account if there has been no interruption. This has been the case with some specific regulations in France and in Italy, and might be also the case in Hungary (see the annexed *Country file*).

The question of continuity of services is a delicate issue: provisions requiring working periods without interruption are not necessarily a breach of EU law. It depends whether taking into account interruptions specially impact upon the possibility to move from one country to another. A worker who does not move from one EU Member State to another will not interrupt working periods with the public service as a whole or with categories of public employers, whereas a worker who

moves necessarily interrupt his working periods with the same employer.

Available information gives very little indications about the existence of such provisions. Complaints to the Commission and references for preliminary ruling show that most of this type of regulations is sector specific, as for instance in education. The vertical fragmentation of public employers is therefore a potential source of persisting obstacles. Only an in-depth scrutiny of the relevant regulations by the Members State's competent authorities will enable to find out about the persistence of such provisions.

11) As already mentioned under 2. 2. for professional experience, what seems to be missing in most member States are general guidelines for public sector employers and recruitment bodies that indicate that they have to take into account working periods abroad in the same way as working periods in the host Member State in order to avoid creating obstacles to free movement. This is especially important when there are no specific regulations on the way seniority has to be taken into account. What has been indicated in section 2. 2. under point 7 fully applies also to seniority, i. e. previous working periods.

To sum up, on the whole the information provided for this report does not allow to make general statements on the existence or not of obstacles due to taking into account seniority.

There are few cases where a legal provision is clearly an obstacle to free movement of workers, e. g. where only seniority in the host Member State is taken into account or where only part of the working periods abroad are taken into account. What is most often lacking is a provision that establishes or confirms the portability of working periods, i. e. that seniority acquired in EU Member States in situations similar to those which are relevant in the host Member State has to be taken into account on the same footing as seniority acquired in the host Member State– whether by citizens of other EU Member States or by the host Member State's own nationals.

2. 3. Language requirements: assessing proportionality

The EU has neither the competence to try and diminish linguistic diversity, nor any political objective of the kind. On the contrary, since 1957 the treaties have been given the same legal authority in all official languages (23 since 1 January 2007). Furthermore treaty reform in the last twenty years has led to give prominence to respect of linguistic diversity as a principle of EU law.

Regulation 1612/68 on freedom of movement of workers in *the Community* already made an exception to the prohibition of discriminatory conditions "*relating to linguistic knowledge required by reason of the nature of the post to be filled*" in its Art. 3 (1).

In the same way, *Directive 2005/36 on the recognition of professional qualifications* provides in Art. 53 that "*Persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practising the profession in the host Member State.* "

The ECJ has recently alluded to the specific status of language as regards free movement of workers in *Case Pesla* C-345/08, where it dismissed a line of argumentation presented by a plaintiff by stating that it "*would, if taken to its ultimate conclusion, be tantamount to accepting that a candidate could be admitted to serve as a legal trainee without having any knowledge of German law or the German language.* " The Court clearly wants to say that a requirement to know German in order to access legal professions is obviously in conformity with EU law.

In order to fully appreciate which language condition may be required in a Member State, it is necessary to have in mind the following.

First, due to the existence of official language(s) in the Member States, it is legitimate to have language requirements for the public service in legislation and regulations. The relevant official language(s) may vary from region to region, as happens e. g. in Belgium or in Spain. The nature and level of the required language is subject to the application of the principle of proportionality.

Second, some minority languages have a special administrative status in some Member States. It is also legitimate to have language requirements relative to minority languages in the relevant part of the Member State's public service, subject to the application of the principle of proportionality in administrative practice.

Third, there may be minority languages which a given public authority wants to take into account for promotion of a specific policy. Here again, subject to the application of the principle of proportionality, specific regulations or administrative practices comply with EU law.

The fact that some languages are common to several Member States generates also a de facto discrimination between nationals from different Member States. Here again, the fact that legislation and regulation takes it into account the education system of another Member State which shares the same language should not be considered as contrary to EU law, subject to a closer examination of the specific circumstances.

The information available for this report shows a great diversity between Member States as regards the status of languages and the formal requirement of languages in the public service. The knowledge of the national language is a formal requirement in the legislation or regulations applicable to public sector or public service employment in Belgium, Cyprus, Estonia, Greece, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia, Spain. It seems to be considered as an implicit requirement in Austria, Bulgaria, Denmark, the Netherlands, Portugal, Sweden and the UK.

There are only rarely precise indications in legislation and regulations about the level of language required, for instance in Finland, Latvia, Lithuania, Luxembourg Malta; or about the procedure for assessment of language knowledge, for instance in Greece, Finland, Latvia, Luxembourg and Poland.

What is missing most in the documentation which was available to the author of this report, as far as language requirements are concerned, is information on practice, in order to assess the proportionality of the language level required to the functions exercise; or to assess the purpose of a language requirement if it is linked to a specific policy.

2. 4. Other potential obstacles to free movement of workers in the public sector

Two topics are not been dealt with in this report, although there are important sources of obstacles to free movement of workers in the public sector: professional qualifications for regulated professions, and the issues related to pension rights. Both are issues are dealt with by the European Commission, but in another framework than the free movement of workers, i. e. in the framework of the functioning of the internal market, because they also apply to the free movement of services and freedom of establishment. They were not dealt with in the questionnaires established for this report. The public, as well specialists of free movement of workers

should nevertheless be aware of their importance. Other potential obstacles to free movement of workers in the public sector appear in some of the documentation which was available to the author of this report.

1) *Professional qualifications for regulated professions*

As indicated in *section 2. 2* under point 5, a distinction needs to be made between the issue of mutual recognition of diplomas and professional qualifications which entitle to the exercise of regulated professions, and mutual recognition of education, training and professional experience as part of a recruitment or promotion system.

The first issue is indistinctly relevant to the private and public sector and to dependent workers as well as to the self employed; it is regulated in EU law by *Directive 2005/36 on the recognition of professional qualifications.*. Within the European Commission services, monitoring of the transposition and application of *Directive 2005/36* is not operated by the same service as the general monitoring of free movement of workers. Information on the mutual recognition of professional qualifications for regulated professions has not been dealt with in this report.

In a few words, there is an EU system of recognition of professional qualifications for regulated professions, based upon *Directive 2005/36 on the recognition of professional qualifications*. Knowing how *Directive 2005/36* on the recognition of professional qualifications has been transposed and is applied in Member States is particularly important for free movement of workers in the public sector.

First, as indicated by the ECJ in its judgement of 9 September 2003 on the *Burbaud* case C-285/01, employment in the public service falls in principle within the scope of directive 89/48 (which was replaced by *Directive 2005/36*), except where it is covered by Art. 45 (4) TFEU. Second, an important number of public sector workers are part of '*regulated professions*': this is especially the case for health professionals (doctors, nurses, dentists, veterinary surgeons, pharmacists), which are all subject to specific sections of the directive. Third, the documents used for this report show that the bodies which are set up on the basis of *Directive 2005/36* are also used in some Member States as a model for establishing or managing bodies for the purpose of recognition of foreign documents which need to be produced in order to get access to a public sector post or to professional advantages, benefits and rights outside of the scope of *Directive 2005/36*.

The second issue, as indicated in the previous paragraph, is specific to the public sector; it depends upon the practice of public employers and the relevant legislation and regulations. This issue has been dealt with in *section 2. 2* under point 5.

2) *Specific obstacles to entry in the public service*

A few remarks about *Case Burbaud C-285-01* need to be made here.

Mrs Burbaud, a French citizen, had studied in Portugal and wanted to become a manager in the hospital public service without having to pass through the relevant open competition and follow the training of the French *National School of Public Health*, which she deemed an unnecessary duplication of her previous studies. She lodged a request for judicial review against the refusal to let her access the relevant career group, and the administrative court of appeal of Douai asked the ECJ indicate the criteria for assessing the compatibility with EU law of the relevant system of training and examination. As a con-

sequence of the ECJ's judgement in the *Burbaud* case, a series of reforms were undertaken in France in order to allow that professional experience acquired abroad be taken into account for access to posts like the one at stake in the *Burbaud* case. The author of this report has some doubts about the fact that the exact meaning of the ECJ's judgement was always fully understood, even in France. Some of the information that was available to the author of this report show that there might also be misunderstandings about the issues at stake in this case outside of France, although the ECJ's judgement is very clearly worded.

