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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The opinions expressed are those of the author(s) only and should not be considered as representative of the European Commission's official position.

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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

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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 healt*h' 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 service*s), 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 *Cases 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 State*s

	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 sovereignty*' 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 *Chapter*s 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 e-xperts. 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 the 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 perc entage 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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Free Movement of European Union Citizens and Employment in the Public Sector

Current Issues and State of Play

Part II – Country Files

Report for the European Commission

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The opinions expressed are those of the author(s) only and should not be considered as representative of the European Commission's official position.

* * *

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

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5. Issues of compliance with free movement of workers in the public sector

6. Reforms and Coming Trends

Sources of Information and Precautions for Use

The following *Country files* are based mainly upon the information given by Member States' authorities in response to questionnaires addressed to them by the European Commission in 2009.

Information has been completed with 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 and with information published 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 *Part I – General Report - References*). The *Country files* further reliy 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).

There is no attempt to standardise the vocabulary used for legal sources, i.e. legislation is sometimes called Law, sometimes Act, etc. The 27 EU Member States are EEA Member States, together with Iceland, Liechtenstein and Norway. The *Country files* nevertheless often mention EU and EEA Member States (or citizens); this is both for the sake of clarity and also because some of the quoted legislation is worded in such a way.

The order of the *Country files* follows the official order of EU Member States in EU documents, i.e. the alphabetical order of Member States in their official language (see list on page 3).

Contrary to the general report (Part I), where the issue of post reserved to nationals has been dealt with after the general issues of free movement of workers in the public sector, *Country files* deal first with the issue of application of Art. 45 (4) TFEU, for the sake of clarity. It should never be forgotten however that posts which may be reserved to nationals are not ipso facto outside of the scope of free movement of workers.

Country files are not up to date at exactly the same period for all Member States, due to the fact that answers to the Commission have come in at different moments, and to the different degree of availability of supplementary information at the time of writing.

If Country files contain misinterpretations of the documents used to establish them, it is of sole the responsibility of the author of this report: the Country files do not commit the European Commission.

General comments to the Country files, as well as references, are provided in Part I – General Report.

Belgie-Belgien-Belgique

BELGIUM

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which contain data are limited to 2009 or sometimes earlier and might not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Belgium is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Belgium is a federal State with four levels of government: the Federation, the Regions (*gewesten, régions*) and Communities (*gemeenschappen, communautés, Gemeinschaften*): Brussels-Capital city Region, Flanders, French speaking Community, German speaking Community, Walloon Region; 10 provinces (*provinciën, provinces*) and 589 municipalities (*gemeenten, communes, Gemeinden*). Regions are competent for the regulation of the public service of provinces and communes.

1.3. Official languages

There are three official languages in Belgium.

Dutch, French and German are the three official languages of the Federal State. Dutch and French are the two official languages of the Brussels-Capital City Region.

Dutch is the official language of Flanders and of the provinces and communes situated in Flanders.

French is the official language of the French speaking Community and the Walloon Region as well as of the provinces and communes situated in the Walloon Region, with the exception of German speaking communes.

German is the official language of the German speaking Community and the corresponding communes in the Walloon Region.

1.4. Statistical data

Total population: 10 584 500 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of active population for 2000 (*Based on ILO Laborsta*)

Total public sector	905 500	20,6 %
Public enterprises	149 100	3,4 %
Total government	756 300	17,2 %

Government employment in 2000 (*Based on EUPAN – Structure of the civil and public services*)

Federal	*268 229*	32,11 %
Communities/Regions	*281 240*	33,67 %
Provinces	*17 283*	2,07 %
Municipalities	*268560*	32,15 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment, especially Art. 10 (2), according to which "*Belgians are equal before the law. They alone are eligible for civil and military service, apart from the exceptions which can be made by law for special cases.*" Art. 107 provides for the King to appoint civil servants and thus to regulate their employment.

The Constitution is complemented by "special laws" (*lois spéciales*) for its implementation. Art. 87 of the *Special law of 8 August 1980* provides that each government level has its own administration, institutions and personnel and the power to regulate employment therein (with the exception of pensions).

As far as federal administration is concerned, employment with tenure is regulated by Royal decrees (*Arrêtés royaux* - government regulations). *Royal Decree of 2 October 1937 concerning the status of servants of the State* has a prominent place, as general status of (State) civil servants. It is complemented by Royal decrees with sectorial scope. Employment by contract is regulated by *Royal Decree of 25 April 2005 determining the conditions of recruitment under a contract of employment in certain public services.*

Employment in public administration of the Regions and Communities as well as in local government is regulated according to a common framework by a Royal Decree of 22 December 2000 (*Arrêté royal fixant les principes généraux du statut administratif et pécuniaire des agents de l'Etat applicables au personnel des services des Gouvernements de Communauté et de Région et des Collèges de la Commission communautaire commune et de la Commission communautaire française ainsi qu'aux personnes morales de droit public qui en dépendent*). The status of employees of each of those governments and of the bodies which depend upon them are regulated by corresponding decrees of the relevant governments (e.g. decree of 6 May 1999 on the status of personnel of the Ministry for the Brussels-Capital region, decree of 13 January 2006 decree on the Flemish framework status of personnel; code of the Walloon civil service of 18 December 2003).

Specific regulations apply to teachers in public schools as well as in private schools receiving public finances. Part of these regulations are common to the Flemish, French and German speaking Communities as they were adopted before 1970. As a matter of principle, Communities are competent for the amendment and application of these regulations.

2. 2. Public sector employers

The (federal) State, of Regions and Communities (5 in total), provinces (10) and communes (589) are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense. At federal level, each ministerial department (about 14 "federal public services") may be considered as an employer of its own.

According to *EUPAN – Structure of the civil and public services*, federal public services employ 268 229 permanent public servants (32,1% of the total); Communities and regions 281 240 (33,7%); provinces 17 283 (2,1%); and municipalities 268 560 (32,1%).

Recruitment procedures for federal regional and community governments are centralised with the Staff and Organisation federal public service *Selor* (under Minister for the Civil Service), with the exception of the Flemish ministries, for which recruitment is centralised with "*Jobpunt Vlaanderen*".

Public schools and hospitals are established and financed by the Communities, and thus the public medical and educational service, are part of public employers.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of Regions, with the exception of Railways, which is under the Federation.

2.3 Public sector workers

Employees of the State, of Regions and Communities, Provinces and Communes, as well as of public bodies created by them are submitted to specific Federal or regional regulations (mentioned under 2.1.).

Statistical data for the year 2000 indicated (*Source: EUPAN – Structure of the civil and public services*):

Federal Level: federal public services: 59 662; organisations of public interest: 20 823; scientific institutions: 2 735; autonomous public companies: 107 434; special corps (justice, army, police...): 77 575.

Communities and Regions: ministries: 26 809; organisations of public interest: 55 169; scientific institutions: 304; education: 279 736; community commissions: 1 200.

Provinces: 17 283.

Communes: 268 560.

Since 1937, Belgium has a civil service based upon career system, inspired by the British Civil service of the time. As a rule, employees of the State, of Regions and Communities, Provinces and Communes have the status of civil servants, while contractual employees should be an exception, applicable solely for temporary posts; no figures are available about the actual percentage of civil servants v. employees. In Flanders, there is a tendency towards a post based system, but the civil service regulations remain based upon a career system.

Employees of public enterprises are submitted to general labour law.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with the State Council, acting as administrative court. Matters relating to contract are submitted to civil courts.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the Federation, Regions and Communities, as well as for the application of the principle of equality.

The federal Ombudsman (*Médiateur federal*) may handle complaints with regard to federal administration. Ombudsmen of the Regions and Communities may handle complaints with regard to federal administration. Some local governments have also installed ombudsmen. They may make recommendations to the relevant public authorities but have no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The Constitution sets as a principle in Art. 10(2) that only Belgian citizens are eligible to public employment, with the possibility of making exceptions by law.

For employees of federal administration, Art. 16 of the status of (federal) State servants of 1937 and Art. 2 (2) of the *Royal Decree determining the conditions of recruitment under a contract of employment in certain* (federal*) public services* are limiting the Belgian nationality condition to cases corresponding to the criteria set by the ECJ (functions involving the participation in the exercise of public authority and the safeguard of the general interests of the State).

When such functions are not at stake, access to tenured employment is reserved to Belgian citizens and citizens of other Member States of the European Economic Area or of the Swiss Confederation, and access to contractual employment is not submitted to any nationality condition.

The status of personnel for the Brussels-Capital Region contains clauses which are similar to those of the *Federal status*.

The statuses of the Flemish and of the Walloon civil service do not mention any nationality clause. It is not obvious at first reading whether this means that there is no nationality clause for their employees, or on the contrary that it would imply that according

to Art. 10 (2) of the Constitution, employment is reserved to Belgians. On the other hand, both the *Flemish* and *Walloon statutes* refer to EU directives on mutual recognition of diplomas and to experience acquired in EU and EEA Member States.

Employees of public enterprises are submitted to general labour law, which does not provide for any exclusion based upon nationality.

3.2. Definition of posts

The general regulations applicable to federal administrations indicate the criteria of functions involving the participation in the exercise of public authority and the safeguard of the general interests of the State. This should imply a case by case examination for each post.

There are furthermore some special regulations that reserve certain categories of posts for Belgian nationals, e.g. those of finance inspectors (*Royal Decree of 1 April 2003 determining the status of members of Inter-federal Finance Inspectorate*) and posts in the diplomatic service (*Royal Decree of 25 April 1956 determining the status of officials of the Ministry of Foreign Affairs and External Trade*).

A Royal Decree of 12 September 2007 has suppressed the condition of nationality for commander functions on ships registered in Belgium.

3.3 Practice and monitoring

A *Circular of the Minister of civil service of 24 February 1995 on the Application of Art. 16 of the status of (federal) State servants* gives indications on the way in which the nationality condition should be applied:

- For recruitment purposes, each ministerial department or public body has to establish whether the functions relating to a vacant post "*is involving the participation in the exercise of public authority*"; this analysis has to be transmitted to the *Personnel Recruitment Office* together with the decision of the relevant minister or body "*to open or not recruitment to EU citizens*". For the personnel of State scientific institutions, the same type of analysis has to be transmitted to the recruiting board.

- For promotion, each administration, public body or scientific institution has to examine on a case by case basis whether the post may be opened or not to EU citizens. This examination has to occur on the basis of the indicated criteria, by an analysis of the functions to be exercised.

Recruitment procedures for federal regional and community governments are centralised with *Selor*, with the exception of the Flemish ministries, for which recruitment is centralised with "*Jobpunt Vlaanderen*".

However there is no office in charge of monitoring recruitment and promotion practices for the whole country.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been a goal of (federal) State regulations and circulars for administrative practice, since the amendment of the *status of (federal) State servants of 1937* and the *Royal Decree determining the conditions of recruitment under a contract of employment*. It was the result of a *Royal decree of 18 April 2005*, opening to EU citizens and citizens of other EEA Member States and Switzerland the posts which do not involve the participation in the exercise of public authority and in the safeguard of the general interests.

The wording of the status of employees of Regions and Communities and local government does not contain an explicit clause comparable to that of the federal regulations. This difference in wording is not as such a source of infringement of EU law, especially as recruitment is centralized with offices which should be aware of the applicable criteria for reserving posts to national. However indications on nationality conditions (or the absence thereof) should be given with vacancies in order not to discourage candidates from other EU Member States of applying.

Available documentation gives no indication as to possible problems for free movement of dependent workers in the public sector that would be due to a nationality condition.

It may be worthwhile signalling that the situation is different in the case of self employed persons (which are normally not in the scope of this report): there seem to be limitations of freedom of establishment for the profession of notary.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions: for federal government and public bodies *Royal Decree of 2 October 1937 concerning the status of servants of the State* and *Royal Decree of 25 April 2005 determining the conditions of recruitment under a contract of employment in certain public services*; for the government and public bodies of Regions, Communities, Provinces and Communes, the framework *Royal Decree of 22 December 2000* as well as the *Flemish framework status* and the *Code of the Walloon civil service* of 18 December 2003. There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

4.1.2. Practice

Government departments and public bodies may have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There is no general condition of professional experience for access to permanent employment as well as fixed term contract employment.

For a specific comparative selection, *Selor* (or *Jobpunt Vlaanderen*) may require some specific knowledge or experience which has to be acquired in a Member State of the EU or of the EEA or Switzerland.

In the federal public service, for access to the two upper grades of level A (posts reserved to holders of University degrees), a professional experience of six or nine years is necessary. Regulations explicitly indicate that experience acquired in an EU or EEA Member State or in Switzerland may be taken into account. There are equivalent provisions in the Flemish and Walloon statuses.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

The regulation on the financial status of federal public services' staff (*Royal Decree of 29 June 1973*, Art. 14(1)) provides for automatic recognition of working periods spent in the public services of EU and EEA Member States or the Swiss Confederation. These periods are automatically included in the calculation of seniority for remuneration purposes. The private or public law nature of the employer is irrelevant as far as they employ staff on a legal basis unilaterally defined by the competent public authority.

Work carried out in other public services, in the private sector or on a freelance basis is also included if recognised as professional experience highly relevant to the post. This recognition is made by the Chairperson of the Management Board or his/her representative.

Staff member applying for the recognition of such professional experience have to provide proof of its relevance to the office.

In case of disagreement between a staff member the authority, the final decision is taken by the Chair of the Management Board of *Selor*.

Taking into account professional experience and seniority is not subject to any special conditions, such as continuity of the employment relationship.

There are equivalent provisions in the Flemish and Walloon statuses.

4.2.3. Language requirements

Dutch, French, and German, which have the status of official languages in Belgium, are also official languages in other EU Member States, i.e. Austria, France, Germany, Luxembourg and – at regional level – Italy. Language legislation applicable to public sector employment takes relevant education abroad into account.

Sufficient knowledge of the official languages of the relevant authorities (see under 1-3) is required in for employment by public authorities. Proofs and interviews for the relevant positions are held in the relevant language.

Holders of positions in the federal public service are integrated in either the Dutch or the French "role" according to the language they have been educated in, in Belgium or abroad. If they have been educated in German language or a foreign language choose in which "role" they want to serve and have to pass a language exam.

There is no case law from Belgian courts on litigation about language requirements. There are indications in the reports of the Network of Free Movement of Workers that language requirements are sometimes applied too broadly especially in the Brussels district; there are however no indications that this is the case with public sector employment: on the contrary, monitoring of published vacancies do not show language requirements.

4.2.4. Other specific requirements

The present report does not cover the issue of regulated professions. A special mention of mutual recognition of professional diplomas, certificates and other qualifications needs however to be made here.

As far as federal government is needed, the Minister for the public service may decide, if needed, that some specific diplomas or certificates be required for recruitment or promotion. The relevant diplomas are mentioned in tables annexed to the Status of State employees. The relevant annex explicitly refers in Chapter II § 2 to the EC directives on mutual recognition of diplomas.

The decision to accept a diploma or certificate of another EU Member State is taken by the Head of *Selor*, after consultation of the (Belgian) authorities competent for education. Similar provisions are foreseen in the status of the Flemish and Walloon civil service. For the Flemish civil service, *Jobpunt Vlaanderen* is in charge of the relevant decisions. The advantage of this system is that it is clearly foreseen in the relevant staff regulations, and therefore transparent.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, there is a difference in wording between the status of *State servants* that of the *Royal Decree of 25 April 2005* determining the conditions of recruitment under a contract of employment. Whereas in Art. 16 of the status of State servants the conditions of participation in the exercise of public authority and in the safeguard of the general interests of the State are presented as cumulative, the *Royal Decree of 25 April 2005* seems to consider them as alternative.

According to the settled case law of the ECJ, the two criteria are cumulative. The question is whether some posts are reserved

to nationals, which imply only functions related to safeguard of general interests, but not direct or indirect participation in the exercise of public authority. Available information is insufficient for such an assessment from outside.

Second, the wording of the Flemish and of the Walloon Status of civil servants is such that it might give the impression that employment in the relevant services is only open to Belgian nationals. The wording of the status of employees of Regions and Communities and local government does not contain an explicit clause comparable to that of the federal regulations.

These problems of wording are not as such an infringement of EU law. Recruitment is centralized with offices which should be aware of the applicable criteria for reserving posts to Belgian national. However indications on nationality conditions (or the absence thereof) should be given with vacancies in order not to discourage candidates from other EU Member States of applying.

5.2. A further point to mention is the absence of a central point for the monitoring of practice in the public sector. It seems that it would be rather easy to remedy to this absence, especially as recruitment is concerned: *Selor,* for the federal and French speaking public authorities, and *Jobpunt Vlaanderen*, for the Flemish authorities, could be in charge of such a monitoring function, or could be used as a model for installing a monitoring office.

5.3. More generally, the lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

An important reform of Belgian regulations applicable to employment in the public sector took place in 2005, as indicated under 3.4, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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България

BULGARIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Bulgaria became a member of the EU on 1 January 2007. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the relevant ECJ case law on the public sector apply since 1 January 2007.

1.2. State form and levels of government

Bulgaria is a unitary State with two levels of government: the State, and 264 municipalities (*obshtini*).

1.3. Official language

There is one official language: Bulgarian.

1.4. Statistical data

Bulgaria has a total population of 7 679 300 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	627 600	26 %
Public enterprises	219400	9,1 %
Total government	408100	16,9 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 105 (2) of the Constitution, "*The Council of Ministers shall ensure the public order and national security and shall exercise overall guidance over the State administration and the Armed Forces*". Art. 116 provides that the conditions for appointment and removal of State servants shall be established by law. *Chapter 6* (Art 135-146) contains the provisions on local self government and local administration. The Constitution contains no specific provision on the nationality required to access public employment, with the exception of positions in the army and elected political offices.

The *Law for the Civil Servant*, Art. 7 (1) 1, as amended in 2008 provides that appointment as a civil servant is open to Bulgarian citizens or other EU citizens and citizens of other EEA Member States and Switzerland.

Public employers may also employ workers under labour contracts, submitted to the provisions of the Labour code.

The Law on Administration, the Law on the Judiciary and the Law on the Ministry of the Interior are also relevant to the determination of the status of civil servants.

2. 2. Public sector employers

The State and the 264 municipalities are public employers. There are also a number of State agencies and commissions (the *Ordinance on the application of the unified classifier of the official positions in administration* mentions 17 such

bodies). Schools and universities, as well as public hospitals; are autonomous public bodies.

No statistics are available on the relevant weight of different public sector employers in terms of employment.

2.3 Public sector workers

The legal status of Servants of the State and of Municipalities is laid down in the Law for the Civil servants. Positions for which recruitment is not by open competition, employment contracted are regulated by the Labour Code

Statistical data for the year 2004 indicated a total number of employees in the administration (central, regional and local) of 85 340 out of which 36 943 (30,21 %) were civil servants (*Source: EUPAN – Structure of the civil and public services*).

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Civil Servants law is provided for by a possibility of action with administrative courts. However decisions relating to the outcome of competition and recruitment are not submitted to court control.

Matters relating to contract are submitted to civil courts.

The Constitutional court exercises judicial review on laws and may be asked to give a binding interpretation of the Constitution.

The Parliamentary Ombudsman may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 116 of the Constitution provides that the conditions for appointment and removal of State servants shall be established by law.

The *Law on the Civil servant*, as amended in 2008, provides that EU citizens and citizens of EEA Member States or of the Swiss Confederation may be appointed as civil servants. Access to contractual employment is not submitted to any nationality condition.

Certain positions are however reserved to Bulgarian nationals by the laws on Administration, on the Judiciary and on the Ministry of the Interior.

3.2. Definition of posts

Posts reserved to Bulgarian nationals are defined by law on the basis of categories.

The *Law on Administration* requires Bulgarian nationality for the posts of chairmen, vice-chairmen and members of State agencies, commissions, and institutions functioning in connection with the implementation of the executive power and established by a law or decree of the Council of Ministers. The *Law on the Judiciary* requires Bulgarian nationality for judges, assistant judges and prosecutors.

All the posts of the Ministry of the Interior require Bulgarian nationality whether held by State servants or contractual agents.

An amendment to Art. 88, paragraph 4 of the Code of Commercial Shipping (State *Gazette ed. 71 as of 12.08.2008*) has suppressed the condition of nationality for commander functions on ships registered in Bulgaria.

3.3 Practice and monitoring

The *State Administration Inspectorate, a directorate* in the *Ministry of State Administration and Administrative Reform* is in charge of general and specialised inspections over the application of Law for the Civil Servant and the secondary legislation.

3.4. Compliance with EU law

The amendments introduced in 2008 to the *Law on the Civil Servant's principles* were adopted in order to comply with the require-

ment of EU law on free movement of workers in the public sector.

However, there are not sufficient indications about the exact scope of those positions which remain reserved to nationals, in order to assess whether they all correspond indeed to the criteria for the application of Art. 45 (4) TFEU. The fact that all the posts of the Ministry of the Interior require Bulgarian nationality whether held by State servants or contractual agents might lead to impose a nationality condition for posts which do not correspond to the criteria for the application of Art. 45 (4) TFEU.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions. Specific conditions are set by secondary legislation, especially by a D*ecree on the unified classification of positions in administration* an *Ordinance on the application of the unified classifier of the official positions in administration*.

For public enterprises, general labour law is applicable.

4.1.2. Practice

Government departments and public bodies may have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

According to the applicable legislation, professional experience is taken into account for recruitment procedures, except for junior ranks, and for promotion as well as for additional remuneration, which is added to the basic wage.

The relevant required duration of professional experience is indicated for each category of positions in the *Decree on the unified classification of positions in administration*.

Art. 2 (2) of the *Ordinance on the application of the unified classifier of the official positions* provides that the minimum required professional experience "*shall comprise the time during which the servant has been carrying out activity in a sphere or spheres, which are relevant to the functions specified in the office profile of the respective official position*".

Art. 2 (3) specifies that professional experience shall be proven by official documents for: 1. length of service; 2. length of official service; 3. length of insurance; and 4. carrying out activities abroad. There are no specific indications in the law and regulations about the way in which activities abroad are taken into account. The legal assumption is thus that no difference is made between experience gained in Bulgaria and experience gained in another Member State. This applies as well for experience in the private as in the public sector.

The *Ordinance on the structure and organisation of the salary* has been amended in 2008, in order to recognize periods of employment in other Member States.

There are no indications about unequal treatment on the basis of case law or other sources. More specific information is not available, which confirms the absence of differentiation in the treatment of professional

experience on the basis of the country and/or the sector in which it has been acquired.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

4.2.3. Language requirements

According to Art. 3 of the Constitution, Bulgarian is the official language. There are no explicit language requirements in the laws and regulations applicable to employment in the public sector.

Information on how knowledge of Bulgarian is being verified and on what level of knowledge of the language is required in practice was not available to the author of this report.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, the absence of court control on competitions and decisions about recruitment (see 2.4) is not in line with the requirements of the ECJ jurisprudence, as it might lead to exclude judicial review of decisions that would be based upon nationality or the country of acquisition of professional experience or seniority.

Second, the definition of posts reserved to nationals seems at first sight not in line with the criteria on the application of Art. 45 (4) TFEU when reserving all posts in a ministry (the Ministry on the Interior) to Bulgarian citizens.

5.2. The information provided is not detailed enough to assess whether in practice there are no discriminations or obstacles to free movement. As the relevant laws and regulations have been amended very recently (2008) this is not astonishing. A special effort should therefore be made by the responsible authorities to monitor practice.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated *under* 3.4, an important reform of Bulgarian legislation and regulations applicable to employment in the public sector took place in 2008, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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Česká Republika

CZECH REPUBLIC

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

The Czech Republic became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

The Czech Republic is a unitary State with three levels of government: the State, 13 regions (*kraje*) and 6 254 municipalities (*obec*).

1.3. Official language

There is one official language: Czech.

1.4. Statistical data

The Czech Republic has a total population of 10 287 200 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	1 003 900	19,9 %
Public enterprises	337 800	6 %
Total government	661 100	13,10 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	194 500	29 %
Local	476 300	71 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 79 of the Constitution *"(1) Ministries and other administrative agencies and their jurisdiction may be established only by law. (2) The legal status of government employees in ministries and other administrative agencies shall be defined by law. (3) Ministries, other administrative agencies and territorial self-government bodies may issue on the basis and within the scope of a law legal regulations, if they are authorized to do so by law.*" Chapter VII of the Constitution contains the provisions about territorial self-government.

There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions, and Art. 93 (2), according to which: "*Any citizen with full integrity, who is the graduate of a university law school, may be appointed judge*".

Employment in the area of public administration in the Czech Republic is governed in particular by *Act 218 of April 26, 2002 on service of public servants in administrative authorities and on remuneration of such servants and other employees in*

administrative authorities (the Service Act). The Service Act contains not only the status of public servants but also some provisions on public service employees, to whom the *Labour Code* is applicable. The entry into force of the Act, and of the relevant transitional measures has however been postponed several times, and at present until 1 January 2012. As the Act is partly a codification of existing law, only the innovations it contains see their effect postponed, but it is rather complicated to understand the exact legal situation of public servants in many respects.

Some sectorial laws are already in force and will continue applying once the Service Act will apply, such as *Act N° 312/2002 Coll., on Officers of Municipalities*, *Act No.182/1993 Coll., on the Constitutional Court*,*Act N° 6/2002 Coll., on Courts and Judges, Act N° 283/1993 Coll., on Public Prosecutors, Act N° 349/1999 Coll., on the Ombudsman*, *Act 361/2003 on Service Contract of Members of Security Corps*, *Act N° 221/1999 Coll., on Professional Soldiers*, *Act N° 154/1994 Coll., on Security Information Service*, and *Act N° 18/2004 Coll., on Mutual Recognition of Qualifications*.

2. 2. Public sector employers

The State, 13 regions and 6 254 municipalities are public employers. There are also a number of State and regional or local agencies and offices.

According to Chapter II *Section* 1 § of the *Service Act:* "*For the purposes of this Act, administrative authorities shall consist in the Ministries, 4) central administrative authorities 5) and other administrative authorities 6) (state administration bodies) 7) if these have been established by special laws, if they are explicitly designated in such laws as the Ministries or administrative authorities or State administration bodies, and if they perform State administration on the basis of such laws*".

The public sector furthermore includes State or regional/local provided medical and educational services.

On the basis of *ILO Laborsta* statistics, it may be indicated that government employment in 2006 is divided between central government (194 500) and regional and local government (476 300) in a proportion of 29 % to 71 %.

2.3 Public sector workers

The *Service Act* makes a distinction between "*public servants*" who are "*employees performing State administration in administrative authorities as a service provided by the Czech Republic to the public*" and "*other employees".*

As mentioned under 2.1., the Service Act is not yet in force, and the rationalisation of the distinction between "*public servants*" and "*other employees*" has not yet been put in place. There are a number of positions – especially in the State service – occupied by "*public servants*" who are appointed permanently, like in the judiciary, police, security, army and intelligence service, while most others are employed on contract under general labour law.

On the basis of figures of *EUPAN – Structure of the civil and public services*, administrative authorities employ 101 071 public servants and regional authorities 5 342 (no indication of the year), while no information is available on municipalities. These figures seem to indicate that at State level the relative proportion of public servants and other employees would be of about 51 % to 49%. On the assumption that most local authorities employ only "other employees", it seems that for the total government sector (central, regional and local), the relative proportion of public servants and other employees might be of about 30 % to 70 %.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Service Act* (in the future) and under some applicable sector specific laws is provided for by a possibility of action with administrative courts. For contract relationships, competence is with the labour chambers of civil courts, which deal with labour law employment.

The Constitutional Court exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Public Defender of Rights) may handle complaints with regard to

public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Only Art. 93 (2) of the Constitution is setting a nationality requirement for public employment, namely as a judge. Other provisions of the Constitution which require Czech citizenship apply to elected political positions.

Various Acts require Czech nationality for some of occupations or functions. These laws require Czech citizenship for policemen, security corps (firemen, members of counter-intelligence service etc.) and professional soldiers, for all judges or public prosecutors for assistants of the Constitutional Court and High Court. Czech citizenship is not required for officers of the municipal authorities, but they are submitted to a condition of permanent residence.

The *Service Act*, which has not yet come into force, requires Czech citizenship for the employment in public service as a *public servant*. According to Chapter 1 *Section* 3 § 6 (2) public servants exercise functions including:

"*a) preparation of draft legal regulations and providing for legal activities of administrative authorities,*

b) preparation of draft international treaties,

c) preparation of draft conceptions and programs,

d) management and directing of activities of subordinate administrative authorities,

e) establishment and administration of information systems in public administration,

f) statistical service (state statistics),

g) administration of the relevant Chapter of the State budget in relation to organizational departments of the State and legal entities, with the exception of the service authority in which service is performed,

h) protection of confidential information, i) providing for State defence,

j) defending of interests of the Czech Republic abroad,

k) the policy of subsidies,

l) administration of research and development,

m) administrative decision-making,

n) State control, supervision or surveillance,

o) provision for organizational matters of the service and administration of service relations and remuneration of public servants pursuant to this Act,

p) management, r) preparation and drawing up of expert substantive basic documents for activities as referred to in letters a) to d), g), j), m) and n), with the exception of basic documents consisting in physical measurements, chemical analyses, or control, comparison and determination of technical parameters".

Czech citizenship is not a requirement for "*other employees*" ", defined according to *Section* 1 § 2 e) as "*employees who only carry out auxiliary, maintenance or manual work in administrative authorities, as well as to employees who only direct, organize and control performance of auxiliary, maintenance or manual work.*"

3.2. Definition of posts

Under applicable law, the definition of posts reserved to Czech citizens is based on sector specific regulations, as mentioned under 3.1., for which no specific criteria are indicated. It appears from the list that it has mainly to do with the judiciary and with police, security and armed forces.

The *Service Act*, which has not yet entered into force, establishes a nationality requirement for all "*public servants*" positions, which appears to be based mainly on a functional approach, that does not however coincide with the criteria for the application of Art. 45 (4) TFEU, as appears from the functions mentioned under letters e), f), g), l), o). As it seems that the functions mentioned under Chapter 1 *Section* 3 § 6 (2) correspond to the safeguard of general interests, the question is whether they do indeed also involve at least indirectly the exercise of public authority: it seems doubtful for the statistical service, administration of research and development and would need to be further checked for the others.

An amendment to Art. 28 par. 4 of Act n° 61/2000, introduced by Act n° 310/2008 (published 21.08.08 and which entered into force on 01.01.09) allows for EU to may become captains on boats flying the Czech flags.

3.3 Practice and monitoring

Information on practice is not available. Furthermore the lack of transparency due to the non entry into force of the *Service Act* renders it difficult to have a clear overview of applicable law.

3.4. Compliance with EU law

Under applicable legislation, there does not seem at first sight to be cases of non compliance with EU law due to the wording of relevant Acts. The *Service Act* which is not due to enter into force before 1 January 2012, would contain restrictions which are questionable with regard to the criteria for application of Art. 45 (4) TFEU.

Further examination of applicable legislation and assessment of the exact scope of positions reserved to national and of administrative practice in recruitment will be indispensable.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions. This means in particular that most of public employment is still regulated by the labour code, as the *Service Act* is not yet into force.

4.1.2. Practice

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

As long as the *Service Act* has not entered into force, and with the exception of the public servants mentioned under 3.1. (mainly policemen, security corps, professional soldiers, judges and public prosecutors), conditions of employment are depending upon each public employer and possibly on relevant collective agreements (if any).

Professional experience often appears in advertisement for public sector positions. Professional experience means the knowledge or capability necessary for pursuance of the activity. The knowledge or capabilities may be documented by a formal document on education or training, or by a document establishing that a person actually exercises an activity where he/she uses the required knowledge or capability. Requests must be reviewed in applying the principle of non discrimination, and ultimately courts would have to decide upon compliance.

Apart from the legislation for the recognition of professional diplomas, certificates and other qualifications for regulated professions, there are no general provisions on the recognition of professional experience acquired abroad in Czech laws and regulations. There is no information on practice applied by public sector employers.

