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European Labour Law

Free movement of workers

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Four fundamental freedoms of the EU

Original objective: development of a common market:

- Increase competition within the EU
- Improve the efficiency through the better allocation of resources

Free movement of

1. goods (Art. 28-37. TFEU) (customs union, remove barriers, eliminate protective national measures)

2. capital (Art. 63-66. TFEU) (EU transfers in euro are considered as domestic payments)

3. services (Art. 56-62. TFEU) (Dir. 2006/123/EC on services in the internal market; Dir. 96/71/EC on posting of workers)

4. persons (Art. 45-55. TFEU)

free movement of workers and self-employed

Free movement of (economically active) persons

3 provisions in TFEU to encourage cross-border mobility:

- Art. 45. gives workers the right to take up employment in another MS on the same terms as nationals
- Art. 49. self-employed (freedom of establishment)
- Art. 56. and 57. right of individuals to provide services

Change in view:

- The initial principle: better allocation of workforce within the EU; workforce = factor of production
- Today: workers = EU citizens; rights to workers' families

Legal sources of free movement of workers

Primary source: Art. 45. TFEU

*„(s)uch 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.**”*

Art. 45. (3) *It shall entail the right, (...):*

*(a) to **accept offers** of employment actually made;*

*(b) to **move freely** within the territory of MSs for this purpose;*

*(c) to **stay** in a Member State for the purpose of employment (...);*

*(d) to **remain in the territory** of a MS after having been employed in that State.....*

CJEU:

This right can be invoked only by those nationals who move from one MS to another (e.g. Moser, C-180/83)

Right to leave their state of origin

Does Art. 45. TFEU have a (horizontal) direct effect?

Commission v France case (C-167/73.): Art. 45 (1) and (2) are directly effective

Horizontal direct effect?

Walrave and Koch case (C-36/74.)

Defrenne v Sabena judgment (C-43/75.)

The prohibition of discrimination in Art. 45 applies both to collective agreements and individual contracts.

Secondary legislation on free movement of workers

Regulation 1612/68 on freedom of movement for workers

Replaced by **Regulation 492/2011**

Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families

replaced by the **Directive 2004/38/EC (Citizens' Rights Directive)**

Regulation 1408/71 regulated the social security consequences of workers and their family members moving to another MS

Regulation 1251/70 on the right of workers to remain in the territory of the MSs after having been employed in that State,
replaced by **Regulation 635/2006**

Directive 2004/38/EC (Citizens' Rights Directive)

Scope of the Directive:

- Union citizens and their family members who accompany or join them
- Family members: spouse, registered partner recognized in the home and host state, descendants under 21, dependent descendants, dependent ascendants

Rights conferred on workers and their family members

1. Right to **depart** the home state (right of exit, Art. 4)
2. Right to **enter** the host state (right of entry, Art. 5.)
- 3. Right of residence in the host state:**
 - a) Up to three months (union citizens and family members)
 - b) Between three months and five years
 - worker, self-employed and their family members
 - registration requirement
 - temporary incapacity for work, involuntary unemployment, work seekers
 - c) Right of permanent residence (union citizens, family members)
 - resided legally for a continuous period of five years in the host state

The personal scope of free movement

Art. 45 TFEU: „Freedom of movement for workers shall be secured within the Union.”

Who is a ‚worker’?

Vatsouras and Koupatantze case (C-22/08 and C-23/08.)

Who is a worker?

- no definition, but ECJ: uniform interpretation

Essential feature of employment relationship:

- **Subordination:** Lawrie-Blum (C-66/85): „for a certain period of time a person performs services *for and under the direction of another person* in return for which he receives remuneration”
- **Genuine and effective economic activity**
- Bettray case, C-344/87. (work is means of a drug rehabilitation programme)
- Part-time work: Levin case, C-53/81. and Kempf case, C-139/85.

Who is a worker?

ECJ: „Worker” includes those seeking work
(Case C-85/96, Martínez Sala v. Freistaat Bayern)

Commission v. Belgium (C-344/95.):
Belgian law required a work seeker to leave the state automatically on the expiry of the three-month period

Work seekers cannot be expelled:

- If they are continuing to seek employment and
- have a genuine chance of being employed
- No time limit is specified

The right of workers to equal treatment

Art. 45. para. 2 of TFEU:

„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.*”

Art. 1. of Reg. 1612/68.:

Any national of a Member State have the right to *take up an activity* as an employed person and *to pursue such activity*, within the territory of another Member State.

- 1. In respect of access to employment**
- 2. during the employment relationship**

Equal treatment concerning access to employment

- Conclude contracts of employment

Direct discrimination:

migrant worker is treated less favourably than national worker

e.g. **Bosman case** (C-415/93):

„Nationality clauses” football clubs could play maximum
3 + 2 foreign players in any match

ECJ: direct discrimination

The clause did not concern the employment of the players, but their chances of employment was restricted.