In its judgement of 9 September 2003 about the *Burbaud* case, the ECJ decided, in answer to the questions referred to it by the administrative court of appeal of Douai (emphasis added):

"Confirmation *of passing* **the final examination** *of the École nationale de la santé publique, which leads to permanent appointment to the French hospital public service,* **must be regarded as a diploma** *within the meaning of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.* **It is for the national court to determine***, for the purposes of applying point (a) of the first paragraph of Article 3 of that directive,* **whether a qualification obtained in another Member State** *by a national of a Member State wishing to pursue a regulated profession in the host Member State* **can be regarded as a diploma within the meaning of that provision and***, if so,* **to determine the extent to which the training courses whose successful completion leads to the award of those diplomas are similar with regard to both their duration and the matters covered**. **If it is apparent** *from that court's examination* **that both qualifications constitute diplomas** *within the meaning of that directive and that those diplomas are awarded on the completion of equivalent education or training,* **the directive precludes** *the authorities of the host Member State* **from making access** *by that national of a Member State* **to the profession** *of manager in the hospital public service* **subject to** *the condition that he* **complete the training** *given by the École nationale de la santé publique* **and pass the final examination** *at the end of that training.* "

What is peculiar to the French civil service system is the existence of a number of government schools which give basic training to career groups (*corps*) of civil servants, so that the competition for entry to the said school as well as the proofs for ranking at the end of training form part of the open competition system for access to the said career groups – a similar system is only known to an extent comparable to France in Spain (where career groups are called *cuerpos*). Most of these government schools base their training programme not only on courses, but also on one or more internships (*stages*) in institutions where the students thus acquire professional experience. One issue is not yet fully settled arises out of *t*he second part of the Burbaud judgment, according to which MS are not allowed to oblige fully qualified migrant workers participate in a competition similar to that which was at stake in the Burbaud case, and that they have to provide for different ways to recruit those workers. The question is how to allow candidates which have acquired abroad a training or professional experience similar to that which is acquired in a government school, to access posts usually reserved to the alumni of those schools according to a ranking which results of the competition.

The most simple solution would consist in separating totally the proofs for ranking at the end of training from the competition to access posts. Due to the high number of government schools which exist in very different contexts in France, it is not possible to adopt a simple solution which would be applicable

across the board. For instance, whereas it seems that posts in the hospital service imply core functions for which education and professional experience may be acquired in any Member State, it seems that a tax school (*Ecole des impôts*) usually provides a type of training and professional experience that is unique to a given country, as there is no general harmonisation of tax law amongst EU Member States.

What is not specific to France (or Spain), is the existence of specific training courses and/or exams organised by government institutions – most often part of government or autonomous public authorities. In Germany, for instance, access to higher civil service posts is conditioned by success in two State examinations separated by a working period in different public or private offices. In the framework of the reform of the Law on the Civil Service of 1993 which opened access to civil service to EU citizens, a special provision was adopted that permitted to waive fulfilment of those requirements in Germany for candidates who could show equivalent training/exams in other EU member States.

In many Member States, there are training course or exams y which give access to specific posts, salary advantages or to career progression. The information provided to the European Commission for the preparation of this report contains very little information about such courses. Especially, there is hardly any detailed information about mechanisms to ensure that training and or examinations obtained in another EU Member State are taken into account in the same way as the training and examinations organised by the host state governmental agencies.

3) *Pension rights*

Pension rights was not either a topic addressed by the Commission questionnaires and network of expert reports which served as a major basis to this report.

Indeed a reform of *Regulation 1408/71 EEC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community* has recently been accomplished. *Regulations 1408/71 and 574/72* will be replaced by *Regulation 883/04* as amended by *Regulation 988/2009* and the *Implementing Regulation 987/2009*. The new legislative package, referred to as "modernised coordination", is applicable from 1st May 2010. While the basic coordination principles are not changed compared to the previous coordination rules, the administrative processes have been improved in order to make citizen's rights more effective. Limitations to the issues related to pension rights have most probably been amongst the most important deterrents to migration of workers in the public sector.

4) *Family members*

In the recently adopted reform of Spanish legislation, access to public employment is explicitly open for EU (and EEA or Swiss) citizens as well as to their spouses and children having a third country nationality. In other Member States, opening is usually limited to EU citizens and EEA or Swiss citizens. In a few number of Member States, like the Netherlands, the only difference made is between Dutch nationals and foreigners, whatever their nationality be.

The question whether EU law requires opening of public sector employment also to family members of mobile EU citizens is somewhat complex from a technical point of view. However, in the view of the author of this report, it seems that the principles of *Directive 2004/38* EC *on the right of citizens to move and reside freely* should prevail: Art. 45 (4) permits Member States to reserve certain

posts to their own nationals, while all other have to be open to all EU citizens in order to guarantee free movement of workers, more broadly free movement of persons. Contrary to other non EU citizens, family members of EU citizens benefit from the same right to free movement as their spouse or parent who is an EU citizen when the latter moves from his home country to another EU Member State.

It is at any rate worthwhile to mention that limitations to the employment of family members may be a very important deterrent to free movement in practice, and should therefore be given due attention.

5) *Residence*

In some cases, there seems to be a residence requirement for access to a post, as in the Czech Republic, Cyprus and Romania. There was such a requirement in Slovakia, but it has recently been abolished.

What is not admissible from the point of view of EU law is a residence requirement for accessing a post, be it reserved to nationals or not, if it is understood as a requirement to be fulfilled at the moment of application, not only after appointment. Indeed, even for a national who has made use of his / her right to free movement, there is an disproportionate obstacle with respect to a resident if he / she has to take up residence before applying to a post in the public sector, as there is no guarantee that the application will be followed by recruitment. Available information is unclear on this issue.

A residence requirement for exercising a function is a different issue. What is certainly permitted by EU law is a residence requirement expressed in terms of proximity of the working place. A requirement of residence which would be limited to the territory of the host Member State when there are other Member States at the same distance from the place of service (this is frequently the case in border regions), would be contrary to free movement, at least for post which may not be reserved to nationals. For the latter, the question to solve would be that of the purpose of a residence clause and the compatibility of its formulation with the principle of proportionality. Available information is unclear on this issue and there is no relevant case law.

6) Formal status

In some cases, some formal aspects of the status of public employee are reserved to nationals – for instance the title of civil servant (*tjenestemaend*) in Denmark. If the formal status of civil servant cannot be granted to non nationals, this might be considered as an indirect discrimination based upon nationality, even in the absence of difference in the content of working conditions.

In order to assess whether such a provision is compatible with EU law, its purpose has to examined: is it justified by imperative grounds of general interest and in conformity with the principle of proportionality? As the ECJ's interpretation of EU law is centred upon a functional approach, one may claim that a discrimination that would be only formal, resulting in a denomination, but having no practical consequences is not incompatible with the obligations resulting from the treaty. On the other hand it remains to be examined whether the fact that an EU citizen who is not a host Member State's national might be deterred from moving to that Member State because of this difference.

7) *Secondment*

A special mention needs to be made of secondment from and to the public sector. This topic is somewhat marginal to the issues

of potential obstacles to free movement in the public sector, especially because it is not often an option for which there are precise and complete provisions in staff regulations.

Generally speaking, with the exception of very temporary missions, secondment of public servants is mainly a feature of career systems, and a possibility absent in post based systems.

The experience with secondment made by Slovenia during its EU presidency, first semester of 2009, seems very positive, and has been an opportunity for the Human Resources Working Group of EUPAN to enquire about possibilities of and practice relative to secondment. The experience of European institutions with "*seconded national experts*" is the obvious source for further enquiry.

There would be an issue of compliance with EU law if the possibility to host workers from the public or private sector were limited to the host Member State, as it would clearly be discrimination on the basis of nationality. France is probably the country with the more generalised and most precise regulations regarding secondment of civil servants, as secondment is a basis of the traditional French mix of career system and post based system. Recent reform of the general staff regulations provide for the possibility of secondment from other EU Member States on the same footing as secondment from French public or private employers.

On the whole, however, secondment can only be a very partial answer to the need to facilitate mobility of workers in the public sector, as it is by definition a temporary solution.

8) Burden of the Proof

Last but not least, the issue of burden of the proof should be mentioned here as a transversal issues relevant for all requirements for access or working conditions.

Whereas it is only logical that burden of the proof rests on the candidate or worker when it comes to producing indispensable certificates, diplomas etc., it is the view of the author of this report that there should not be requirements for proof that put a higher burden on workers who make use of their right to free movement than on non mobile workers. If the situation is complicated, the procedure for examination of evidence should be organised in such a way that it does not constitute a specific obstacle to free movement. When it comes to determine whether access to a specific advantage, benefit of right may be limited, the burden of the proof that such a limitation is consistent with EU law should lie with the employer.

In Germany there is a federal regulation which provides that the relevant authority levies taxes and reimbursement of expenses for the recognition of qualifications for the purpose of entry in the civil service, and that the Ministry of the Interior may regulate the basis and level of the relevant taxes. The author of this report has no information on practice; depending on the level of reimbursement and taxes there might be a question of proportionality implied, and furthermore an issue of illegitimate burden on citizens who make use of their right to free movement.

There is very little relevant information about the issue of burden of the proof in the documentation examined for this report, with the exception of some indications that certificates are required or that the public employer enquires with other employers abroad.

Chapter 5

Posts Reserved to Nationals According to Article 45 (4) TFEU: Understanding the Functional Approach

Before the 1980s, as a longstanding tradition, nationality was a requirement for access to posts in the public sector or in the public service or civil service of all Member States of the EEC. This is the reason why in 1957 the authors of the treaty of Rome provided in Art. 48 that "*The provisions of this Article shall not apply to employment in the public service*".

