

Report on Posts in the Public Sector Reserved for Nationals Developments in the 27 Member States in 2009-2012

**Prepared for the European Commission
by the Network on Free Movement of Workers**

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Report on national developments in Member States from 2009-2012: Free movement of workers in the public sector, on posts reserved for nationals according to Article 45 (4) TFEU.

1. Introduction

This report is put forth to provide an overview of the developments in Member States from 2009-2012, regarding free movement of workers in the public sector, in particular with respect to posts reserved for nationals. The report is based on information from the report 'Free Movement of European Union Citizens and Employment in the Public Sector: Current Issues and State of Play Part II – Country Files', written for the European Commission in 2010 by Jacques Ziller; Annual reports from Member States on the Free Movement of Workers from 2010, 2011 and 2012; Annual European Reports on the Freedom of Movement of Workers in Europe, written by Experts of the European Network on Free Movement of Workers, from 2010, 2011 and 2012 and replies by Members of the Technical Committee on Free movement of workers to the questionnaire sent by the Commission services on 19 October 2012 asking them to provide information on the national developments on the issue of posts reserved for nationals since the Member States provided information to the Commission services in 2009.

The report provides an overview of the development in each Member State, found in the country files (section 3) and a comparative analysis of the developments in Member States (section 4).

2. Background

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

The Commission asked Prof. Jacques Ziller to summarise and analyse the information provided by Member States in their replies to the Commission. The Report "Free Movement of European Union Citizens and Employment in the Public Sector" contains a first general part on the state of play of free movement of workers in the public sector and a second part with country files on each of the 27 EU Member States.¹

In a tentative assessment of issues of compliance with Free Movement of Workers in the Public Sector, Ziller, on the basis of the available information, summarised for each Member State in the Country files, "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."²

Furthermore, the report concludes that 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. 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 Court of Justice of the European Union (CJEU). 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 CJEU. 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 States 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:

¹ SEC (2010) 1609 final of 14.12.2010. See <http://ec.europa.eu/social/main.jsp?catId=465&langId=en>.

² Ziller Report Part I, p. 99.

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.³

In 2010 the Commission services adopted the Commission Staff Working Document (CSWD) "Free movement of workers in the public sector" (SEC (2010)1609 final). It informs citizens, Member States' authorities, social partners and other stakeholders about how the Commission understands the most important aspects of free movement of workers in the public sector. It urged the Member States' authorities to make the necessary reforms with regard to those national provisions which are not yet in conformity with the EU rules and to monitor the application of national provisions to guarantee that individual cases are solved in line with EU law.

The Commission disseminated the CSWD and the Ziller Report to the other European Institutions, to the authorities of Member States (in particular through the Technical Committee on Free movement of workers), to social partners (including through the Advisory Committee on Free movement of workers), to the European Ombudsman and the European Network of National Ombudsmen, to EURES advisors, to the national SOLVIT centres, to Your Europe Advice and to other stakeholders. Discussions were held on several occasions. The Commission also continued its close monitoring of the issues in particular on the basis of citizens' complaints (e.g. EU-Pilot investigations; infringement procedures).

In the CSWD special attention was drawn to the following issues regarding the free movement of workers as follows: Every national of an EU Member State has in general the right to work in another Member State (Article 45 TFEU and Regulation (EU) N° 492/2011 on freedom of movement for workers within the Union).

A migrant worker must be treated in the same way as nationals of the host country in relation to access to employment, working conditions as well as tax and social advantages.

Civil servants and employees in the public sector are workers in the sense of Article 45 TFEU; the rules on free movement of workers in principle apply also to them.

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

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

In its Communication of April 2012 "Towards a job-rich recovery" (COM(2012)173 final) the Commission highlighted one of the issues of free movement of workers, the restriction of access to certain posts in the public service to its own nationals in accordance with Article 45(4) TFEU. The Court of Justice of the European Union (CJEU) has consistently held that this exception is to be interpreted restrictively and covers only 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. Those criteria must be assessed on a case-by-case basis. The Commission urged the Member States to open and facilitate access by EU nationals to their public sector posts in accordance with EU law as interpreted by the CJEU.⁵

As a follow-up to the 2010 CSWD the Commission services, by questionnaire of 19 October 2012 asked the Members of the Technical Committee on Free movement of workers to provide information on the national developments on the issue of posts reserved for nationals since the Member States provided information to the Commission services in 2009.

³ Ziller Report Part I, p. 105.

⁴ SEC (2010) 1609 final of 14.12.2010.

⁵ COM(2012)173 final of 18.4.2012.

The aim is to obtain an overview of the developments, accomplishments and remaining challenges for Member States on this issue. The Commission services intend to hold regular discussions in the Technical Committee (first time in April 2013) and want to use this information also for its monitoring task.

The Member States were asked to provide the following information:

- What developments took place since 2009, on national/federal, regional and local level? Are there any reforms pending or planned? Did reforms of the applicable national provisions (legislation and administrative rules) take place? Were there any further guidelines, recommendations on criteria etc. adopted? If relevant, please provide a copy of the new national provisions, guidelines, recommendations etc. (with translation into English, French or German, if available) and an internet link, if available.
- What is the administrative practice? Were special procedures and/or bodies set up to assess this issue and how do these procedures and bodies function in practice? How are individual cases solved? How are administrative procedures on complaints being solved? How many and what type of posts reserved are still pending? Could you give examples and numbers of posts which were reserved to nationals and for what reasons?
- What is the judicial practice? What was the outcome of Court procedures? How many procedures and on what type of posts reserved are still pending?