4.2.2. Seniority

Seniority is taken into account s in the same way as professional experience (see 4.2.2). There seem to be no general provisions on the recognition of working periods abroad in Czech laws and regulations.

4.2.3. Language requirements

Under the current legislation, language requirements depend on the conditions for participation in a recruitment procedure, which are stated by the employer.

Knowledge of Czech language should be required to the extent necessary to the execution of the employment. The conditions must not be discriminatory.

There is no information on practice, which would allow assessing compliance with the principle of proportionality.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, the definition of positions reserved to nationals according to the *Service Act* is based upon the functions for which employment should occur under the status of public servant, and it is most probable that a number of posts do not correspond to functions that correspond to the criteria for the application of Art. 45 (4) TFEU. This is not yet an infringement of EU law, as the *Service Act* will not enter into force before 2012, and as current legislation reserves access to Czech citizens only for a very limited number of posts. Closer examination of the *Service Act* is indispensable before it enters into force in order to avoid infringements in the future.

*Second, w*here professional experience and/or seniority is or may be taken into account for working conditions, there is no provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States, apart from regulated professions.

5.2. There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which would allow detecting possible non-compliance due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 2.1, Czech legislation has been reformed in 2002 in order to introduce a general public *Service Act*, but the date of entry into force of the Act has been postponed four times, and it is set at present for 1 January 2012.

Although this legislation was prepared to a certain extent in view of accession to the EU, it does not contain provisions which can directly be related to an obligation stemming from EU law as regards public employment, i.e. provisions on free movement of workers in the EU.

According to Parliamentary debates as well as the Governmental report accompanying the bill which deferred the entry into force of the *Service Act*, the Government would be working on a completely new codification of the law of public service, which should include not just the status of State officials, but all public servants (including also the employees of regional self-administration units and others).

Danmark

DENMARK

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Denmark joined the European Communities on 1 January 1973. No transition period was foreseen for free movement of workers.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Denmark is a unitary State, with three levels of government: the State, 5 regions and 98 municipalities (*kommuner*).

The Kingdom of Denmark also includes two autonomous regions: the Faroe Islands and Greenland; EU law does not apply at all to the Faroe Islands, and the provisions on the free movement of workers do not apply to Greenland.

1.3. Official languages

There is one official language: Danish.

In Greenland, Greenlandic (*Kalaallisut*) is also official language.

1.4. Statistical data

Denmark has a total population of 5 447 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	922 900	32,3 %
Public enterprises	82 000	2,9 %
Total government	840 900	24,4 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	200 100	24,7 %
Regional	132 900	16,4%
Local	475 300	71 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. *Section* 27 establishes the principles applicable to the appointment dismissal, transfer, and pensioning of civil servants. It provides that "*No person shall be appointed a civil servant unless he is a Danish subject.*"

Employment of civil servants is regulated by the *Civil Servants Act*, the provisions of which also apply to posts occupied by non nationals that would be conferred to civil servants if Danish nationals.

Employment of non civil servants in the public sector is regulated by labour law and (sectorial) collective agreements.

2. 2. Public sector employers

The State, the Regions (5) and Municipalities (98) are all public employers, as well as the agencies and autonomous bodies they are controlling.

Public schools and hospitals are self governed bodies under the authority of the ministries for education and health and thus the public medical and educational service are part of public employers.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of municipalities, with the exception of railways, which is under the State.

According to responses from the Danish government to the Commission, for 2009, in terms of persons employed in Denmark, the public sector employs about 730 000 (converted into fulltime/man-years FTE's), which corresponds to one third of the entire labour market. The State sector employs approximately 178 000 (24,8 %), regions about 120 000 (16,4 %); and municipalities about 435 000 (53,3 %).

2.3 Public sector workers

Public sector workers are divided in civil servants and employees: the latter about 86 % of the employees of the State, municipalities and regions, are submitted to labour law and collective agreements.

According to responses from the Danish government to the Commission, for 2009 Civil servants positions represent about 14 % of the total of public sector employment, i.e. 36% of State employment (about 64 000), 4 % of regions employees (about 5 000) and 9 % of municipal employment (about 40 000).

2. 4. Appeals and remedies

Judicial review on decisions of public authorities (including those relating to employment), as well as matters relating to contract, are dealt with by civil courts.

There is no constitutional court, but all courts may rule on the compatibility of a relevant law with the Constitution. Danish courts have always shown a very high level of self restraint in that matter.

The ombudsman (*Ombudsmand*) may handle complaints with regard to all parts of the public administration, including regional and municipal administration. He may make recommendations but cannot adopt decisions that would be binding upon the administration.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The Constitution, Art. 27, sets as a principle that only Danish citizens may be civil servants. The *Civil servants act* of 1969 applies to all posts where workers in principle have the status of civil servant. Since an amendment adopted in 1990, the *Civil servants act* provides in Chapter 15a *Section* 58 c. that "*Persons without Danish nationality shall be employed on terms similar to those of civil servants where persons with Danish nationality are employed as civil servants. The provisions regarding appointment by the King shall, however, not apply.*"

For positions under labour law, there are no conditions of nationality whatsoever.

In some ministries, there are posts reserved to Danish nationals on the basis of the relevant sectorial rules. There are no positions reserved to Danish nationals in municipal and regional government.

3.2. Definition of posts

Some posts are reserved to Danish nationals within the Ministry of Justice: judges, police officers, governors and deputy governors of prisons and prison officers. A non national may however be employed on probation as prison officer if it is expected that (s)he will obtain Danish citizenship shortly after

(approx. within a year after) employment on probation.

Within the Ministry of Defence, clergymen, private first class, officers of the line and reserve have to be Danish nationals in principle. However the Ministry of Defence can, after assessment of the individual case, and provided that specific circumstances in the native country of the applicant does not prevent this, grant an exemption to the requirement of Danish nationality.

A decree nº 1010 of 9 of October 2006 opened access to the post of master of Danish commercial and fishing vessels to Danish nationals to EU citzens. Persons covered by these provisions shall hold a Danish certificate of recognition. The rules also provide that a requirement for masters to have Danish nationality can be introduced when evidence is produced that the powers conferred by public law on masters of passenger vessels or vessels transporting troops, military equipment or nuclear waste are exercised on a regular basis and do not represent a very minor part of the activities.)

3.3 Practice and monitoring

The provision according to which "*Persons without Danish nationality shall be employed on terms similar to those of civil servants where persons with Danish nationality are employed as civil servants"* is applied in the sense that (s)he will in all aspects be treated like a civil servant, with respect to salary, redundancy pay, pensions, disciplinary proceedings, working conditions etc. etc.

The provision according to which appointment of civil servants is done by the King or by the relevant minister, foresee that the Minister for Finance decides which civil servants are to be appointed by the King. This has been regulated in a circular of 18 May 2004, stating that appointment by the King will take place regarding employment as civil servants in the State or in the national church in positions belonging to salary grade 36 or above.

In 2004 the State Employers' Authority (*Personalestyrelsen*, an agency within the Ministry of Finance) carried out a survey on the extent to which a requirement on Danish citizenship exists regarding positions in the State public sector. A supplementary survey from 2006 has shown that in practice, for certain other posts, mainly within the police, the judicial system and the foreign services, Danish nationality is required. The conclusions of these surveys are mentioned under 3.2.

There are no statistics about employment of non nationals. Municipalities have made efforts to attract foreign labour, and in this sector there are a small amount of Swedes in eastern Denmark and a small amount of Germans in southern Jutland.

3.4. Compliance with EU law

The Constitution, laws and regulations comply with EU law in so far as they do not explicitly reserve to Danish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

Compliance with EU law of the nationality condition for the formal status of civil servant will be discussed under 5.1.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions for positions which are in principle be filled by civil servants. Labour law.

Collective agreement and specific sectorial regulations on pay etc. apply to other posts.

Rules on salary grading/pay determination are to be found in the *Collective framework agreement on new pay systems*, the *Collective agreements for different State sector personnel group*s, the *Circular on salary and seniority for civil servants* and the *Personnel Administrative Guidelines*.

Persons working in central government are as a main rule employed under collective agreements; about one third are employed as civil servants.

Since 1 January 2001, appointment as civil servants is confined to special positions that are specified in *Circular of 11 December 2000 on the application of civil servants employment in the State sector and the national church*. Accordingly, it is typically senior managers, judges as well as police, prison and defence staff that are employed as civil servants.

Other groups are typically employed on collective agreement terms. A few individual personnel groups are employed according to regulations, and in a small number of cases, employment is based on individual contracts.

In connection with employment under a collective agreement, the Minister for Finance and various organisations have concluded the terms of the agreements.

In connection with individual employment, the basis of employment is an individual contract that is concluded between the employee and the employment authority.

Employment regulations apply to groups whose work area is not subject to any collective agreement.

The most significant difference between civil servants and other groups of employees is that civil servants have no right to strike; they are entitled to three years' pay if they are dismissed due to abolition of positions; and their pension scheme is a defined-benefit plan; non nationals filling the same type of positions as civil servants are submitted to identical rules, albeit being formally employees.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Previous work experience or specific qualifications of relevance to the performance of the work to be done may lead the appointing authority to grant additional seniority.

4.2.2. Seniority

The Danish system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system). Applicants who are already employed in central, regional or municipal government have no preferential right to vacant positions.

Promotion depends upon the individual employee who has always an option to decide to give notice in the current job and apply for another post in the public sector, i.e. also a post at a lower salary level than the previous post. In such cases, the salary level linked to the previous employment cannot be guaranteed.

For appointments that require an educational qualification, seniority shall be determined on the basis of the length of time the person in question has been employed in a job that requires the qualifications in question. Any period of military service after the qualification was obtained shall be counted.

For appointments not requiring an educational qualification, the appointing authority may grant additional seniority where the person has acquired specific work experience or specific qualifications of relevance to the performance of the work.

No difference is made between periods in Denmark or abroad or between periods in the public or private sector.

Salary grading for civil servants (or employment on terms similar to civil servants) shall be determined on the basis of length of time the person has been employed as civil servant. Salary grading from a period before appointment as civil servant (or employment on terms similar to civil servants) can be counted where the person has acquired specific work experience or specific qualifications of relevance to the performance of the work (including appointment in other Member States).

The principle according to which the formal status of civil servant cannot be granted to non nationals might be considered as discrimination based upon nationality, even if on content there is no difference of treatment between a (Danish) civil servant and a (foreign) employee for the same position. This is a delicate issue to assess, and it is not obvious that it constitutes an infringement to EU law (see. 5.5).

4.2.3. Language requirements

There are no legal provisions on language requirements.

In isolated cases, a certain linguistic knowledge may be required in practice by reason of the nature of the posts. This may for instance be the case where the job requires communication with citizens and authorities on medical and pharmaceutical issues.

4.2.4. Other specific requirements

5. Issues for free movement of workers in the public sector

5.1. Available information reveals one potential issue of compliance with EU law.

As indicated under 3.1 and 3.3., the formal status of civil servant cannot be granted to non nationals and this might be considered as an indirect discrimination based upon nationality, even in the absence of difference in the content of working conditions. 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 Danish national might be deterred from moving to Denmark because of this difference.

The fact that the Danish Constitution is especially difficult to amend is not relevant from a strictly legal perspective, as the Constitution gives no indication as to which positions have to be filled by civil servants: this is demonstrated by Chapter 15a *Section* 58 c. of the civil servants Act.

5.2. As indicated under 3.3. surveys on practice have been conducted by Danish authorities in the past years.

It would nevertheless be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 3.1, an important reform of Danish legislation applicable to employment in the public sector took place in 1991, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

* * *

Deutschland

GERMANY

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Germany is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Germany is a federal State with, as a rule, four levels of government: the Federation (*Bund*), the 16 *Länder* (literally: countries), 439 districts (*Kreise*) and 12 432 municipalities (*Gemeinden*). The number of levels of government is not the same in all *Länder*, due to the existence of *Länder* which correspond to cities (Berlin, Bremen, Hamburg) and to 116 cities which constitute a district on their own (*Kreisfreie Städte*). The *Länder* are competent for the regulation of the public service of districts and communes.

1.3. Official language

The official language of Germany is German.

In some districts of Northern Germany Danish is a minority language; in some districts of Eastern Germany, Sorbian is a minority language.

1.4. Statistical data

Germany has a total population of 82 314 900 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	5699000	14,3 %
Public enterprises	1639000	4,1 %
Total government	4060000	10,2 %

Government employment in 2008 (*Based on ILO Laborsta*)

Federation	849 000	20,9 %
Länder	2 160 000	53,2 %
Local	1 051 000	25,9 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Basic Law (*Grundgesetz* - constitution) contains one specific provision that is applicable to public employment: Art. 33, which establishes equal access of all Germans to public offices, and provides that *"(4) The exer-*

cise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law. (5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service."

Employment of civil servants (*Beambte*) is regulated by specific laws of the Federation and the *Länder*.

Employment of workers and employees (*Arbeiter und Angestellten*) of public authorities is submitted to labour law and collective agreements.

2. 2. Public sector employers

The Federation the *Länder (16*), districts (439, of which 116 are cities and thus also exercise the powers of communes) and communes (12 432, including the 116 cities) are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

Public schools and hospitals are established and financed by the *Länder* and local government and thus the public medical and educational services are part of public employers.

The public sector in a broad sense also includes public enterprises, i.e. enterprises with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of the *Länder* and local government, with the exception of federal railways, which are under the Federation. Transport services are considered public enterprises.

According to answers to the Commission, in 2009 the public sector employed about 4 400 000, which corresponded to about 10% of the entire labour market. The Federation employed approximately 462 000, the *Länder* about 1 900 000, local government about 1 300 000 and agencies and autonomous public bodies about 790 000.

2.3 Public sector workers

Personnel in the public service are divided into two groups: civil servants (*Beamte*); employees and workers (*Angestellte und Arbeiter*).

Employment of civil servants is regulated by the *Federal Law on civil servants* (*Bundesbeamtengesetz*) as far as federal authorities are concerned. Each of the 16 *Länder* has its own civil service law, which applies to the relevant *Land* and local government authorities. The framework law on the civil service which was setting rules common to all *Länder* is not in force any more since the constitutional revision of 2006, which has suppressed civil service law from competences shared by the Federation and the *Länder*. There are also special laws relating to the status of judges and prosecutors (federal laws for the supreme courts and the federal constitutional court; *Länder* laws for lower degrees of courts and *Länder* constitutional courts), and to the military (federal law).

Employment of workers and employees (*Arbeiter und Angestellten*) is submitted to labour law and collective agreements. Labour law is in the field of shared legislation and regulated mainly by federal law and collective agreements for the entire federation.

Whereas functions relating to the exercise of public authority may not be performed by workers or employees, the civil servants' status is not limited to posts relating to that exercise: for instance, teachers and university professors are usually civil servants.

The main differences in status between civil servants and workers/employees is that civil servants are submitted to a specific unilateral legal status and are normally employed on career terms for lifetime, whereas workers/employers are employed on contractual base; civil servants but have no right to strike, no right to participate in trade unions (only in associations) and are submitted to specific regulations for remuneration, career progression and pensions.

Out of the total of 4 400 000 employed by government at all levels, about 1 900 000 (43,2 %) are civil servants, judges or military; 2 600 000 (59,1 %) are employed under labour law and collective agreements. In federal government, the relative proportion of civil servants is much higher than in the *Länder* or local government.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to the employment of civil servants – is provided for by actions administrative courts. Matters relating to contract are submitted to civil courts.

Infringement to fundamental rights (including professional freedom) by public authorities and the legislator may be appealed to the *Federal Constitutional Court*.

Most *Länder* have an ombudsman who may handle complaints with regard to the relevant *Land* and local administration. They may make recommendations to the relevant public authorities but have no power to make binding decisions. There is no equivalent institution at federal level (except for the military).

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The *Basic Law*, Art. 33 (2) guarantees equal access to the civil service to Germans, but this is not an impediment for access of foreigners.

Since an amendment of 1993, the *Federal Law on the civil service* sets as a principle in Art. 7 (1) that access to the civil service is open to German nationals and to citizens of other EU Member States or other EEA Member States as well as third countries for which there is an agreement with the EU on mutual recognition of qualifications. Art. 7 (2) provides, as an exception, that access may be restricted to nationals "if the duties to be performed necessitate it". Art. 7 (3) in turn provides that the Federal ministry of the Interior may provide for exceptions to this restriction (i.e. nevertheless recruit foreigners) in case of urgent necessities of service.

The relevant *Länder* laws usually contain similar provisions. Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

For employees and workers, no equivalent provisions are provided by labour law: as they may not be entrusted with the exercise of public authority there is no nationality requirement.

3.2. Definition of posts

The civil service laws give no definition of the posts for which access may be limited to German nationals. The assumption is that limitations have to comply with the criteria for the application of Art. 45 (4) TFEU; posts corresponding to these criteria may nevertheless be opened to non nationals.

The only – non binding – general document giving indications about this is the circular of 20 May 1996 from the Federal Ministry of the Interior to the upper federal authorities, known as *Recommendations for the application of the legal provisions on access of EU citizens to the German civil service* (*Koordinierung der Anwendung der gesetzlichen Regelung über den Zugang von EU-Mitbürgern zum deutschen Beamtenverhältnis*).

The circular indicates that the wording of Art. 7 (2) was chosen on purpose, in order to guarantee compliance with possible developments of the jurisprudence of the ECJ as well as agreements with third countries. It then indicates a catalogue of criteria upon which the Federation and the *Länder* have reached agreement, in order to facilitate decision on how to assess groups of positions.

The list includes 14 categories of posts. These are linked to the "heart of State activities" (top positions and counsel positions in upper State institutions); posts in the sectors of defence; diplomacy; justice; security; posts implying the power to make decisions which have an impact on rights and freedoms; posts implying legal and financial control of public authorities; or horizontal functions (personnel, budget and organisation); as well as positions where there might be a conflict of interests between nationality and the specific loyalty obligations towards the employer.

The *Circular* indicates that in deciding upon the allocation of groups of functions the centrality of activities to the post has to be considered. It also indicates that exceptions to the

list may be made due to specific legislation (such as legislation on elected municipal employees) or the field of administration (such as universities).

The circular only applies to federal civil servants since the constitutional reform of 2006. No equivalent guiding document has been published for the Länder.

As a consequence of the ECJ's judgment of 30 September 2003 in *Case* Anker C-47/02, an amendment to Art. §2 of the *Schiffsbesatzungsverordnung* (Ship's Crews Regulation) and amendment of §7 of the *Schiffsoffizier-Ausbildungsverordnung* (Ship's engineer training order) opened access to EU citizens for commander functions on ships registered in Germany. They need hold a valid German or a recognised foreign certificate of competence; or alternatively to demonstrate his knowledge of the respective German sea law through participating in training, as well as knowledge of the German language before taking up service on a ship.

3.3 Practice and monitoring

The circular of 20 May 1996 of the Federal Ministry of the Interior cited under 32 is available on the Internet (http://www.eu-info.de/static/common/files/view/1260/beamte.pdf). There is no more recent document of the kind at federal level, and no equivalent document at the level of the *Länder*. The federal authorities do not have the right to address injunctions to the authorities of the *Länder* and local government.

Recruitment procedures are handled by each relevant ministry or agency of the Federation and of the *Länder* and by each relevant local government.

For the federal government, the Ministry of the Interior has the necessary authority to provide for monitoring. There is no central monitoring service with competence for all levels of government.

There are no statistics about employment of non nationals in the civil service or in the public sector as a whole

3.4. Compliance with EU law

Federal and *Länder* legislation have the goal of complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU, since the amendments introduced in 1993. The criteria indicated ("if the duties to be performed necessitate it") are vague and depend entirely on their application by public employers. This is not an infringement of EU law, but might be a source of non compliance if public employers are not aware of the existence, content and scope of the criteria for the application of Art. 45 (4) TFEU. As a consequence of the constitutional reform of 2006, it would be advisable that the *Länder* governments issue at least non binding circulars similar to the recommendations of 1996 quoted under 3.3.

No case law is signalled on the application of the possibility to restrict access to the civil service by administrative authorities.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. There are also federal and *Länder* regulations about remunerations, pensions and working conditions. The Federal and *Länder* Regulations on careers (*Laufbahnverordnung*) are particularly relevant.

Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

4.1.2. Practice

Government departments and public bodies may have their own complementary rules or practices.

A general administrative circular of 14 July 2009 relative to the Federal Regulation on careers (*Allgemeine Verwaltungsvorschrift zur Bundeslaufbahnverordnung*) gives further details on how to apply the Regulation.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector for Germany as a whole. For federal authorities, the federal Ministry of the Interior has the necessary powers to enquire.

The case law on employment in the civil service is generally abundant in Germany and therefore deemed to be an indicator of compliance with law by public authorities. No cases have been published on the issue of discriminatory treatment with regard to professional experience or seniority of EU citizens.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There is no general condition of professional experience for access to the civil service or to contract employment. The relevant authorities may set specific conditions for the access to specific careers (*Laufbahngruppen*), as well as for access to specific posts.

The general administrative regulation of 14 July 2009 mentioned under 4.1.2. provides that professional activity in an administration of another EU Member State has to be taken into account in order to calculate the length of the probation period preceding appointment with tenure.

Professional experience may also have an impact upon the level of remuneration for a specific post. The experience taken into account is accessed with a view to its relevance to the type and difficulty of the activities to be carried out in the relevant position.

Professional experience abroad and in the private sector is taken into account.

The Regulations on careers provide for a probation period. They provide for the recognition of professional activities in the public service or public authorities of EU Member States as parts of the probation period (e.g. Art. 19 of the Federal Regulation on careers *Bundeslaufbahnverordnung*). There are similar provisions on promotion (e.g. Art. 33 of the *Federal Regulation on careers - Bundeslaufbahnverordnung*).

The laws on remuneration also provide for recognition of work in the in the public service or public authorities of EU Member States as parts of the probation period (e.g. Art. 29 of the *Federal law on civil servants remunerations - Bundesbeoldungsgesetz*).

As mentioned under 4.2.3. the federal law on the civil service refers to *Directive 2005/36 on the mutual recognition of professional qualifications,* and provides for the possibility of levying taxes and the reimbursement of expenses for mutual recognition when it is necessary to access civil service employment.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

The indications given under 4.2.2. for professional experience are applicable for the computation of previous working periods for career purposes.

4.2.3. Language requirements

According to Art. 18 (2) of the federal law on the civil service, language knowledge is required only in so far as it is necessary to perform tasks in a specific career path.

There is no information on practice which may help to assess to what extent the principle of proportionality is observed in the application of language requirements.

4.2.4. Other specific requirements

Art. 18 of the federal law on the civil service refers to *directive 2005/36 on the mutual recognition of professional qualifications*. Art. 18 (3) and (4) 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.

Similar provisions might exist in *Länder* legislation. Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, as indicated under 4.2.4, Art. 18 (3) and (4) of the federal law on the civil service provides that the relevant authority levies taxes and reimbursement of expenses for the recognition of qualifications for the purpose of entry into the civil service, and that the Ministry of the Interior may regulate the basis and level of the relevant taxes. Similar provisions might be found in the relevant *Länder* legislation. It would have to be examined if such taxes are indeed levied, and if so, to what extent they could be considered as an obstacle to free movement of workers, as they would make it more costly to rely on professional qualifications acquired abroad than for equivalent qualifications acquired in Germany.

Second, the criteria indicated in the federal law on the civil service for reserving posts to German citizens ("if the duties to be performed necessitate it") are vague and depend entirely on their application by public employers. This is not an infringement of EU law, but might be a source of non compliance if public employers are not aware of the existence, content and scope of the criteria for the application of Art. 45 (4) TFEU. As a consequence of the constitutional reform of 2006, it would be advisable that the *Länder* governments issue at least non binding circulars similar to the recommendations of 1996 quoted under 3.3.

5.1. More generally, the lack of statistics on the number of posts reserved to nationals, and on the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are in practice obstacles to the free movement of workers in the public sector.

5.3. With the constitutional reform of 2006 which suppressed civil service legislation from competences shared by the Federation and the *Länder*, the mechanisms which permitted an overall monitoring of practice in civil service recruitment and personnel management have ceased to be available. An issue might arise if no appropriate new mechanism is being set up, for instance through horizontal collaboration between the relevant *Länder* authorities.

6. Reforms and Coming Trends

As indicated under 3.1., an important reform of civil service law took place in 1993, in order to comply with the criteria for the application of Art. 45(4) TFEU. It also included a reform in recruitment conditions in order to exempt non nationals and nationals who had made use of their right to free movement in the EU from the specific traineeship that traditionally takes place between the first and second State examinations for lawyers and teachers.

As a consequence of the constitutional reform of 2006 which suppressed civil service legislation from competences shared by the

Federation and the *Länder*, the laws on the civil service of the 16 *Länder* are being partially rewritten. German authorities will have to monitor the new legislation in order to check that the results of the 1993 reform are not being questioned by new wording of laws and regulations, or by subsequent practice.

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Eesti

ESTONIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Estonia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

Estonia is a unitary State with two levels of government: the State and 227 municipalities (*omavalitsus*).

1.3. Official language

There is one official language: Estonian.

Russian is a minority language spoken by a rather important number of residents.

1.4. Statistical data

Estonia has a total population of 1 342 400 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	155 500	23,7 %
Public enterprises	25 300	3,8 %
Total government	130 200	19,8 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 30 of the Constitution "*Offices in State agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These offices may, as an exception, be filled by citizens of foreign States or Stateless persons, in accordance with law.*" According to Art. 94: "*Corresponding ministries shall be established, pursuant to law, for the administration of the areas of government. - A minister shall direct a ministry, shall manage issues within its area of government, shall issue regulations and directives on the basis and for the implementation of law, and shall perform other duties assigned to him or her on the bases of and pursuant to procedure provided by law.*" Chapter XIV (Art 154 to 160) contains provisions about local government. According to Art. 160 "*The administration of local governments and the supervision of their activities shall be provided by law.*"

The *Public service Act of 1996* regulates the status of public servants.

2. 2. Public sector employers

The State and the 227 municipalities are public employers. According to *Eupan – Structure of the Civil and Public Services,* Central government employed about 19 300 civil servants and local government about 4 500 public ser-

vants. Central government is composed of 11 Ministries (about 2 900 civil servants), State administrations, boards and Inspectorates (about 14 860), constitutional institutions (about 820 civil servants) and County governments (about 730 civil servants).

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies, whose workers are not public servants.

2.3 Public sector workers

The legal status of Servants of the State and of Municipalities is laid down in the *Public Servants Act*. Other public sector employees who are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

According to Estonian government, public sector employees (129 400) represent 20 % of the total workforce (656 500). The total number of public servants was 29 384 (4,5 % of the total workforce) on 31 December 2008.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Public Servants law is provided for by a possibility of action with administrative courts.

The Supreme court, to which decisions of subordinate courts may be appealed, exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Legal Chancellor – *Oiguskantsler*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 30 of the Constitution "*Offices in State agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These offices may, as an exception, be filled by citizens of foreign States or stateless persons, in accordance with law.*"".

The *Public service Act, 1996*, Art. 14 (1) provides that Estonian citizenship is a requirement to be employed as State or local government official; but Art. 14 (1) extends the possibility of employment to EU citizens "*who conform to the requirements established by law and on the basis of law*". Art. 14 (1) further provides that "*only Estonian citizens shall be appointed to positions which involve exercise of public authority and protection of public interest. Such positions are, for example, the positions related to the directing of the administrative agencies specified in subsections 2 (2) and (3) of this Act, exercise of State supervision, national defence and judicial power, processing of State secrets, representing of public prosecution and diplomatic representation of the State, and the positions in which an official has the right, in order to guarantee public order and security, to restrict the basic rights and freedoms of persons".*

Special legislation is applicable to the diplomatic corps, the police, the judiciary and the military, as well as e.g. to the Bank of Estonia, Financial Supervisory Authority and Estonian Health Insurance Fund.

3.2. Definition of posts

Posts reserved to Estonian nationals are defined by law on the basis of a mix between the relevant agencies and the functions which have to be exercised.

Employment is reserved to nationals in the following agencies: Chancellery of the *Riigikogu* (Parliament); Office of the President of the Republic; Office of the Chancellor of Justice; courts (including land registries and their departments); government agencies; Headquarters of the National Defence League; State Audit Office; Office of Gender Equality and Equal Treatment Commissioner; a number of Local government administrative agencies (office of a rural municipality or city

council; rural municipality and city governments (as agencies) together with their structural units; governments of a district of a rural municipality and of a district of a city (as agencies); city government executive agencies; bureaus of local government associations.

Employment is also reserved to nationals for the following positions: diplomats; military; police officers; judges; prosecutors, as well as lifesaving (rescue) officers; border guard officers; and prison officers.

In certain cases, like the Bank of Estonia the Financial Supervision Authority or Estonian Health Fund, membership of the Boards is reserved to Estonian nationals.

An amendment to the law on the flag of vessels and to the law on ship registration has been made by a Law of 12 may 2005, which entered into force on 1 July 2002, opened access to EU citizens for commander functions on ships registered in Estonia.

3.3 Practice and monitoring

Information on practice was not available to the author of this report.

3.4. Compliance with EU law

With the amendments introduced on 1 May 2005 to the *Public service Act, 1996,* a first step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Estonian nationals.

However, a first examination of the relevant laws and regulations indicates that the criteria for the application of Art. 45(4) TFEU are not entirely applied, as the positions that are reserved to nationals do not result from a post by post analysis of the functions which have to be exercised. The discussion in Parliament of the draft for a new Public Service Act might lead to better compliance with EU law in so far as the definition for public official would derives from functions and not from working in an administrative agency; furthermore the draft act broadens to a large extent the possibilities for the citizens from European Union to access in Estonian public service.

Compliance will be conditioned by the application of the new criteria in implementing norms, and even more by practice.

The lack of information on practice under the present legislation also indicates that a monitoring system and procedure by Estonian authorities is missing and should be established.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

A new Public Service Act is in discussion with Parliament.

4.1.2. Practice

Information on practice was not available to the author of this report. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

According to the legislation applicable before the entry into force of the new Public service Act, professional experience was not necessarily taken into account for recruitment procedures. Professional experience could however be taken into consideration by the head of the agency where the public servant will work for a part of remuneration.

Professional experience in State or local government was also taken into account for accession to certain categories of officials.

There were no legal provisions that related to taking into account professional experience acquired outside of the Estonian State or local government.

4.2.2. Seniority

Seniority was taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

4.2.3. Language requirements

The Public Service Act (§ 14 subsections 1 and 2) was requiring proficiency in Estonian to be employed in the service as a State or local government official. The level of proficiency differs according to the level of the official. This requirement did not apply for supporting staff.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, the definition of positions reserved to nationals in the *Public service Act*, 1996, as amended in 2005, was based upon the nature of the agency in which the person would be working; it is most probable that a number of posts therefore did not correspond to functions that correspond to the criteria for the application of Art. 45 (4) TFEU. This problem might be corrected with the adoption of a new *Public Service Act*.

Second, where professional experience and/or seniority is or may be taken into account for recruitment, promotion and salaries, there is no provision in the *Public service Act*, 1996, as amended in 2005 to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States. No information was available in order to foresee whether this issue will be dealt with in the new *Public Service Act*.

5.2. There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Bulgarian legislation applicable to employment in the public sector took place in 2005, in order to try and meet the requirements of EU law as far as opening posts in the public service are concerned.

In 2009, a draft for a new Public Service Act has been introduced for discussion in

Parliament. By November 2009, the new Act had been adopted. One of the most significant changes is linking of the definition of an official with the function of exercising public authority which means that the employment of officials who do not exercise public authority is to be based on employment contract relationships. A Public Service Act Implementation Bill (598 SE), had been presented to Parliament by the Government, as a transition regulation was necessary because the new Public Service Act provides a number of fundamental changes in the legal regulation of the public service in Estonia.

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ÉIRE - IRELAND

IRELAND

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Ireland joined the European Communities on 1 January 1973.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Ireland is a unitary State, with three levels of government: the State, 25 county councils (or city councils for 5 of them) and 80 municipalities (5 borough councils and 75 town councils).

1.3. Official languages

There are two official languages: Irish and English. English is also an official language in Malta and the UK.