There were big differences in the scope of application of the requirement, due to the differences, from one Member State to another, in the definition of the civil service, public service, and even public sector. It took some time after the completion of the transitional period foreseen in the EEC treaty (1 January 1970) to find out that leaving to the Members States the definition of posts which could be reserved to nationals could seriously reduce the scope of application of free movement of workers, and in a way that would be contrary to the objectives of the treaty. As a consequence, the European Commission undertook action, and this lead the ECJ to give an authoritative interpretation of the relevant treaty provisions.

It is currently accepted, according to the case-law of the ECJ (*Case 149/79 Commission v. Belgium*), that the sentence of Art. 45 (4) TFEU (ex Art. 39 (4) EC, ex Art. 48 (4) EEC), according to which "*The provisions of this Article shall not apply to employment in the public service*", means that Member States are authorised to reserve access to certain posts in their public administration on the basis that "*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*".

The criteria established by the ECJ in order to determine if a post may be reserved to nationals are that a post involves:

i) direct or indirect participation in the exercise of public authority

and

ii) duties designed to safeguard the general interests of the state or of other public authorities.

A more in depth analysis of the meaning of Art. 45 (4) TFEU is provided in the *Introductory Chapter, section 1e* of this report.

Since the mid eighties, almost all Member States undertook to modify their legislation and regulations on access to public employment in order to adapt them to the definition which has just been recalled. The process of adaptation has sometimes encountered a temporary resistance, probably mainly because it implied changing some long established rules, but it eventually showed that Member State's authorities fully accept the ECJ's interpretation.

It is worthwhile to note that, with the exception of the Netherlands, the reforms undertaken in Member States have lead to open

to citizens of other EU Member States the posts in the public sector which did not comply with EU law criteria. Only in the Netherlands, the reform of access to public employment lead to leave out any nationality requirement for most posts in the public sector; the reason was a linked to the general migration policy of the Netherlands. Elsewhere, the reforms lead usually to replace the host State nationality requirement with a requirement to be a citizen of the EU, or of the EEA or Switzerland. As indicated in *Chapter 4 section 2 (5)*, there is a problem due to the fact that most Member States do not take into consideration the members of the family of EU citizens.

Information on Member States which has been examined for the purpose of writing this report have convinced the author of this report of the necessity to insist upon three premises, when it comes to dealing with Art. 45 (4).

First, focusing on the application of Art. 45 (4) should not divert attention from more general issues of obstacles to free movement of workers which have been dealt with in *Chapter 4*. Even if a Member State has undertaken all the necessary to make sure that no posts which would not comply with the criteria of exercise of public authority and safeguard of general interest are reserved to nationals, it does not mean that free movement of workers in the public sector is guaranteed as it should. The issues dealt with in the previous *Chapter* are often more complicate to solve than defining posts which are reserved to nationals, and there is too little information available for a full assessment of the situation in Member States with regard to other obstacles to free movement, as opposed to the case of posts reserved for nationals, where information, albeit not exhaustive enough, is more easy to retrieve.

Second, in many Member States, hardly any attention seems to be given to the fact that if Art. 45 (4) allows restricting access to certain posts to nationals of the host Member State, it does not entail a total exemption of the relevant posts from EU law.

Often indeed, too little attention is given by Member States' authorities and by literature to the situation of nationals of the host Member State who have made use or want to make use of their right to free movement (e. g. a candidate to a post, or a worker on a post, reserved to nationals, who has lived, studied or worked in another EU Member State). This lack of attention is probably due to two factors.

The ECJ indeed sometimes refers to Art. 45 (4) in a way that might give the impression that those posts are totally exempted from EU law. For instance in the judgement of 9 September 2003 on the *Burbaud* case C-285/01 the Court said: "*Employment in the public service falls in principle within the scope of Directive 89/48 [...], except where it is covered by Article 48(4) of the Treaty [...]*".

Furthermore, what is too often forgotten by commentators and in practice, is that if a post is exempted from the application of paragraphs 1, 2 and 3 of Art. 45, this does not entail an exemption from Art. 18 TFEU (prohibition of discriminations based upon nationality), or Art. 20 (2) a TFEU and 45 (1) Charter (right to free movement and residence). The quotation from the *Burbaud* case might nevertheless be used as an argument in order to say that if the relevant post had been a reserved post, Mrs. Burbaud (who by the way was a citizen of the host Member State at the moment of litigation) could not have prevailed herself of the right to free movement in so far as recognition of diplomas and professional experience was concerned. Such a conclusion would be an error as it would be based upon a reasoning that would not take into

account the question which was referred to the ECJ by the relevant French court.

There seems also too often to be a lack of perception of the consequences of increased mobility of students and EU citizens, i.e. that more and more nationals who are candidate to public employment or already working in the public sector have made use of their right to free movement, or would like to make use of this right. Such a lack of perception is in contradiction with official declarations in Member States about the benefits of mobility in the public sector – let alone about cross-border mobility. Nevertheless, the wording of the documentation examined for the preparation of this report confirms this impression.

Third, it might be useful to remember that political posts (especially elective ones) are out of the scope of Art. 45 TFEU. This is due to the combination of two factors. The definition of worker in most cases cannot apply to a political post. Furthermore, the provision on the right to vote for local elections, adopted with the Maastricht Treaty and now contained in Art. 20 (2) TFEU, as well as the implementing directive, confirm that political posts need not to be open to non nationals under EU law. Knowing whether they are reserved to nationals is not relevant for free movement of workers – with the exception of marginal issues.

This being said, the documents used for the preparation of this report enable to make a number of general comments and syntheses of the indications given in the annexed *Country files*.

1. Relevant Laws and Regulations: Assessing the Rigidity of Legal Impediments to Access to Posts

1. 1. Constitutional provisions

In a number of Member States, the Constitution contains a provision about equal access to citizens to public employment. The presence or absence of such a provision is not necessary relevant to the issue of application of Art. 45 (4). The real question is whether the wording of the relevant clauses is limiting access to nationals either explicitly (for instance in Denmark and Romania) or implicitly, due to a settled interpretation of the constitution (this was the case of many Member States before the 1980, like for instance in France, but the interpretation was changed without formal amendment of the Constitution).

A constitutional provision may be the source of non compliance with Art. 45 TFEU if it contains a limitation of access to nationals worded in a way which cannot coincide with the cumulative criteria of direct or indirect exercise of public authority and safeguard of general interest. If it is so, the Constitution has to be amended, and in the meanwhile, EU law prevails in application to concrete cases. In certain Member States indeed, the Constitution has been amended, for instance in the Netherlands in 1982; whether such an amendment was indeed indispensable or not is only a matter for discussion between specialists.

The issue of amendments is of special relevance when the procedure for amendments of the Constitution is very rigid, or difficult to handle due to political circumstances. On the basis the documentation analysed, it is doubtful whether there are indeed Member States with constitutional provisions relevant to the application of Art. 45 (4) TFEU that could not be overcome in a legal formal sense by interpretation or by complementary legislation.

1. 2. Legislative provisions

In almost all Member States, there are legislative provisions about access to public employment. It seems that Ireland has no relevant legislative or constitutional provisions. For the other Member States, there are roughly four types of legislative provisions.

The reasoning followed here is also applicable to provisions embedded in regulations or collective agreements. The difference between legislation on the one hand, and regulations or collective agreement on the other hand, is that the latter provisions are normally to be disapplied if they contradict the law or constitution of the Member State. Furthermore it is sometimes more difficult to change a legislative provision than a regulation – or vice-versa – let alone changing the content of a collective agreement. Difficulties in changing legislation, regulation or collective agreements are never a reason that allows disregarding EU law – even temporarily; but these difficulties may be taken into account when assessing the appropriateness of opening a procedure with national courts for candidates to public employment, or of an infringement procedure with the ECJ, for the European Commission.

1) Some legislative provisions take over the content or wording of the conditions for the application of Art. 45 (4) TFEU, i. e. the cumulative criteria of direct or indirect exercise of public authority and safeguard of general interest. This is the case in Belgium, Cyprus, Estonia and Malta. Austrian legislation is even closer to the case law of the ECJ, as according to Art. 42 posts reserved to Austrian citizens are defined as "*positions requiring a special loyalty link to Austria that can only be expected from Austrian nationals*" which are "*in particular, those which 1. involve a direct or indirect participation in the exercise of public authority and 2. the protection of the general interests of the State*".

Clearly, these provisions as such are in line with EU law, but it has to be checked whether complementing legislation, regulations, collective agreements and practice comply with the legislative requirement.

2) Some legislative provisions take both criteria of direct or indirect exercise of public authority and safeguard of general interest into account, but in an alternative way, i. e. in principle it suffices that one of the criteria apply in order to reserve a post to the nationals of the host Member State. This seems to be the case of Greece, Luxembourg, Poland and Spain.