Equal treatment in respect of access to employment

Indirect discrimination:

Art. 3 (1) R 1612/68: Apparently nationality-neutral provisions, „their exclusive or principal aim or *effect* is to keep nationals of other Member States away from employment offered.”

Language requirements

Art. 3. (1) of Reg. 1612/68: a condition relating to language knowledge is not discriminatory if required by nature of the post

Equal treatment in respect of access to employment

Angonese case (C-281/98.)

Discussion

Equal treatment during the employment relationship

Art. 7. R. 1612/68. „any conditions of employment and work”

Case Allué and Coonan (C-33/88)

Italian law limited the duration of contracts of employment of foreign language assistants

Only 25% of foreign language assistants were Italian nationals

ECJ: Indirect discrimination – cannot be justified

Case Schöning-Kougebetopoulou (C-15/96)

Clause in collective agreement: promotion depended on seniority.

took no account of service performed in another MS

Limitations on freedom of movement

General derogations: (Art. 45. para 3. TFEU and Art. 27. Dir. 2004/38.)

- Public policy
- Public security
- Public health

ECJ:

- Exhaustive list
- Derogations need a particularly restrictive interpretation
- Cannot be used to serve economic purposes

Specific derogation: (Art. 45. para. 4. TFEU)

- Employment in the public service
- only the initial refusal of access to employment (!)

What constitutes public policy and public security?

It matters exclusively the *personal conduct of the individual*

Van Duyn case (C-41/74)

Mrs. Van Duyn was refused entry into the UK to work as a secretary for the Church of Scientology

- her conduct was not unlawful, but „socially harmful”

What constitutes public policy and public security?

Adoui and Cornuaille v Belgian State (C-115 and 116/81)

- Two French prostitutes were refused permission to reside in Belgium, but prostitution was not prohibited in Belgium.

What constitutes public policy and public security?

Art. 27. para 2. of Dir. 2004/38:

Public policy exception is justified only if the personal conduct of the individual concerned **represents „a genuine, present and sufficiently serious threat** affecting one of the fundamental interests of society”.

Calfa case (C-348/96.)

Obtainment and possession of drugs for personal use

Which measures can be taken against the migrants?

- **Exclusion or expulsion**
- Measures shall comply with the principle of proportionality
- No automatic measures, no penalty

Art. 28. of Dir. 2004/38 - Protection against expulsion:

The host MS shall take into account length of residency, age, health, family and economic situation, social and cultural integration into the host state and enduring ties with their country of origin.

Ban on deportation:

- permanent residence - except on serious grounds of pp./p.s.
- Minors and citizens with 10 years residence – except on „imperative grounds of public security”

Which measures can be taken against the migrants?

Less severe sanctions:

- Fine, imprisonment
- restriction on the right of residence to a limited area in the country

Olazabal case (C-100/01.)

Olazabal: Spanish national, member of ETA

Involvement in a kidnapping: 18 months' imprisonment

4 year ban on his residing in the vicinity of the Spanish border

ECJ: it was proportional

Duration of exclusion orders (Art. 32. of Dir. 2004/38)

Exclusion cannot be for life or for unlimited duration

Right to reapply after a reasonable period, in any event after 3 years



Limitation of free movement on public health grounds

Art. 29. Dir. 2004/38: public health derogation

Diseases with epidemic potential, infectious diseases

It can justify:

- Initial refusal of entry or
- Deportation within three months from the date of arrival

Diseases occurring after the 3 months period shall not constitute grounds for expulsion

Persons with HIV/AIDS

Employment in the public service

Art. 45. (4) TFEU: excludes ,employment in the public service’

Significance: 20% of the total employment in the EU is in the public sector

Typical types of posts which are reserved for nationals

Employment in the public service - ECJ case law

- **Narrow interpretation:** Scope is limited to what is strictly necessary for safeguarding the interests of the state
- **Applies only to conditions of access to employment**
- **Community definition of „employment in the public service”:**
 - Direct or indirect participation in the exercise of power and
 - Duties designed to safeguard the interests of the state.

Meaning of public service: institutional or functional approach?

Institutional approach:

views the institution and its personnel as a whole regardless of the specific function carried out by the individual

Functional approach:

examines the work involved in a particular post
Tasks and responsibilities inherent in the post, on a case by case basis

Do not constitute employment in the public sector:

Where the exercise of public law powers is marginal and ancillary
e.g. teacher in a state school, state nurse, foreign language assistant in a university, posts in the state railway, job in research

Future prospects for Croatia

1. July 2013 - accession of Croatia

- **Transitional period** for free movement: gradual opening of the labour markets

2 + 3 + 2 years

- Similar to the Hungarian accession

Discussion: Advantages - disadvantages