1.4. Statistical data

Ireland has a total population of 4 312 500 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	373 300	17,70 %
Public enterprises	41 700	2 %
Total government	334 600	15,9 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	293 100	88,4 %
Local	38 500	11,6 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 28 (12) of the Constitution "The following matters shall be regulated in accordance with law, namely, the organization of, and distribution of business amongst, Departments of State, [...]". Art.28 A contains the provisions applicable to local government. The Constitution contains no provisions applicable to public employment.

Employment of civil servants is regulated by the *Civil Service Regulation Act* 1956, which provides that the Minister for Finance shall be responsible for the regulation and control of the Civil Service, as well as the fixing of the terms and conditions of service of civil servants and the conditions governing their promotion. The Minister may, for this purpose, make such arrangements as he thinks fit and may cancel or vary such arrangements.

The Public Service Management (Recruitment and Appointments) Act 2004, confers responsibility to the same Minister for running competitions on the Public Appointments Service. *Section* 58

makes it plain that the Minister for Finance is responsible for all matters relating to recruitment in the Civil Service, including "eligibility criteria".

Codes of Practice are published by the Commission for Public Service Appointments under the *Public Service Management (Recruitment and Appointments) Act 2004*.

2. 2. Public sector employers

The State (C*ivil service*) the 25 County councils and 5 city councils, the 5 borough councils and 75 town councils are all public employers.

Mainstream national schools, second level schools, universities, the Health Service and the Police (*An Garda Síochánâ*) are also public employers.

According to the *Public Service Superannuation (Miscellaneous Provisions) Act 2004*, a "public service body" means: the Civil Service, the Police (*Garda Siochana*), the Permanent Defence Force, local authorities, health boards, vocational education committee, as well as other bodies established by or under any enactment other than the Companies Acts and bodies wholly or partly funded out of moneys provided by Parliament or from the Central Fund or the growing produce and their subsidiaries.

2.3 Public sector workers

The same laws and regulations apply usually both to the Civil service and to local government and the police (Public service).

According to *EUPAN – Structure of the civil and public services*, Central government Bodies employ about 36 900 public servants, local authorities about 33 500; Health services about 98 700; Education services about 79 700; The Police about 12 200, non commercial State sponsored bodies about 9 000 and the police about 12 200.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment –, as well as matters relating to contract are dealt with courts and tribunals.

There is no constitutional court, but the High Court and Supreme Court may rule on the compatibility of a relevant law with the constitution.

The Ombudsman may handle complaints with regard to government departments, the Health Service Executive (including public hospitals), local authorities and the Post.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

There is no provision reserving positions in the public sector to nationals, neither in the Constitution, nor the *Civil Service Regulation Act* 1956 or in *The Public Service Management (Recruitment and Appointments) Act 2004*. There is no legal provision stating that employment would be open to EU citizens. Only the *Defence Act, 1954* explicitly states that Irish nationality is, in principle, a requirement to be appointed as an officer, with a possibility for the Minister to grant exceptions.

The *Civil Service Regulation Act, 1956* gives authority to the Minister for Finance for fixing the terms and conditions of service of civil servants and the conditions governing their promotion. The *Public Service Management (Recruitment and Appointments) Act 2004,* confers responsibility to the same Minister in order to regulate matters relating to recruitment in the Civil Service, including "eligibility criteria". There are recruitment practices which reserve certain posts to nationals.

3.2. Definition of posts

The definition of posts reserved to Irish nationals results from practice.

Recruitment to professional posts is fully open to nationals of the other EU Member States, but recruitment to certain administrative posts is limited to restricted to Irish na-

tionals in areas considered to be essential to the national interest (such as the diplomatic service and security posts). There is no published list of such posts.

There is no legislation or regulation reserving access to posts of captains of vessels under Irish flag to nationals.

3.3 Practice and monitoring

When posts are advertised, it is specified whether they are only open to Irish nationals.

In relation to the Department of Foreign Affairs, all posts in the Irish Diplomatic Service (Third Secretary, Counsellor and Ambassador) which require the holding of a diplomatic passport are reserved for Irish citizens (the basis of this restriction is Art. 8 of the *Vienna Convention on diplomatic relations*). Other reserved posts have included posts in the Department of *An Taoiseach* (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence and the Department of Justice, Equality and Law Reform and the Department of Foreign Affairs.

There are no indications on the method or specific criteria used in order to decide whether a post should be reserved to nationals.

There are no available statistics about employment of non nationals in the public sectors.

3.4. Compliance with EU law

The Constitution, laws and regulations comply with EU law in so far as they do not explicitly reserve to Irish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

There is not enough detailed information about practice reserving posts to nationals in order to know whether it always complies with the relevant criteria.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions for positions in the civil service and with other public employers. The *Public Service Superannuation (Miscellaneous Provisions) Act 2004* provides for further relevant regulation.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that could be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Professional experience may be taken into account where such experience is specified as being relevant to a particular post. Credit will then be given for such experience. This will be the case for competitions for certain technical and professional posts.

Incremental credit for previous experience in the public service does not play a part in establishing an order of merit in the selection process, but may be relevant for salary purposes. The question of incremental credit for previous service has been addressed in agreements between the Minister for Finance and

trade unions. In December 2007, the Minister of Finance agreed to provide for the granting of incremental credit for previous service for certain other entry level grades. This is stated to apply to those who have been previously employed in the public service in Ireland in the public service or an equivalent body in the EU Member States or in EFTA countries as well as in the EU Commission.

The person concerned must apply for credit and provide proof of relevant previous service. Departments are invited to check with the previous employer to establish whether the purpose of job and level of responsibility are equivalent. The Department of Finance is to make final decision on new cases.

In general, recognition is not given for experience in the private sector.

4.2.2. Seniority

There are no specific provisions on seniority. As far as relevant, the indications given under 4.2.2. for professional experience apply.

4.2.3. Language requirements

English language competence is required for almost all posts in the public sector. Save for the primary education sector, there is no formal Irish language requirement applying to all applicants. However, applicants for certain Irish-speaking posts may have to show that they have the necessary qualifications or competence. Some posts – for example, in the Department of Community, Rural and *Gaeltacht* Affairs – require a competency in Irish.

In addition, as part of the State's policy to ensure that services are available in Irish, applicants may be assessed for Irish language ability and Irish-speakers may be favoured in the selection process. A certain advantage is given to applicants for posts in the Civil Service who may take an optional Irish language test and are awarded extra marks which may give them a higher ranking in a competition. There are equivalent practices for the Health Service. Recent reforms have reduced the requirements to know both English and Irish in the Police force

5. Issues for free movement of workers in the public sector

5.1. Available information reveals no specific issue of compliance with EU law, apart from the lack of published procedures on the recognition of diplomas and more generally of monitoring of the practices relevant to free movement of workers in the public sector.

5.2. It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

No specific reform has been needed in Ireland in order to open posts in the public sector to non nationals. This is due to the fact that employment conditions are not indicated in legally binding instruments, but are a result of practice.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ΕΛΛΆΔΑ

GREECE

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1. General data

1.1. Date of applicability of EU law

Greece became a member of the European Communities on 1 January 1981. The Act of accession foresaw a transitional period of 7 years for free movement of workers.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 January 1988.

1.2. State form and levels of government

Greece is a unitary State with three levels of government: the State, 54 prefectures (*nomoi*) and 1 033 local authorities (*dimoi*).

1.3. Official language

The official language of Greece is modern Greek..

1.4. Statistical data

Greece has a total population of 11 171 700 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	1 022 100	22,3 %
Public enterprises	629 800	13,7 %
Total government	392 300	8,6 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	315 900	80,5 %
Local	76 400	19,5 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. According to Art. 4(4), "*only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.*" Art 103 and 104 contain provisions about public authorities' employees.

Employment by public authorities is regulated by law, i.e. the *Civil Servants' Code*, the present version of which has been ratified by virtue of *Act 3528/2007*. Other specially relevant laws are *Act 2190/1994*, creating the *Civil Service Staffing Council* (*ASEP*) and *Act 2431/1996*, which and regulates the appointment of citizens of the EU Member States in the civil service.

2. 2. Public sector employers

State public services (Ministries, Regional Services, corporate public bodies), the 54 Prefectural Self-Governments, the 1 033 Municipalities, and other bodies of the public sector including legal entities under private law that are supervised by the State or regularly subsidized by State resources by at least 50% of their annual budget are considered as public sector employers, and select their staff

on the basis of the aforementioned *Act 2190/1994*, creating the *Civil Service Staffing Council* (*ASEP*).

According to *EUPAN – Structure of the civil and public services*, public services (Ministries and Regional administration) employ 90 854 permanent public servants; legal entities of public law 116 642; local authorities 80 391; to which one should add military, security bodies, educational personnel judiciaries and clergymen 237 595 (no indication of the year).

2.3 Public sector workers

Employees of the State, of Prefectural Self-Governments and Municipalities, as well as of public bodies created by them are submitted to the legislation mentioned under 2.1.

Special Scientific Personnel, are employed under a labour contract under private law. There are also often non permanent staff employed on a contract basis.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with the administrative courts, and in appeal with the State council. Matters relating to contract are submitted to civil courts.

There is no constitutional court, but all courts may review the constitutionality of laws.

The Greek Ombudsman may handle complaints with regard to public administration. he may make recommendations to the relevant public authorities but have no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The Constitution sets as a principle in Art. 4 (4)) that only Greek citizens are eligible to public employment, with the possibility of making exceptions by law.

The Civil service code art. 4, provides that "*The citizens of other EU Member States can be appointed to or recruited for posts or specialties, the competencies of which do not involve direct or indirect participation in the exercise of public authority as well as performance of duties designed to safeguard the general interests of the State or of other public authorities.*" This provision has been introduced by virtue of Act 2431/1996.

3.2. Definition of posts

Posts or specialties reserved to Greek citizens are defined by presidential decrees, which are adopted upon proposal of the Minister of the Interior, Public Administration and Decentralization, the Minister of Economy and the competent Minister.

37 presidential decrees have already been issued that define in detail the disciplines and specialties for which appointment of citizens of the EU Member States is permitted as well as those reserved to the Greek citizens. These include General Directors, Directors and Seniors of *Section*s of the Ministry of Finance, counsellors to the Ministers, security guards, policemen, firemen, frontier guards, special guards, rural policemen or civil servants of the Police, but also data base-network-software-hardware specialists in the Ministry of Finance, special collaborators and journalists in the Ministry of Transports, civil servants of the Fire Brigade.

Access to posts of captains of ships under Greek flag is restricted to Greek citizens. A judgement of the ECJ of 10 December 2009 in *Case Commission v Greece C-460/08* confirmed that this is contrary to EU law. Reform is pending

3.3 Practice and monitoring

The competent body for the application of the personnel selection system is the *Civil Service Staffing Council* (*ASEP*). *ASEP* functions as an independent authority, enjoys operational independence and is not subject to

supervision and control by government bodies or other administrative authorities.

The selection of the regular staff of public employers is carried out either by the ASEP or by the bodies themselves subject to ASEP's control.

No precise list of positions and specialties reserved to Greek citizens is available for non-Greek-speakers.

No special organizations or practices have been established to address the issue of appointment of citizens of the EU Member States, and no statistics about employment of EU citizens in the public sector are available.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of *Act 431/1996*.

It should be possible to establish a list of positions and specialties reserved to Greek citizen on the basis of a detailed study of the relevant Presidential degrees in Greek language, in order to check whether they seem to correspond at first sight to the criteria for the application of Art. 45 (4) TFEU; however supplementary work would be needed in order to determine whether the functions to be exercised indeed correspond to those criteria.

On the basis of information available in the English language, some doubts arise about for instance special collaborators and journalists in the Ministry of Transports, civil servants of the Fire Brigade.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

4.1.2. Practice

As mentioned under 3.3, the selection of the regular staff of public employers is carried out either by the *Civil Service Staffing Council* (*ASEP*), or by the bodies themselves subject to ASEP's control.

As far as employment conditions are concerned, it is up to each public employer to apply the relevant laws and regulations.

Case law of the State Council (supreme administrative court) indicates that administrative courts are taking care of ensuring that promotion and working conditions do not entail discrimination on the basis of nationality.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There is no general condition of professional experience for access to permanent employment, but professional experience may constitute a compulsory precondition for recruitment to certain posts. Professional

experience is taken into account if it is followed by the acquisition of a degree, in the cases where recruitment is based upon previous acquisition of a permit to exercise the relevant functions. Marks for written tests are increased taking into account previous professional experience.

Professional experience and length of service in Greek public services, in public services of Member States and of the EU is taken into account for promotion and for wage augmentation.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes. As indicated under 4.2.2., length of service in Greek public services, in public services of Member States and of the EU is taken into account for promotion and for wage augmentation.

4.2.3. Language requirements

Legislation indicates how to define the level of the required knowledge of Greek, as well as the way to certify it. More particularly, the provisions of Art. 28, par. 4 of the Qualifications List stipulate that, for the citizens of EU member-states, the level of the required knowledge of Greek is defined in the vacancy notice for posts and is certified through a certificate in the Greek language, which is granted either by virtue of Act2413/1996, (Art. 10, para 3) or by a Greek language school.

In the framework of the monitoring of EU legislation relative to mutual recognition of diplomas, the European Commission has adopted a reasoned opinion asking Greece to amend its legislation requiring qualified EU teachers to have an "excellent knowledge" of the Greek language.

4.2.4. Other potential obstacles to free movement

The State Council ruled in *Case* 50/2007 that if the status of citizen of a certain municipality is required as a condition for the access to a position, it should be replaced by the status of resident of the municipality for EU citizens.

Residence in the municipality as a condition for employment could however be an obstacle to free movement, depending on the way residence conditions are formulated. It remains to be verified whether this condition is the result of an imperative requirement of general interest, and if it respects the test of proportionality. Otherwise it should be considered as an obstacle to free movement of workers.

There are also indications that public authorities do not always recognise diplomas of higher education acquired in other EU member sates in the same way as Greek diplomas.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals three specific issue of compliance with EU law.

First, as indicated under 4.2.3., there is an issue, which has already been taken up by the Commission, with the legislation requiring qualified EU teachers to have an "excellent knowledge" of the Greek language.

Second, as indicated under 4.2.5., the ruling of the State Council in *Case* 50/2007 requires replacing the citizenship of a municipality by the status of resident of the municipality for EU citizens might not meet the requirements in order not to be considered as an obstacle to free movement of workers.

Third, there are indications that public authorities do not always recognise diplomas of higher education acquired in other EU member sates in the same way as Greek diplomas.

5.2. Detailed examination of the Presidential decrees reserving certain specialities to Greek citizens would be needed in order to know whether they comply indeed with the criteria for the application of Art. 45 (4) TFEU.

5.3. Previous to Cyprus' accession to the EU, some provisions of laws and regulations provided for the recognition of professional experience in Cyprus for the admission to the Greek Civil service. It needs to be checked whether these provisions have been extended to all other EU citizens.

5.4. Generally speaking, information on practice seems to be lacking, and is at any rate non available to a non Greek-speaking readership. A further issue to mention is the absence of a central point for the monitoring of practice in the public sector.

The lack of statistics on the number of posts reserved to nationals, and of the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Greek law applicable to employment in the public sector took place in 1996, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ESPAÑA

SPAIN

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1. General data

1.1. Date of applicability of EU law

Spain became a member of the European Communities on 1 January 1986. A transition period of seven years was foreseen for free movement of workers, which was then reduced to six years.

EU law provisions on free movement of workers and the ECJ case law on the public sector fully apply since 1 January 1992.

1.2. State form and levels of government

Spain is a "regional" State (*Estado de las Autonomias*) with four levels of government: the Kingdom, 17 autonomous communities (*comunidades autonómas*), 50 provinces (*diputación Provincial* – 6 autonomous comunities consist of a single province) and 8 109 municipalities (*municipios*).

1.3. Official languages

Spanish (Castillan) is an official language on the whole of the Spanish territory.

Basque (*Euskadi*) is also an official language in the Basque Autonomous Community and in some parts of the Community of Navarra.

Catalan is also an official language in the Autonomous communities of Catalonia and of the Balearic Islands, and Valencian, which is very close to Catalan, is an official language in the Autonomous Community of Valencia.

Galician is an official language in the Autonomous Community of Galicia.

Aranese, is also an official language in a valley in the Autonomous Community of Catalonia.

1.4. Statistical data

Spain has a total population of 44 474 600 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	2 958 600	14,6 %
Public enterprises	145 400	0,7 %
Total government	799 100	13,8 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	566 900	20,2 %
Regional	1 600 700	57,18 %
Local	631 600	22,6 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 23 provides that Spanish citizens have equal rights to access public functions, but is not worded in a way that excludes non nationals to access to

public employment. Art. 103 provides that the legal status of civil servants, and especially access to the civil service, shall be regulated by law, a competence reserved to the State by Art. 149 as far as general principles are concerned.

Civil service legislation in force is the result of Law 7/2007 of 12 April 2007 providing for the *Basic Staff Regulations for Civil Servants (Estatuto Básico del Empleado Público*), which amended the Law 30/1984 of 2 August 1984, *on Measures to reform the Civil Service*. Further relevant legislation includes Law 55/2003 of 16 December 2003 *on the Framework Staff Regulations for statutory health service personnel* and Organic Law 4/2000 of 11 January 2000 *on the rights, freedoms and social integration of foreigners in Spain*.

This State legislation is supplemented by specific legislation of the Autonomous communities.

When implementing the *Basic Staff Regulations*, the State and Autonomous Community legislators adopt or amend the laws governing civil service under their Administrations, and the rules applicable to local Administrations. These laws may also be general or refer to specific sectors of the civil service, as required: these 'specific sectors' will necessarily include those that concern teaching staff and statutory health service personnel.

2. 2. Public sector employers

The State, the 17 Autonomous Communities, 50 provinces and 8 109 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

According to *EUPAN – Structure of the civil and public services*, the State general administration employs 546 038; Autonomous communities 1 196 23; local government 579 899; and Universities 93 930 (no indication of the year).

Recruitment for the General State Administration is centralised with a Standing Selection Committee (*Comisión Permanente de Selección*). For posts in other Administration groups or categories a special temporary Selection Board is created for this purpose.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

2.3 Public sector workers

Employees of the State, of Autonomous Communities, Provinces and Communes, as well as of public bodies created by them are submitted to the *Basic Staff Regulations for Civil Servants* as well as related laws and regulations from the State and Autonomous communities (mentioned under 2.1.).

Personnel may also be employed by public authorities under contracts submitted to labour law (*personal laboral*).

Employees of public enterprises are submitted to general labour law.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative judges. Matters relating to contract are submitted to civil judges.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the State and Autonomous Communities, as well as verifying compliance of State and Autonomous legislation with the Constitution or with relevant State legislation.

The Ombudsman (*Defensor del Pueblo*) protects fundamental rights and civil liberties against encroachments by public administration. He ensures that Administration decides in time and form to requests and appeals it may have received. He may appeal to the Constitutional court on cases submitted to him.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 57 of the *Basic Staff Regulations for Civil Servants*, Law 7/2007 of 12 April 2007, concerning access to public-sector employment for nationals of other States, provides as follows:

"1. *Nationals of the Member States of the European Union may access public-sector posts as civil servants under the same conditions as Spanish nationals, with the exception of those posts which directly or indirectly involve participation in the exercise of public authority or in functions safeguarding the interests of the State or of the Public Administrations.*

Accordingly, the Government bodies of the public administrations will define the groups of official posts alluded to in Art. 76 to which nationals of other States may not have access.

2. The above provisions will apply, irrespective of their nationality, to the spouses of Spanish nationals and nationals of other Member States of the European Union, provided they are not legally separated, and to their descendants and those of their spouse, provided they are not legally separated, who are below the age of 21 years or dependent descendants over this age.

3. Access to employment in the public sector as a civil servant shall also be available to the persons included in the scope of the International Treaties concluded by the European Union and ratified by Spain where the free movement of workers applies under the terms established in paragraph (1) of this Article."

4. The foreign nationals referred to in the previous paragraphs and foreigners who are legally resident in Spain may have access to the Public Administrations as contracted staff under the same conditions as Spanish nationals.

5. Exemptions from the nationality requirement in the general interest and for the purpose of access to the status of civil servant can only be granted by Law of the Cortes Generales (Parliament) or of the Legislative Assemblies of the Autonomous Communities."

It is worth noticing that this very exhaustive provision extends access to public sector posts not only to EU citizens and citizens of EEA Member States and Switzerland, but also to their spouses and children nationals of third countries. Furthermore, it should be noted that further opening of public sector posts can be granted by the State legislator as well as by the legislators of Autonomous communities.

As far as personnel under contracts and labour law are concerned, there are no posts reserved to Spanish nationals. Art. 10.2 of Organic Law 4/2000 of 11 January 2000 *on the rights, freedoms and social integration of foreigners in Spain*, provides that: "*2. Foreign nationals resident in Spain may access public sector posts as contracted staff under the same conditions as Spanish nationals, in accordance with the constitutional principles of equality, merit and ability, and the principle of publicity. They may therefore apply for any vacancies for public sector posts announced by the public administrations.*"

The legislation on the civil service of some Autonomous Communities (e.g. Balearic Islands, Galicia and Valencia) also contain provisions on nationality, which are complying with the provision of the *Basic Staff Regulations for Civil Servants.*

3.2. Definition of posts

Art. 57 of the Basic Staff Regulations quoted under 3.3. takes up the wording of the ECJ case law on Art. 45 (4) TFEU, but it refers to alternative criteria, whereas the criteria are cumulative in the case law of the ECJ.

On the basis of this provision, each public employer has defined the positions reserved to Spanish nationals in two ways: by functions corresponding to career groups (*Cuerpos y Escalas*) and according to the duties related to each post.

On the basis of available information, it appears that in most State and Autonomous Communities administrations, career groups (*Cuerpos*) rather than specific posts are being reserved to nationals.

In order to comply with the ECJ's rulings on merchant marine captains case law that followed case *Colegio de Oficiales de la Marina Mercante Española* C-405/01, a law 25/2009, of 22 December 2009 has opened up access to

posts of merchant ships under Spanish flag to EU citizens. The law entered into force on 27 December 2009

3.3 Practice and monitoring

The Directorate general of the civil service (*Direction general de la function publica*) in the Prime Minister's Office (*Ministerio de la Presidencia*) is monitoring the definition of career groups (*cuerpos*) and posts reserved to Spanish nationals in State administration as well as in the administration of Autonomous communities.

As far as recruitment practice is concerned, centralisation of recruitment for the General State Administration with the Standing Selection Committee (*Comisión Permanente de Selección*) means that this committee is able to monitor and guide practice in order to ensure compliance with the legal requirements – which correspond in their wording with the requirements of EU law.

There are however no statistics on employment of non nationals in public administrations, that could give indications about the effects of administrative practice.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of Royal Decree 240/2007 *of 16 February 2007 on the entry, free movement and residence in Spain of nationals of European Union Member States and of other States party to the Agreement on the European Economic Area*, transposing into Spanish Law *Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, and of the wording of Art. 57 of the *Basic Staff Regulations for Civil Servants.*

The corresponding wording of Spanish legislation and of the relevant legislation of Autonomous communities is at first sight complying with the criteria for the application of Art. 45 (4) TFEU, albeit with a difference: the criteria in Spanish law are alternative (public authority and general interest) instead of cumulative (public authority or general interest) as in the jurisprudence of the ECJ. This difference in wording might be a source of infringement if it led to broadening the scope of posts reserved to Spanish citizens beyond the effects of a cumulative application of the criteria, especially to posts which involve safeguarding the general interest but not the direct or indirect participation in public authority.

Furthermore, it remains to be checked to what extent the definition of positions reserved to Spanish nationals on the basis of career groups (*cuerpos*) is complying with EU law for each of the relevant posts: the fact that that in most State and Autonomous Communities administrations, career groups (*Cuerpos*) rather than specific posts are being reserved to nationals is an indication of possible non compliance.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

4.1.2. Practice

Government departments and public bodies may have their own complementary practices.

The Directorate general of the civil service (*Direction general de la function publica*) in the Prime Minister's Office (*Ministerio de la Presidencia*) is monitoring the application of civil service legislation by State administration as well as in the administration of Autonomous communities.

It does not seem to monitor specifically the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Professional experience obtained prior to entry as an official into public administration plays no role in recruitment. It may be taken into account when evaluating the knowledge and experience acquired for the purposes of career advancement. Such experience can also be taken into account for contracted staff or temporary officials, in accordance with the conditions of the corresponding vacancy notice.

Professional experience in the public service plays an important role in promotion, which can occur within the same career group (*cuerpo*) or by changing career group or public administration (State to Regional administration, for instance).

The *Basic Staff Regulations for Civil Servants* contains no specific provision as regard recognition of professional experience in other EU Member States. State administration and the administrations of Autonomous communities are deemed to be committed to guarantee that professional experience acquired in other Member States be recognised. However no precise indications on practice are available.

The cases dealt with by the Spanish Supreme Court from 2008 show that there are indeed problems in practice. It also seems that the judicial review of the relevant administrative practice is limited to "manifest error of appreciation".

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

The *Basic Staff Regulations for Civil Servants* contains no specific provision as regard recognition of professional experience in other EU Member States. The observations regarding professional experience apply to the question of seniority.

4.2.3. Language requirements

The *Basic Staff Regulations for Civil Servants*, require to demonstrate knowledge of the Spanish language as a condition for access to a public sector post.

Some legislation enacted of Autonomous Communities do include a requirement to demonstrate language knowledge following completion of the tests for access to a public-sector post. This is the case for Catalonia, Galicia, and Valencia. There is not enough information of practice in order to assess whether these requirements are applied in a way which complies with EU law or if they exceed the proportionality test.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals three potential issues of compliance with EU law.

First, the method used for determining which positions are reserved to Spanish nationals – i.e. mainly reserving access to certain career groups (*cuerpos*) – may have as a result that posts not corresponding to the criteria of application of Art. 45 (4) TFEU be closed to EU citizens.

Second, the corresponding wording of Spanish legislation and of the relevant legislation of Autonomous communities differs from the criteria for the application of Art. 45 (4) TFEU, being alternative (public authority or general interest) instead of cumulative (public authority and general interest) as in the jurisprudence of the ECJ. This difference in wording might be a source of infringement if it led to broadening the scope of posts reserved to Spanish citizens beyond the effects of a cumulative application of the criteria, especially to posts which involve safeguarding the general interest but not the direct or indirect participation in public authority.

Third, the absence of specific clauses on the recognition of professional experience in other EU Member States, although not being as such a source of infringement of EU law, may generate obstacles to free movement, including discrimination on the ground of nationality.

5.2. A further point to mention is the lack of information on the practice relative to language requirements in the Autonomous communities with another official language than Spanish (*Castillan*). This does not enable to assess whether the practice complies with the principle of proportionality.

5.3. More generally, the lack of statistics on the number of posts reserved to nationals, and of the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Spanish legislation applicable to employment in the public sector took place in 2007. It included specific provisions in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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FRANCE

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1. General data

1.1. Date of applicability of EU law

France is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

France is a unitary State with four levels of government: the State, 24 regions (*regions*) including 4 overseas regions, 100 departments (*departments*) including 4 overseas departments and about 36 560 municipalities (*communes*).

Special overseas communities (*collectivités d'outre-mer*) and New Caledonia are also part of the French Republic, although most of them are not part of the EU's internal market.

1.3. Official language

The official language of France is French.

German has an administrative status in Alsace and in the department of Moselle.

Alsatian; Breton; Catalan; Corsican; Flemish; Occitan as well as (overseas) Creole, Polynesian and Melanesian languages are minority languages, with a limited administrative status.

1.4. Statistical data

France has a total population of 63 392 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	6 719 000	29 %
Public enterprises	686 000	3 %
Total government	6 033 000	26 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	2 725 000	58,3 %
Regional and local	1 948 000	41,7 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 6 of the Declaration of Rights of Man and Citizen of 1789 – which is part of the Constitution, provides that "*All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.*" Art. 34 of the Constitution requires Acts of Parliament to enact principles of civil service regulation. Title XII on Terri-

torial Communities (Art. 72 to 75-1) provides for the organisation of regional and local government.

Three general laws on civil service apply to respectively State civil servants (*General Status of the State Civil Service - Statut général de la fonction publique de l'Etat*), Civil servants of regional and local government (*General Status of the Territorial Civil Service - Statut général de la fonction publique territorial*) and to the public hospitals (*General Status of the Hospital Civil Service - Statut général de la fonction hospitalière*). They are complemented by a series of specific regulations on different aspect of working conditions, as well as profession specific regulations applying to career groups (*corps* – there are several hundred of corps). There are also several general regulations applying to contractual employment in the public sector.

2. 2. Public sector employers

The State, the 24 regions, 100 departments and about 36 560 municipalities, as well as the Special overseas communities and New Caledonia are all public employers. All these governments have also created a big number of autonomous public authorities (*établissements publics*) which are public employers. Schools and hospitals are such autonomous authorities.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government. Their staff is submitted to ordinary labour law, with the exception of the chief executive and chief accountant who are under public service regulations.

About 2 725 000 civil servants are employed by the State and its autonomous public bodies, including teachers and university professors (about 1 000 000) and the medical service (about 700 000). Regional and local authorities and their autonomous public bodies employ about 1 948 000.

2.3 Public sector workers

Employees of the State, regional and local authorities and their autonomous public bodies are as a rule employed as civil servants with tenure (*fonctionnaires*) under the respective general status (State, local and hospital). Teachers and university professors are as a rule civil servants. Judges and the military are also civil servants, but under a specific legislative status.

The French civil service is traditionally organised in career groups (*corps* or *cadre* – for the local government civil servants) submitted to a specific status, complementing the general status. Posts in government are to some extent reserved to one or more specific corps, but in most cases they may be held by members of other corps on secondment (*détachement*) for a limited period, or even by persons coming from the private sector, also for a limited period.

Personnel may also be employed by public authorities under contract, but submitted to special administrative law; this is an exception and normally corresponds to temporary work or to very specific posts in autonomous authorities. In the education sector auxiliary workforce is rather often recruited on contract basis

There are very limited cases of temporary fixed term contracts under civil law, as has been the case between 1997 and 2002 with the so-called "*contrats jeune employ"* which were part of a policy to combat youth unemployment.

Employees of public enterprises are submitted to general labour law.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative courts. Matters relating to employment contracts with government and public authorities are also normally submitted to administrative courts.

The Constitutional Council may be appealed to by courts in order to verify compliance of legislation with the Constitution.

The Ombudsman (*Médiateur de la République*, soon to become *Défenseur des droits*) may be appealed to in case of conflicts between individuals or legal persons and public administration. However he has no competence for litigation regarding the civil service.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 6 of the Declaration of Rights of Man and Citizen of 1789 – which is part of the Constitution, provides that "*All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.*"

This has been for a very long time the basis for a nationality requirement in French legislation for access to civil service employment. The nationality requirement was enshrined in the general status of the civil service since 1946 and restated in the three general statuses of 1983. The general nationality requirement has been withdrawn from the general statuses of civil servants in 1991, and since then a series of amending laws and regulations has progressively reduced the scope of posts reserved to nationals.

According to present legislation, as a result of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service* the general status provides that: "*Nationals of Member States of the European Community or of a State party to the European Economic Area agreement other than France, have access, under the conditions stated in the general civil service statuses, to the corps, levels of employment and posts. However, they do not have access to posts for which the qualifications either cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of the public authorities of the State or of other public authorities.*"

Furthermore, the law provides that "*The individual statuses stipulate, as far as needed, the conditions under which civil servants who are not of French nationality can be appointed to the consultative bodies whose opinions or proposals are imposed on the authority vested with decision-making power.*" The law then continues "*The conditions for application of the present Art. are established by decree in the Council of State* [government decree]".