This difference in wording is not necessarily a source of non compliance with EU law. A closer look needs to be given at complementing legislation, regulations collective agreements and practice. It might very well be that the primary factor is direct or indirect exercise of public authority, and that in the relevant Member State public authority can only be exercised in view of safeguarding general interest. If on the contrary public authority could be exercised in view of protecting a private interest solely, there would be a breach of EU law. Such a situation is hardly evidenced by available documentation. What is important to remember, is that the sole safeguard of general interest is not sufficient if it does not entail at least indirect participation in the exercise of public authority.

Available documentation, although not allowing for a clear-cut assessment, contains indications that some or many posts which are reserved to nationals, although linked to the safeguard of general interests, cannot be linked to the exercise of public authority (see *Country files*). Examining the legislation is not sufficient in order to assess the existence or not of a violation of EU law. The relevant Member State's authorities and Commission services, as well as courts, need to check in

detail what exactly the functions to be exercised are.

3) Some legislative provisions only partially coincide with the wording of the criteria for the application of Art. 45 (4). For instance, in France, the criterion of safeguard of general interest is replaced by the criterion of links to sovereignty. In the case of France, the scope of application of sovereignty functions is far more reduced than that of general interest. Furthermore, it is the view of the author of this report that in French law, sovereignty functions always imply direct or indirect participation in public authority. In the case of sovereignty in French law, the difference in wording with the ECJ's case law is therefore not contrary to EU Law.

4) Some legislative provisions have a wording which at first sight differs entirely from EU law. For instance in some Member States like Hungary or the Netherlands, the concept used is that of functions or posts of '*confidence'*. In some others it is even less precise, with a reference to '*duties which necessitate'* to be reserved to nationals (as in Germany) or to posts "*which the responsible Minister considers needs to be held otherwise than by a relevant European"* as in the UK.

Whether such a wording is or not a source of non-compliance depends on how it is applied and necessitates therefore precise scrutiny of binding and non binding general provisions, and of practice. The situation is also complex when the legislation refers to apparently formal concepts like the technical nature of functions, or if it simply results from lists with no general indication of the criteria to be applied.

5) In some Member States, access to '*the civil service'* or concepts of the like is reserved to nationals, as is the case with the Czech *Service Act*, as well as in Lithuania, Slovenia and Slovakia.

At first sight such provisions probably do not comply with EU law, as they seem to contradict the functional approach to defining the relevant posts which is to be followed in applying Art. 45 (4). However, the Member State's definition of '*the civil service'* or concepts of the like needs to be looked at, as it might well coincide with the definition of posts in public administration according to Art. 45 (4). This is sometimes an extremely delicate task, especially for cases which are on the fringe of the exercise of public authority and safeguard of general interests.

It may be useful to point out that the theory behind the 'German' system of civil service (see *Chapter 2 section 3*), where the civil servant status should be reserved to the exercise of public authority, could lead to a coincidence between civil service in the strict sense and posts in public administration in the sense of Art. 45 (4). In practice, however, there is no such coincidence in the Member States which have a German type of civil service. This has been pointed out for instance by the State Council of Luxembourg, who indicated in its opinion on the recent legislative reform opening up the civil service to EU citizens, that it would be a good opportunity to revise the scope of posts which have to be occupied by "*fonctionnaires*, *Beamte*" (see annexed C*ountry file*); but the opinion did not have consequences on that point in legislation.

6) Last but not least, one should not forget that the absence of legislation or regulations reserving posts to nationals does not necessarily mean compliance with EU law. It depends upon practice whether it means that posts are open to non nationals, or closed; practice depends upon national traditions – which more often imply that access to public administration is reserved to nationals – and upon the existence or not of general informa-

tion to the public and guidelines for public employers.

2. Definition of Posts: from Formal Coincidence with EU Law Criteria to Apparent Contradiction with Article 45 (4) TFEU

As explained more in detail in the *Introductory Chapter, section 1e*, the criteria for the application of Art. 45 (4) should lead to a post by post examination in order to determine which posts may be reserved to nationals; the decision to reserve posts to nationals should not be based upon general categories or principles. A post by post examination may be the task of the legislator or government – or more precisely of those preparing legislation or regulations –; it may be the sole task of the public employer. There is no requirement from EU law that the definition of posts be made by the legislator, government or public employers; what EU law requires is that, at the end of the process, if a post is being reserved to nationals, it should be on the basis of application of the criteria recalled under *section 1* to the post of the case.

There are big differences from one Member State to the other as far as the relevance and exhaustiveness of available information on the definition of posts is concerned.

As indicated in the previous section, in some cases, the wording of legislation or regulations is such that one may think prima facie that the definition of posts reserved to the host Member State's nationals has a broader scope than permitted by the criteria for the application of Art. 45 (4).

On the other hand there are cases where prima facie, the list of post does not contain some of the positions which could be reserved to nationals on the basis of the criteria for the application of Art. 45 (4). A Member State is indeed free to open its public employment beyond what is required by EU law, provided there is no discrimination between different EU Member States other than the host State. Before amendment of the relevant regulations in 1991, the UK civil service was open to Irish nationals, not to nationalsof another EU Member State. Maintaining such a difference would have been a breach of EU law. Available documentation does not reveal the existence of any such discrimination at present.

The documents used for the preparation of this report enable to make a number of general comments and syntheses of the indications given in the annexed *Country files*.

1) It seems to the author of this report that in many Member States, the functional criteria established by the case-law of the ECJ have been transformed into organizational criteria: what is contained in legislation and regulations, or what is produced on their basis, are lists of posts according to sectors, departments, categories etc.

If indeed all the posts in a sector, a department etc. imply that their holders exercise functions which correspond to the functional criteria of EU law, there is no problem; but only closer examination on a post by post basis might confirm or contradict the conclusions of a prima facie assessment. Especially, it seems very doubtful that all posts in a given ministry, part of a ministry, or agency comply with the cumulative criteria of involving involves direct or indirect participation in the exercise of public authority and duties designed to safeguard the general interests of the state or of other public authorities. It is true that the notion of '*indirect*' participation is difficult to define, but if a post by post analysis has been carried out keeping in mind the necessity or not of a special loyalty bond which results from nationality, the scope of

relevant functions should be relatively reduced.

2) In most cases, it seems that only the criteria of direct or indirect exercise of public authority and safeguard of general interest are taken into account by the relevant offices or authorities, forgetting that they are the expression of a special loyalty bond which results from nationality.

Whether there is a need of such a special loyalty bond is a matter of appreciation by Member State's authority which the ECJ has never questioned; it is not a reason to neglect it. In rare cases specific provisions have been adopted which recall the link between the special loyalty bond and the criteria for reserved posts; this is the case, formally, in the Austrian law on the civil service, or in practice, with the indications given by the French State Council on how to determine whether a post which "*cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives* [of public authorities]*"* (see *Country files*).

As an illustration of the issues at stake, one may take the example of labour inspectors. According to one of the documents used for the preparation of this report, maintaining a nationality clause for labour inspectors in a certain Member State would seem to be contrary to EU law.

If one applies the functional criteria, however, the answer is different. In most Member States, a labour inspector has the power to establish the existence of a breach of labour legislation, which may entail a fine; furthermore, labour legislation is established in the general interest, especially when it comes to health and security; so it seems clear that a labour inspector is exercising (even directly) public authority and safeguarding the general interests.

On the other hand, if one asks whether in the case of a labour inspector a special loyalty bond to the State is necessary, the answer is more difficult. Clearly there must be loyalty to the State as opposed to loyalty to private interests; but why would a national citizen be more loyal to the State in exercising the function of labour inspector than a citizen of another EU Member State?

In legal terms, and in consideration of the settled case law of the ECJ, the first part of the reasoning is sufficient to establish that reserving labour inspectorate to host State's nationals is not in breach of EU law. In practice, the second part of the reasoning explains probably why labour inspectorate is not reserved to nationals in a number of Member States.

Beyond mere compliance with EU law, Member States' authorities and public employer should be encouraged to think more about the special loyalty bond, which should be the purpose of reserving posts; otherwise the impression might remain that reserving posts to host Member State's nationals is permitted also for e. g. policies favouring employment of nationals, provided there is a formal compliance with the two functional criteria.

3) A very special issue has arisen with the so called '*captains'* jurisprudence.

As explained in the *Introductory Chapter*, 17 out of the 27 present EU Members States traditionally had legislative provisions which required their nationality for the post of captains of merchant and fishing ships under the flag of their country . Under international law, also landlocked countries may have a merchant fleet, so the issue is relevant for all EU Member States. The ten other Member States, i. e. Cyprus, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Poland, Slovakia,

Slovenia and the UK had no nationality requirement for this type of posts.

After two references for preliminary rulings (against Spain and Germany), the Commission started infringement proceedings against all Member States which still had a general nationality condition, but most cases were solved without the need to go to the ECJ. Procedures had only to be brought to the ECJ for the Czech Republic (which undertook the reform in time for the case to be withdrawn), France, Italy, Greece and Spain.

