

Free Movement of Public Sector Workers

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Ursula Scheuer
European Commission
DG Employment, Social Affairs and Equal Opportunities
e-mail: Ursula.Scheuer@ec.europa.eu

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Overview

- Free movement of public sector workers
 - What are the specific aspects and obstacles?
- What is the situation in the Member States?
 - Activities at Member State level
 - Monitoring activities of the Commission

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Definition of public sector worker in the sense of Article 39 EC

- ECJ: A worker is someone who undertakes genuine and effective work under the supervision of someone else for which he is paid
- The entire staff of the public sector (civil servants and employees) fulfills these criteria
- Therefore everybody working in the public sector is a worker in the sense of Article 39 EC

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Free movement of public sector workers – Specific aspects and obstacles

- Nationality condition for access to posts
- Recognition of professional experience and seniority acquired in another Member State for access to the public sector and for determining working conditions
- Other aspects:
 - language requirements
 - recognition of diplomas for access to the public sector and for determining working conditions
 - recruitment procedures
 - different treatment in relation to working conditions

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Nationality condition (1)

- Constant interpretation of Article 39 (4) EC by the ECJ:
 - Member States are authorised to reserve only those public service posts for their nationals which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or other public authorities
 - functional approach
 - case-by-case approach
 - examples: secondary school teachers, researchers, nurses, electricians, plumbers, railway workers

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Nationality condition (2)

- Commission Action of 1988 – focused on 4 sectors (commercial services, public health sector, public teaching sector and non-military research)
- Main points of position of the Commission expressed in its Communication of 2002 (COM (2002) 694 final)
 - independently of the sector all posts which do not involve the exercise of public authority and the responsibility for safeguarding the general interest of the State must be open to EU-workers

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Nationality condition (3)

- not all posts in the fields of armed forces, police/forces of maintenance of order, judiciary, tax authorities and diplomatic corps may be restricted; e.g. administrative tasks, technical consultation and maintenance have to be open
- recruitment competitions may only be restricted if all posts accessible via that competition fulfil the criteria of Art. 39 (4) EC
- access to procedures for recruiting civil servants may not in general be refused

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Nationality condition (4)

- Captains' jurisprudence (nationality condition for access to posts of masters and chief mates on ships flying the Member State's flag) - 2003 (C-405/01 and C-47/02) and 2008 (C-98/07, C-447/07 and C-94/08).
 - concerns private sector posts where some public powers are exercised
 - based on Article 39 (4) EC
 - posts may be reserved to nationals only if the rights under powers conferred by public law on masters and chief mates are actually exercised on a regular basis and do not represent a very minor part of their activities
 - applicability of this jurisprudence to all public sector posts?

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Recognition of professional experience and seniority (1)

- Concerns access to the public sector and determination of working conditions
- Indirect discrimination
- ECJ-judgments:
 - 1994, Scholz (C-419/92)
 - 1998, Schöning (C-15/96)
 - 1998, Commission v. Greece (C-187/96)
 - 2000, Öst. Gewerkschaftsbund (C-195/98)
 - 2003, Köbler (C-224/01)
 - 2005, Commission v. Italy (C-278/03)
 - 2006, Commission v. Spain (C-205/04)
 - 2006, Commission v. Italy (C-371/04)

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Recognition of professional experience and seniority (2)

- Main aspects of ECJ-jurisprudence
 - previous periods of comparable employment acquired in another Member State must be taken into account
 - requirements which apply to periods spent in other Member States must not be stricter than those applicable to comparable periods spent in the home Member State
- Problems of application of ECJ-jurisprudence:
 - criteria of comparison
 - practical aspects of comparison

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Recognition of professional experience and seniority (3)

- Commission's position on main issues:
- Member States have the duty to compare the professional experience
 - If experience in any job in the public sector is taken into account, also experience in any job in the public sector of another Member State must be taken into account
 - If a specific experience is taken into account, the Member State has to compare its system with the system of the other Member State to compare the previous periods of employment (legal status in previous work as civil servant or public sector employee may not be used as criterion of comparison)

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Recognition of professional experience and seniority (4)

- If a Member State takes into account professional experience in the private sector, it must also take into account comparable professional experience acquired in the private sector of another Member State
- Additional requirements: e.g. condition of continuity

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Language requirements

- Any language requirement must be reasonable and necessary for the job in question
- Employers cannot demand only a specific qualification as proof
- Employers must not require a mother tongue level

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Recognition of diplomas (1)

- For being entitled to exercise a profession
- Directive 2005/36/EC on recognition of professional qualifications is applicable to regulated professions in the public sector
- If only a certain level of education or one of several diplomas is required Directive 2005/36 is not applicable; position of Commission explained in Communication of 2002 (COM (2002) 694 final)

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Recognition of diplomas (2)

- Diplomas sometimes play a role in the recruitment procedure: e.g. condition for access to recruitment; points awarded in recruitment procedure
- Diplomas sometimes play a role in determining working conditions: e.g. salary; career perspectives

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Recruitment procedures

- In general (except for posts falling under Article 39 (4) EC), migrant workers are entitled to apply for work in the public sector of another Member State under the same conditions as apply to nationals
- Member States are allowed to oblige migrant workers to participate in recruitment competitions
- However, ECJ has ruled that fully qualified migrant workers are not obliged to participate in a competition used to recruit people for a specific training with a view to filling a post in the relevant field of public service after the completion of the training (C-285/01 Burbaud)

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Different treatment in relation to working conditions

- ECJ: apart from nationality condition no further discrimination may be based on Article 39 (4) EC
- Examples: civil servant status, trade union rights

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Situation in the Member States Activities at Member State level

- Reforms undertaken in many Member States, also in the framework of infringement procedures
- Human Resources Working Group (intergovernmental working group created by the Member States' Directors General for Public Administration) established several reports and information packages for their administrations on this issue, latest: Report of Austrian Presidency 2006
- Still need for reforms

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Situation in the Member States Monitoring activities of Commission

- Action of 1988 on nationality condition
- Infringement procedures
- Communication of 2002 and follow-up
- Collection of most up-to-date information on Member States' national rules and their application in practice; Report will be made by an external expert
- The Commission intends to publish a Commission Staff Working Document on this issue in 2010 (annexed to a Communication on free movement of workers)

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Conclusions

- Many developments concerning free movement of workers in the public sector - however: specific obstacles still exist
- To improve the situation joint efforts are necessary:
 - Member States have to undertake reforms and to control the application of their rules in practice
 - Migrant workers need information and have to invoke EC-law in national proceedings
 - Commission provides information to migrant workers and national authorities, gives opinions on preliminary questions and proceeds with infringement procedures

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Questions



Discussion



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