3.2. Definition of posts

The commonly employed definition of a position involving sovereignty, results from an opinion of the State Council (*Conseil* d'Etat) according to which the notion of a position that cannot be separated from the exercise of sovereignty enable to decode, on a case-by-case basis, whether or not a position can be reserved solely for nationals. Such an analysis has to be undertaken on the basis on a range of indices which lead to the view that the employment in question is linked to the exercise of the prerogatives of public authority. The range of indices include: taking oath when entering service in the post, prohibition of strike, access to confidential documents, level in hierarchy, giving advice to the government, having a delegation to sign in the name of a minister or elected politician.

The Council of State indicated in its opinion of 31 January 2002 that the ministerial sectors that could be described as sovereign, and therefore correspond to fields where employment may be closed to foreigners, are the following: Defence, Budget, Economy and Finance, Justice, Interior, Police, Foreign Affairs.

This opinion also indicates that the notion of direct or indirect participation in the exercise of public authority and the protection of the general interests of the State concerns the exercise of functions described as sovereign and the participation as a main activity within a public entity in at least one of the following elements: drafting laws, regulations and legally binding decisions, monitoring their application, sanctioning infringement, fulfilling measures that might involve the use of constraint, guardianship. According to the State Council, the presence of one of these elements is a necessary condition, but not sufficient to automatically determine that the relevant post may be reserved to French citizens.

As a consequence of the ECJ's judgement of 11 March 2008 in *Case Commission v France C-89/07*, a law of 2008 on the nationality of ship's crew (*Loi nº 2008-324 relative à la nationalité des équipages de navires*, published on 8 April 2008) has opened up access of posts of captains of ships under French flag to EU citizens.

3.3 Practice and monitoring

There are two levels to take into account in practice.

First, if a career group (*corps* or *cadre d'emploi*) entitles its members to accessing the posts mentioned under 3.2. the relevant special regulation (*statut particulier*) may contain a condition of nationality. All other *statuts particuliers* have to be amended in order to suppress – if any – the mention of nationality. The Directorate general of the civil service (DGAFP *Direction générale de la function publique*) in the Prime Minister's services is monitoring this adaptation of special regulations with the help of the EU law cell of the State council.

Second, posts for which French nationality remains a condition of access need to be defined as such. This needs further government regulations and is also monitored by the DGAFP. During the French Presidency of the EU, 2008, the DGAFP published a guide for the reception of Community nationals, which reminds the state of the law in force in terms of access conditions, the public in question and the procedures envisaged within this framework.

There is not yet a general document indicating the state of the art for the amendment of regulations. At any rate, if a regulation has not yet been amended and still contains a nationality clause, administrative courts would make the EU principles of application of Art. 45 (4) prevail over contrary regulations, as has already happened in the past.

There are no precise statistics on employment of non nationals in public administrations, which could give indications about the effects of administrative practice.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of Law n° 2005-843. It uses the concept of "*sovereignty*" instead "*general interest*", due to the fact that the concept of general interest as shaped in French administrative law is extremely broad and might go beyond the EU concept of general interest. The wording "*exercise of the prerogatives of the public authorities*" is the same wording, in the French language, as that of the ECJ when it comes to the exercise of public authority.

The wording of the general principle according to which posts may be reserved to French citizens such as embedded in the general statuses of civil service may be considered as complying with EU law, with two provisos.

First, it has to be checked whether using of alternative criteria i.e. *"the exercise of sovereignty"* or *"direct or indirect participation in the exercise of the prerogatives of the public authorities"* has the same effect as the application of the cumulative criteria in the ECJ case law (public authority "and" general interest).

Second, although it seems that compliance with EU law has also been achieved for special regulations of *corps* and *cadres d'emploi*, it remains to be indicated by French authorities that the amendments of regulations foreseen by Law n° 2005-843 have all been carried through.

The legislative reforms required by the ECJ's rulings on merchant marine captains have been carried through.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

4.1.2. Practice

It has to be kept in mind that the French system of civil service is that of a highly regulated career system, which however combines also elements of an employment system, as there is no direct and automatic link between the elements of career and posts. Careers, i.e. title, basic remuneration and pension rights, are regulated on the basis of the special regulations of career groups (*corps* or *cadres d'emplois*), whether most other elements of working conditions are linked to the post, on the basis of general and sector specific regulations.

Government departments and public bodies may have their own complementary practices.

The Directorate general of the civil service (*Direction générale de la function publique*) in the Prime Minister's services, and the Directorate general for local government (*Direction générale des collectivités locales*) in the Ministry of Interior as far as regional and local government is concerned, are monitoring the application of civil service legislation, with the help if needed of the EU law cell of the State Council.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Professional experience plays an important role in the French civil service system, according to different situations.

As far as access to career groups is concerned, there are two ways of taking into account professional experience.

First, the general system of competitive examination (*concours*) is usually composed of two different competitions: a general competition open to all those who have the necessary diplomas or certificates (if any), called *concours extérieur*; a specific competition open to persons who already are civil servants, in another career group than the one for which the competition is opened, called *concours interne*. In some cases, like for instance the competition to access the *Ecole Nationale d'Administration*, which leads to many of the generalist career groups of higher level, there is a third competition, called *troisième voie*, open to candidates with professional experience in the private sector. The *concours interne* and the *troisième voie* competitions take into account professional experience - respectively in public administration and in the private sector - without any difference being made according to the country where the experience has been acquired.

As a result of *Law n° 2009-972 of 3 august 2009 on mobility and professional routes in the civil servic*e (*Loi relative à la mobilité et aux parcours professionnels dans la fonction publique*), Art. 26, access to *concours internes* is provided for candidates who have acquired a professional experience of the same duration in a body whose tasks are comparable to those of the relevant administrations in France.

In a number of special regulations, such as with teachers, it was however foreseen that only service without interruptions would be taken into account. The rationale for such a limitation is to avoid that successive short term contracts be used in order to by-pass the normal system of open competitions. However, such a system has a higher impact on persons who have made use of their right to free movement of workers, and should therefore be deemed contrary to EU law, in application of the criteria set by the ECJ in *O'Flynn* C-237/94.

On the basis *of Law n° 2007-148 of 2 February 2007 on the modernisation of the civil service* (*loi de modernisation de la fonction publique*), open competitions may include, as one of the proofs, the presentation of a file relating the professional experience. No difference is made between professional experience in France and abroad.

For all competitions, it is up to the independent recruiting board (*jury de concours*) to

assess professional experience. It seems that some general guidance is given in circulars as to non discrimination between professional experience acquired in France and abroad.

Second, as indicated earlier, access to posts in the civil service is not necessarily tied to membership of the relevant career group in the French civil service. Posts can be accessed either civil servants by secondment from their career group or, in some cases, through temporary appointment of a non civil servants.

As a result of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service*, all posts in the civil service can be accessed through secondment from either the French civil service or equivalent bodies from EU Member States. As far as access from the private sector is concerned, no difference is made on the basis of the country of previous service.

The present legislation relating to the French civil service does not make any discrimination based upon the country where professional experience has been acquired. However the absence of possibilities of secondment equivalent to the French system of *détachement* in another EU Member State might lead to maintaining an obstacle, the compatibility of which with the principle of free movement remains to be assessed.

Third, the very specific issues illustrated by the *Burbaud* case, have also to be taken into account in relation to professional experience, as far as they concern training with internships (see 4.2.4.)

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

For career purposes, seniority is a formal condition of access to higher grades which correspond to a different *career group*: promotion is the result of a competition (*concours interne*). The relevant provisions on *concours interne* ensure taking into account seniority acquired outside of the French civil service.

Within a single career group, previously acquired seniority may be taken into account for the purpose of classification at a certain salary level. This depends upon the relevant special regulation (*statut*) of the relevant career group. In some cases there are specific provisions about seniority acquired outside of the civil service, or even seniority acquired outside of France. In principle no difference should be made on the basis of the locus of previous employment, but due to the big number of special regulations of career groups, it is not possible to state that there are no more provisions which are not compatible with EU law.

Furthermore, French authorities should ascertain that there are no provisions the limiting the periods of service which can be taken into account, or requiring a continuity in service. Clearly, any regulation that would contain such a limitation only for services outside of France would be discriminatory and thus contrary to EU law. But even non discriminatory regulations (i.e. applying in the same way to duration of service in France and abroad) might be contrary to EU law if they have a bigger potential impact on persons having made use of their right to free movement of workers, as indicated by the ECJ in the *O'Flynn* C-237/94.

4.2.3. Language requirement

The general statuses of civil servants require candidates to demonstrate knowledge of the French language as a condition for access to the civil service.

As open competitions always include specific proofs, both written and oral, knowledge of the French language is a practical requirement. The level of knowledge required in open competition is normally corresponding to the level of responsibility of the relevant posts. There is however no comprehensive information on the practice of examining boards when dealing with foreign candidates.

4.2.4. Specific obstacles

A big number of career groups (*corps*) are based on initial training in a specialised school. This is a special feature of the French civil service, which has been first established for engineers in the XVIIIth century. Usually, access to posts corresponding to the qualifications acquired in these schools is reserved to members of the relevant career groups. This is

the origin of the *Burbaud case C-285-01*. The ECJ recalled in that case that if a candidate had acquired an equivalent training or professional experience which would be recognised by a diploma in another Member State, reserving access to a post to candidates who would have had their training in France is a discrimination that infringes with EU law.

The *Burbaud* case has led to the generalisation of assessment of a professional experience in competitive examinations. A specific 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.

The specific problem of the *Burbaud* case is however not entirely solved, as it remains difficult to assess to what extent the special training received in a civil service school amounts to a diploma for a regulated profession, as for hospital managers in the *Burbaud* case. If the profession does not meet criteria of regulated professions, the situation is different from the *Burbaud* case, and has not been addressed until now in ECJ case law.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals three potential issues of compliance with EU law.

First, the definition of posts which may be reserved to French citizens does not coincide exactly with the criteria of application of Art. 45 (4) TFEU be closed to EU citizens. This being said, the criteria indicated by the State Council for the determination whether a post may or may not be reserved to French citizens seem to be complying with EU law; furthermore, the criterion of safeguard of general interest does not appear in French legislation, thus there is no risk that a post involving the safeguard of general interest but not the exercise of public authority be reserved to French nationals.

The main issue is that there is not yet a comprehensive list of reforms of secondary regulation carried out in order to implement *Law n° 2005-843* which set the criteria which may be applied to reserve posts to nationals, and therefore there is no

Second, the legislation and regulation relative to the recognition of professional experience provides for taking into account equivalent professional experience acquired abroad, but there are still some issues relating to the cases where a specialist career starts with training in a specialist school, as in the *Burbaud* case. If the relevant posts correspond to regulated professions, the *Burbaud* jurisprudence would apply, and there would be an infringement of EU law. In the opposite case, it is not yet possible to assess to what extent the requirement of a special training in order to participate in a competition to access posts is compatible with EU law.

Third, in the absence of a general provision on recognition of seniority acquired abroad, the computing of seniority acquired outside of a specific career group (*corps* or *cadre d'emploi*) leaves room for discrimination or for obstacles to free movement. This is especially the case for specific regulations which limit the amount of working time that may be taken into account or which require continuity in the working period.

5.2. The monitoring role of the DGAFP for State civil service should help identifying issues and solving them in time, but the big number of special regulations for carer groups, and even more, the big number of autonomous bodies and local government makes it somewhat difficult to have a totally accurate overview of practice.

6. Reforms and Coming Trends

As indicated under 3.4, a series of reforms of French legislation applicable to employment in the public sector took place since 1991 in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants as well as eliminating obstacles linked to professional experience acquired outside of France.

A White Paper of 2008 on the future of the civil service in France puts forward over 40 proposals for modernising the service and the public sector in France. Specifically, it suggests evolving into a professional public sector in which a new statutory organisation based on 7 professional sectors would replace the current segmentation based on several hundreds of corps. Such a reform might simplify complying with EU law at the level of legislation and regulations, but it is not obvious that deregulating would better guarantee free movement of workers in the public sector. It remains to be seen whether such a reform will be undertaken, or whether the method of incremental adjustments which has been followed with some success since the early nineties for civil service reform will be continued.

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ITALIA

ITALY

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Italy is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Italy is a "regional" State with four levels of government: the State, 20 regions (*regioni* – the region of Trentino-Alto Adige has no institutions of its own, it is composed of two provinces), 110 provinces (*provincie*) and 8 101 municipalities (*communi*).

1.3. Official languages

Italian is the official language in whole Italy. French is an official language in the Val d'Aoste Region, German in the region of Trentino-Alto-Adige-*Südtirol*.

Furthermore, twelve minority languages are protected by law: Sardinian, Friulian (Rhaeto-Romance), Occitan, Albanian, Franco-Provençal, Slovene, Ladin, Griko, Alguerese (Catalan), Molise Slavic dialect (Croatian).

1.4. Statistical data

Italy has a total population of 59 131 300 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	3 611 000	14,45 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	2 081 800	57,6 %
Regional and Local	1 600 700	42,4 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The main relevant provision of the Constitution is Art. 97, which provides that: *"(1) The organization of public offices is determined by law ensuring the proper and fair operation of public affairs. (2) Areas of competence, duties, and responsibilities of public officials must be defined in regulations on public offices. (3) Appointments for public administration are determined by public competition unless otherwise specified by law.*

Furthermore, according to Art. 51 on Public Offices *"(1) Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To this end, the republic adopts specific measures in order to promote equal chances for men and women. (2) The law may, regarding their right to be selected for public positions and elective offices, grant to those italians who do not belong to the republic the same opportunities as citizens.*"

Title V (Art. 114 to 133) contains the provisions applicable to Regions, Provinces and Communes.

Legislative Decree 2001 n° 165, on the General Rules on the status of employment in the public sector, regulates access to and employment in the public sector, including national, regional or local authorities and all public bodies.

Every Italian Region is free to organize its own regional public sector through Regional laws, but within the limitations set by the Italian Constitution (such as Art. 97), and the general principles of State legislation (*Legislative Decree n° 165 of 2001*).

Furthermore, sector based collective agreements contain a major part of the rules applicable to working conditions, career progression and salaries. Collective agreements may derogate to the general legislative rules applicable to public employment.

2. 2. Public sector employers

The State, 19 regions, 110 provinces and 8 101 municipalities are all public employers, as well as the numerous autonomous public bodies *(enti pubblici*) which they have created. These include amongst others schools and Universities, while hospitals are regional public bodies. An *Agency of public employers* A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*) has been set up in 1994 to represent all public employers in negotiations for collective agreements.

There are also numerous corporations established under the relevant private law provisions, with often 100% of the shares owned by national, regional or local government. Their employees are not considered as public employees in the sense of Art. 97 of the Constitution.

On the basis of figures of *EUPAN – Structure of the civil and public services*, administrative authorities employed about 3 524 700 in 2002, including employees with flexible contracts. For full time employees the figures indicated were: This total includes: Ministries: 196.059; Prime Minister's Office: 2.374; other State Institutions: 33.603; Fiscal Agencies: 54.493; Judges: 10.765; Diplomatic career: 1.014; Prefectoral career: 1.518; Police: 324.734; Army: 132.792; Public bodies: 62.247; National Health Service: 687.210; School: 1.129.474; Universities: 110.574; Research Institutions: 16.928; Regions and local autonomies: 597.199.

2. 3. Public sector workers

Since 1994, employees in the Italian public sector are recruited on the basis of a contract subject to the ordinary rules of the Italian Civil Code and labour law, on the same footing with employees in the private sector. Individual contracts are based on the collective agreements between the *Agency representing public employers* A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*), and the trade unions related to the public sector.

As an exception, some specific categories of workers in the public sector are civil servants subject to a public law regime, i.e. judges and prosecutors, State police and the military, professional firemen, diplomats and prefects, heads of prison wardens and university professors. Their working conditions and the relevant provisions on career progression and remuneration are only based upon law and regulations.

Access to public employment, as well for employees as for civil servants, has to be based upon an open competition. A proper notice of the selection procedure has to be given to the public in order to guarantee the open access on national basis.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative judges. This includes all decisions relating to

open competitions, which is the normal recruitment method of all employees of public bodies.

Matters relating to individual and collective contracts are submitted to civil judges, including all matters about working conditions, career progression and remuneration of public sector employees.

The Constitutional Court may be appealed to by courts in order to solve conflicts of competence between the State and Regions, as well as by national regional governments verifying compliance of State and Regional legislation with the Constitution.

There is no Ombudsman at national level, but many regions, provinces and municipalities have their own ombudsman (*Difensore civico*). They can mediate between citizens and public administration, with no decision making power.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

It follows from Art. 51 (1) of the Constitution that Italian nationality is a general requirement for access to positions in the public sector.

Since 1994 however, access to public sector positions is open to other EU citizens (*Decree n. 487 of 2 May 1994*). The relevant provision is now Art. 38 (1) of *Legislative Decree n° 165 of 2001*, according to which "*Citizens of European Union Member States may access posts in public administrations that do not imply direct or indirect exercise of public authority or do not involve the safeguard of National interest.*" Art. 38 (2) empowers the Prime minister to adopt a decree which indicates "*posts and functions*" for which Italian citizenship is a requirement, as well as the indispensable requirements for access of EU citizens.

The relevant implementing regulation is of 7 February 1994, n. 174. "*Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche".*

3.2. Definition of posts

Posts and functions which are reserved to Italian nationals are listed in the regulation is of 7 February 1994.

A number of posts are listed, which amount to management posts in the State administrations; posts comprising senior administrative functions in branch offices of the State administrations; posts of judges State's advocates and prosecutors; civil and military posts in the office of the Prime Minister, Ministry of Foreign Affairs, Ministry of the Interior, Ministry of Justice, Ministry of Defence, Ministry of Finance and in the National forests corps (*Corpo forestale dello Stato*).

The types of functions which require Italian citizenship are defined as "a) functions which involve the elaboration, decision or execution of authorisations and binding orders; b) reviewing legality and appropriateness of decisions".

3.3 Practice and monitoring

According to Art. 2.2 of *Decree n. 487 of 2 May 1994*, in case of doubt on the nature of the functions to be performed by the employee, the President of the Council of Ministers, given a reasoned refusal, can deny access to a specific employment or to the conferral of specific responsibilities, if they involve reserved functions. Such a refusal has general prohibitive effect.

Recruitment occurs as a rule on the basis of an open competition (*concorso*) organised by the relevant employer. Notice of the competition has to be given in the official journal in order to ensure access from the whole territory. As indicated under 2.4. appeal against all aspects of open competition can be made to administrative courts.

The *Agency of public employers* A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*) represents all public employers in negotiations for collective agree-

ments, but it has no role in monitoring competitions.

There are no statistics on employment of non nationals in public administrations that could give indications about the effects of administrative practice.

As a consequence of the ECJ's judgement of 11 September 2008 in *Case* Commission v Italy C-447/07, a law n° 101 of 6 June 2008 has abolished the Italian nationality condition for access of posts of captains of ships under Italian flag.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose the relevant provision of the legislative decree of 1993 now replaced *Legislative Decree n° 165 of* 2001 and of *Decree n. 487 of 2 May 1994*.

The wording of Italian legislation and regulations does not entirely coincide with the criteria for the application of Art. 45 (4) TFEU. As for general interest, it only envisages national interest, which is less broad a concept than that of the ECJ's case law, and therefore complies without any doubt with the latter. However, on the other hand, the two criteria of Italian law are alternative (or) whereas in the ECJ case law they are cumulative (*and*). This might be a source of non compliance with EU law.

Looking at the list contained in the regulation of 7 February 1994, some questions remain open as it is not clear which posts in the office of the Prime Minister, Ministry of Foreign Affairs, Ministry of the Interior, Ministry of Justice, Ministry of Defence, Ministry of Finance are reserved to nationals.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. Art. 38 (3) of *Decree n° 165 of 2001* provides that equivalence of diplomas, certificates and recognized services is decided by decree of the Prime minister upon proposal of the relevant Minister.

An important role is played for most of employments by collective agreements, which are usually concluded for three years.

There are also regulations on remuneration and pensions, as well as for specific sectors, especially education.

Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ Disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzioni di sentenze della Corte di giustizia delle Comunità europee* provides the necessary means to enforce the ECJ's judgement of 26 december 2006 in *Case* C-371/04, *Commission v. Italy*.

Art. 5 of the law provides that public administration has to recognize the professional experience and seniority gained by Union citizens in the exercise of a comparable activity within the public administration of another Member State (even before accession to the EU) as equivalent to the experience or seniority acquired in Italy, when professional experience or seniority is considered relevant by Public Administration for any economic or legal purpose. The experience or seniority has to be considered on equal footing with that acquired in Italy (*secondo condizioni di parita' rispetto a quelle maturate nell'ambito dell'ordinamento italiano*). The wording of Art. 5 implies that recognition of professional experience and seniority has to be done as well for access to posts as for working conditions.

Law 2008 n° 101 does not modify Art. 38 of *Legislative Decree n° 165* but provides that contrary normative provisions (i.e. in laws or regulations) and provisions in collective agreements are not applicable.

Differently, in order to comply with an ECJ judgment in *Case* C-278/03, a decree of the Minister of Education n. 53 2006 corrected the table annexed a Law of 2004 (Legge 4 giugno 2004, n. 143) which provided for the attribution of a specific number of points for professional qualifications acquired in another EU Member State that was inferior to the maximum number of points which could be acquired according to the votes attributed to a similar Italian exam, the system constituters a source of discrimination.

The technique adopted with Art. 5 of the Law of 2008 has the advantage that it has a far broader scope than e.g. the cited ministerial decree, but its application in practice is conditioned by knowledge by all relevant public administration, and this is far from being guaranteed as long as there is not a special informative circular pointing to the consequences of Law 2008 n° 101.

4.1.2. Practice

Public employers may have their own complementary practices.

The *Agency of public employers* A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*) represents all public employers in negotiations for collective agreements. It does not the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There are no general rules on the recognition of professional experience and seniority. Collective agreements mentioned under 4.1.1. are the normal source of relevant rules and practice. In the education sector, rules are in the relevant legislation (for schools and Universities). Some of them foresee time limits for taking into account professional experience or seniority acquired in another EU Member State.

Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ* mentioned under 4.1.1. prevails over any rule in collective agreements, laws or regulations, and should hence lead public administrations to dis-apply any norm that would for instance limit the way into professional experience acquired abroad is taken into account.

As Law 2008 n° 101 has not amended the relevant legal provisions and does not foresee a mechanism to amend laws and regulations, the issue is to what extent public administrations are aware of the content of Art. 5 and of its meaning.

4.2.2. Seniority

Seniority usually plays a role in remuneration and working conditions, on the basis of the relevant collective agreements. It is a key element in the career of those employees which have the status of civil servants.

What has been mentioned for professional experience applies to seniority. The problems mentioned about Art. 5 of Law 2008 n° 101 are even more complicated when it comes to civil servants, for whom there are strict rules of seniority for wages and careers.

4.2.3. Language requirements

According to Art. 3 of the *decree of 7 February 1994, n. 174*, EU citizens shall have an adequate knowledge of the Italian language in order to access to posts in the public sector. *Legislative Decree n° 165 of 2001*, Art. 37, requires the knowledge of at least one foreign language (beside the knowledge of Italian) for the access to posts in the public sector.

Italian is the official language on the whole territory, but a special status is reserved to French in Valle d'Aosta, German in Trentino-

Alto Adige *Süd Tirol* and Slovenian in Friuli-Venezia Giulia.

There is no relevant useful information about the practice relating to language requirements in the public sector that would make it possible to verify compliance with the principle of proportionality.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, the wording of Italian legislation and regulations reserving posts to Italian citizens does not entirely coincide with the criteria for the application of Art. 45 (4) TFEU. It might be a source of non compliance with EU law in so far as the two criteria of Italian law are alternative (or) whereas in the ECJ case law they are cumulative (*and*). The question arises mainly for posts in the Ministries mentioned in *Decree n. 487 of 2 May 1994* which indicates the posts which may be reserved to Italian nationals.

Second, Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ*, mentioned under 4.1.1., is intended to ensure compliance with EU law when taking into account professional experience or seniority acquired in other EU Member States. However the legislative technique which has been adopted does not guarantee clarity and precision in its application. It would need to be publicized and illustrated at least by ways of an explanatory circular, and by all means it would be better to adopt the necessary amendments to legislation and regulations.

5.2. More generally, the absence of monitoring systems for access to public administration and recognition of professional experience and seniority, as well the lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service make it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

A number of reforms of the public service are presently undertaken on the basis of parliamentary authorisations for delegated legislation, e.g. in the public administration as a whole, and in the school and universities sector.

By law of 4 March 2009, Parliament has given power to the Government to adopt delegated legislation in order to reform public employment. Legislative decree n° 150 of 27 October 2009, adopted on the basis of the cited law, has introduced a series of innovations and amendments to the existing general staff regulations, i.e. to *Legislative Decree n° 165 of 2001*. No changes have been introduced, which might directly impact upon free movement of workers. According to the new text of *Legislative Decree n° 165 of 2001*, collective agreements may only include derogations if this is expressly foreseen in the law. This will make it more easy to ascertain that there are no rules on working conditions that might impede free movement of workers in the public sector.

The new legislation also requires professional experience in other EU Member States' administrations or in EU institutions in order to access higher executive posts.

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ΚΥΠΡΟΣ/KIBRIS

CYPRUS

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Cyprus became a member of the EU on 1 May 2004.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004, as there are no transitional arrangements for Cyprus in the Accession Treaty of 2003.

1.2. State form and levels of government

Cyprus is a unitary State with two levels of government, the State and 68 municipalities (*demos*) and communities or villages (*koinote*).

1.3. Official languages

There are two official languages in Cyprus: Greek and Turkish.

Greek is in practice the language of the southern part of Cyprus, while Turkish is the language in the northern part, which is not under control of the Government of Cyprus.

1.4. Statistical data

Cyprus has a total population of 778 700 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	67 100	17,6 %
Public enterprises	10 000	2,6 %
Total government	57 100	15 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	52 600	92.3 %
Local	4 400	7,7 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Part VII of the Constitution is dedicated to the public service, with provisions to ensure representation of Greeks and Turks in the permanent public service and especially in the Public Service Commission.

The *Public service Law 1990-2005* regulates the status of public servants. It is complemented by more specific laws, e.g. the *Evaluation of Candidates for Appointment in the Public Service Law* 1998-2008 and ministerial decrees.

The *Public service law* is also complemented with Regulations for specific aspects of employment in the public service, which apply to all public service employees such as: medical examinations and medical treatment, employee assessment/ appraisal, emoluments, allowances, and other economic benefits, leaves in general, working hours.

2. 2. Public sector employers

The State Ministries, Departments, Services and independent authorities and the 68 municipalities and communities or villages are public employers. There are also a number of State and local agencies and offices.

Under the *Public Service Law*, "*Public Service*" means any service under the Republic other than the judicial service, the Armed or Security Forces, the offices of the Attorney-General, of the Auditor-General or their Deputies, of the Accountant-General or his Deputies.

The Public Service Commission is responsible for recruitment and for important aspects of career management of public servants. It is an independent body, according to the Cyprus Constitution, and its decisions can be challenged only by the Supreme Court of Laws.

2.3 Public sector workers

The legal status of Servants of the State is laid down in the *Public Servants Law*. Specific laws and regulations apply to the categories mentioned under 2.2. and to the educational services. A special mention can be made of workers or of persons whose remuneration is calculated on a daily basis in accordance with the *Employment of Casual Officers (Public and Educational Service)* Laws, 1985-1991 and the *Procedure for Appointment of Casual Officers in the Public and Educational Service Laws, 1995- 2004*.

According to government information provided to the European Commission, in 2009 public servants and other government employees (59 590) represent about 23 % of the total workforce (379 900); the number of local government employees is not available. The total number of public servants is about 18 490 (31 % of the total of public sector employees).

2. 4. Appeals and remedies

The *Supreme Court* may rule on appeals against any ill giving to ones rights/privileges. This includes appeals against any decision made by the *Public Service Commission*.

The Ombudsman (*Commissioner for Administration*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions. The *Cyprus Equality Body*, under the *Commissioner for Administration* is playing an important role in reviewing decisions that encroach upon equal treatment of EU citizens.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 31(a) of the *Public Servants Law* "*No person shall be appointed to the Public Service unless he is a citizen of the Republic, or -provided that the post is not one that involves the exercise of public authority and the responsibility for the safeguarding of the general interests of the State- a citizen of a Member State*".

Other specific laws, are applicable to the Judiciary, Police, Armed Forces and Fire Service.

3.2. Definition of posts

Posts reserved to Cypriot nationals are defined by decree adopted by the Council of Ministers, upon recommendation of a special committee; this committee is assigned with the task of carefully examining each post in the public service so as to determine which posts fall under the exception based on the criteria of public authority.

Since 2004, four Ministerial Decrees have been issued, covering the vast majority of public posts, but the procedure is ongoing, in order to include new posts that may be created each year.

Posts reserved to nationals include posts in the Customs Department, Inland Revenue Department, VAT Service, Ministry of Foreign Affairs, director posts in various ministries etc.; posts in the Police, Armed Forces and Fire Service are also reserved for nation-

als, as well as Court Registrars, the President of the Supreme Court and the Judges.

According to the legislation of the Educational Service, the Local Authorities and the Semi – governmental Organizations, the practice for the latter is the same as for the public service.

The Council of Ministers decides for the posts that may be reserved to nationals based on the recommendations of a special technical committee. According to the current situation, all the posts of the Educational Service are open to EU citizens as well as the majority of the posts of Local Authorities and Semi – governmental Organizations. The exception applies for posts at the very high hierarchical levels, which involve the exercise of public authority.

There are no legislation or regulations reserving access to posts of captains of vessels under Cyprus flag to nationals.

3.3 Practice and monitoring

The appropriate authorities have to submit a proposal with the posts they wish to entail nationality conditions. Proposals have to be supported reasonably. Each proposal is assessed by the *Public Administration and Personnel Department*. The evaluated proposals are then submitted by the Ministry of Finance to the Council of Ministers which, after studying the proposals submitted decides on which posts to impose nationality conditions.

A list of posts reserved to national in the public service is available with the *Public Service Commission*.

The competent authority responsible for the appointment of public servants is the *Public Service Commission*. All vacant posts advertised in the Official Gazette after the issuing of the aforementioned decrees explicitly state whether they are open to other EU citizens as well as to nationals.

The *Public Service Commission*, being responsible for the appointment of public servants, is able to monitor the relevant aspects of free movement of workers for public servants.

The Public Administration and Personnel Department assesses the number of public sector posts with access reserved to nationals to 3 300, i.e. 18% of public servants and government employees (about 0,9 % of the labour market).

Information on local government practice is not available.

3.4. Compliance with EU law

With the amendments introduced in 2003 to the *Public service Law 1990,* a first step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Estonian nationals.

As far as the public service is concerned, it seems that the criteria for the application of Art. 45(4) TFEU are applied, but further amendments to laws and regulations need to be adopted for the Police, Armed forces and Fire Service.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

The *Public Service Commiss*ion is responsible for the appointment, confirmation, emplacement on the permanent establishment, promotion, transfer, secondment, retirement and

exercise of disciplinary control, including dismissal or compulsory retirement, of public officers. It is thus able to monitor the free movement of workers for public servants as far as recruitment is concerned. The *Public Administration and Personnel Departmen*t seems also in a position to monitor practice of government departments on, and the *Educational Service Commission* as far as education is concerned.

Detailed information on local government practice is not available.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Professional experience is usually not a formal condition for access to a recruitment procedure. First entry posts may require relevant experience or consider it as an advantage. It can play a role in the ranking during the procedure for appointment in a first entry post.

Professional experience can be acquired by previous employment either in the public sector or in the private sector or both. There is no specific legislation at the moment as to the treatment of comparable experience of EU nationals, but the competent authority will apply the same principles and equal treatment when assessing qualifications of candidates- and in this case, the professional experience.

The competent authority responsible for the appointment of public servants is the *Public Service Commission*, which determines whether the experience acquired in the national public or private sector or those of another Member State meets the requirements stated in the relevant Job Description.

Recognition of professional experience does not have effects on salaries and grading. However, in the case of a person serving in a position in the national public service who is appointed to another post of the same salary scale, he/she will maintain their current salary advantages and will be placed on a higher incremental point than the normal starting pay for the post in question, in recognition of work experience gained during the previous years of public service

The rules and legislation of semi-government organizations and municipalities are usually similar to the corresponding ones in the public service.