Even though most posts of merchant vessels are in the private sector, the Member States for which a case was examined by the ECJ tried to justify the requirement on the basis of the fact that captains of merchant ships would participate in the exercise of public authority and had duties designed to safeguard the general interests, when they were in international seas. The ECJ however indicated in its judgements of 30 September 2003 in *Case Colegio de Oficiales de la Marina Mercante Española* C-405/01 and in *Case Anker* C-47/02 that if this participation did not occur on a regular basis, but occurred in very occasional cases, as in the submitted case, no nationality clause was admissible.

At the beginning of 2010, it may be said that the specific issues of captains of merchant ships has been solved by amendments to the relevant legislation – except for Greece, where the necessary reform is still pending.

Four Member States which had to face an action for infringement with the ECJ adopted the necessary reforms: France and Italy in 2008, Spain only in December 2009 .

Eleven other Member states amended their legislation without waiting for an action in infringement to be but to the ECJ by the European Commission: Sweden in 2003, Austria and Estonia in 2005, Denmark in 2006, the Czech Republic Finland and Lithuania in 2008 (date not available to the author of this report for the amendments in Germany, Hungary and Portugal).

The case of merchant ships captains shows that even if the issues in practice are rather simple from a legal point of view, reactions differ from a Member State to another. About seven years after a first clear-cut judgement of the ECJ, the legal situation in almost all Member States is the same from the point of view or free movement of workers.

What remains open is the question whether a very occasional involvement in the exercise of public authority and safeguard of general interests would suffice to justify a nationality requirement for posts with public employers. From a legal point of view, this is a far more complex situation than that of the merchant ships' captains.

To sum up, apart from a few cases where there is prima facia non compliance with EU law, available information points to the fact that more needs to be known about practice in order to assess a single Member State's situation. Such an assessment of practice is especially difficult due to the fragmentation of public sector employers which has been analysed in *Chapter 3 Section 2*.

3. Practice and Monitoring: Misunderstandings and Lack of Information

As already indicated in *Chapter 4*, information on practice for access to public employment is either completely lacking, or, most often, quite incomplete, due mainly to the horizontal and vertical fragmentation of employers in Member States.

There is only rarely a body able to give precise information on practice of recruitment in the entire public service, and what opening or not posts to non nationals means in practice, as is the case with e. g. the *Public Service Commission* of Malta.

In several Member States, central government authorities tend to point to the constitutional principles of federalism or autonomy of local government, or even to '*ministerial sovereignty*', in order to explain the absence of appropriate monitoring systems which would enable assessment of the situation in the whole public service. As explained in *Chapter 3* when discussing the fragmentation of public sector employers, such an argument would not be acceptable in case of breach of EU law.

In some cases, available information shows that special efforts have been made in enquiring about practice, and even about the number of non nationals employed in the public sector – for instance in Denmark –or in giving guidance to public administration about the way in which the possibility to reserve posts to the host member's nationals have to be handled, for instance in France (see *Country files*).

In the view of the author of this report, diffusion by Member States' authorities as well as at EU level (for instance by the EURES network) of more explicit and detailed information for candidates to public employment and for public employers should be encouraged.

It is important in all Member States to take into account that there is a quite widespread culture in the public, and amongst officials working for public employers, according to which traditionally public service employment is reserved to nationals. Such a culture means that, in the absence of a specific mention that access to posts is open to non nationals, many potential candidates will not even think of applying to a post, and many officials assessing a foreign candidate's file will have a tendency to dismiss it without further enquiry. For the latter hypothesis an obligation to give reasons and good a system of appeals may well counteract the natural tendency of officials, but they will not be sufficient if not complemented by proactive information in the Member States. Proactive information also means an explicit indication in notices of vacancies, or of open competitions, that non nationals are welcome.

As already mentioned in the previous *Chapter* for general obstacles to free movement of workers, special consideration should be given also to the issue of burden of the proof, when it comes to closing posts to non nationals. Whereas it is only logical that burden of the proof rests on the candidate to a post when it comes to producing indispensable certificates, diplomas etc., for a post which is open to non nationals, the burden of the proof that a limitation of access to nationals is consistent with EU law should lie with the employer. Reasons need to be given with a precise reference to the applicable legislation or regulations, and to how discretion has been exercised in their application. There is very little relevant information about the issue of burden of the proof in recruitment practice.

4. Compliance with EU Law: Few Obvious Cases of Non-Compliance, or Overall Good Compliance?

On the basis of the documentation which was available to the author of this report, a few general comments may be made on compliance with EU law when it comes to reserv-

ing posts to nationals. Further indications are given in the annexed *Country files*.

1) Complying with the criteria set by the ECJ for the interpretation of art. 45 (4) TFEU, has been a goal of quite a number of legislative reform since the early 1990s. The latest amendments to general legislation on access to public employment for this purpose were adopted in Germany in 1993, in Italy in 1994, Greece in 1996, Cyprus and Slovenia in 2003, Belgium, Estonia and France in 2005, Spain in 2007, Bulgaria and Poland in 2008 and Luxembourg in 2009; a number of previous reforms had been accomplished earlier in some of the cited Member States (see *Country files*).

The fact that there have been successive reforms in some Member States, often driven by complaints to the European Commission or by referrals to the ECJ is an indication that the current state of the play (early 2010) in legislation about access to public employment should not be considered as a final stable situation.

It should go without saying that comparing Member States' legislation and reforms for a 'shaming and blaming' exercise does not make sense. Each piece of legislation and each legislative reform has to be assessed in a national framework only, taking into account the whole of public service employment legislation and regulations, the existing civil service system and a series of other factors. The mere fact that legislation exactly reproduces the criteria set by the case law of the ECJ is not a guarantee that the posts which remain closed to non nationals in a given Member State all correspond to a correct application of these criteria. The fact that there are no complaints to the Commission, and no referrals to the ECJ, does not either mean that a Member State's rules and practices comply with EU law.

2) There are still cases where the wording of legislation and or regulations applicable to access to the civil service is posing problems. Beyond what has been said in section two, the following issues may be indicated.

In federal countries, there may be a mismatch between the wording of federal legislation and the legislation of constituent units of the Federation. This is the case at present in Belgium (see annexed *country* file), or potentially in Germany, where reform of *Länder* legislation is going on. The discrepancy is on wording, not necessarily on substance. Such a discrepancy is not contrary to EU law, but it indicates a lack of coordination which, to the view of the author of this report, cannot be simply accepted on the basis of the constitutional autonomy of the different parts of a Member State. For the public, it may engender quite some confusion.

In a number of Member States, although the general definition of posts which may be reserved to nationals is not inconsistent with EU law, existing lists of posts – which may be embedded in legislation, regulations or in other instruments, including non binding ones – show at first sight the existence of posts reserved to nationals where applicability of the EU law criteria is questionable. This seems to be the case amongst others in Bulgaria, Greece, Ireland, Italy, Hungary, Lithuania (see *Country files*).

In some Member States, such as Cyprus, France, Luxembourg and Spain the regulations which need to be adopted for the application of recent legislation have not yet been entirely adopted (see *Country files*). As long as the reform is not completed on all levels of regulation, it is not possible to assess the exact situation in Member States. If the reform process is progressing in consultation with the European Commission, there are opportunities to correct the wording of regulations.

In a number of Member States as different as Austria, Finland, Portugal, Romania, Slovenia, the absence of a comprehensive list of posts reserved to nationals makes it difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

3) In all Member States, even if legislation seems at first sight to comply with the criteria of EU law, existing information on sectorial regulations and more generally on practice does not permit to check whether indeed the posts reserved to nationals comply with those criteria.

***To sum up*,** it is undeniable that Member States have undertaken efforts in order to limit the posts which they reserve to their nationals and make them comply with the EU law criteria of participation in the exercise of public authority and duties designed to safeguard the general interests of the state or of other public authorities. On the other hand, one may think that in all Member States there may still be posts reserved to nationals which do not comply with these criteria.

This is due, to some extent, to the fact that the criteria set up by the ECJ cannot be applied in a mechanical way and therefore always leave some room for appreciation for the relevant authorities.

It is also due to the fact that Member States' authorities have modified their legislation incrementally, in order to avoid open conflicts with EU law, but very often without thinking again about the main issue: is there a need for a special loyalty bond which is necessarily linked to nationality in order to exercise certain functions in the public sector? EU institutions leave it to the Member States to appreciate the necessity of such a loyalty bond, and from a legal point of view this might be considered as an expression of the respect of Member States identity.

The analysis presented in *Chapter 4* reminds us that beyond the question of how to define posts in public administration according to Art. 45 (4) TFEU, there are issues which need to be tackled in order to fully guarantee free movement of workers to all EU citizens, including the host State's citizens which by definition may not be excluded from any post in the public sector.

Chapter 6
Summary of Findings and Recommendations

As indicated at the beginning of this report, it has been written at the beginning of 2010 for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities. The Commission wanted to investigate the current state of play in the national legislation, the reforms undertaken since 2005 and the way the legislation is applied in practice in order to implement the right to free movement of workers in the public sector of EU Member States. The report is based upon the information given by Member States' authorities in response to questionnaires addressed to them by the European Commission in 2009; upon the reports written by the network of experts in the field of free movement of workers established by the European Commission, which are published together with the Member States' comments; upon information collected by Member States authorities in the framework of the Human Resources Working Group, which is a working party of the EUPAN (see *References*). The report further relies on information gathered by the author in specialised literature (law journals, handbooks and monographs, as well as specialised databases and documents available in research centres and on the Internet).

On the basis of the available documentation, the author of the present report has identified three broad series of issues which need attention in the Member States and which have to be taken into consideration by Member States authorities, by experts working on the issues of free movement of workers and by the EU institutions.

These three series of issues are presented in this *Chapter*, together with a very brief overview of ongoing reforms and coming trends.

The *Chapter* then proceeds with recommendations, including a proposal for a '*free movement of workers in the public sector test*' to be used by practitioners involved in establishing legislation and regulations applicable to employment in the public sector, in their application, and in monitoring

1. A Tentative Assessment of Issues of Compliance with Free Movement of Workers in the Public Sector

On the basis of the available information, which is summarised for each Member State in the annexed *Country files* and commented upon in *Chapters 2* to *5*, the author of this report has identified three major sets of issues: understanding free movement of workers in the public sector; identifying and removing obstacles to free movement of workers in the public sector; and understanding the functional approach to Art. 45 (4) TFEU.

1. 1. Understanding free movement of workers in the public sector

As mentioned in the previous *Chapter*s, one of the problems with the documentation

which was available to the author of this report is due to the fact that in very often only some of the relevant legislation, regulations and practice are identified in the documents, literature and responses to questionnaires. The reason of this lack of comprehensiveness lie with the concept of free movement of workers in the public sector itself, which has some outstanding features when compared with the more general concept of free movement of workers.

First, as explained in the two first *Chapters* of this report, the public sector differs in an important manner from the private sector when it comes to free movement of workers.

For the purpose of free movement of workers, Member States' authorities have a dual function. Public authorities have the power to act as regulators of employment in the public sector according to the Member States' constitutional rules, through the adoption of legislation and regulations; public authorities also act as employers; in both functions they are bound by the duties of Member States, especially by the duty of sincere cooperation.

The duty of sincere cooperation embedded in Art. 4 TEU implies that public authorities of Member states "*refrain from any measure which could jeopardise the attainment of the Union's objective*" and requires a proactive attitude from them as they have to "*facilitate the achievement of the Union's tasks*". The Union's tasks linked to the principle of free movement of workers, embedded in Art. 45 TFEU, are a consequence of the right of EU citizens to freely reside in the Member State of their choice and to move from a Member State to another, guaranteed by Art. 45 - *Freedom of movement and of residence* – of the *Charter of fundamental rights* as well as Art. 20 and 21 TFEU on EU citizen's rights.

Hence, when trying to asses whether all the necessary is being done in a Member State in order to facilitate the achievement of the Union's tasks, it is not sufficient to take into account general legislation and regulations applicable to employment in the public sector. All public authorities in a Member State need to be taken into account in examining the outcome of their regulatory functions, as well as their behaviour as public employers.

A comprehensive examination of public authorities activities is difficult in the Member States due to the fragmentation of the public sector,:both vertical fragmentation and horizontal fragmentation, which have been considered in *Chapter 2 section 2* and in *Chapter 3*

Horizontal fragmentation, i. e. fragmentation in different levels of government, has increased in many Member States due to decentralisation, devolution, regionalisation etc.

Vertical fragmentation is a normal consequence of the functional specialisation of public sector employers. Vertical fragmentation within the overall public sector appears in a differentiation between the functions of public administration and those of public enterprises; fragmentation within non commercial government activities may be due to the existence of bodies which are formally separate from the State, or the government of the level they are pertaining to; a third type of vertical fragmentation has developed over the two last decades, with the establishment of so called '*regulatory agencies*', or '*independent administrative authorities*'; a fourth type of vertical fragmentation is due to the development of so called "*executive agencies*"; a fifth type of vertical fragmentation is due to the traditional separation of ministries and government agencies according to policy specialisation.

From the point of view of EU law, the degree of autonomy of a public authority towards central government is irrelevant. As

long as a regulatory activity of a public authority is concerned, or its activity as a public employer, the Member State is liable in case of non compliance of this activity with EU law.

Second, workers in the public sector belong to different legal categories. Some public sector workers are employed entirely according to common labour law, on the basis of contracts and collective agreements, as is usually the case with public enterprises. Some others are employed according to a very specific system of civil service, based upon legislation and regulations which differ both in form and substance from labour law, contracts and collective agreements. Some other workers in the public sector are partly submitted to specific legislation and regulations and partly to general labour law, contracts and collective agreements.

The variety of systems from one Member State to another makes it hardly possible to compare the situation of public sector workers in a general way. There is no generally applicable correspondence between the form of applicable law (public or private, legislation, regulations or collective agreements, etc.) and its content.

Available documentation indicates that there is not a single Member State where all public sector workers are submitted to the same legislation and regulation; most of the documentation concentrates on the more specific civil service or public service regulations, without giving a comprehensive overview of the content of law and practice relevant for all different types of workers of the public sector. A full assessment of the situation with regard to free movement of workers needs a thorough examination of all the categories of public employment.

Third, available documentation indicates that in Member States and in literature there seems sometimes to be a somewhat too narrow perspective of the scope of free movement of workers in the public sector.

In some cases, the impression is that attention focuses only on the issues regarding citizens of other EU Member States who work or want to work in the host Member State, forgetting about the fact that also the host Member State's own citizens are beneficiaries of free movement. If they have made use of – or intend to make use of – their right to free movement as citizens, they become subject to EU law. Hence they benefit from the prohibition of discriminations which are indirectly based upon nationality (like the country where a specific experience has been acquired) and of obstacles to free movement of workers which cannot be justified by imperative grounds of general interest and in conformity with the principle of proportionality.

In other cases, available documentation gives the impression that public authorities or literature base their analysis on the assumption that if a post in public employment may be reserved to nationals according to Art. 45 (4) TFEU, the given post is totally out of the scope of EU law. Such an assumption is mistaken. First, as mentioned earlier, if the candidate to, or holder of, a post which may be reserved to nationals is indeed a national of the host Member State, and if he has made use – or intends to make use – of his right to free movement, EU law on free movement of workers is applicable to his / her situation. Second, Art. 45 (4) contains an authorisation to reserve posts to nationals in certain circumstances, not an obligation. If a Member State decides to open up access to such posts to non nationals, for whatever reason, the exception of Art. 45 (4) is not applicable to such posts.

1. 2. Identifying and removing obstacles to free movement of workers in the public sector

Potential sources of discrimination and obstacles to free movement of workers in the public sector are being given special attention in the *Country files* and in *Chapter 4*. On the whole, available documentation does not point to an important number of clauses in general legislation and regulations which may be considered as such as prohibited obstacles to free movement of workers in the public sector. However, different sources indicate that there are indeed a number of obstacles to free movement of workers in the public sector in law and practice of the Member States.

First: *mutual recognition of professional experience.* Complaints to the European Commission, petitions to, and questions from, the European Parliament, as well as references for preliminary ruling to the ECJ have in the last two decades revealed the existence specific issues of free movement of workers in the public sector linked to the recognition of professional experience raised. The issues of mutual recognition of professional experience relevant to public sector employment are being examined in detail in *Chapter 4 section 2. 3*.

On the whole, available information does not allow making general statements on the existence or not of obstacles due to the requirement of professional experience. There are specific cases where a legal provision is clearly an obstacle to free movement of workers (see *Country files*). What is most often lacking in Member States is a provision in the relevant legislation or regulations that establishes or confirms that professional experience acquired in other EU Member States has to be taken into account on the same footing as professional experience acquired in the host Member State– whether by citizens of other EU Member States or by the host Member State's own nationals.

Second*, portability of working periods.* Complaints to the European Commission and petitions to the European Parliament as well as references for preliminary ruling to the ECJ have in the last two decades also revealed the existence specific issues of free movement of workers in the public sector linked to the recognition of working periods accomplished in other Member States.

The issues of portability of working periods relevant to public sector employment are being examined in detail in *Chapter 4 section 2. 3*.

On the whole, available information does not allow to make general statements on the existence or not of obstacles due to taking into account seniority.

There are few cases where a legal provision is clearly an obstacle to free movement of workers, e. g. where only seniority in the host Member State is taking into account or where only part of the working periods abroad are taken into account (see *Country files*). What is most often lacking is a provision that establishes or confirms the portability of working periods, i. e. that seniority acquired in EU Member States in situations similar to those which are relevant in the host Member State has to be taken into account on the same footing as professional experience acquired in the host Member State– whether by citizens of other EU Member States or by the host Member State's own nationals.

Third, *language requirements.* It is only natural that a language requirement exists for work in the public sector, but there are only rarely precise indications in legislation and regulations about the level of language required; or about the procedure for assessment of language knowledge. Language requirements are dealt with in *Chapter 4 section 2. 4*.