4.2.2. Seniority

Promotion posts (i.e., positions open only to public officers serving in the immediately lower hierarchic position in the same job structure) call for "service", which by law, means service in the immediately lower hierarchic position (career system).

According to the *Public Service Law* (Art. 49), there is no recognition of seniority in the Cyprus public service, other than that acquired from service in the immediately lower hierarchic post in the national public service. *Regulation 14 of the Public Service (General) Regulations 1990-2006* defines 'service' and specifies the cases which are considered as real service and taken into consideration when calculating seniority. It also specifies those cases that are not considered real service and are not taken into consideration when calculating seniority.

There is no legislation/regulation about the recognition of seniority acquired in other EU Member States' equivalent public service. The *Public Service Commission* has not yet had the experience of dealing with a claim regarding seniority acquired in another Member State, since the time Cyprus became a full member of the EU.

In the Education service, *Educational Service Commission* examines applications on the basis of the relevant national educational service legislation and if it recognizes this teaching experience, one increment will be added on the basic salary of the employee then for each year recognised, with the exception of an employee appointed to substitute another employee.

4.2.3. Language requirements

The knowledge of language and its level are specified in the scheme of services (job vacancy) of the post. These are specified according to the needs and demands of the appropriate authority in relation to the duties of the post.

In practice, most of the schemes of services require a very good to excellent command of the Greek and or Turkish Language and a good to very good command of English or any other language of EU Member States. If a citizen of an EU Member State wishes to apply for post for which knowledge of Greek is required, he/she has to provide the necessary documentary evidence that they possess the knowledge required, in the same way as a Cypriot national applying for a position in the public sector has to do by law.

A number of complaints against public sector institutions have been decided by the *Cypriot Equality Body* as using language as a barrier to access.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals one issue of compliance with EU law.

The definition of seniority as service in the immediately lower hierarchic post in the national public service does not provide for the necessary recognition of seniority acquired in other EU Member States. The *Public Service Commission* has not had to deal with a request for equivalence and it is thus not possible to say to what extent the absence of relevant legislation is an obstacle to free movement in itself.

5.2. Ongoing complaints logged with the *Cypriot Equality Body* indicate problems in the practice of language conditions.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Cyprus legislation applicable to employment in the public sector took place in 2004, in order to try and meet the requirements of EU law as far as opening posts in the public service is concerned.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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LATVIJA

LATVIA

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1. General data

1.1. Date of applicability of EU law

Latvia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

Latvia is a unitary State with two levels of government: the State 530 local governments (*pagasts, pilseta*, and *novads*).

1.3. Official language

There is one official language: Latvian.

Russian is a minority language spoken by a rather important number of residents.

1.4. Statistical data

Latvia has a total population of 2 281 300 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	320 100	31,9 %
Public enterprises	72 200	7,2 %
Total government	247 900	24,7 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	107 900	43,5 %
Local	140 000	56,5 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 101 of the Constitution "*Every citizen of Latvia has the right, as provided for by law, to participate in the activities of the State and of local government, and to hold a position in the civil service*".

The *State civil service Law* of 2000 regulates the status of civil servants.

The *Law on Labour*, and a number of sector specific laws further contain provisions that are relevant to free movement of the public sector.

2. 2. Public sector employers

The State and the 530 local governments are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, and a number of para-statal authorities and agencies, whose workers are not public servants.

2.3 Public sector workers

The legal status of Servants of the State and is laid down in the *State civil service law*. Other public sector employees are covered by a specific status or regulation or by labour law.

According to Latvian government information provided to the European Commission, at the 2nd quarter 2009 public sector employees (310 454) represents 31% of the total workforce (999 300). The total number of civil servants was 14 406 (4,6 % of the public sector).

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *State civil service law* is provided for by a possibility of action with ordinary courts.

The Constitutional Court examines the compliance of legislative acts with the Constitution and with the other laws.

The Ombudsman (*Tiesibsargs*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities and file applications to the Constitutional Court.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. *Section* 7 of the *State civil service law* of 2000, Latvian citizenship is a requirement for access to the civil service.

The Law *on Judicial Power* of 1992, the *Law on Bailiffs* of 2002, the *Law on the Office of the Prosecutor* of 1994, the *Law on the State Revenue service* of 1993, the *Diplomatic and Consular Service Law* of 1995, the *National Armed Forces Law*, the *Border Guard law* and the *Law on the National Guard* of 1993as well as the *Law On the Career Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prisons Administration* of 2006 contain similar provisions.

3.2. Definition of posts

Posts reserved to Latvian nationals are defined by the relevant laws, without mention of specific reasons, criteria or procedures.

Posts reserved for Latvian citizens according to the special laws are those of judges, bailiffs, notaries, prosecutors, policemen, State security officers, firemen, boarder-guard, national guard, civil employment in military service, employees of the *State Revenue Office* and employees in the diplomatic and consular service, as well as all civil servants posts.

According to Art. 3 of the *State Civil Servants law,* civil servants are in charge of performing "*sectorial policy or development strategy, coordination of sectorial activities, distribution or control of financial resources, development of draft legislation or control over its implementation, issuance of administrative acts or preparation or adoption of the important decisions related to the rights of the individuals.*"

Secretarial services as well as assistants' and public relation services to Ministers are not performed by civil servants. There are no civil servants in municipalities. According to the definition above, it seems thus that civil servants are employed in posts which correspond to the criteria for application of Art. 45 (4) TFEU.

There is no legislation or regulations reserving access to posts of captains of vessels under Latvian flag to nationals.

3.3 Practice and monitoring

The legal provision reserving posts to Latvian citizens apply to a rather limited amount of workers in the public sector, as mentioned under 2.3.

However there is no information on administrative practice for access to these posts, which would enable to confirm its compliance with the legal criteria.

3.4. Compliance with EU law

The definition of civil servants positions in the *State Civil Servants law*, as well as the special

legal provisions requiring Latvian nationality seem to be complying with EU law.

However, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment would be useful in order to verify compliance.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Generally professional experience is evaluated as a merit point during the recruitment procedure. Professional experience is a formal condition for access to a recruitment procedure for posts bailiffs, notaries and prosecutors.

Previous professional experience is important with regard to the amount of remuneration.

Recognition of professional experience is carried out on a case by case basis. It mainly requires submission of relevant notice, certification or information from the previous employer. There are no legal provisions on the recognition of previous professional experience, whether in Latvia or abroad.

Career in the State civil service is regulated by the State *Civil Service law*, but these provisions apply only to Latvian nationals, as mentioned earlier. It does not contain provisions as how to handle previous professional experience acquired abroad by Latvian nationals.

There is no information on practice of recognition of professional experience that would be relevant for free movement of workers.

4.2.2. Seniority

The comments under 4.2.2. apply to seniority as well as to professional experience.

4.2.3. Language requirements

Language requirements for access to the public sector are provided by *Official Language Law* and Regulation of Cabinet of Ministers Regulation *No 296 On the level of knowledge of the State language necessary for performance of professional duties and duties of position and procedure for verification of State language proficiency*.

Employees of State and local government institutions, courts and institutions constituting the judicial system, State and local government undertakings, as well as employees of companies in which the greatest share of capital is owned by the State or a local government, have to be fluent in and use the official language to the extent necessary for performance of their professional duties and duties of office.

There are three levels of knowledge which are divided in two sublevels A and B. No information on practice is available.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, the absence of explicit reference to professional experience and seniority acquired abroad might induce practices which would not comply to the requirements EU law, as well for Latvian citizens who would have made use of their right to free movement, as for other EU citizens.

Second, the positions reserved to nationals seem to correspond to the criteria for the application of Art. 45 (4) TFEU, but no explicit reference to EU law is being made. This does not help in raising consciousness about the limited character of derogations to the principle of free movement allowed by EU law.

These issues need not necessarily to be faced by the adoption of specific laws or regulation. However, as special proactive effort in making known how the right to free movement of workers applies in the Latvian public sector would be necessary in order to ensure full compliance.

5.2. There seems to be no monitoring system of practice in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

The absence of monitoring system also makes it difficult to assess whether the principle of proportionality is being correctly applied when it comes to language requirements.

6. Reforms and Coming Trends

No need for reform of public sector work regulations has resulted from accession to the EU.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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LIETUVA

LITHUANIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Lithuania became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

Lithuania is a unitary State with two levels of government: the State 60 municipalities (*savivaldybės*).

1.3. Official language

There is one official language: Lithuanian.

Russian is a minority language spoken by a rather important number of residents.

1.4. Statistical data

Lithuania has a total population of 3 384 900 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total public sector	430 800	33,3 %
Public enterprises	83 800	6,5 %
Total government	347 000	26,9 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Art. 33 of the Constitution provides for equal access of Latvian citizens to the public service. Chapter 10 (Art. 119 to 124) of the Constitution deals with public administration and local government.

Employment in the public sector is regulated by the *Law on the Public Service* N° VIII-1316 of 8 July 1999, (new version adopted on 1 July 2002, last amended 1 may 2009). Resolutions of the Parliament and of the Government are complementing legislation. There are also other relevant general laws, such as the *Law on Recognition of the Regulated Professional Qualifications*, and sectorial laws, such as the *Law on Health Care Institutions* and the *Law on Education of the Republic of Lithuania.*

Labour law applies to an important number of workers of the public sector.

2. 2. Public sector employers

The State and the 60 municipalities are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, as well as para-statal authorities and

agencies, whose workers are not public servants.

On the whole there are about 800 public employers.

Accoding to *EUPAN – Structure of the civil and public services*, in 2005 out of a total of 47 648 public servants, 5 017 (10,5 %) were employed by local government.

2.3 Public sector workers

Persons in the public service are divided into two groups: civil (public) servants, and public employees. The legal status of Servants of the State and of Municipalities is laid down in the *Law on the Public Service*. Other public sector employees are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

The main differences between public servants and persons employed under labour contracts in the public service are that salaries of public servants are higher by virtue of qualification grade (the latter is not granted to persons working under labour contracts) and length of service. Public servants are entitled to additions to their salaries, additional holiday days and to receive supplements for performing additional functions for a period of one year.

According to information provided by the Lithuanian government to the European Commission for 2009 he *Law on Public Service* applied to some 54 500 public servants (13 % of all public sector employees), of which half are statutory public servants. The total number of public sector employees (418 300) represented 27,5 % of the total workforce (1 520 000).

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the law on the Public Service is provided for by a possibility of action with administrative courts. Labour disputes are of the competence of courts of general jurisdiction.

The Constitutional court exercises judicial review on the conformity of laws with the Constitution.

The Ombudsmen (*Seimas* - Ombudsmen's Office) may handle complaints with regard to public administration. They may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 33 of the Constitution "*All citizens shall have the right to take part in the conduct of public affairs, both directly and through democratically elected representatives, and the right to* seek *employment, on general terms of equality, in the public service of the Republic of Lithuania*".

The *Law on the Public Service (*or *Law on the Officials of the Republic of Lithuania*), Art. 9 (1) provides that Lithuanian citizenship is a requirement for admission to the public service.

According to Art. 2(1) "*Public service means a sum total of legal relations arising after the acquisition of the status of a public servant, the change or loss thereof, as well as those resulting from the public administrative activities of a public servant in a State or municipal institution or agency when implementing the policy of a particular sphere of State governance or ensuring the co-ordination of the implementation thereof, co-ordinating the activities of institutions of a particular sphere of State governance, managing and allocating financial resources and controlling their use, carrying out audits, adopting and implementing legal acts, decisions of State and municipal institutions or agencies in the sphere of public administration, preparing or co-ordinating draft legal acts, agreements or programmes and giving opinions on them, managing personnel, or having public administrative powers with respect to persons, who are not subordinate*".

Posts reserved to Lithuanian nationals are defined by Parliament and Government Resolutions establishing lists of positions.

A *Resolution of the Parliament of the Republic of Lithuania N° 1X-992 of 27 June 2002* estab-

lishes a list of positions of public servants in the Parliament, Chancery of the Parliament, institutions accountable to the Parliament, the President's Office and institutions accountable to the President, National Court Administration, courts, Prosecutor's Office and municipal institutions.

A *Resolution of the Government N° 684 of 20 May 2002* establishes a similar list of positions of public servants in the prime Minister's Office, Chancery of the Government, ministries, government institutions and institutions at the ministries.

3.2. Definition of posts

Posts reserved to Lithuanian nationals are defined by Parliament and Government establishing lists of positions, as mentioned under 3.1. These resolutions are complemented by government and municipal institutions.

According to the Parliament resolution, employment is reserved to nationals for the following positions (amongst others): head of Parliament Chairman's Secretariat and chief advisor; advisor, consultant and secretary to the president of the Republic; representative of the President for special assignments, public relations officers of the Parliament and of the President; secretary of the municipal council, advisor and assistant to the mayor, director and deputy director of department or section, director of commission or council administration, deputy inspector of municipality; chancellor of the Ombudsmen institution, chief State auditor, chief internal auditor and chief specialist, assistant to the prosecutor of Prosecutor's General Office or regional or county prosecutor, advisor and assistant to the chairman of the courts, assistant to the judge, court consultant, secretary of court sessions, secretary of the administration, chief and junior investigator or specialist.

According to the Government resolution, employment is reserved to nationals for the following positions (amongst others): chief advisor, advisor and assistant of the Prime Minister, head of the Prime Minister's Secretariat, spokesperson for the Prime Minister and ministers; vice-minister, advisor and assistant to the minister; chief and deputy chief of the county; head and deputy head of government institution, State secretary, undersecretary; Government agent in the European Court of Human Rights, director and deputy director of department, commission, council administration or section, head of section, chief auditor of government institution; advisor in the Chancery of the Government; special attaché and his deputy, chief specialist and specialist in the government institution; ambassadors, consul general and consul, vice-consul, advisor of the department/section, first/second/ third secretary, attaché; chief of headquarters, chief commissioner - deputy commissioner general of the police, head and deputy head of battalion/ squadron/ company/ platoon; investigator of particularly important cases and chief investigator; master of the ship, pilot, chief bodyguard, deputy chief of cordon, chief instructor, head of fire-prevention post, chief border guard, police officer, fireman.

The adoption on 19 June 08 of the law n° X-1628 amending Art. 11 of the Lithuanian Merchant Shipping Law has opened access to the posts of captain and first officer on ships under Lithuanian flags to EU and EEA citizens

3.3 Practice and monitoring

The resolutions mentioned under 3.2 are complemented by government and municipal institutions. The resulting lists, approved by the head of the relevant body are internal and thus not open to the public. The criteria for approving the lists are functional, taking into account the nature of the tasks and responsibilities inherent in the posts.

Usually, advertisements for posts in government and municipal bodies explicitly mention whether the post advertised is for public servant or for public employee.

There seems not to be specific monitoring which would enable to have an overview of compliance with EU law.

3.4. Compliance with EU law

The definition of civil servants positions in the law on the public service seems to be complying with EU law. The lists established

by the Government and Parliament resolutions in 2002 seem at first sight to be complying with criteria for the application of Art. 45(4) TFEU in most cases. There might be doubts about e.g. master of the ship, pilot, chief bodyguard, deputy chief of cordon, chief instructor, head of fire-prevention post, chief border guard, police officer, fireman.

The fact that the lists of government and municipal institutions are not open to the public is a problem as regards compliance with EU law.

Lithuanian authorities would gain from monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment, in order to avoid non compliance with EU law.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Professional experience is not a condition for access to the public service, but generally a candidate's previous professional experience has an important influence on the assessment of his/her suitability and qualification for the individual post. Previous professional experience plays a role with regard to the amount of remuneration.

Apart from the provisions on length of service mentioned under 4.2.3. there are no legal provisions on the recognition of previous professional experience for the public service.

4.2.2. Seniority

Seniority plays an important role for salary purposes in the public service.

According to Art. 42 of the *Law on Public Service*, the length of service shall consist of the number of years served for the State of Lithuania as from 11 March 1990 in the civil service. The length of service shall be calculated from the beginning of the service (work) of a civil servant in State and municipal institutions and agencies or from the day of appointment (election) to a civil service post in accordance with the procedure laid by law laws.

Only service in Lithuanian public authorities is taken into account in the law. Even if the posts restricted to Lithuanian nationals were all complying with the criteria for the application of Art. 45 (4) TFEU, Lithuanian citizens having made use of their right to free movement would therefore be discriminated against.

4.2.3. Language requirements

According to Art. 50 of the *Law on Recognition of diplomas and qualifications* "*Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the Republic of Lithuani*a". Linguistic knowledge is to be assessed, if need be, after the recognition is granted. It is not to be used to check, in any way, the substantial qualifications of the migrating professional.

Art. 9(1) of the *Law on Public Service* mentions "*a good command of State language*" amongst requirements for admission to the public service.

No information on practice and monitoring is available.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, as the *Law on Public service* takes only into account seniority acquired in Lithuanian institutions there is a clear source of discrimination for Lithuanian citizens who would have made use of their right to free movement – as for other EU citizens if they could apply to posts reserved to public servants.

Second, the positions reserved to nationals, i.e. public service positions, seem to correspond to the criteria for the application of Art. 45 (4) TFEU, but no explicit reference to EU law is being made. This does not help in raising consciousness about the limited character of derogations to the principle of free movement allowed by EU law. Furthermore, there are doubts about some posts which are included in the general lists established by Parliament and Government. Last but not least, the specific lists established by government and municipal offices are not accessible to the public.

These issues need not necessarily to be faced by the adoption of specific laws or regulations. However a special proactive effort in making known how the right to free movement of workers applies in the Lithuanian public sector would be necessary in order to ensure full compliance.

5.2. There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

There is no information on practice as far as languages requirement are concerned, and therefore it is not possible to assess whether the principle of proportionality is being observed.

6. Reforms and Coming Trends

No need for reform of public sector work regulations has resulted from accession to the EU.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

* * *

LUXEMBOURG-LUXEMBURG-LËTZEBUERG

LUXEMBOURG

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Luxembourg is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

Luxembourg is a unitary State with two levels of government: the State 117 and municipalities (*communes, Gemeinden*).

1.3. Official languages

There are three official languages in Luxembourg: French, German and *Lëtzebuergesch*.

French is the language of written law. French and German are the languages of justice.

Lëtzebuergesch is very close to the German dialects spoken in the neighbouring regions of Belgium, France and Germany.

1.4. Statistical data

Luxembourg has a total population of 476 200 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	37500	12 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	26 800	71,5 %
Local	10 700	28,5 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 11 (2), according to which "*Luxembourgers are equal before the law; they alone are eligible for civil and military service, save as the law may in particular cases otherwise provide.*" Art. 107 on local authorities deals with municipalities.

Employment in the public sector is regulated by the law on the *General status of State civil servants* (*statut général des fonctionnaires de l'Etat*) of 1976, the *Law on the regime of State employees* (*loi fixant le regime des employés de l'Etat*)

of 1972 and by the law on the *General status of municipal civil servants* (*statut général des fonctionnaires communaux*) of 1985, the *Law on the organisation of the National Institute of Public Administration* of 1999, recently modified by a Law of 18 December 2009,

2. 2. Public sector employers

The State and the 117 municipalities are public employers. There are also a number of State and local agencies and offices. The State employs more than 70 % of public sector workers; local government less than 30 %.

The public sector furthermore includes State provided medical and educational services, as well as para-statal authorities and agencies.

2.3 Public sector workers

Persons in the public service are divided into two groups: civil servants (*fonctionnaires – Beamte*) and employees (*employés – Angestellte*). The legal status of civil servants is laid down in the relevant status for the State and for the Municipalities State employees are covered by a specific law, as mentioned under 2.1.

Whereas functions relating to the exercise of public authority may not be performed by employees, the civil servants' status is not limited to posts relating to that exercise.

No statistics on employment as civil servants as opposed to employees were available to the author of this report.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative court. Matters relating to contract are submitted to civil courts.

The Constitutional Court may review the constitutionality of Laws.

The federal Ombudsman (*Médiateur*) may handle complaints with regard to public administration, but not for litigation between a civil servant and his/her employer. He may make recommendations to the relevant public authorities but have no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 11 (2), according to which "*Luxembourgers are equal before the law; they alone are eligible for civil and military service, save as the law may in particular cases otherwise provide.*"

For civil servants Art. 2 (1) a) of the *General status of State civil servants* provides that in order to access to the civil service, one has to be "*a national of a Member State of the European Union*". This is the result of an amendment introduced by a Law of 18 December 2009. However, Art. 2 (1) 2 provides that Luxembourg citizenship may still be required for "*posts which involve direct or indirect participation to the exercise of public authority and for the functions which have as purpose safeguarding the general interests of the State or other public persons."*

The posts to be reserved to Luxembourg nationals will be established by Grand-Ducal Regulation.

Similar provisions are also inserted in the *Law on the regime of State employees* (*loi fixant le regime des employés de l'Etat*) of 1972, and in the *Status of municipal employees* of 1985 stills require Luxembourg citizenship as a condition for access.

Before 1 January 2010, access to the civil service was restricted to Luxembourg nationals, with the exception of the sectors of education, research, health, trans, telecommunications and post as well as water, electricity and gas supply.

3.2. Definition of posts

As indicated under 3.1., the government has chosen to establish a full an exhaustive list, in application of the above criteria – i.e. after thorough examination of the relevant functions to be exercised.

It has already been indicated that posts which involve only a very occasional exercise of public authority, like for instance those medical doctors of the National Health Laboratory will not be included in the list of posts reserved to nationals.

No special procedure, nor body, is foreseen in order to implement the definition of posts, as the *Regulation* will be exhaustive and precise as to which posts are reserved to Luxembourg nationals.

3.3 Practice and monitoring

As the amendments described earlier entered into force on 1 January 2010, it is too early to know about practice.

Reports of the *Network of Free Movement of Workers* indicate that in the sectors that were already open to non nationals, newspaper ads recruiting for public sector positions were still very often indicating Luxembourg citizenship as a requirement. The *Civil service trade Union* (*Confédération générale de la function publique*) was opposing opening to non Luxembourg citizens until the first months of 2009, when a compromise was finally found with government, which opened the way to the legislative amendment.

As indicated under 3.2. no specific monitoring procedure or body is foreseen.

Although having no access to open sea, Hungary indeed has a fleet of merchant ships under its flag. The new wording of Art. 34 (3) of Act XLII 2000 on water transport opens up post of masters and chief mates of vessels flying the Hungarian flag in international shipping on inland waterways and coastal traffic to EU and EEA citizens.

3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the goal of the amendments to relevant State regulations adopted in 2009. The new wording of the *General status of State civil servants,* of the *Law on the regime of State employees and of the General status of municipal civil servants* complies with EU law.

The necessary implementing Regulation needs to be adopted in order to have the necessary rules set down for State public sector.

The first draft regulation set up in order to implement the Law of 18 December 2009 has been strongly criticised by the State Council as not being in line with the requirements of Luxembourg law and of EU law.

Monitoring the application of the new rules will be important for Luxembourg authorities, especially in consideration of the important number of non Luxembourg EU citizens established in the country and of the previous hostility of the trade union to opening recruitment in the public sector.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

The *Law setting the general regime of State civil servants' remuneration* (*loi fixant le regime general des traitements des fonctionnaires de l'Etat*) contains clauses which are relevant to free movement of workers.

Similar provisions are applicable to State employees, as well as to municipal civil servants and employees.

Furthermore,, a law on change of administration *Loi modifiée du 27 mars 1986 fixant les conditions et les modalités selon lesquelles le fonctionnaire de l'Etat peut se faire changer l'administration* – contains the provisions applicable if a civil servant changes employer in the framework of state administration.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There is no general condition of professional experience for access to public sector employment.

According to a specific provision of the *General status of State civil servants* (Art. 2 (4)), the Government may decide in Council of Ministers that persons having an extended experience in the private sector or showing specific qualifications required for a vacant position may be admitted to the Civil service. There is no limitation to experience in Luxembourg for the application of this provision.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

According to the *Law setting the general regime of State civil servants' remuneration*, Art. 7, previous working periods are taken into account in order to establish seniority at the time of permanent appointment. A difference is made between time passed in State service which is entirely taken into account, and other working time, which is only taken into account for half of the relevant period. At any rate there is a general limit of 12 years for taking into account professional seniority

For the implementation of this provision, time passed at the service of or at the service of the Crown, of municipal government and of autonomous public bodies as well as time passed in an institution of an EU Member State which is identical or similar to these is considered in the same way as Luxembourg State service.

For civil servants already appointed, law on change of administration mentioned under 4.2.1. establishes a special body and procedure for change from one state administration to another. No mention is made of changes between communal and state administration; no mention is made either of change between the administration of another Member State and Luxembourg State administration.

4.2.3. Language requirements

According to the *General status of State civil servants* (Art. 2 (1)), one of the requirements for admission to the State service is to show a knowledge "*adapted to the career level*" of the three languages of Luxembourg.

The mention of a knowledge "*adapted to the career level*" has been introduced by the Law of 18 December 2009. Language requirements should be checked before the participation in selection for access to the civil service. Special language training will be organised for access to the civil service.

An important issue will be for the Luxembourg authorities that language requirements do not become a way to exclude foreign applicants. Special attention will have to be given to the way in which language will be tested, and to the observance of the proportionality principle.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, concerning posts reserved to nationals, the amendments to the legislation relevant to work in the public sector are in line with the requirements of EU law, but they still need to be enacted by Grand-Ducal Regulation, and practice has to implement the legal changes.

The first draft regulation set up in order to implement the Law of 18 December 2009 has been strongly criticised by the State Council as not being in line with the requirements of Luxembourg law and of EU law.

Monitoring the application of the new rules will be important for Luxembourg authorities, especially in consideration of the important number of non Luxembourg EU citizens established in the country and of the previous hostility of the trade union to opening recruitment in the public sector.

Second, the legislation on civil service seems to recognise professional experience and working periods only in access to the civil service, not for civil servants already in service. Although the legislation does not directly discriminate against non Luxembourg citizens, it might have a greater impact on EU citizens (whether Luxembourg citizens or not) having exercised their right to free movement of workers.

5.2. An important issue will be for the Luxembourg authorities that language requirements do not become a way to exclude foreign applicants. Special attention will have to be given to the way in which language will be tested, and to the observance of the proportionality principle.

5.3. The lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Luxembourg legislation applicable to employment in the public sector entered into force on 1 January 2010, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

It was the second legislative reform triggered by the application of Art. 45(4) TFEU after a first modification of rules in 1999. The 2009 reform was the consequence of an infringement action that had been started by the Commission.

At the beginning of 2010, the main issue is not any more legislative reform but the correct implementation of the new law.

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MAGYARORSZÁG

HUNGARY

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Hungary became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 1 May 2009.

1.2. State form and levels of government

Hungary is a unitary State with two levels of government: 19 counties (*megyék*) and 3 169 municipalities (*városok* and *falu* or *község*)

1.3. Official language

There is one official language: Hungarian.

German, which is spoken by about 10% of the population, is officially considered as a minority language.

1.4. Statistical data

Hungary has a total population of 10 066 200 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total government	822 300	29,2 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	255 600	31 %
County	89 900	11 %
Local	477 600	58 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Art. 70 of the Constitution guarantees equal access of Hungarian citizens to public offices. Art. 37, 40 and 44B deal with State administration.

Hungarian legislation does not contain any general set of framework regulations for public authorities, the relevant regulations are included in the legislative acts pertaining to the employment and labour relations in question. Of particular relevance are *Act XXIII of 1992 on the legal status of civil servants* and *Act XXXIII of 1992 on the legal status of public employees*. Sectorial laws are applicable to public prosecutors, judges and judiciary employees, law enforcement bodies and civil national security services and the army, as well as the act on higher education.

2. 2. Public sector employers

The State, the 19 counties and the 3,169 municipalities are public employers. There are

also a number of State and local agencies and offices.

The State employs about 31 %, the counties about 11 % and municipalities about 58 % of the total of public workers.

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies, whose workers are not public servants.

2.3 Public sector workers

Workers in the public service are divided into two groups: civil servants and public employees, each of those two main categories is submitted to different legal provisions,, as mentioned under 2.1.

According to Hungarian government information provided to the European Commission, on 31 December 2008 about 500 000 are public employees, i.e. 2/3 of the 750 000 public employees, and thus the civil servants and assimilated may be estimated to 250 000, 1/3 of the total.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Public Servants law is provided for by a possibility of action with ordinary courts.

The Constitutional courts exercises judicial review on the conformity of laws with the constitution.

The Ombudsman may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 70 of the Constitution guarantees equal access of Hungarian citizens to public offices; this does necessarily entail a limitation of access to employment in the public sector.

According to Art. 7(1) of the *Act on the legal status of civil servants*, Hungarian nationality is, as a rule a requirement to be a civil servant. Art. 7 (8) c) provides for an exception: persons with the right of free movement and residence may also become civil servants if in charge of administrative tasks; non nationals may not be hired in important and confidential administrative positions, or managerial positions as defined in the given legal regulation.

There are also limitations on the basis of nationality for "state leaders" (top positions in central administrative bodies), public prosecutors, judges, law enforcement bodies and civil national security services and the army,

3.2. Definition of posts

Posts reserved to Hungarian nationals are defined by law and ministerial decrees on the basis of the notion that administrative tasks may be accomplished by foreigners, except for important and confidential positions, to which some categories of positions are added, such as mentioned under 3.1.

There is no standard legal definition of important and confidential positions. These positions are specified in the relevant sectorial regulations, as well as the organizational and operating rules of the individual institutions.

Numerous ministerial decrees foresee the requirement of Hungarian nationality. Some were recently amended (in 2008) in order to suppress the nationality condition. Usually high level leaders (e.g. director of public financed institutions under the supervision of minister, director of an institution appointed by the local municipal) and heading position of public servants in the field are to be Hungarian nationals.

The following positions are also restricted to Hungarian nationals: positions of security

or asset-guard of archives and public collections (museum); in public institutions, organs under the supervision of the minister of the interior positions where "public order, investigation of crime, border control, catastrophe-management, protection of data and migration interests requires it" (e.g. administrators, security-technician, night watchman, captain and member in security guard with gun, receptionist, gatekeeper, preparation in duty, communication and telephone-technician at National Catastrophe-Management Directorate and all its units including the Training Centre; unless the minister of justice allows exception, prison-guards, and service-men in the prison system; positions s at Defence Security Service.

3.3 Practice and monitoring

There seems to be no specific monitoring of the posts reserved to Hungarian nationals and information on the relevant recruitment practice is not available.

3.4. Compliance with EU law

The criteria indicated by the *Act on the Status of civil servants* do not coincide with the criteria for the application of Art. 45(4) TFEU. This is not as such a cause of non-compliance, but the vagueness of the criteria in the relevant legislation does not facilitate analysis, as there is no official comprehensive list of positions reserved to Hungarian nationals.

At first sight, the list indicated under 3.2. seems to include functions for which it would be difficult to find a justification complying with the criteria for the application of Art. 45 (4) TFEU; for instance positions of security or asset-guard of archives and public collections (museum) as well as receptionist, gatekeeper, preparation in duty, communication and telephone-technician at National Catastrophe-Management Directorate and all its units including the Training Centre.

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment would be necessary.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Both for public employees and civil servants, professional experience and seniority may be set as conditions for the occupation of any given position in calls for applications to positions in public authorities.

The recognition of professional experience is regulated in a general way *Act C of 2001 on the recognition of foreign certificates and diplomas.*

Hungary has transposed directive 2005/36. According to Art. 36 (1) d), if the given activity is deemed to be regulated in Hungary, the applicant is entitled to pursue the professional activity concerned provided that he/she has pursued the given activities for three consecutive years in any Member State, and can prove that prior to the commencement of the activity the applicant did attend such education for the preparation of the performance of the activity that was recognized by the Member State concerned or accepted by any professional organization.

According to *Act XXIII of 1992 on the legal status of civil servants* and *Act XXXIII of 1992 on the legal status of public employees*, service time and professional experience acquired in a foreign country should be recognized.

Institutions of higher education are to evaluate within their own scope of competence whether an employee originating from any Member State of the European Union has adequate professional experience.