What is missing most in the available documentation are concerned is information

on practice, in order to assess the proportionality of the language level required to the functions exercise, or the purpose of a language requirement if it is linked to a specific policy.

Fourth, *qualifications, skills and pensions.* Issues of professional qualifications which are needed to be entitled to exercise some professions and issues related to pension rights are clearly very important in order to fully allow for free movement of workers, in the public sector as in the private sector.

The issue of entitlement to exercise professions falls outside of the scope of the investigation asked by the European Commission, as it is specially dealt with in other frameworks. There are however specific issues in the public service, which are being dealt with in cases where there are specific procedures in which the professional skills or diplomas play a role in access to certain posts or for working conditions. They are dealt with in *Chapter 4 section 2. 2.*

The related to pension rights rare not dealt with in this report, as there has been a recent reform *Regulation 1408/71 EEC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community*, replaced as of 1 May 2010 by *Regulation 883/2004 on the coordination of social security systems*, and the *Implementing Regulation 987/2009*.

Fifth, *other issues.* Apart from the issues relative to professional experience, seniority and language requirements, and from the issues of professional qualifications for regulated professions issues related to pension rights, only few other specific issues emerge.

In some Member States, the combination of training and competitions to access posts in the public service may generate hurdles for EU citizens which have made use of their right to free movement.

In most Member States, access to employment in the public service is usually open to EU citizens and EEA or Swiss citizens, not to their family members having a third country nationality. This is a question which needs to be considered, as *Directive 2004/38* EC *on the right of citizens to move and reside freely* provides for equal rights for EU citizens and their family.

In some Member States, there seems to be a residence requirement for access to a post. A residence requirement for accessing a post, if it has to be fulfilled at the moment of application would be in breach of EU law. A residence requirement for exercising a function is a different issue: a requirement of residence which mentions the territory of the Member State would be contrary to free movement, at least for post which may not be reserved to nationals.

If the formal status of civil servant cannot be granted to non nationals, this might be considered as an indirect discrimination based upon nationality, even in the absence of difference in the content of working conditions. In order to assess whether such a provision is compatible with EU law, its purpose has to be examined: is it justified by imperative grounds of general interest and in conformity with the principle of proportionality?

If there is legislation, regulations or practice relative to secondment in public sector posts, there would be an issue of compliance with EU law if the possibility to receive seconded workers from the public or private sector were limited to the host Member State.

Last but not least, the issue of burden of the proof has to be mentioned here as a transversal issues relevant for all requirements for access or working conditions. Whereas it is only logical that burden of the proof rests on the candidate or worker when it comes to producing indispensable certificates, diplomas

etc., it is the view of the author of this report that there should not be requirements for proof that put a higher burden on workers who make use of their right to free movement than on non mobile workers. If the situation is complicated, the procedure for examination of evidence should be organised in such a way that it does not constitute a specific obstacle to free movement. When it comes to determine whether access to a specific advantage, benefit of right may be limited, the burden of the proof that such a limitation is consistent with EU law should lie with the employer.

1. 3. Understanding the functional approach to posts reserved to nationals according to Article 45 (4) TFEU

Art. 45 (4) TFEU provides that "*The provisions of this Article shall not apply to employment in the public service*". The criteria established by the ECJ in order to determine if a post may be reserved to nationals are that a post involves: i) direct or indirect participation in the exercise of public authority and ii) duties designed to safeguard the general interests of the state or of other public authorities. A more in depth analysis of the meaning of Art. 45 (4) TFEU is provided in the *Introductory Chapter, section 1e* of this report.

Since the mid eighties, almost all Member States undertook to modify their legislation and regulations on access to public employment in order to adapt them to the definition which has just been recalled. The process of adaptation has sometimes encountered a temporary resistance, probably mainly because it implied changing some long established rules, but it shows that Member State's authorities now support the ECJ's interpretation. This issue is being dealt with in detail in *Chapter 5* and in the annexed *Country files*.

Apart from a few cases where there is prima facia non compliance with EU law, available information points to the fact that more needs to be known about practice in order to assess a single Member State's situation. Such an assessment of practice is especially difficult due to the fragmentation of public sector employers which has been already mentioned under *section 1.1.a*.

It is undeniable that Member States have undertaken efforts in order to limit the posts which they reserve to their nationals and make them comply with the EU law criteria of participation in the exercise of public authority and duties designed to safeguard the general interests of the state or of other public authorities.

On the other hand, one may think that in all Member States there may still be posts reserved to nationals which do not comply with these criteria. This is due to some extent to the fact that the criteria set up by the ECJ cannot be applied in a mechanical way and therefore always leaves some room for appreciation for the relevant authorities. It is also due to the fact that Member States' authorities have modified their legislation incrementally, in order to avoid open conflicts with EU law, but very often without re-thinking about the main issue: is there a need for a special loyalty bond which is necessarily linked to nationality in order to exercise certain functions in the public sector? EU institutions leave it to the Member States to appreciate the necessity of such a loyalty bond, and from a legal point of view this might be considered as an expression of the respect of Member States identity.

2. Reforms and Coming Trends: Public Sector Reform and Free Movement of Workers in the Public Sector

In most Member States, there have been reforms of public sector employment rules in order to ensure compliance with free movement of workers in the public sector. As examined in *Chapter 5* and in the annexed *Country files*, most of these reforms have consisted in opening up access to employment in the public sector to EU citizens, whereas it was previously reserved to nationals.

In some Member States there have also been more specific reforms of legislation and regulations on access to public employment and on working conditions in public employment, in order to eliminate obstacles to free movement which had appeared due to complaints to the European Commission or references for preliminary rulings to the ECJ. It seems that only rarely such reforms have been undertaken spontaneously by Member States; often they were the consequence of an infringement procedure started by the Commission or of a judgement of the ECJ. On the basis of available information there is no reason to think that this will change in the coming years, as long as Member States do not set up specific monitoring systems in order to ensure compliance with the principles of free movement of workers in the public sector not only in legislation and regulations, but also in practice.

Parallel to these specific reforms aimed at complying with EU law, public employment reforms have been going on in a number of Member States in the two or three last decades. In many cases, these reform lead to more or less de-regulation of public sector employment, sometimes in a rather radical way, by replacing legislation and regulations as a source of staff regulations by collective agreements. This being said, quite a number of Member State keep their traditional civil service system, most often based on special public law regulations, while adapting them to new trends in public management.

Deregulation may lead to the suppression of some existing clauses in legislation and regulations which might be the source of obstacles to free movement; but this does not mean that deregulation is the better way to grant full freedom of movement to workers in the public sector. It may even be the contrary: deregulation means that potential obstacles to free movement will be mainly the result of discretion exercised by public employers. If there are not appropriate rules for reason giving and systems of appeal, there is a danger that deregulation leads to more infringements. Furthermore, if there are no appropriate monitoring systems within Member States, the information function which is usually embedded in general legislation and regulations is at risk of disappearing. Hence deregulation needs a special effort of Member States'_ authorities in issuing general information and guidelines on free movement of workers.

Incremental reform, on the other hand, may well be a good way to adapt employment in the public sector to the needs of free movement. In order to facilitate such adaptations, specific procedures are needed in the reform process in order to use the opportunities of reform at the right moment. Agencies and offices involved in public service reform therefore need to give special attention to questions of free movement of workers in the public sector.

Last but not least, the entry into force of the Lisbon Treaty entails a new provision which did not exist in the EC treaty until the end of 2009, i.e. Title XXIV of the TFEU on *Administrative Cooperation*, Art. 197 TFEU:

"1. Effective implementation of Union law by the Member States, which is essential for the proper

functioning of the Union, shall be regarded as a matter of common interest.

"2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

"3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union. "

The provision of par. 1 according to which "*effective implementation*" "*shall be regarded as a matter of common interest*" is interesting as it makes it clear that Member States should be aware of the internal organisation of other Member States. Furthermore it gives a more solid grounding for EU Institutions being interested in how the public service of Member States functions.

The provisions of par. 2 which exclude any harmonisation of the laws and regulations of the Member States and those of par. 3 should be considered as a guarantee that EU institutions do not interfere with public service regulation beyond what are the consequences of art. 45 TFEU on free movement of workers.

The provision of par. 2 according to which regulations shall establish the necessary measures for the Union to support the efforts of Member States to improve their administrative capacity to implement Union law might lead to setting up interesting schemes for exchanges of information, practice and experience, which could become a sort of "*Erasmus programme*" for the public service.

The fact that such regulations have to be established according to the ordinary legislative procedure might lead to a further involvement of the European Parliament, as well as National Parliaments in public service issues with European relevance.

3. Recommendations

The following are a selection of recommendations that the author of this report deems worthwhile for Member States' authorities in order to guarantee a better application of the principles of free movement of workers of the public sector. They are followed by a proposed *free movement of workers in the public sector test*, to be used in Member States.