Public employees are grouped into so-called salary classes, and within these classes into salary categories which are made on the basis of school qualifications as well as professional qualifications. In principle, professional qualifications acquired abroad should be taken into account for the establishment of the salary category.

4.2.2. Seniority

As indicated under 4.2.1., seniority may be set as conditions for the occupation of any given position in calls for applications to positions in public authorities. It seems that there are no specials conditions for taking seniority acquired abroad into account for the purpose of recruitment.

The duration of services abroad should be taken into for the purpose of establishing the remuneration category. Time periods spent in public employee legal relations by public employees or in public service legal relations by civil servants are taken into account as one of the elements of the establishment of remuneration. There is no legal provision excluding periods in public service spent abroad. There is no time limitation for taking the service time spent in any public employee or public service legal relation into account.

As a consequence of the legal definition of the relevant time periods, seniority acquired abroad cannot be taken into account as time periods spent in public employee legal relations for the establishment of periods of notice, severance pay, and amount of jubilee bonus.

There is no specific relevant information on practice.

4.2.3. Language requirements

According to *Act XXIII of 1992 on the legal status of civil servants* and *Act XXXIII of 1992 on the legal status of public employees*, the proper command of Hungarian language is a condition for the occupation of civil servant and judiciary employee positions.

The same applies to education services, with the exception of native-speaker teacher positions in special bilingual institutions, as well as institutions offering minority education and training.

For health services, only public employees who are performing healthcare activities at the armed forces under the control of the minister in charge of judicial and law enforcement bodies, as well as public employees working in the healthcare institutions of the Ministry of Defence and the Hungarian Army are required by law to demonstrate proper command of Hungarian.

There is no specific relevant information on practice. Therefore it is not possible to assess whether the principle of proportionality is duly observed when applying language requirements.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two general issue of compliance with EU law.

First, the legal criteria for the definition of posts reserved to Hungarian nationals, e.g. "*important and confidential positions*" allows for far more discretion than the criteria for application Art. 45 (4) TFEU. The absence of reference to EU law may lead to regulations and decisions which would not comply with EU law. Furthermore, at first sight, there are posts reserved to Hungarian citizens which do not seem to comply with the criteria for application Art. 45 (4) TFEU.

Second, where professional experience and/or seniority is or may be taken into account for recruitment and salaries, there is no express provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States. Here again the absence of reference to EU law, which is not as such an infringement, may lead to regulations and decisions which would not comply with EU law.

5.2. There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

There has not been until now any general legislative reform of public sector employment legislation as a consequence of accession to the EU, but only some recent amendments to the ministerial decrees requiring Hungarian nationality for some positions.

Public sector and administration reform is underway since 2006, and might have consequences on the laws and regulations relevant to free movement of workers in the public sector. For instance, competitive examinations have been introduced for recruitment in public administration as of the beginning of 2010.

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MALTA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Malta became a member of the EU on 1 May 2004. There are no transitional arrangements for Malta in the Accession Treaty of 2003 with regard to free movement of workers.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

Malta is a unitary State with two levels of government: the State and 68 municipalities (local councils).

1.3. Official language

According to Art. 5 (1) of the Constitution, the national language of Malta is the Maltese. Maltese and English are the official languages of Malta and the languages of administration of justice.

1.4. Statistical data

Malta has a total population of 407 800 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	46 900	30,7 %
Public enterprises	4 600	3 %
Total government	42 300	27,7 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Chapter X of the Constitution contains the provisions on the public service, i.e. on the *Public Service Commission* and powers of the Prime minister, and Chapter XA on local councils. There is no provision with respect to Maltese nationality as a condition of access.

The *Public Service Management Code* regulates the status of public servants. It is not a legally binding instrument in itself, but many of its provisions are now embedded in the *Public Administration Act*, 2009.

Labour law applies to employees who are not public servants (see 2.3.)

2. 2. Public sector employers

The Sate Ministries and Departments are public employees and are subject to a common framework of rules and regulations.

The wider public sector includes local councils as well as many public corporations, statutory authorities and other entities which are not part of the Public Service.

No statistics on the relative distribution of public workers between State and local government are available. However, as local councils have been introduced only very recently in Malta, it may be assumed that most

of the public sector employees are indeed employed by the State sector.

2.3 Public sector workers

The Public Service consists of staff recruited under the authority of the *Public Service Commission* who serve in Ministries and Departments and are subject to a common framework of rules and regulations, assembled in the *Public Service Management Code*.

Teachers in State schools, for instance, are public officers; university lecturers are not. Police officers are also members of the Public Service, but soldiers are not.

According to information provided by the Maltese government to the European Commission, public servants were 28 795 in 2009. This means that they represent about 68 % of the total public sector employees.

2. 4. Appeals and remedies

The *Public Service Management Code* provides the possibility to petition the *Public Service Commission*, a Constitutional organ autonomous from the Administration, for applicants for Public Service posts / positions, if they feel that they have been unjustly treated.

In the case of employees of public corporations and authorities beyond the Public Service, recourse exists through the Industrial Tribunal which has jurisdiction to consider cases of discrimination.

Public sector employees may also initiate judicial proceedings if they feel that their fundamental Human Rights have been breached.

In addition, all public sector employees can refer to the Office of the Ombudsman if they feel that they have been treated unfairly.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 49 (4) of the *Public Administration Act, 2009: "The Prime Minister may make regulations to give effect to any of the provisions of this Act and the enforcement thereof, and without prejudice to the generality of the foregoing such regulations may provide for:* [...]*(f) the recruitment in public administration of nationals of Member States of the European Union other than Malta and nationals of other countries enjoying similar rights in relation to the free movement of workers: Provided that posts involving the exercise of public authority and the safeguarding of the general interests of the State, and particularly those listed herein, may be reserved for Maltese nationals* [list of posts, see 3.2.]*"*

These provisions are in line with paragraph 1.2.3. of the non legally binding P*ublic Service Management Code*.

For employees in the public sector who are not public servants, there are no conditions of nationality.

3.2. Definition of posts

Art. 49 (f) of the *Public Administration Act* is giving a non-binding, non-exhaustive list of posts which "*may be reserved for Maltese nationals*:

(i) posts in the Office of the President, the House of Representatives, the Prime Minister's and Ministers' Secretariats, the Cabinet Office, and the offices of the Principal Permanent Secretary and of Permanent Secretaries;

(ii) the Judiciary, posts involving the preparation of expert advice in the field of prosecution of offences or lawmaking, and posts entailing responsibility for advisory constitutional bodies;

(iii) posts involving the sovereignty of the State, including diplomatic and foreign representation;

(iv) posts in the Office of the Prime Minister and the Ministries of Finance, Justice, Home Affairs and Foreign Affairs;

(v) posts within departments charged with the protection of the economic interests of the State, including tax authorities;

(vi) positions in the Senior Executive Service;

(vii) posts in the disciplined forces and offices responsible for defence matters; and

(viii) posts in the security services and in the field of civil protection and defence."

The approach taken by the Public Service of Malta is to apply a Maltese nationality restriction to posts on a case-by-case basis in the

light of Art. 49(f) of the Public Administration Act cited above. Nationality restrictions are adopted by exception, and a number of EU citizens as well as third country nationals are already in the employ of the Public Service.

There is no legislation or regulation reserving access to posts of captains of vessels under Maltese flag to nationals.

3.3 Practice and monitoring

The application of a nationality requirement to positions in the Public Service is determined by the Principal Permanent Secretary (head of the Public Service), possibly following representations by the Permanent Secretary of the ministry in which a particular post is located. Decisions are based within the framework indicated under 3.2.. No additional special procedures are in place or envisaged.

The number of public service posts reserved to Maltese nationals is assessed by the Ministry of Social Policy as 2 800, i.e. about 10% of the Public Service positions, 1,7 % of the total labour force in Malta. About 4 200 non Maltese EU citizens (2, 35 % of the total labour force) are working in Malta.

3.4. Compliance with EU law

The wording of the *Public Administration Act*, 2009, which consolidate the administrative practice embedded in the *Public Service Management Code*, seem to be complying with EU law, and so does apparently the practice, on the basis of information provided for this report.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and the non-legally binding *Public Service Management Code* mentioned under 2.1 are applicable for access and employment conditions.

4.1.2. Practice

The *Public Service Commiss*ion, is responsible for the appointment, confirmation, emplacement on the permanent establishment, promotion, transfer, secondment, retirement and exercise of disciplinary control, including dismissal or compulsory retirement, of public officers. It is thus able to monitor the free movement of workers for public servants as far as recruitment is concerned.

Detailed information on employment in the public sector outside of the Public Service and in local councils practice is not available.

4.2. Special requirements for access to employment and working condition

4.2.1. Professional experience

In the Maltese Public Service it is normal practice to distinguish between professional experience and service in the grade. Professional experience is a core eligibility requirement and/or selection criterion which is assessed by the selection board at the stage of interview. In either case, according to the *Public Service Commission*, credit is given for relevant professional experience regardless of the country in which it has been obtained.

The selection criteria are determined in consultation with the *Public Service Commission* before the calls are issued. Such a system is meant to ensure that selection criteria are not tweaked to favour or disadvantage any of the applicants. This system has been in place for over 40 years.

The relevance of professional experience is not tied to experience gained with a specific employer.

4.2.2. Seniority

Seniority (length of service) determines progression to higher points within the same salary scale and may also govern eligibility for promotion to higher grades.

In various career streams, promotion to a higher grade may be dependent upon accumulating a certain number of years of service in a particular grade.

Salary scales and working conditions are clearly established in a collective agreement signed with all the unions representing Public service employees. Service in the grade usually also determines progression to a higher point within the salary scale applying to each grade.

Seniority only applies in the case of serving public officers. It is only an eligibility criterion in the case of automatic progressions and/or eligibility criteria as determined in the particular sectorial agreements. This only applies internally and no time limit is factored in when evaluating experience claimed.

In the case of external recruitment, seniority is taken into account without differentiating eligible applicants, regardless of the nature of the previous employment. There are no requirements for professional experience or length of service to be continuous. On the contrary, for serving public officers, a career break of up to one year in the four year period immediately preceding promotion to a higher grade or progression to a higher salary scale is automatically reckoned as active service. The private sector is also taken into account. No difference is made between professional experience in Malta and professional experience abroad.

These practices, as codified in the *Public Service Management Code* should enable to avoid that computing length of service becomes an obstacle to free movement in the EU.

4.2.3. Language requirements

According to paragraph 1.2.3.4 (ii) of the *Public Service Management Code*: "*applicants have to be conversant in both official languages, namely Maltese and English, unless exceptional circumstances warrant that either of the official languages is waived to the satisfaction of MPO [the Management and Personnel Office within the Office of the Prime Minister]*".

A good working knowledge of Maltese is required to communicate with and serve the public. There is no specific information on practice that enables to assess to what extent the principle of proportionality is applied with respect to the knowledge of languages.

5. Issues of compliance with free movement of workers in the public sector

5.1. On the basis of information available to the author of this report, no issue of compliance with EU law seems to appear.

The question of proportionality in the application of the requirement to know official languages needs some attention on behalf of the relevant authorities.

5.2. The *Public Service Commission*, which is an independent authority, has the necessary powers and means to apply the relevant rules and principles of EU law and monitor its application in the Public Service.

Practice in the rest of the public sector – outside of the Public service, would also need to be monitored by Maltese authorities.

6. Reforms and Coming Trends

There has not been until now any specific legislative reform of public sector employment legislation as a consequence of accession to the EU.

The recent adoption (2009) of a *Public Administration Act* brings greater clarity on the binding character of rules that were already applied and set down in the non legally binding *Public Service Management Code*.

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NEDERLAND

THE NETHERLANDS

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

The Netherlands are a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

The Netherlands are a unitary State with three levels of government: the Kingdom, 12 provinces (*provincies*) and 467 municipalities (*Gemeenten*).

Furthermore the Caribbean Aruba, Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten are part of the Kingdom of the Netherlands, but not integrated in the EU internal market.

1.3. Official language

The official language of the Netherlands is Dutch. Furthermore, Frisian is an administrative language in the province of Friesland,

1.4. Statistical data

The Netherlands have a total population of 16 358 000 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	1 821 600	27 %
Public enterprises	751 700	1,1 %
Total government	1 069 900	15,8 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	269 700	25,2 %
Local	800 200	74,8 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Art. 3 of the Constitution (*Basic law - Grondwet*) provides that "*All Dutch nationals shall be equally eligible for appointment to public service*". According to Art. 109, the legal status of civil servants as well as rules regarding employment protection and co-determination for civil servants have to be laid down by Act of Parliament. *Chapter 6* of the Constitution is

dedicated to Provinces, Municipalities and other public bodies.

The *Law on Civil Servants* (*Ambtenarenwet*), 1929 and the *General regulation of Kingdom civil servants (Algemeen Rijksambtenarenreglement*), 1931, which have been amended several times, lay down the general rules applicable to civil servants. They are complemented by a number of sector specific laws and regulations, as well as by collective agreements for civil servants of the provinces and municipalities.

2. 2. Public sector employers

The Kingdom, the 12 provinces and 467 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers. The relative proportion of civil servants is of about 25 % for the State and 75 % for provinces and municipalities.

Public schools and hospitals are also public employers.

2.3 Public sector workers

State (Kingdom) employees have as a rule the status of civil servant. Those, of Provinces and Municipalities, as well as of autonomous public bodies are submitted to similar rules. Employees of public enterprises are submitted to general labour law. Although the legal sources are different, there are no substantial differences in content between civil service rules and general labour law.

The Dutch civil service is based upon appointment under the civil service regulations, but it is typically a post based system, not a career system.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative courts. Matters relating to contract under labour law are submitted to civil courts.

There is no constitutional court, and other courts may not review the constitutionality of laws.

The Ombudsman may handle complaints with regard to public administration. Ombudsmen of the Regions and Communities may handle complaints with regard to federal administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions. Since its institution in 1982, the Ombudsman has been dealing with complaints about recruitment in the civil service, which at that time did not come under judicial review.

The *General Equal Treatment Law* (*Algemene wet gelijke behandeling*) provides that anyone who faces discrimination on the basis of a.o. nationality can submit a complaint to the *Commission for Equal Treatment* (*Commissie Gelijke Behandeling*).

3. Posts reserved to nationals

3.1. Relevant laws and regulations

Art. 3 of the Constitution provides that "*All Dutch nationals shall be equally eligible for appointment to public service*". However, this is not interpreted as an impediment for access of foreigners to the civil service.

Since a law of 1988, the principle is that access to the civil service is not subject to nationality conditions, unless explicitly stated otherwise by law.

For some functions, Dutch nationality is required on the basis of a specific sectorial legal provision, mentioning the relevant posts.

3.2. Definition of posts

The definition of posts reserved to Dutch nationals is made by the legislator without a general indication of the criteria used. This system was presented in 1988 as linked to the achievement of the European Community's internal market, but the opening went beyond

citizens of other EEC Member States, making no difference between categories of foreigners. There is no reference to the criteria of application of Art. 45(4) TFEU.

Dutch nationality is required for the following categories of posts: posts in the judiciary; functions with the police; military posts with the exception of temporary appointments for posts which cannot be fulfilled by already appointed military personnel, e.g. translators abroad; functions in diplomatic service; some high State offices, such as the National Ombudsman and members of the State Council.

As a general rule for civil servants, according to Art. 125e *Civil Service Act*, only Dutch citizens may be appointed in "*functions of confidence*", unless the interest of the service necessitates that a foreigner be appointed.

There is no legislation or regulation reserving access to posts of captains of vessels under Netherlands flag to nationals.

3.3 Practice and monitoring

The Dutch system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system).

There is no specific system of monitoring of practices with regard to recruitment of civil servants. So far there have been no procedures regarding EU-nationals with the *Commission for Equal Treatment* for employment in the public sector. Generally speaking, there are only very few appeals on recruitment in the civil service.

3.4. Compliance with EU law

The criteria indicated by the *Civil Service Act, i.e.* "*functions of confidence*", do not coincide with the criteria for the application of Art. 45(4) TFEU. This is not as such a cause of non-compliance, especially as exceptions in the interest of the service are possible. However the vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of "*functions of confidence*".

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment would be necessary in order to permit a precise assessment of practice.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are no general rules on e.g. professional experience and seniority.

4.1.2. Practice

Government departments and public bodies have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Conditions for employment and access to advantages and benefits linked to employment

4.2.1. Professional experience

The Dutch system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system). Professional experience may play a role, especially as candidates have usually to present recommendations from previous employers. There are no rules or general practices. No information was available to the author of the report in order to known whether experience abroad is treated in the same way as experience in the Netherlands.

4.2.2. Seniority

As mentioned under 4.2.2., the Dutch system of public employment is based upon open recruitment on a post by post basis. Promotion depends upon the individual employee who has always an option to decide to give notice in the current job and apply for another post in the public sector.

Seniority is taken into account for remuneration purposes, including salary increments.

No information was available to the author of the report as to whether and how service time with different employers, and especially with employers fulfilling functions equivalent to the Dutch State public service are taken into account for establishing the salary level or salary increments.

4.2.3. Language requirements

There are no explicit regulations concerning the knowledge of the Dutch language for posts in the public sector.

In practice, a good knowledge of the Dutch language will be required for most posts in the public sector.

No information is available in order to assess whether the principle of proportionality is correctly applied to language requirements.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, the criteria indicated by the *Civil Service Act* in order to reserve posts to nationals, i.e. "*functions of confidence*", does not coincide with the criteria for the application of Art. 45(4) TFEU. Vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of "*functions of confidence*".

Second, the absence of legal provisions on the recognition of seniority acquired in other EU Member States may generate obstacles to the free movement of EU citizens, including Dutch nationals who make use of their right to free movement.

5.2. A further point to mention is the absence of a central point for the monitoring of practice relevant to the free movement of workers in the public sector.

5.3. More generally, the lack of statistics on the number of posts reserved to nationals and on the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Dutch regulations applicable to employment in the public sector took place in 1988, in order to open up the civil service to foreigners. This was made possible from a legal point of view by the wording of Art 1 and 5 of the new constitutional text adopted in 1982.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ÖSTERREICH

AUSTRIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Austria joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

1.2. State form and levels of government

Austria is a federal State with three levels of government: the Federation, the 9 *Länder* and 2 358 municipalities (*Gemeinden*). The capital city Vienna is a *Land* which also exercises the usual competences of a municipality.

1.3 Language

The official language of Austria is German. Furthermore, Croatian, Hungarian and Slovene are minority languages and administrative languages in the relevant areas.

1.4. Statistical data

Austria has a total population of 8 298 900 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	476 900	11,8 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. There is no clause on Austrian citizenship as a condition for access to public employment.

The *Law on civil service* (*Beamtendienstrechtsgesetz*), 1979 and the law on contractual employees (*Vertragsbedienstetengesetz*) 1948 contain the provisions applicable to respectively civil servants and public employees. They are supplemented by specific laws e.g. on recruitment *Act on the Advertisement of Vacancies* (*Ausschreibungsgesetz*) 1989 as well as sectorial laws, i.e. the *Law on teachers of the Länder* (*Landeslehrer-Dienstrechtsgesetz*) 1984 and of teachers of agricultural and forestry *Land- und forstwirtschaftliches Landeslehrer-Dienstrechtsgesetz* 1985. These are all federal laws, applicable at all levels of government.

2. 2. Public sector employers

The Federation, the 9 *Länder* and 2 358 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers. Public schools and hospitals are also public employers.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a

majority of public capital or which are otherwise controlled by government.

According to information provided by the Austrian government to the European Commission, in 2009 public sector employment represents 470 000, i.e. 12,5 % of the total labour force (4,09 million). The Federation employed approximately 132 700 (28 %), the *Länder* about 141 000 (30 %), municipalities about 74 000 (15,8 %).

2.3 Public sector workers

Persons in the public service are divided into two groups: civil servants (*Beamte*) and contractual employees (*Vertragsbediensteten*).

Whereas in theory functions relating to the exercise of public authority should not be performed by contractual employees, there is no systematic rationale in practice for the division of functions and posts between civil servants and contractual employees.

The main difference in status between civil servants and contractual employees is that civil servants are employed on career terms.

According to information provided by the Austrian government civil servants represent about 61,2 % of the total, contractual staff 38,8 %.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to the employment of civil servants– is provided for by actions administrative courts. Matters relating to contract are submitted to labour courts.

Infringement to fundamental rights (including professional freedom) by public authorities and the legislator may be appealed to the *Constitutional Court (Verfassungsgerichtshof Österreichs)*.

The Austrian Ombudsman Board (*Volksanwaltschaft*) may handle complaints with regard public administration. The *Länder* of Vorarlberg and Tirol have their own Ombudsman boards. Ombudsman boards may make recommendations to the relevant public authorities but have no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 4 of the *Civil servants law* 1979, Austrian nationality or the nationality of a country whose nationals Austria has to grant the same rights due to a treaty in the context of the European integration, is required to access posts in the civil service, with the exception of posts defined under Art. 42. The latter 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*".

Similar provisions are included in *the Law on teachers of the Länder* (and of teachers of agricultural and forestry. Those provisions also apply to contractual teachers.

3.2. Definition of posts

Posts reserved for Austrian nationals are directly or indirectly linked to official representation or the defence of the general interests of the State: the police force, the military, the diplomatic service, justice, official representation.

The final decision is made on a case by case basis. Decisions on the posts that are to be reserved to Austrian nationals is made on a case by case basis. There is neither an exhaustive, nor an exemplary list of public sector posts reserved for nationals.

The notice of competition for the post which is published in the Official Journal or the "*Wiener Zeitung*" and additionally on the website of the Federal Chancellery indicates whether Austrian nationality is a condition for access.

Examples of posts for which Austrian nationality would be required are: Director Gen-

eral in the Federal Chancellery-Constitutional Service; Head of Law Office of the Republic of Austria; Director in Federal Chancellery responsible for staff regulations and general legislative affairs; Government Tax Auditor in the Federal Ministry of Finance; Legal Expert in the Federal Ministry of Transport, Innovation and Technology (participation in formulation of draft laws); Posts in the Parliamentary Directorate.

Although having no access to open sea, Austria indeed has a fleet of merchant ships under its flag. Art. 27 par. 4, of the Law on maritime transport (*Seeschiffahrtsgesetz*) which permitted to require Austrian nationality for the crew has been abolished in 2005.

3.3 Practice and monitoring

There are no special procedures or bodies assessing the nationality conditions. Due to the structure of the public service and the principle of "ministerial sovereignty", the proper application of the rules governing the nationality condition and the exemptions thereto lie within the final responsibility of each minister.

There are no statistics on employment of non nationals in public administrations, which could give indications about the effects of administrative practice.

3.4. Compliance with EU law

Art. 42 of the *Civil servants law 1979* has clearly been worded in order to comply with the criteria for the application of Art. 45 (4) TFEU: the criteria are worded in the same way as the case law of the ECJ. Interestingly the law also mentions that "*positions requiring a special loyalty link to Austria that can only be expected from Austrian nationals*", as was indicated by the ECJ in *Case* 149/79 *Commission v Belgium*.

The absence of a comprehensive list of posts reserved to Austrian nationals makes it difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

4.1.2. Practice

As mentioned under 3.3 there are no special procedures or bodies assessing the nationality conditions. The proper application of the rules governing the nationality condition and the exemptions thereto lies within the final responsibility of each minister.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

A distinction is made between seniority and professional experience: recognition of both seniority and professional experience has financial (remuneration) but no grading effects; there is no recognition of seniority and only exceptional recognition of professional experience of previous services in the private sector (as regards determining salaries).

Professional experience can play a role in the recruitment procedure: for example as an additional merit point it can place the candi-

date in a higher position on the shortlist in the recruitment procedure of teachers. In other cases it may influence the candidate's suitability and qualification based on the requirements for the individual post.

Recognition of professional experience is carried out by the human resources department of the relevant authority.

4.2.2. Seniority

As indicated under 4.2.2, a distinction is made between seniority and professional experience.

When workers move within the public service, prior periods of employment in the public service in Austria are taken into account fully and automatically when determining salaries ('seniorit'); the content of the prior post(s) or a distinction between full-time/part-time does not matter, nor does the status as a civil servant or an employee.

Since the accession of Austria to the European Union the same rules have applied to the recognition of seniority acquired by EU-EEA nationals in comparable institutions in the public sector of EU- or EEA Member States as well as Switzerland.

In the federal administration prior professional experience outside the public service is taken into account for up to 2, 3 or 5 years depending on the level of post only if certain conditions are fulfilled: the recognition must be in the public interest and the prior professional experience must be of significant relevance for the post concerned. Otherwise the professional experience is taken into account only partly (50% up to a maximum of 3 years, later on 1,5 years).

Recognition of professional experience is carried out by the human resources department of the relevant authority.

As a consequence of the judgement of the ECJ in the *Köbler case* C-224/01, seniority acquired by a university professor at institutions of another Member State comparable to Austrian universities to determine the grant of a special length-of-service increment has been recognized in 2003 through an amendment to Art. 50a of the Law on remunerations (*Gehaltsgesetz 1956*. In December 2008, the Austrian Administrative Court started a new preliminary procedure as regards the benefits for university professors ECJ (C-542/08); here the issue at stake was the impact of a procedural rule which impeded the application of the *Köbler* jurisprudence prior to the judgement of the ECJ in 2003.

4.2.3. Language requirements

Candidates to employment in the public service have to prove a certain level of knowledge of the German language depending on the level and the content of the post applied for.

5. Issues for free movement of workers in the public sector

5.1. On the basis of information available to the author of this report, no specific potential issues of compliance with EU law on free movement of workers in the public sector emerge.

5.2. A point to mention however is the fact that reliance on the principle of "ministerial sovereignty" seems to impede a general monitoring of recruitment and management practices in public authorities.

The absence of a comprehensive list of posts reserved to Austrian nationals makes it difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

5.3. More generally, the lack of statistics on the number of posts reserved to nationals, and of the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

The Austrian legislation had been adapted prior to Austria's accession to the EU to the requirement of EU law as far as posts reserved to nationals are concerned. Indeed, those rules already applied in the framework of the association agreement of the European Community with EFTA Countries.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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POLSKA

POLAND

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Poland became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 1 May 2007.

1.2. State form and levels of government

Poland is a unitary State with four levels of government: the State, 16 regions (*voivodoships*), 373 districts (*powiaty*) and 2 500 municipalities (*gmina*).

1.3. Official language

The official language of Poland is Polish.

1.4. Statistical data

Poland has a total population of 38 125 500 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total public sector	3 619 800	26,3 %
Public enterprises	1 977 100	14,3 %
Total government	1 642 700	11,9 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 60 of the Constitution "*Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.*" Art. 153 further provides that "*a corps* (korpus) *of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations*"; it also provides that "*the Prime Minister shall be the superior*" of this corps.

Act of 21 November 2008 on the Civil Service (Dz. U. nr 227 pos. 1505) regulates the status of civil servants. A series of other laws are relevant for the definition of posts which require Polish nationality.

The Polish Labour Code and the laws on the Polish education system (i.e. the *Teachers' Charter and the Act on the Education System*) apply to teachers.

2. 2. Public sector employers

The State, the 16 regions (*voivodoships*), 373 districts (*powiaty*) and 2 500 municipalities (*gmina*) are all public employers. There are also a number of State and local agencies and offices.

According to *EUPAN – Structure of the civil and public services*, in 2004, total employment in the public administration was 358 205, which included 162 279 for State administration (45,4 %) and 194 941for local self-government administration (54,6 %).

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies.

2.3 Public sector workers

As indicated under Art. 2.1. the legal status of Civil Servants is laid down in the *Law of 21 November 2008 on the Civil Service*, which applies both to civil servants i.e. a "*person employed on the basis of an appointment*" and to "*civil service employee*, i.e. *"any person employed under an employment contract*".

According to Art. 2 of the *Law on the Civil Service*, the civil service is defined as covering the positions in the offices of the central government; of regional government administration which are subordinate to ministers or to central government bodies; inspectorates and other organisational units of the heads of "*consolidated services*" and district (*powiat*) services"*;* the *Office for the Registration of Medicinal Products, Medical Devices and Biocidal Products* and the *Seed Production Office (BNL)*; Border and District Veterinary Officers and their Deputies. According to Art. 2.2.4, specific rules applyto the foreign service.

According to *EUPAN – Structure of the civil and public services*, in 2005 there were some 106 479 members of the Civil Service Corps, divided into two categories: civil service employees (102 880 –96,62%) and civil servants *strict sensu* (3 599 – 3,38%).

Local government employees are submitted to *Act of 21 Nov. 2008 on self-government workers* (Journal of Laws 2008, N° 223, poz.1458)

Other public employees, including teachers are submitted to labour law.

No recent statistics indicating the number of civil servants and of public sector employees were available to the author of this report.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action with administrative courts, but litigation between civil servants or civil service employees and their employers are of the competence of labour courts.

The Constitutional court exercises judicial review of legislation.

The Ombudsman (*Rzecznik Praw Obywatelskich*) may handle complaints with regard to public administration. He / she may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 60 of the Constitution "*Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality*." This does not necessarily mean that foreigners cannot access the public service.

According to Art. 4 of the *Law on the Civil Service* "*A person may be employed in the civil service if that person is a Polish citizen, subject to Art. 5*". Art. 5.2., wich has been introduced in 2008 and entered into force on 24 March 2009 provides that "*A person without Polish citizenship may be appointed to a position which does not entail direct or indirect participation in the exercise of public authority or functions protecting the general interests of the State if that person has a knowledge of the Polish language as attested by one of the documents referred to in provisions issued pursuant to paragraph 3*"

Similar provisions are contained in the *Act of 21 Nov. 2008 on self-government workers*. Heads of self-government offices indicate the vacancies for which, beside Polish citizens, citizens of the European Union and citizens of the other countries may apply.

3.2. Definition of posts

Posts reserved to Polish nationals are to be determined, according to Art. 5.1. of the *Law on the Civil Service*, by the Director general of the relevant office, who "*when publishing job vacancies in his office, [...] shall, in agreement with the Head of the Civil Service, indicate those vacancies for which not only Polish citizens but also citizens of the European Union and of other countries who, on the basis of international agreements and the provisions of law, are entitled to take up employment in the Republic of Poland, may apply*".

Polish nationality is required to take up posts – not necessarily employment – of the supreme authorities of the State, ombudsmen, heads of centralised government agencies, regional and local representatives of the central government, regional and local self-governments officials, judges, prosecutors, inspectors of public control bodies, public servants, uniformed services staff and some posts in other bodies.

There is no legislation or regulation reserving access to posts of captains of vessels under Netherlands flag to nationals.

3.3 Practice and monitoring

As the new rules concerning employment in the civil service came into force on 24 March 2009, there is not yet information available on administrative practice.

The Head of Civil Service may apply to the Prime Minister for the exercise of control. The Civil Service Council is entitled to evaluate qualification procedures in the Civil Service. If infringements in the course of qualification procedures are disclosed, the Council can approach the Head of Civil Service with a motion to hold another qualification procedure.

3.4. Compliance with EU law

With the amendments introduced on 21 November 2008 to the *Law on the Civil Service,* a first step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Polish nationals, and the law refers to the criteria for the application of Art. 45(4) TFEU.

The procedure laid down in the law, which provides for a decision at the moment of publishing job vacancies, should result in a post by post analysis of the functions which have to be exercised. Practice has yet to be established and monitored before one can assess its compliance with EU law.

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment will be necessary.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Updated information on practice for the civil service is not available when it comes to employment of non nationals, as the relevant legislation is only applicable since 24 March 2009. Information on practice with teachers is available. There is no information either on practice for Polish nationals who would have made use of their right to free movement of workers.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting infor-

mation about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There are no general obligatory conditions of professional experience and seniority to be employed in the Civil Service.

Requirements in general are set for the certain position on the basis of job description. Senior positions in the Civil Service may be held by a person who has at least six years of professional experience, including a specific number years of experience on a managerial position in the public finance sector units for a number of specific positions.

Professional experience in the private sector is also taken into account for certain positions (e.g. senior positions in the Civil Service).

For certain employee's rights and benefits professional experience in the civil service, public administration or public finance sector is also required.

The decision on the professional experience required for a given position is estimated by the Director General of the relevant service.

There are no specific rules for the recognition of professional experience acquired out of Poland, and especially for the recognition of experience in institutions equivalent of the relevant Polish institutions.

However, Art. 86 of the *Act on promotion of employment and labour institutions* provides that it is possible to document previous employment abroad in order to gain special employment rights (such as a full time leave, additional remuneration, etc…). The regulation allows demonstrating periods of employment with various documents, not only by employment certificate. Therefore any certificates issued by the former employer or any other documents proving periods of employment abroad shall be deemed acceptable.

Art. 38 (5) of the *Act on self-government employees* states that in order to gain employment benefits such as remuneration for a long employment, jubilee awards, one-time severance pay as a result of retirement or pension, all periods of employment shall be taken into account and that these rules shall apply to both Polish and EU citizens.

In the education service, the procedure of recognition of professional qualifications acquired in one of the Member States of the European Union is detailed in the *Act of 18th March 2008 on the Rules of Recognition of Professional Qualifications acquired in the EU Member States*. The recognition procedure is initiated on a motion by the applicant.

4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

4.2.3. Language requirements

According to Art. 5 of to *the Act of 21 November 2008 on Civil Service,* a non-Polish national may be employed on the positions mentioned under 3.1 and 3.2 provided that his/her command of the Polish language is certified with a document specified in regulations issued by the Prime Minister. According to the law the regulation has to take into consideration the type of work performed by the Civil Service Corps members and the need to ensure an appropriate level of performance of their tasks.

A regulation on documents certifying command of Polish language was to be published in April 2009, but was not accessible to the author of this report. There is no specific information that may enable to assess whether the principle of proportionality is fully taken into account when applying language requirements.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals one possible issue of compliance with EU law.

Where professional experience and/or seniority is or may be taken into account for recruitment, promotion and salaries in the public service there is no specific provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States. This is not as such a breach of EU law, but the absence of legislative or regulatory provisions should be compensate by appropriate information of the heads of public offices who are in charge of recruitment and management of human resources. It should be pointed out that mutual recognition not only applies to non nationals, but also to Polish citizens who have made use of their right to free movement.

5.2. There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which might help Polish authorities in detecting possible non-compliance that would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Polish legislation applicable to employment in the public sector took place in 2008, in order to try and meet the requirements of EU law as far as opening posts in the public service are concerned.

At the beginning of 2010 there seems to be no other reform on the agenda that might impact on the free movement of workers in the public sector.

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PORTUGAL

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Portugal joined the European Communities on 1 January 1986. A transition period of seven years was foreseen for free movement of workers, which was then reduced to six years.

EU law provisions on free movement of workers and the ECJ case law on the public sector fully apply since 1 January 1992.

1.2. State form and levels of government

Portugal is a unitary State with three levels of government: the State, 18 districts (*distreitos*) and 308 municipalities (*municípios*).

The Azores and Madeira archipelagos are autonomous regions with legislative powers.

1.3. Official language

The official language of Portugal is Portuguese.

1.4. Statistical data

Portugal has a total population of 10 599 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	677 900	13,1 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	532 500	78,5 %
Regions	8 000	1,2 %
Municipalities	137 400	20,3 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Art. 15 of the Constitution is devoted to "*Foreigners, stateless persons, and European Citizens*"; Art. 47 to the "*freedom to chose a profession and to join public administration*". Art. 199 contains provisions on "*administrative responsibilities*" of government. Title IX is devoted to public administration – including Art. 269 on the rules governing public administration staff –, whereas title VIII is devoted to local government and title VII to the two autonomous regions.

Civil service legislation and regulations include several acts dealing with specific subject matters. Especially relevant to the issues of free movement of workers in the public sector are e.g. *Law 12-A/2008, of 27 February* 2008, which establishes the general regime of access to positions in the public sector, *Law 23/2004, of 22 June* 2004, establishing the legal regime of the individual labour contract of the Public Service, which are complemented by enacting regulations, as well as sector specific or post specific laws and regulations.

2. 2. Public sector employers

The State, the 18 districts and 308 municipalities as well as the two Autonomous regions of the Azores and Madeira are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

According to *EUPAN – Structure of the civil and public services*, the total number of public administration workers was of 360 067 for direct State administration and 200 756 for indirect State administration (thus 78,3 % of the whole of public administration workers for State administration), 15 166 for the autonomous regional administration of the Azores and 18 638 (thus 4,7 % for regional administration) and 116 066 for local government (16,2 %).

Recruitment for the general State administration is centralised with a *Standing Selection Committee* (*Comisión Permanente de Selección*). For posts in other administration groups or categories a special temporary selection board is created for this purpose.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

2.3 Public sector workers

Civil servants and agents of the State, of Autonomous Regions, districts and municipalities are submitted to the same legal rules, with some minor adaptations for regional and local government officers.

In accordance with the new system of employment relationships, which entered into force in January 2009, careers and salaries of public sector workers relating to the armed forces, State representation abroad, security services, criminal investigation, the police force and inspection is carried out by agents employed by appointment (as opposed to public sector employment contract).

Other positions should be submitted to public sector contract.

According to information provided by the Portuguese government to the European Commission, for 2008 the number of Civil servants and agents of central government was of 465 122 as opposed to 57 539 with a work contract and 5 590 with a contract for provision of services. Numbers including local government are only available for 2005: 150 008 civil servants and agents, 15 848 work contracts and 3 617 contracts for the provision of services. These figures are not any more relevant as, since January 2009, the majority of public sector workers in Portugal are employed under contract.

Employees of public enterprises are submitted to general labour law.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative courts. Matters relating to contract are submitted to ordinary courts.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the State and Autonomous Communities, as well as verifying compliance of State and Autonomous legislation with the Constitution.

The Ombudsman (*Provedor de Justiça*) protects fundamental rights and civil liberties against encroachments by public administration. He ensures that Administration decides in time and form to requests and appeals it may have received. He may appeal to the Constitutional court on cases submitted to him.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 15(1) of the Constitution, foreigners and stateless persons who are staying or residing in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens. Art. 15(2) however pro-

vides that equal rights for foreigners do not apply to "*the performance of activities in the public sector that are not predominantly technical in nature*". This provision has be interpreted not according to how technical the activities are performed, but according to the prevalence of the authoritative or technical aspects of the post.

Law 12-A/2008, of 27 February 2008, establishes the general regime of access to positions in the public sector. According to its Art. 8, a general requirement for admission to open competitions and recruitment to public sector posts is Portuguese nationality, except when exempted by the Constitution, specific legislation or international convention.

The nationality requirement must be interpreted therefore in the sense that applies exclusively to public posts implying the exercise of authority or sovereignty powers.

There is no reference in legislation or regulations to the specific criteria for the application of Art. 45 (4) TFEU.

Law 23/2004, of 22 June 2004, establishing the legal regime of the individual labour contract of the Public Service prohibits "*activities that involve the direct exercise of authority powers or the exercise of sovereignty powers*" from being the subject of a labour contract in the ambit of the direct Administration of the State.

3.2. Definition of posts

0n the basis of sector specific laws and regulations the following posts are considered to be reserved to Portuguese citizens: Judges and Public Prosecutors, the Diplomatic Corps (Art. 10 of Decree-Law 40-A/98), Police, Armed Forces and Tax Administration.

For other posts, each public authority acting as an employer has to apply the interpretation of the law on access to the public sector in the light of Art. 15 (2) of the Constitution as mentioned under 3.2. It therefore may be deduced that the definition of posts is the consequence of a post by post analysis based on emerging issues, not on a systematic screening.

Posts of captains on ships under Portuguese flag used to be reserved to Portuguese nationals, but Art. 61.2 of *Legislative decree nº 280/2001* on professional activity of maritime agents and ships crews has been amended in order to open them up to EU citizens.

3.3 Practice and monitoring

Acts governing access to certain public sector careers or announcements of open competitions frequently mention that applicants may be nationals of a Member State of the EU. This is the case, for example, of Art. 22(1)(a) of Decree-Law 139-A/90 (*Career Statutes for nursery school, teachers for primary and secondary school level*s), which expressly foresees EU citizens' access to the teaching profession in State schools.

In cases where Portuguese legislation foreseeing specific public competitions does not mention the requirement of nationality of the applicants, it should be interpreted as opening the competition to both Portuguese and EU citizens.

Each public service or body has to apply the existing legislation to the cases submitted internally for its consideration in exactly the same way as for Portuguese nationals. In situations where there are doubts as to the correct interpretation/application of the law, however, the Portuguese *Solvit* centre asks for assistance from the *Directorate-General for Public Administration and Public Sector Employment*.

There is no information available about the practice used in assessing what are activities involving the direct exercised of authority powers or the exercise of sovereignty powers.

3.4. Compliance with EU law

The Constitutional and legislative criteria for reserving posts in public administration do not coincide with the criteria for the application of Art. 45(4) TFEU. According to the interpretation given by Portuguese authorities, their interpretation however seems rather close to these criteria. The question of their correspondence with the EU law criteria is therefore a question of practice, for which there is little information available.

Monitoring the exact scope of positions reserved to national and, above all, administra-

tive practices in recruitment would be necessary.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. There is no specific legislation or administrative rules in place on the recognition of professional experience, except in the case of recruitment for middle management posts (*Art. 20 of Law No 2/2004*) and for career progression in education services (Decree N° 12/2004 of 3rd March).

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

4.1.2. Practice

Each public service or body has to apply the existing legislation.

The *Directorate-General for Public Administration and Public Sector Employment* does not seem to monitor specifically the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

4.2. Special requirements for access to employment and working condition

4.2.1. Professional experience

Law No 12-A/2008 allows for applications to posts in the public service to be made by persons who do not have the required qualifications but who have the necessary and sufficient training and/or professional experience to make up for this lack of qualifications. It is for the competition board to decide whether this training and experience is appropriate for the career, category and area of activity in question.

As a rule, professional experience and/or length of service do not constitute formal requirements in the recruitment process. The publication notice for a competition cannot stipulate that previous experience is necessary when it is not a legal requirement for the job description of the category of post to be filled. It is cannot be a basis for excluding a candidate in the applications evaluation stage.

During the selection process the assessment of candidates' CVs covers, inter alia, their career history and the relevance of their professional experience, with an emphasis on the performance of tasks related to the position for which they have applied and the type of duties carried out. Professional experience in a specific area of activity is considered to be an advantage, and it is important in relation to the previously defined skills profile.

In accordance with the new system of employment relationships, careers and salaries, which entered into force on 1 January 2009, working conditions, as well as salaries and pay grades, are not determined on the basis of professional experience and/or length of service. Changes to pay grades are linked more to the assessment of employees' performance.

Under this new system, employees with a public sector employment contract may apply for competitions for any pay grade, provided that they meet the stipulated requirements, since the salary may be negotiated with the public sector employer (*Art. 55 of Law 12-A/2008*).

According to Portuguese authorities, these arrangements make it easier for migrants to gain access to the public sector, as career development is no longer determined by length

of service in the category occupied by the jobholder.

Recognition of professional experience is taken into account during recruitment in certain selection methods.

Professional experience acquired in the private sector may be relevant for competitions for middle-management posts.

There is no reference in the applicable legislation and regulations to professional experience acquired abroad. It is therefore a question of administrative practice whether it is taken into account in the same way as professional experience acquired in Portugal.

4.2.2. Seniority

The indications given under 4.2.2. apply as well to professional experience as to seniority, i.e. seniority does not apply anymore since 1 January 2009 to the determination of working conditions, salaries and pay grades.

4.2.3. Language requirements

Applicants to public sector employment are required to prove their command of the Portuguese language only for teaching positions in pre-school, primary and secondary education (*Order No 21 703/2006*). However, as part of the procedure for the recognition of professional qualifications, it is to the competent authority to verify that the applicant possesses the level of Portuguese needed to carry out the work in question (*Art. 48 of Law 9/2009 of 4 March 2009*).

There is no specific information available that would enable to asses whether the principle of proportionality is duly taken into account in applying language requirements.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, although the criteria for reserving posts to Portuguese nationals may correspond to the criteria of application of Art. 45 (4) TFEU, the difference of wording and the lack of reference to EU law leaves room for divergent interpretation. There is thus a risk that posts be reserved to Portuguese nationals, which do not correspond to the criteria set in EU law.

Second, the absence of general clauses on the recognition of professional experience in other EU Member States, although not being as such a source of infringement of EU law, may generate obstacles to free movement, especially as far as Portuguese citizens having made use of their right to free movement are concerned.

5.2 More generally, the lack of statistics on the number of posts reserved to nationals and of the number of applications to posts, benefits or other advantages of non nationals, or of Portuguese citizens having made use of their right to free movement in the EU, make it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

No specific reforms of public sector employment have been undertaken as a direct consequence of Portugal's accession to the EEC in 1986.

As indicated under 4.2.2, an important reform of Portuguese legislation applicable to employment in the public sector came into force in 2009, which had two significant consequences: the majority of public sector employees should now be employed under contract, not as career civil servants, and the impact of seniority and professional experience and seniority should be dramatically reduced

due to the implementation of a performance based system.

It remains to be seen whether this new system will have positive consequences on the free movement of workers in the public sector.

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ROMÂNIA

ROMANIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Romania became a member of the EU on 1 January 2007. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the relevant ECJ case law on the public sector appliy since 1 January 2007.

1.2. State form and levels of government

Romania is a unitary State with three levels of government: the State, 44 departments (*Judete*) and 3136 local governments (2 825 *comune*, 208 towns – *orase* – and 103 municipalities – *municipii*).

1.3. Official language

There is one official language: Romanian.

Hungarian, Romani, Ukrainian, German, Serbian and Russian are minority languages, without specific official status.

1.4. Statistical data

Romania has a total population of 21 565 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	1 723 400	18,4 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 16 (3) of the Constitution "*Access to a public office or dignity, civil or military, is granted to persons whose citizenship is Romanian and whose domicile is in Romania.*" Other provisions relevant to employment in the public sector: *Law No. 303 of 28 June 2004 on the status of judges and prosecutors*, as republished; *Law No. 304 of 28 June 2004 on judicial organization*, as republished; *Law No. 293 of 28 June 2004 on the Statute of civil servants with special status in the National Administration of Penitentiaries*, as republished; *Law No. 144 of 21 May 2007 on the establishment, organization and operation of National Integrity Agency*, as republished; *Law Nr. 1 of 6 January 1998 on the organization and operation of the External Intelligence Service*, as republished..

These laws are complemented by regulations, such as *Order Nr. 2321 / C of 4 September 2008 on Methodology for the admission of candidates in the National School for Agents Training.*

The Labour code applies to a public sector employees under contract.

2. 2. Public sector employers

The State, the 44 departments (*Judete*) and 3136 local governments are public employers. There are also a number of State agencies and. Education services, social insurance of the public sector, health and social assistance services are also public employers.

2.3 Public sector workers

The legal status of public Servants of the State and of Municipalities is laid down in the *Law 188/1999 on the status of a public servant*, which "*sets the general regime of juridical reports between the civil servants and government or local public administration, through autonomous administrative authorities or through public authorities and bodies of central and local public administration*".

According to Art. 6, of the cited law it does not apply to: "*the contractual personnel from own structure of public authorities and bodies, who perform secretariat, administrative, protocol, management, maintenance – repairs and serving activities, security, as to any other category of personnel that does not exercise prerogatives of public power*". The relevant positions are filled by contract personnel under labour legislation.

National statistics do not provide with a relevant enough breakdown of numbers to be used for the purpose of establishing the relative proportions of public servants and contractual employees or of the total public sector employment in the total workforce. The only indication available to the author of this report is in According to *EUPAN – Structure of the civil and public services*, which indicates for Romania that the latest figures provided by the National Agency of Civil Servants refer to the number of civil servants as being about 110 000 (to compare with the ILO figure for the total public labour force of 1 723 400 for 2008).

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Public Servants law* is provided for by a possibility of action with administrative courts.

Matters relating to contract are submitted to civil courts.

The Constitutional court exercises judicial review on laws and may be asked to give a binding interpretation of the Constitution.

The Ombudsman (*People's advocate – Avocatul Poporului*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to Art. 16 (3) of the Constitution "*Access to a public office or dignity, civil or military, is granted to persons whose citizenship is Romanian and whose domicile is in Romania.*"

Law 188/1999 on the status of a public servant, and the other relevant laws repeat the condition of Romanian citizenship and domicile.

As for positions for which have to be filled on the basis of a contract, the application of ordinary labour law which establishes the principle of equal treatment with Romanian citizen means that they are open to nationals of EU Member States.

3.2. Definition of posts

The definition of posts reserved to Romanian citizens is based on categories established by law.

As a general principle, it results from Art. 6, of the *Law 188/1999 on the status of a public servant* that the positions of persons "*who perform secretariat, administrative, protocol, management, maintenance – repairs and serving activities, security, as [well as] any other category of personnel that does not exercise prerogatives of public power*" are open to non nationals, as they are filled by contract. According to Art. 111 (1) *)"Public authorities and institutions that have provided on the States functions contractual positions, that imply the pursue of a duty*

mentioned at art.2(3) are required to establish public positions under the art. 107".

Furthermore specific sectorial law reserve to Romanian nationals the posts of judges and prosecutors, staff of prison administration, inspectors of national integrity, and staff of the Ministry of defence and of the Intelligence services.

It may be therefore assumed that the definition of posts reserved to nationals is based on a mix of general categories and post by post assessment.

Posts of captains on ships under Romanian flag used to be reserved to Romanian nationals, but there is no nationality condition any more since Art. 52 of the *Government Ordinance n° 42/1997 regarding the naval transport* ahs been amended by an *Emergency Government Ordinance n° 74/2006*.

3.3 Practice and monitoring

Recruitment for entry into the body of civil servants is on the publication of vacancies followed by open competition.

The completion notice is published in the Official Gazette of Romania, and in a newspaper of wide circulation, at least 30 days in advance. Competitions for vacant positions in public authorities and public institutions are organised by the National Agency of Civil Servants for a number of public leadership positions or by special commissions assisted by the National agency or with the agreement of the National agency, directly by public authorities for other positions.

There does not appear to be a specific system for monitoring practice as far as access to public service is concerned.

3.4. Compliance with EU law

The Constitutional and legislative criteria for reserving posts in public administration do not coincide with the criteria for the application of Art. 45(4) TFEU.

They are apparently in contradiction with EU law when requiring candidates to have domicile in Romania, as this might impede Romanian citizens who make use of their right to free movement in the EU to apply.

The criteria of Art. 6 of the *Law 188/1999 1999 on the status of a public servant* might correspond with the criteria for the application of Art. 45(4) TFEU when it comes to posts reserved to Romanian citizens, but it is a question of practice, for which there is little information available.

Monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment should be undertaken by Romanian authorities.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

According to *Decree n° 92 from 16th of April, 1976 regarding the labour book*, a labour book has be filed in and kept by the Territorial Labour Inspectorate for the employees of the most employers, which seem to include public employers. The labour book represents the official document proving seniority, continuous seniority, continuous seniority in the same unit, seniority in the same position, occupation or specialty, length of service at working places with special conditions, tariff retribu-

tion for employment and other rights included in this kind of remuneration.

Educational and professional training has to be proved and will be written down in the labour book by means of original study and qualification documents.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

According to the *Law 188/1999 1999 on the status of a public servant*, professional experience is required for access to the permanent civil service.

Civil servants who don't fulfil the seniority requirements foreseen for the promotion in the superior professional degree are permitted to participate in the organized contest, according to law, for the fast promotion in the public post, i.e. persons who graduated organized programs, within the limits of law, to acquire to status of public manager as well as civil servants that have no less than 1 year of experience. For the latter, the law mentions training obtained with specialised bodies "*in this country or abroad, for a minimum period of 1 yea*r".

Apart from the above-mentioned recognition of vocational and professional training ""*in this country or abroad",* it does not seem that a specific system of recognition of professional experience in other EU Member States is taken into account if equivalent to that obtained in Romania.

4.2.2. Seniority

Seniority is taken into account for the purpose of establishing rights of workers.

It is relevant: for establishing the period of time the employees are entitled to request the payment of the rights they deserve according to individual labour contracts (i.e. legal holiday); determining the seniority for financial supplement – in case of remuneration systems that apply it; to demonstrate the seniority in a certain trade/profession/specialty. Seniority has a special relevance in the civil service for the purpose of career progression.

Seniority established up to 31 December 2009 is established on the basis of the labour book mentioned under 4.1.2, or in case a person does not own a labour book, at request by the legal instance with competences in solving labour conflicts, on the basis of documents or other proves demonstrating the existence of labour relationships.

It does not appear that a specific system of recognition of seniority acquired in other EU Member States is taken into account if equivalent to that obtained in Romania.

4.2.3. Language requirements

According to Art. 54 of the *Law 188/1999 1999 on the status of a public servant*, knowledge of the Romanian language, written and spoken, is a condition to hold a public function. Some other relevant sector laws are also requiring oral and written knowledge of Romanian. In certain territorial units where the percentage of a national minority is above 20 %, knowledge of the minority language is also a requirement.

Language requirements are not regulated on labour law.

Information on how knowledge of Bulgarian is being verified and on what level of knowledge of the language is required in practice was not available to the author of this report. It is therefore not possible to asses to what extent the principle of proportionality is taken into account in applying language requirements.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals three potential issues of compliance with EU law.

First, the requirement to have domicile in Romania in order to become a civil servant might impede Romanian citizens who make use of their right to free movement in the EU to apply. It is not clear whether the constitution and of relevant legislation leaves room for an interpretation according to which the residence condition applies only once appointment to the civil service has been made. If so, it is only an issue of clarification in notices of competition. Otherwise, amendments to existing law would be needed.

Second, although the criteria for reserving posts to Romanian nationals might correspond in practice to the criteria of application of Art. 45 (4) TFEU, the difference of wording and the lack of reference to EU law leaves room for divergent interpretation.

Third, the absence of specific clauses on the recognition of professional experience and experience acquired in other EU Member States, - with the exception of the above-mentioned recognition of vocational and professional training "*in this country or abroad*"- although not being as such a source of infringement of EU law, may generate obstacles to free movement, especially as far as Romanian citizens having made use of their right to free movement are concerned.

5.2 More generally, lack of information on practice, as well as the lack of statistics on the number of posts reserved to nationals make it difficult to assess whether and to what extent there are in practice obstacles to the free movement of workers in the public sector.

6. Reforms and Coming Trends

No reform of the general rules applicable to public sector employment has been made in Romania as a consequence of accession to the EU.

The author of the present report has no information on reforms on the political agenda at the beginning of 2010 that might impact on the free movement of workers in the public sector.

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SLOVENIJA

SLOVENIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Slovenia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 25 May 2006.

1.2. State form and levels of government

Slovenia is a unitary State with two levels of government: the State and 210 municipalities (*obcine*) or urban municipalities (*mestna obcina*).

1.3. Official language

There is one official language: Slovene.

Hungarian and Italian are a minority language with administrative status in some municipalities, they are also recognized and protected as official languages in their residential municipalities.

1.4. Statistical data

Slovenia has a total population of 2 010 400 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	263 400	31,1 %
Public enterprises	82 800	9,8 %
Total government	153 600	18,1 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Art. 122 of the Constitution, on *Employment in the State Administration*, provides that "*Employment in the State administration is possible only on the basis of open competition, except in cases provided by law*". Art. 120 further provides that "*The organisation of the State administration, its competence and the manner of appointment of its officers are regulated by law*", and Art. 121[9] that "*By law or on the basis thereof, legal entities and natural persons may be vested with the public authority to perform certain duties of the State administration.*"

The *Civil servants Act of 2002* regulates the status of civil servants. I has been amended four times (last amendment in June 2008)

Other relevant legislation are the *Employment Relationships Act* of 2002 (amended in November 2007). It applies only in subsidiary cases when an issue is not dealt with by the *Civil Servants Act*. Employment relationship is entered into by employment contract.

Both Acts have been amended rather recently. Sectorial legislation, such as the *Medical services Act*, or the *Organisation and Financing of Education Act* are also relevant.

2. 2. Public sector employers

The State and the 193 municipalities are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, whose workers are not civil servants.

According to Art. 1 (1) of the Civil Servants Act, for the purpose of its application: "*the public sector shall be comprised of: - State bodies and the administrations of self-governing local communities, -public agencies, public funds, public institutions, and public commercial institutions -other entities of public law that indirectly use State or local budgetary funds.*" According to Art. 1 (3) "*Public companies and commercial companies, where the State or local communities are controlling shareholders or have prevailing influence, shall not be a part of the public sector under this Act.*"

According to *EUPAN – Structure of the civil and public services*, state administrations employ 34 924 public servants (90 % of the total); municipalities 3 900 (10 %).

2. 3. Public sector workers

There is an important difference between "*officials*" and "*professional-technical civil servants*". According to Art. 23 of the Civil Servants Act in its original version "1) *Officials shall be civil servants that perform public tasks in the bodies, and civil servants that perform exacting ancillary work requiring the knowledge of the body's public tasks*", whereas "3) *Civil servants performing other ancillary work in the bodies shall be the professional-technical civil servants.*" Art. 6 gives further precisions: "16. *"public tasks" means tasks falling within the field of activity of State bodies or local community administrations, or tasks carried out by entities of public law established for such purposes*; 17. *"ancillary work" means work in the field of personnel and in the field of material and financial management, technical and similar services, and other work required to secure uninterrupted performance of public tasks by bodies or entities of public law.*" The definition in art. Art. 23 of the Civil Servants Act (p.141), has changed with the amendments of 2005.

Other public sector employees are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

No data on the respective proportion of officials and professional-technical civil servants were available for this report.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Civil Servants Act* is provided for by a possibility of action with labour courts, who are also competent for other public sector employees.

The Constitutional court exercises judicial review on the conformity of laws with the constitution.

The Human Rights Ombudsman (*Varuha človekovih pravic*) may handle complaints with regard to public administration lodged by any person who believes that his/her human rights or fundamental freedoms have been violated by an act or an action of a State body, a body of local self-government or a body entrusted with public authority. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

There is no provision of the Constitution that would reserve access to the public service or to civil servants positions to Slovene nationals.

The *Civil Servants Act*, requires Slovene citizenship for employment as an "official".

Art. 84 provides that officials "*shall perform public tasks in title*", and Art. 88 that "*citizenship*

of the Republic of Slovenia" "s*hall be set as a condition for appointment to title*".

Since 2003, public tasks are defined as tasks which are directly related to the exercise of public authority as well as to the responsibility for safeguarding the general interest of the State.

Special legislation is applicable to the diplomatic corps, the police, the judiciary and the military.

3.2. Definition of posts

The *Civil Servants Act* requires Slovenian nationality for the officials' work posts in State bodies and local community administration which are performed in following titles: clerk; senior clerk; counsellor; senior counsellor; undersecretary; secretary and senior secretary. Slovenian nationality is also required for officials' work posts where authorisations related to management, coordination and the organisation of working process are exercised.

The Civil Servants Act indicates several relevant positions which mainly amount to director-general, secretary-general, directors and heads of organisational unit in State and local administration. It is also indicates posts implying the substitution and direct assistance to the officials just mentioned. The list is not exhaustive, as the Civil Servant Act provides that positions in other State bodies shall be determined by such bodies by their general acts.

There are also nationality requirements for the functions with the courts, the public prosecutors' office, the attorney generals' office, the police, the defence and the customs office.

There is no legislation or regulation reserving access to posts of captains of vessels under Slovenian flag to nationals.

3.3 Practice and monitoring

Whether Slovenian nationality is required or not is indicated in the notice for competition for the post which is published on the website of the Ministry of Public Administration and in the official Gazette of the Republic of Slovenia.

No specific body or procedure has been set up for the determination of posts requiring Slovenian nationality, and information on practice is not available.

3.4. Compliance with EU law

With the amendments introduced in 2003 to the *Civil Servants Act* the legal definition of posts reserved to Slovenian nationals seems to be complying with the criteria for the application of Art. 45 (4) TFEU.

In the absence of a comprehensive list of functions reserved to Slovenian nationals, it is not possible to indicate with certainty that all the relevant posts comply indeed with EU law.

The Slovenian authorities should monitor the exact scope of positions reserved to national. Furthermore, monitoring administrative practice in recruitment will be necessary in order to know to what extent compliance is guaranteed.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Especially relevant information on practice is not available. There does not seem to be specific permanent monitoring of practices in personnel management that would be particu-

larly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

According to the *Civil Servants Act*, professional experience is relevant both to access and for working conditions in the civil service.

The *Civil Servants Act defines "working experience*", in Art. 6 as "*the years of employment at work posts demanding the same level of education, and the period of apprenticeship demanding the same level of education, regardless of whether a person entered into employment or apprenticeship with the same employer*; *working experience shall also include the working experience that a civil servant has gained by working at work posts demanding a one-degree lesser level of education in the same line of profession or the same occupation, not including the period of apprenticeship at one-degree lesser level of education.*"

Since 2005 all work (which means all work in the public and private sector) performed at the same level of difficulty as the work of the post for which a person is a candidate, is considered as a professional experience. As evidence of professional experience authentic documents showing the period of performance and the level of education are accepted.

The *Civil Servants Act* provides in the Art. 88 that the Government shall lay down provisions on conditions regarding the required years of working experience for "appointment to title" upon entering into employment in public administration bodies and local administration bodies; for other bodies, such provisions shall be laid down in general acts of the bodies.

Professional experience is one of the conditions for the appointment of officials and is a compulsory element of the open competition notice.

For professional-technical servants, Art. 23 of the *Employment Relationships Act* provides that public advertisement of vacancies must contain conditions for carrying out the work and the deadline for applications.

Professional experience appears therefore in public advertisement of vacancies, except in case of apprenticeship.

Working conditions (e.g. salary, grade) are also determined on the basis of professional experience.

Professional experience does not depend on the legal nature of the previous employment and there is no time-limit determined for taking professional experience into account.

Professional experience and/or seniority acquired in another EU Member State is taken into account not only in case of job vacancy in public administration, public health or in public teaching sectors but also when deciding on certain rights arising out of civil servants' employment relationship (e.g. annual leave).

4.2.2. Seniority

"*Years of employment*" are defined in the Civil Servants Act, Art. 6, as *"the years of employment as a civil servant in State bodies or local community administrations".*

This definition seems to be more limitative than the definition of "*working experience*" indicated under 4.2.1. However, according to the 2008 report of the *Network of experts on free movement of workers*: the Ministry of Public Administration addressed an instruction to all ministries, Government's services and local administration in which it pointed out that the length of service accomplished in an EU Member State shall always be taken into account for determining certain professional advantages of the employed (e.g. supplement for the years of service, the calculation of the length of the paid annual leave).

4.2.3. Language requirements

The Civil Servants Act requires active knowledge of Slovenian as one of the compulsory conditions to be fulfilled in order to

be appointed as official. Evidence of active knowledge of Slovenian is required also for doctors but not for teachers according to the Organization and Financing of Education Act.

Detailed information is lacking, that would enable to assess if this criterion is applied in compliance with the principle of proportionality.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information does not reveal specific issues of compliance with EU law in Slovene legislation. However, in the absence of a comprehensive list of functions reserved to Slovenian nationals, it is not possible to indicate with certainty that all the relevant posts comply indeed with EU law.

5.2. There is no monitoring system of practices in recruitment and personnel management in the public sector, which would allow detecting possible non-compliance with EU law due to a wrong application of Slovene legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 3.1, an important reform of Slovene legislation applicable to employment in the civil service took place in 2003 in view of accession to the EU, in order to meet the requirements of EU law for the determination of posts reserved to Slovenian nationals.

No information relating to possible reforms on the agenda, which could have an impact on free movement of workers in the public sector was available to the author of this report.

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SLOVENSKO

SLOVAKIA

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Slovakia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

1.2. State form and levels of government

Slovakia is a unitary State with three levels of government: the State, 8 autonomous regions (*samosprávne kraje*) and 2 887 municipalities (*obec*).

1.3. Official language

There is one official language: Slovak (or Slovakian).