3. 1. Summary of recommendations

1) Standard common statistics should be assembled and published on a regular basis by Eurostat for a number of essential indicators, i.e. :

- the number of workers in the public sector as a whole and in percentage of total employment;
- the number of workers in public administration as a whole and in percentage;

- the number of workers in public administration according to the different levels of government, as a whole and in percentage;

- the number of workers in public administration according to their direct employment by government (central, regional or local) or by autonomous bodies, as a whole and in percentage;

- the number of workers employed under specific public sector or public administration law and regulations, as opposed to workers employed under standard labour law and collective agreements, as a whole and in percentage.

Finding common denominators for the criteria used for these statistics is a very difficult task, which partly explains the absence of such Eurostat statistics. However establishing common denominators is the standard work of Eurostat, and the author of this report sees no reason why it should not apply to the statistics mentioned above.

2) Member States' authorities would be well advised to establish and maintain monitoring systems, which are indispensable in order to ensure compliance with EU law in the field of free movement of workers in the public sector.

Whether monitoring systems have to be established by central government or in some other ways – for instance by agreements between regional governments – is of the exclusive competence of the Member States.

What is indispensable is that the public and the European Commission have easy access to information on practice, and guarantees to get accurate information if they ask for it.

Needless to say, monitoring systems are not only indispensable in the absence of general legislation and regulation; they are also indispensable in order to know how legislation and regulations are enforced when they exist.

3) Member States' authorities would be well advised to establish procedures and organisation for the purpose of facilitating free movement of workers and ensuring compliance with EU law.

This may appear as having a high cost for Member States, but it should be taken into consideration that such procedures or organisations are certainly worthwhile establishing also for more general purpose in a Member State, in order to try and ensure effectiveness of public sector reform which aims at increasing the cost-effectiveness of spending public money.

Furthermore, none of the grounds which generate and/or justify fragmentation of public sector employers should impede central government of Member States to communicate with all public sector employers in order to raise consciousness of the issues relating to free movement of workers in the public sector.

4) Member States' authorities would be well advised to confirm the obligation to ake into account professional experience acquired in other Member State in their legislation and regulations.

What is often lacking in Member States is a provision in the relevant legislation or regulations that establishes or confirms that professional experience acquired in other EU Member States has to be taken into account on the same footing as professional experience acquired in the host Member State – whether by citizens of other EU Member States or by the host Member State's own nationals.

5) A special effort would need to be made by Member States in terms of procedural and organisational means in order to facilitate mutual recognition of professional experience.

Such procedures and/or organisational devices for the purpose of mutual recognition should be set in legislation and regulations, or at least up or indicated as a good practice in guidelines.

The procedures and bodies in charge of mutual recognition of diplomas may be a good model for such procedures and organisational devices, or even be put in charge of the function of mutual recognition.

6) It would be useful in Member States legislation regulations and practice, or at least in explanatory documents, to clearly distinguish between professional experience (which could be defined as the content of work accomplished) and seniority (which could be defined as the duration of previous working periods).

7) Member States' authorities would be well advised to confirm the portability of working periods acquired in other Member State in their legislation and regulations.

What is often lacking is a provisions that establishes or confirms the portability of working periods. Portability of working conditions means that seniority acquired in EU Member States in situations similar to those which are relevant in the host Member State has to be taken into account on the same footing as professional experience acquired in the host Member State – whether by citizens of other EU Member States or by the host Member State's own nationals.

8) It would be useful to involve the Committee of the Regions in promoting free movement of workers in the public sector. This would help overcoming the problems stemming from horizontal fragmentation of public authorities in the Member State.

9) It would be useful to involve ombudsmen in guaranteeing free movement of workers in the public sector.

Usually in Member States, appeals to the ombudsman are fare more easy and less costly than going to court. In some Member States, issues about civil service are excluded from the realm of the ombudsmen; in some others, only question of access to the civil service might be of their competence; in others again, there are no limitations that would impede appealing to them for any issue linked to free movement of workers. Whatever the limita-

tions of their competence in individual cases, ombudsmen have furthermore very often a broad possibility of addressing general issues in reports. For all these reasons, it seems worthwhile that Member States' authorities try and involve the ombudsmen in monitoring and solving issues free movement of workers in the public sector.

3. 2. Free Movement of Workers in the Public Sector Test

The author of this report is proposing a '*free movement of workers in the public sector test*', (see next pages) to be used in Member States by practitioners involved in establishing legislation and regulations applicable to employment in the public sector, in their application, and in monitoring: it is also designed in order to be used by officials in charge of recruitment or human resource management for public authorities in the Member States. The same test could also be applied by ombudsmen and other independent authorities as well as by courts and tribunals when they have to asses if a norm or a decision is complying with the requirements of Art. 45 TFEU.

Using this test does not guarantee that the conclusions drawn by the relevant authority in the Member State would also be the same as the conclusion drawn by the Commission or the ECJ for the same situation; however it would certainly make it easier for officials to explain to politicians there 'raison d'être' of a specific wording for legislation and regulations; it could also be helpful in order to facilitate officials in Member States and the Commission to come to common views; it could also help officials in charge of recruitment or human resource management for public authorities.

The recommendations formulated in this report, as well as the proposed 'free movement of workers in the public sector test' are of the sole responsibility of the author of this report and do not commit in any way the European Commission.

.../...

Free Movement of Workers in the Public Sector Test

The following questions have to be answered in order to decide upon the wording of a clause of legislation or regulations, or upon a decision which establishes, maintains or applies a specific requirement for access of a person to a post in the public sector, or a specific requirement in order for a worker or to be granted a right, or an advantage or benefit, or a given status, etc. By host Member State, we mean the Member State of which the public authority concerned makes part.

1

Is the **requirement** that the person concerned **hold a given nationality**?

If yes, go to 2.

If no, go to 5.

2

Is the **requirement** to hold the **nationality of the host Member State**?

If yes go to 4.

If no go to 3.

3

Is the **requirement** to hold the **nationality of an EU Member State** (or another EEA Member State or Switzerland) other than the host Member State?

If there the requirement expressly mentions only one or some Member States and not the others, this is discrimination on the grounds of nationality: *the requirement is not admissible.*

If the requirement makes **no distinction between the Member States** other than the host Member State, it does not constitute a discrimination in the sense of free movement of workers: **the requirement is admissible**.

4

Is the **requirement** to hold the **nationality of the host Member State** applicable **for access to a given post**? (It does not matter whether this is a first access to public sector employment or access to another post by promotion, mobility etc.).

If yes, go to 12.

If no, go to 6.

5

Is the **requirement linked** to a specific **quality** of the person which would be necessarily **linked to a characteristic indissociable from nationality**? This would for instance be the case of a requirement have previous experience as a mayor of a municipality, in a case where only the nationals of the host Member State may be elected mayor.

If yes, go again through steps 3 and 4.

If no, got to 6.

6

Is it **more easy to fulfil the requirement if** the concerned person has **always** lived, studied and worked **in the host Member State**, than if the person has moved between different EU Member States? Answering this question may necessitate

If yes, go to 7.

If **no**, **the requirement is admissible.**

7

What is the **purpose of the requirement**?

If the purpose is to guarantee **imperative grounds of general interest**, or to promote a policy intimately linked to the **constitutional identity** of the Host Member State, go to 8.

If there is **not** such a purpose, **the requirement is not admissible**.

8

If the **purpose** of the requirement is to guarantee **imperative grounds of general interest**, or to promote a policy intimately linked to the **constitutional identity** of the Member State, it needs to be formulated in very specific terms which refer to the protection of public order, public security or public health; if the requirement is to know a language, the purpose may include a policy to promote the use of a specific language in the region concerned.

If it is **not** possible to formulate the purpose of the requirement in such a specific way, the requirement will **not be considered as admissible**.

If it is possible to formulate the purpose of the requirement in such a specific way, go to 9.

9

Is the requirement fulfilling the **proportionality** test? First, is the requirement **appropriate** to guarantee the purpose specified as an answer to 8?

If yes, go to 10.

If **no** the requirement is **not admissible**.

10

Is the requirement necessary to achieve the purpose specified as an answer to 8?

If yes, go to 11.

If **no** the requirement is **not admissible**.

11

Is there another way to achieve the purpose specified as an answer to 8 which would not impede the relevant person from applying for a post, an advantage, a benefit or status etc?

If no, the requirement *is admissible*.

If **yes** the requirement is **not admissible**.

12

If there is a **requirement** to hold the **nationality of the host Member State** in order **to access a** given **post** in the public sector, the functions which are to be exercised by the holder of the post need to be analysed.

Do these **functions involve the direct or indirect exercise of public authority**? The concept of direct or indirect exercise of public authority needs to be formulated in very specific terms.

If the answer is yes, go to 13.

If the answer is **no**, the requirement is **not admissible**.

13

Do these **functions also involve safeguard of general interests**? The general interests need to be able to be specified.

If the answer is yes, the requirement is **admissible**.

If the answer is no, the requirement is *not admissible*.

End of the test

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