Hungarian is a minority language spoken by a number of residents.

1.4. Statistical data

Slovakia has a total population of 5 393 600 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	519 200	22,8 %
Public enterprises	232 200	10,2 %
Total government	287 000	12,6 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

According to Art. 86 f) and 122 of the Constitution, State administration and bodies (including local bodies of State administration) are established by law. Chapter IV contains the provisions applicable to territorial self-administration, according to which (Art. 67) "*The community decides independently in matters of local self-administration*". There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions.

Employment in the area of public administration in the Slovak Republic was until recent governed in particular by *Act N° 312/2001 Coll. on Civil Service and on the amendments of certain laws*, which has been replaced by a new *Civil Service Act*, that entered into force on 1 November 2009. Also applicable are *Act N° 313/2001 Coll. on Public Service*, which applies to employment in local government, and *Act N° 552/2003 Coll. on the Performance of Works in the Public Interest*.

These are complemented by regulations, e.g. Regulation of the Civil Service Office 596/2004.

2. 2. Public sector employers

The State, the 8 autonomous regions and 2 887 municipalities are public employers. There are also a number of State and regional local agencies and offices.

No statistics on the respective number of employees of the State, regional and municipal levels were available for this report.

The public sector furthermore includes State or regional/local provided medical and educational services.

2.3 Public sector workers

The legal status Servants of the State is laid down in the *Act on the Civil Service*. Public administration also employs workers submitted to labour law.

According to *EUPAN – Structure of the civil and public services*, the total number of civil servants was 41 618 for a total public sector of 473 237. Comparing with ILO statistics it is thus possible to deduct that about 15 % of public administration workers are civil servants, and about 85 % are employed under normal labour law contracts.

2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Civil Service Act* is provided for by a possibility of action with ordinary courts, which are also competent for labour law employment.

The Constitutional Court exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Public Defender of Rights - *Verejný ochranca práv*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions.

According to Art. 3 of the *Civil Service Act,* citizens of the Slovak Republic, citizens of other EU Member States, of the EEA and Switzerland are entitled to apply for admission into the civil service under the conditions stipulated by the Act and a special regulation.

There was a condition of residence in the 2004 legislation, which has been abolished in 2007.

The law is complemented by a regulation establishing civil service sectors, which are based at ministries and other central State administration bodies and at offices subordinate to them, which perform State administration or special State administration.

Special legislation applies to the judiciary, police force, the intelligence service, the national security office, court guards and prison wardens corps, the railway police, the fire and rescue service, the mountain rescue service, customs officers and professional soldiers, which require Slovak nationality for access to the relevant positions.

3.2. Definition of posts

The positions that may only be performed by citizens of the Slovak Republic are stipulated by a *Decree of the Ministry of Labour, Social Affairs and Family of the SR of 26 May 2006,* which lays down a list.

The list includes civil service positions in the sectors of justice, defence, industrial property, interior, protection of classified information. The list furthermore includes civil service positions at service offices, i.e. the office of the Government of the Slovak republic, the

Supreme Audit Office, the ministry of Foreign Affairs, the General Prosecutor's office, regional prosecutor's offices, higher military prosecutor's office and district prosecutor's offices. The list further includes civil service positions of special importance, for which authorization is required for becoming familiar with classified information.

Furthermore, Slovak nationality is required for posts in the police force, the intelligence service, the national security office, court guards and prison wardens corps, the railway police, the fire and rescue service, the mountain rescue service, customs officers and professional soldiers, on the basic of the sectorial legislation mentioned under 3.1.

3.3 Practice and monitoring

The implementation of legislative tasks and supervision over the implementation of the *Civil Service Act* is of the responsibility of the *Ministry of Labour, Social Affairs and Family*, more specifically to the *Civil Service Department* in the jurisdiction of the *Labour Section*, while other duties resulting from the law are handled at the level of the service offices of individual departments and other State administration bodies.

Information on practice in establishing the lists mentioned under 3.3 and applying them to recruitment was not available for this report.

There is no legislation or regulation reserving access to posts of captains of vessels under Slovakian flag to nationals.

3.4. Compliance with EU law

The general clause of Art. 3 of the *Civil Service Act,* complies with EU law when stating in principle that access to the civil service is open to EU citizens.

However, according to information provided by the Slovak administration, the criteria adopted by the relevant legislation and regulations for limiting access to posts to Slovak nationals are those of "*legitimate interests of the Slovak Republic*", which do not coincide with the criteria for application of Art. 45 (4) TFEU. The criteria of "legitimate interests of the Slovak Republic" seem to leave too much discretion with respect to the criteria of participation in public authority and safeguard of general interests. Furthermore, there is no indication about the method adopted for the definition of relevant posts, which seems based on a sector approach more than on a post by post approach.

It is not clear whether the monitoring functions of the *Civil Service Department* enables it to be aware of the practice followed in reserving posts to national.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

4.1.2. Practice

Information on practice was not available for this report.

There seems to be no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

Provisions on professional experience and seniority were repealed from the *Civil Service Act* in 2003. According to the applicable legislation professional experience is not a condition for entry into the civil service. It is not a direct condition for inclusion into a salary class, but it has an impact on the level of salary in the given class.

To the extent to which professional experience or salary is taken into account, no difference is made in regulations between the employers and the country where experience has been acquired. There is no specific provision for the recognition of experience or seniority acquired in other EU Member States.

4.2.2. Seniority

Seniority is taken into account s in the same way as professional experience (see 4.2.2).

4.2.3. Language requirements

Knowledge of the Slovak language is a prerequisite for applying to civil service positions. This also applies to posts in the public services where such knowledge is required for the performance of work, for instance in cases of direct contact with patients, students or citizens and if required by the employer. The requirement is not applied to citizens of the Czech Republic, due to the proximity between Czech and Slovak languages.

In cases where performance of the work does not necessarily require knowledge of the Slovak language and knowledge of a "world language", e.g. English, is sufficient, such condition is not required and respectively a time period is given for learning the Slovak language.

5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

First, the definition of positions reserved to nationals is based upon the "*legitimate interests of the Slovak Republic*" and on the sector in which the person is working; it is most probable that a number of posts reserved to Slovak nationals imply functions that do not correspond to the criteria for the application of Art. 45 (4) TFEU.

*Second, w*here professional experience and/or seniority is or may be taken into account for working conditions, there is no provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States.

5.2. There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which would allow Slovak authorities to detect possible non-compliance due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

As indicated under 2.1, Slovak legislation on the Civil Service has undergone a number of reforms in the recent years and amendments were introduced to the *Civil Service Law* in view of accession to the EU on 1 May 2004. The big number of recent amendments to the 2001 legislation has led to the approval of a new *Civil Service Act* which entered into force on 1 November 2009.

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SUOMI/FINLAND

FINLAND

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Finland joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

1.2. State form and levels of government

Finland is a unitary State with three levels of government: the State, 19 regions (*maakunnan liitto* - regional council are joint local authorities indirectly elected by the municipalities of the region) and 416 municipalities (*kunta*).

1.3. Official languages

There are two official languages in Finland: Finnish (*Suomi*) and Swedish.

Karelian, Romani and Sami are minority languages.

1.4. Statistical data

Finland has a total population of 5 277 000 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	666 000	26,3 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	157 000	23,6 %
Regional/local	509 000	76,4 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

Chapter 11 of the Constitution (sections 119 to 126) contains the main provisions applicable to public administration. According to *section 126*: "*It may be stated in an Act that only Finnish citizens are eligible for appointment to certain public offices or duties.*"

The civil service is regulated by *Civil service law of 1994 (281/2000)*. There are also a number of relevant sectorial laws. Employees are employed under labour legislation, i.e. by the *Employment Contracts Act*. The *Act on Collective Agreements for State Civil Servants* covers collective agreements on terms and conditions of service for civil servants, while the *Collective Agreements Act* does the same for personnel on an ordinary employment contract.

In addition to this, negotiation procedures in respect of civil servants have been agreed in the main collective agreement for civil servants. Under the system of negotiation and collective agreement for central government,

the terms and conditions of employment relationships for civil servants and employees under contract are agreed in the *Collective Agreement for State Civil Servants and Employees Under Contract* at central level and in separate collective agreements for civil servants and employees under contract at agency level.

2. 2. Public sector employers

The State, the 19 regions and 416 municipalities are all public employers. These governments also have created autonomous public bodies, which in turn are public employers in the strict sense. The State employs about 23,6 % of public workers, regional and local government about 76,4 %.

Public schools and hospitals and public transport are considered as part of the public sector.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

2.3 Public sector workers

For state administrations, according to information provided by the Finnish government to the European Commission, Civil servants positions represent about 80 % of the total of government employment; about 20 % are employed on ordinary employment contract. No statistical data were available for this report as regards the respective numbers of civil servants and contract employees including local government workers.

2. 4. Appeals and remedies

Decisions of public administration may be appealed to administrative courts. Matters relating to contract are dealt with by labour courts.

Finnish courts may not rule on the compatibility of a law with the Constitution.

Review on decisions of public authorities – including those relating to employment – are dealt with by the Chancellor of Justice (*Oikeuskansleri*, *Justitiekanslern*), an independent government official who supervises public authorities.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The Constitution, *section 1*26, provides that "*It may be stated in an Act that only Finnish citizens are eligible for appointment to certain public offices or duties.*"

The *Civil Service Law*, section 7, gives a comprehensive a list of positions reserved to Finnish nationals.

For positions under labour law, there are no conditions of nationality whatsoever.

3.2. Definition of posts

According to the *Civil service law of 1994 section 7 (281/2000)* only a Finnish citizen may be appointed to the following offices, or to posts involving the performance of duties falling within purview of these offices:

1) Chancellor of Justice and Assistant Chancellor of Justice, Secretary General and Referendary Counsellor in the office of the Chancellor of Justice;

2) State Secretary, Permanent State Secretary, Permanent Secretary, Head of Department and Head of Unit, as well as any similar or higher office;

3) offices in the foreign affairs administration;

4) judges;

5) heads of Government agencies (except for the principal of a university);

6) Provincial Governors, of Heads of Department of Provincial Government, and Provincial Readiness Director;

7) offices involving the duties of public prosecutor or enforcement officer; 8) police officers; 9) members of the board of directors of a prison;

10) offices with the Ministry of Defence, the Defence Forces and the Frontier Guard; 11) offices with the Finnish Security Police (except policemen); 1

2) offices with the Customs Administration, offices involving the authority to make arrests and an office, involving participation in the supervision and the defence of Finland's territorial integrity, or involving criminal investigation and supervision;

13) head of the public authority department of Finnish Civil Aviation Administration; 14) Maritime Security Director with the Finnish Maritime Administration.

No indication about the criteria used by the legislator is given.

Posts of captains on ships under Finnish flag used to be reserved to Finnish nationals. A Law amending Art. 1 of *Chapter* 6 of the Sea law 310/2008 has been adopted, and entered into force on 1 June 2008, which opens access to these posts to EU and EEA citizens.

3.3 Practice and monitoring

When a position becomes vacant or is created, each ministry or agency organises the recruitment of its staff. The applicant with the best profile is awarded the position following an interview; each recruitment body determines its own recruitment methods.

There are no statistics about employment of non nationals.

3.4. Compliance with EU law

The Constitution, laws and regulations seem to comply with EU law in so far as they do not explicitly reserve to Finnish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

In the absence of indications about the criteria used to establish the list mentioned under 3.2. it is not possible to say whether all the posts reserved to Finnish nationals indeed comply with EU law.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and collective agreements mentioned under 2.1 are applicable to employment conditions.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There are no specific legal provisions relating to the taking into account of professional experience in the civil service or in the public sector.

Payment is based upon a post specific component and an individual component, based upon the performance and competence of the employee.

There are no specific legal provisions on taking to account professional experience gained abroad. There is no information on practice, and no relevant court cases are signalled.

4.2.2. Seniority

The Finnish civil service is a post based system. An employee seeking advancement has to change post.

However, some positions of employment form part of career-based system. This is the case for the police, armed forces and foreign affairs. The post based system means that that advancement through seniority is not possible.

4.2.3. Language requirements

The language proficiency requirements for State civil servants are laid down in separate legislation: the *Language Act (Kielilaki 423/2003)* and the *Act on language proficiency required from personnel of public authorities (Laki julkisy-hteisöjen henkilöstöltä vaadittavasta kielitaidosta 424/2003*).

The requirements concerning linguistic competence are bound to the qualification requirement (for example university degree) and not, for example, to the tasks in question. Normally specified level of command of both of the national languages, Finnish and Swedish, is required.

The means by which a person can show that she has reached the required level of language proficiency are national language tests and certificates. The *Board on Language Exams (Kielitutkintolautakunta)* may upon application issue a certificate on excellent command of Finnish or Swedish language.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issue of compliance with EU law.

First, in the absence of indications about the criteria used to establish the list of posts reserved to Finnish nationals in *Civil service law of 1994 section 7* it is not possible to say whether all the posts reserved to Finnish nationals indeed comply with EU law.

Second, the fact that the requirements concerning linguistic competence are bound to the qualification requirement and not to the tasks in question might lead to situations of non compliance with the principle of proportionality.

5.2. No specific monitoring of free movement of workers in the civil service and public sector is being undertaken.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

Accession to the EU has not lead to legislative reform as far as opening up the public sector was concerned. The relevant rules of EU law already applied in the framework of the association agreement of the European Community with EFTA Countries, but this had not lead to a modification of the relevant Finnish legislation.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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SVERIGE

SWEDEN

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

Sweden joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

1.2. State form and levels of government

Sweden is a unitary State with three levels of government: the State, 18 counties (*Lan*) and two regions (*Skåne et Västra Götaland*), and 290 municipalities (*kommuner*).

1.3. Official language

There is formally no official language in Sweden, but Swedish is the national language.

Finnish, Sami, Romani, Yiddish, and Meänkieli (Tornedal Finnish) are minority languages.

1.4. Statistical data

Sweden has a total population of 9 113 300 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total government	1 267 400	33,9 %

Government employment in 2007 (*Based on ILO Laborsta*)

State	227 100	17,9 %
Regional and locla	803 300	76,2 %
Local	237 000	22,4 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The "*Instrument of Government*", which is part of Sweden's constitution, contains provisions relevant to public sector employment. Chapter 11 contains provisions on Administration of Justice and General Administration. Chapter 11 Art. 9, provides that "*Appointments to posts at courts of law or administrative authorities coming under the Government are made by the Government or by a public authority designated by the Government*"; it further provides that Swedish citizenship is required for a number of posts enumerated in the *Instrument*, and that other offices can be restricted to only Swedish citizens.

Chapter 11 Art. 7, of the "*Instrument of Government*", which is the constitutional basis for the Swedish administration's organisation in autonomous government agencies, provides that "*No public authority, including the Riksdag and the decision-making bodies of local authorities, may determine how an administrative authority shall decide*

in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or relating to the application of law."

The basic law regarding employment in the governmental sector is the *Public Employment Act,* 1994, amended in 2005).

Further, some sectorial legislation is relevant, such as *Act on Professional Activity in Health and Medical Services*, the *Code of Judicial Procedure*, the *School Act*, the *Act on the qualifications for the veterinarian profession*, and the *Act on driving schools*.

Legislation is complemented by government regulations, such as for instance the *Ordinance on Professional Activity in Health and Medical Services* and by regulations issued by State authorities (authorities' statute-books).

In addition to this wages in the public sector are settled in collective agreements.

2. 2. Public sector employers

The State, 18 counties and two regions, and the 290 municipalities are all public employers. The Swedish system of government is furthermore characterized since two centuries by the fact that the implementation of public policies and application of law is the task of autonomous public agencies (about 250 at State level).

Public schools and hospitals and public transport are considered as part of the public sector.

According to *EUPAN – Structure of the civil and public services*, the 250 State agencies employ 235 000 permanent public servants (18 % of the total); regions 825000 (63 %); and municipalities 248 000 (19 %).

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

The total number of government employees, including all types of national and local public services, as well as public enterprises are of approximately 1,5 million (37% of the labour force).

2.3 Public sector workers

On the basis of the *Public Employment Act,* 1994, civil servants are employed with an employment contract, although the decision of employment is formally an administrative decision.

Judges, prosecutors, military officers and police officers have special status and special regulation regarding education, recruitment and job security. They are altogether approximately 30 000 employees, 12,5% of Government employees.

2. 4. Appeals and remedies

Decisions of public administration may be appealed to administrative courts; this includes the formal decision to appoint somebody as a civil servant. Matters relating to labour contracts are dealt with by labour courts.

Swedish courts may not rule on the compatibility of a law with the constitution.

Review on decisions of public authorities – including those relating to employment – are dealt with by the Parliametary Ombudsmen and the Chancellor of Justice (*Justitiekanslern*), an independent government official who supervises public authorities.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

According to *Chapter* 11 Art. 9 of the *Instrutment of Governement* (Constitution), " *Only a Swedish citizen may hold or exercise the functions of a judicial office, an office coming directly under the Government, an office or appointment as head of an authority coming directly under the Riksdag or the Government, or as a member of such an authority or its governing board, an appointment in the Government Offices coming directly under a minister, or an appointment as a Swedish envoy. Also in other cases only a person who is a Swedish citizen may hold an office or appointment if the holder of such an office or appointment is elected by the Riksdag. Swedish national-*

ity may otherwise be stipulated as a condition of qualification to hold an office or appointment under the State or under a local authority only with support in law or in accordance with conditions laid down in law."

The constitutional provisions are complemented by the *Public Employment Act, Section* 5: "*In addition to the requirements for Swedish citizenship prescribed by the Instrument of Government or any other enactment, only Swedish citizens may be employed as a prosecutor or police officer or hold a military post*".

Furthermore, according to *Section* 6 of the *Public Employment Act*: "*The Government may prescribe or for special cases decide that only Swedish citizens may hold 1. posts within the Government Offices or foreign service, 2. public posts that may be combined with exercise of official duties or dealing with issues that affect the relationship with other States or with international organisations, 3. public posts that may involve knowledge about circumstances that are of important for the security of Sweden or for other important, public or private financial interests.*" It has to be underlined that in Sweden, "*government offices*" are a very small administration, supporting the work of ministers, as policy implementation is carried out by autonomous agencies.

3.2. Definition of posts

The definition of posts reserved to government is made by law for the posts mentioned under 3.2., and by the government for the posts indicated under section 6 of the the *Public Employment Act* (see 3.1.).

The positions for which Swedish citizenship is a requirement are most of the positions in Parliament services (head of offices and accountants in the *Riksdag*), in the judiciary, the police, the military, the enforcement service, as well as some other leading positions (e.g. in the Electricity security board; *Elsäkerhetsverket*). However, Swedish citizenship is not a necessary requirement to become a judge.

Posts of captains on ships under Swedish flag used to be reserved to Swedish nationals. Art. 2 of *Chapter*4 of *Ordinance 2003:438 on the security of ships* has been amended and access to these posts is open to EU and EEA citizens

3.3 Practice and monitoring

Each agency acts autonomously for the recruitment of civil servants. When a position becomes vacant or is created, each agency organises the recruitment of its staff. The applicant with the best profile is awarded the position following an interview; each recruitment body determines its own recruitment methods. When posts are restricted to Swedish citizens this is indicated in the vacancy note. If a post is open for candidates of any nationality this is normally not specified.

In the year 2000 an Official report was presented, dealing with the requirements for Swedish citizenship for employment and more in the public sector. According to the investigation committee the guiding principle should be the right to equal rights and liabilities for persons residing in Sweden irrespective of citizenship. However, the committee indicated that Swedish citizenship should be required when the motivation is State security and Sweden's relations to other countries. The committee also held that public activities that interfere with the citizens' legal relations should still be reserved for Swedish citizens.

There are no exact figures but it is estimated that approximately 20-25% of State governmental sector is limited to Swedish citizens, i.e. 40 000 -50 000 State employees.

3.4. Compliance with EU law

The criteria indicated in *Section* 6 (3) of the *Public Employment Act*, i.e. "*3. public posts that may involve knowledge about circumstances that are of important for the security of Sweden or for other important, public or private financial interests*", do not coincide with the criteria for application of Art. 45 (4) TFEU, especially as they mention "*public or private financial interests*".

This difference in wording is not as such an infringement of EU law, but might be a source of non compliance, as it may lead to reserving posts to Swedish nationals which do not imply the exercise (even indirect) of public authority and the safeguard of general interest.

The absence of a central monitoring system, makes it difficult to understand to what

extent existing regulations, and furthermore, practice, are indeed complying with EU law.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation and collective agreements mentioned under 2.1 are applicable to employment conditions.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There are no specific legal provisions relating to the taking into account of professional experience in the civil service or in the public sector.

Payment is based upon a post specific component and an individual component, based upon the performance and competence of the employee.

There are no specific legal provisions on taking to account professional experience gained abroad. There is no information on practice, and no relevant court cases are signalled.

4.2.2. Seniority

The Swedish civil service is a post based system. An employee seeking advancement has to change post.

However, some positions of employment form part of career-based system. This is the case for judges, prosecutors, military officers and police officers. The post based system means that that advancement through seniority is not possible.

4.2.3. Language requirements

There are no explicit legal provisions about language requirements in the Swedish civil service.

Considering the *Public Employment Act* § 4, good language skills – and especially in Swedish – could in practice be a very important qualification when the recruitment is made if skills in Swedish language is considered to be important for the performance of the work. A request for language skills should basically be based on the qualifications necessary for the employment.

For access to some posts knowledge of the Swedish language is a formal requirement on the basis of sectorial legislation or regulation. For instance, for a position as a teacher in schools the requirement for a certain proof of competence will be issued only if the applicant has "*the knowledge in Swedish language that is necessary*". However, the regulation should only apply when the applicant has another mother language than Swedish, Danish, Faeroese, Icelandic or Norwegian.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals one potential issue of compliance with EU law.

The criteria indicated in *Section* 6 (3) of the *Public Employment Act*, do not coincide with the criteria for application of Art. 45 (4) TFEU. While not being as such an infringement of EU law, this formulation might be a source of non compliance.

5.2. No specific monitoring of free movement of workers in the civil service and public sector is being undertaken.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

6. Reforms and Coming Trends

Accession to the EU has not lead to legislative reform as far as opening up the public sector was concerned. The relevant rules of EU law already applied in the framework of the association agreement of the European Community with EFTA Countries, but this had not lead to a modification of the relevant Swedish legislation.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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UNITED KINGDOM

Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.

1. General data

1.1. Date of applicability of EU law

The United Kingdom joined the European Communities on 1 January 1973.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case* 149/79 *Commission v Belgium*, in December 1980.

1.2. State form and levels of government

The United Kingdom is a unitary State; regionalized as far as Scotland, Wales and Northern Ireland are concerned.

There are two levels of government for England (the Crown and 34 Shire Counties, divided into districts), except for London where there is also a regional authority (Greater London); and three levels for devolved regions: the Crown, Scotland, Wales and Northern Ireland and 70 unitary local authorities or district councils.

1.3. Official language(s)

The UK has not formally an official language, but English is the language of law and public administration.

The *Welsh Language Act 1993*, has given Welsh equal status with English in the public sector in Wales.

1.4. Statistical data

The UK has a total population of 60 816 700 (*Eurostat, Statistics in focus* 81/2008).

In terms of persons, the public sector employs about 7 200 000, which corresponds to one quarter of the entire labour market.

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	5 850 000	20,19 %
Public enterprises	348 000	1,2 %
Total government	5 502 000	18,9 %

Government employment in 2006 (*Based on ILO Laborsta*)

Central government	2 560 000	46,5 %
Local government	2 942 000	53,5 %

2. Employment in the public sector: legal, organisational and economic aspects

2.1. Relevant legal sources

The UK has no written constitution, but there is a fundamental constitutional principle applicable to public employment: under the *Royal Prerogative*, the Crown (i.e. in practice the Cabinet) has the power to regulate the *Civil Service* without prior legislative authorisation

by Parliament. This applies only to Crown servants (i.e. State servants).

Employment of civil servants is regulated on the basis of government regulations adopted in the form of Orders in Council, and by subject specific legislation for some aspects. There are also important non legally binding documents resulting from answers to Parliamentary committees, Reports and codes of practice.

The most important of these sources are the *Civil Service Order in Council* 1991, the *Civil Service (Management Functions) Act* 1992, the *Civil Service Order in Counci*l 1995, the *Civil Service Management Code* (which includes the Civil Service Code), the *Carltona Principle*, the *Armstrong Memorandum*, and the *Osmotherly Rules*.

2. 2. Public sector employers

The State (C*ivil service*) the local government councils, schools and the National Health Service are the main public employers. In some legal contexts, universities are considered private bodies and in others public bodies; sometimes they have a hybrid status, where in the exercise of their public functions they fall under the public body requirements. However, they are legally separate corporations and are not part of the local government.

On the basis of ILO statistics, it is possible to indicate that about 46,5 % of public sector workers are employed by central government, and about 53,5 % by local government.

2.3 Public sector workers

The specific rules and regulations for the Civil service do not apply to local government. Local government employees (about 53,5 % of the total) are employed under ordinary labour law, but there are also specific regulations embedded in legislation or adopted by the local authorities

2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – as well as matters relating to contract are dealt with courts and tribunals. The remedy for a breach of equality on grounds of nationality is a claim of nationality discrimination under the *Race Relations Act 1976*.

There is no constitutional court.

The Parliamentary and Health Service Ombudsman may handle complaints with regard to government departments, the National Health Service. The Local Government Ombudsman looks at complaints about councils and some other authorities, including education admissions appeal panels.

3. Posts reserved to nationals

3.1. Relevant laws and regulations

The *Civil Service Nationality Rules* govern eligibility for employment in the UK Civil Service (also known as Home Civil Service) on the grounds of nationality. These rules must be followed by Government departments and agencies and other bodies within the Home Civil Service and Diplomatic Service in their recruitment and appointment procedures.

The Rules are set in UK legislation, i.e. in the *European Communities (Employment in the Civil Service) Order 2007*, which amended the Aliens' Employment Act 1955 and the *European Communities (Employment in the Civil Service) Order* 1991 and came into effect on 7 March 2007.

Employment arrangements for the Northern Ireland Civil Service (devolved government in Northern Ireland) are consistent with that in England and Wales, as set out in the *European Communities (Employment in the Civil Service) Order 2007*.

Applicants for posts in local government in England are required to provide documentary evidence of their entitlement to work in the UK in accordance with the *Asylum and Immigration Act 1996*. This is also the position for posts in Wales and Scotland.

3.2. Definition of posts

The definition of posts reserved to UK citizens nationals results from the *European Communities (Employment in the Civil Service) Order 2007* sections 2(3) and 3 (3).

According to section 2(3) "a *reserved post" means*

(a) a post in the security and intelligence services;

or (b) a post falling within subsection (7) or (8) *which the responsible Minister considers needs to be held otherwise than by a relevant European.*"

The latter mean:

"(a) a post in Her Majesty's Diplomatic Service and posts in the Foreign and Commonwealth Office; and (b) posts in the Defence Intelligence Staff;"

According to section 3 (3) of the Order, the "*posts whose functions are concerned with—(a) access to intelligence information received directly or indirectly from the security and intelligence services; (b) access to other information which, if disclosed without authority or otherwise misused, might damage the interests of national security; (c) access to other information which, if disclosed without authority or otherwise misused, might be prejudicial to the interests of the United Kingdom or the safety of its citizens; or (d) border control or decisions about immigration.*"

Some posts are thus automatically reserved to UK nationals, whereas others are capable of being reserved. No criteria are given for the exercise of the Minister's decision.

If posts do not fall into the criteria set out in the Order, they cannot be reserved. Currently about 95 % of Civil Service posts are non reserved.

3.3 Practice and monitoring

When posts are advertised, it is specified whether they are only open to UK citizens.

There are no indications on the method or specific criteria used in order to decide whether a post should be reserved to nationals. The relevant government authorities do not publish specific information for EU citizens who might like to apply to civil service positions.

There are no available statistics about employment of non nationals in the public sectors.

There is no legislation or regulation reserving access to posts of captains of vessels under UK flag to nationals.

3.4. Compliance with EU law

The list of reserved posts indicated in *European Communities (Employment in the Civil Service) Order 2007* seems to comply with the criteria set for the application of Art. 45 (4) TFEU. However, the absence of criteria for the Minister's decision on posts capable of being reserved might leave room for discrimination amongst EU citizens – as well between British citizens and others as between citizens from different Member States of the EU. The absence of criteria for the Minister's decision is not as such an infringement of EU law, but requires appropriate mechanisms of appeal and review in order to ensure compliance.

The absence of a central monitoring system, makes it difficult to understand to what extent existing regulations, and furthermore, practice, are indeed complying with EU law.

4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

4.1. Legislation and general regulation of access and employment conditions

4.1.1. Legal sources

The legislation, regulations and non legally binding documents mentioned under 2.1 are applicable for access and employment conditions for positions in the civil service and with other public employers.

4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that appears as particularly helpful in getting information about the implementation of free movement of workers in the public sector.

4.2. Special requirements for access to employment and working conditions

4.2.1. Professional experience

There are no general rules on professional experience and seniority for the UK Civil Service.

The *Professional Skills for Government competency framework* is used for jobs and careers in the Civil Service. It sets out the skills that staff in the Civil Service need in order to do their job well, at all levels and no matter where they work.

Recruitment for posts in the public sector varies between organizations. The following is an example from the Department for Business, Innovation and Skills. "*We operate a competence-based recruitment process where applicants are asked to give examples of their skills, knowledge and experience as relevant to the job they are applying for. Seniority is not an issue, except in rare cases, where we might advertise a job as requiring X years experience in e.g. the field of estates management*".

There are no specific provisions other than those mentioned under 4.2.1. for the recognition of professional experience acquired outside of the UK. No specific mention of this type of experience appears clearly on the relevant websites for employment in the Civil service.

4.2.2. Seniority

There are no specific provisions on seniority. As far as applicable, the indications given under 4.2.2. for professional experience may be transposed o seniority.

4.2.3. Language requirements

There are no specific legislative or administrative language requirements for teaching posts. However, when recruiting teachers, schools and local authorities must be satisfied that all candidates can communicate effectively with pupils.

5. Issues for free movement of workers in the public sector

5.1. Available information reveals one possible issue of compliance with EU law.

The absence of criteria for the Minister's decision on posts capable of being reserved to UK nationals might leave room for discrimination amongst EU citizens – as well between British citizens and others as between citizens from different Member States of the EU. The absence of criteria for the Minister's decision is not as such an infringement of EU law, but requires appropriate mechanisms of appeal and review, in order to ensure compliance.

5.2. The lack of published procedures on the recognition of skills needed to access civil service posts and more generally of monitoring of the practices specifically relevant to free movement of workers in the public sector do not provide for all the necessary transparency in order to promote free movement of workers in the public sector.

The relevant authorities' monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service and on the recognition of professional experience acquired out of the UK.

6. Reforms and Coming Trends

Before accession to the EEC, Civil service positions were reserved to UK nationals – and Irish nationals – by the *Act of Settlement of 1700*. The *European Communities (Employment in the Civil Service) Order 1991* amended the *1955 Aliens' Employment Act* so as to allow nationals of other Member States of the European Communities to access the Civil service. The *European Communities (Employment in the Civil Service) Order 2007* is the most recent piece of legislation directly related to employment in the public sector.

In the 1990s the Civil Service was profoundly reformed, without the intervention of Acts of Parliament, as the necessary powers are with the Cabinet under the Royal Prerogative. The career system which was the basis of employment in the civil service since the 1920s was replaced by a post based system, and life-long tenure by fixed term contracts.

The Lord Chancellor announced on 25 March 2008 the introduction of a *Constitutional Renewal* Bil, which would give the Civil Service a legislative basis, by enshrining in an Act of Parliament "its core values of impartiality, integrity, honesty and objectivity, making provision for the appointment of special advisers and establishing an Independent Commission for the Civil Service". The legislation was carried over to 2009-10, but did not complete its passage through Parliament before the 2010 General Election. At any rate, it is not clear whether and to what extent such an Act would have a major impact on the status of civil servants, with relevance to free movement of workers.

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