3. Country Files - Overview of developments in Member States from 2009-2012

The country files provide an overview of the developments in Member States on posts reserved for nationals from 2009-2012. The assessments of potential sources of discrimination and obstacles to free movement of workers in the public sector, issues of compliance with free movement of workers in the public sector as well as the indication of reforms and coming trends identified in the Ziller report on the basis of an analysis in each of the Member States are used as a background to measure the developments. These developments have been reported in the annual reports from Member States on the Free Movement of Workers from 2010, 2011 and 2012; annual European Reports on the Freedom of Movement of Workers in Europe, written by Experts of the European Network on Free Movement of Workers, from 2010, 2011 and 2012 and replies by Members of the Technical Committee on Free movement of workers to the questionnaire sent by the Commission services on 19 October 2012.

The country files do not summarize all the information put forth in the reports listed above on the situation in each country, but seek to reflect the changes in legislation and practice that have taken place from 2009-2012.

Austria

Assessment of issues of concern in Austria from the Ziller Report⁶:

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

Legislation and general regulation of access and employment conditions

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*, 1979 and the law on contractual employees, 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*, 1989 as well as sectorial laws, i.e. the *Law on teachers of the Länder*, 1984 and of teachers of agricultural and forestry, 1985. These are all federal laws, applicable at all levels of government. There are also regulations on remuneration and pensions, as well as for specific sectors.

Practice

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.

Special requirements for access to employment and working conditions

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 candidate 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.

Seniority

As indicated above, 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 ('seniority'); the content of the prior post(s) or a distinction between fulltime/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.

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.

⁶ Ziller Report Part II, p. 116, 118-120.

Issues for free movement of workers in the public sector

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.

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.

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.

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.

Developments 2009-2012⁷

Access to public service posts which are not reserved for Austrian nationals was considerably simplified in 2011 by amendment to the Public Service Act (*Dienstrechts-Novelle*) BGBl. I No 140/2011 in respect of the Civil Servants Employment Act (*Beamten-Dienstrechtsgesetz*), the Contracted Staff Employment Act (*Vertragsbedienstetenrecht*) and the Teaching Staff Employment Act (*Lehrerdienstrecht*).⁸ The eligibility requirement for such posts is no longer Austrian nationality and any person with unrestricted access to the Austrian labour market is now eligible. Further details can be found in the explanations relating to the Public Service (Amending) Act 2011 (http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01610/fname_237597.pdf [from page 2, re § 4(1)(1)(b), § 20(1)(5), § 53(2)(3) BDG 1979 etc.] and the circular concerning the Public Service (Amending) Act 2011 (http://www.ris.bka.gv.at/~Dokumente/Ebm/ERL_01_000_20120518_001_920_90_0_0003_III_5_2012/920_900_0003_2012.pdf [point 11 on the employment of persons who do not hold Austrian nationality]).

The legal situation in respect of public service posts which are reserved for Austrian nationals however remains unchanged. As regards posts reserved for Austrians, that is posts in the field of the sovereign administration of the Republic of Austria, e.g. police and customs, armed forces, diplomatic service, judiciary and external representation of the State. There is neither an exhaustive list nor a list of examples of the posts concerned. The kinds of posts reserved to Austrian nationals result from § 42a Civil Servants’ Service Act 1979 and from the Communication from the Commission “Free movement of workers: achieving the full benefits and potential” (COM/2002/0694 final), p. 20ff. Decisions on reserved posts are made in individual cases, taking account of Article 45(4) TFEU and relevant case-law, and are included in the job description published in the Vienna Official Gazette (*Amtsblatt zur Wiener Zeitung*) or on the website of the Federal Chancellery. It is the responsibility of each Federal Minister to ensure compliance with the rules. As regards judicial practice, there are no reports of court cases brought by EU nationals relating to posts reserved for Austrians.

⁷ Unless otherwise indicated the information in this section is based on the reply of Austria to the Commission services questionnaire of 19.10.2012.

⁸ http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2011_I_140/BGBLA_2011_I_140.pdf.

Belgium

Assessment of issues of concern in Belgium from the Ziller Report⁹:

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

Legislation and general regulation of access and employment conditions

Legal sources

The applicable legislation 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.

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.

Special requirements for access to employment and working conditions

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 statutes.

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.

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 is required 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 they 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.

⁹ Ziller Report Part II, p. 11-13.

Issues for free movement of workers in the public sector

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.

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.

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.

Reforms and Coming Trends

An important reform of Belgian regulations applicable to employment in the public sector took place in 2005 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.

Developments 2009-2012¹⁰

No legislative changes have occurred on the federal level concerning posts reserved for Belgian nationals.

At the regional level Ordinances have been adopted which open 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 of the authorities. In the Brussels-capital Region (Ordinance of 11 July 2002, *M.B.*, 23 July 2002, p. 32859; Ordinance of 11 March 2004, *M.B.*, 23 March 2004, p. 16325) and the French Community Commission (Decree of 19 March 2004, *M.B.*, 18 May 2004, p. 39355) which opened jobs in the public sector to non-EU nationals under the same conditions as those provided by the jurisprudence of the CJEU for non-Belgian EU nationals. More recently, the Walloon Decree of 15 March 2012 enlarges the conditions of nationality for access to jobs in the public sector of the Walloon Region (*M.B.*, 23 March 2012, p. 18088). It stipulates that non-Belgians are admissible, in services of the Government and public legal persons which are related to the Walloon Region, to jobs which do not involve the direct or indirect participation in the exercise of public authority and to posts which do not have as their objective to safeguard the general interests of the State or other public authorities. The same provision is found in the project of Decree of the French Community of 15 February 2012 enlarging the conditions of nationality for access to jobs in the public sector of the French Community (Doc. 319, parliamentary session 2011-2012). The Walloon Decree has been adopted despite a negative opinion by the State Council which considers that it disregards Article 10, indent 2, of the Belgian Constitution, according to which Belgians alone are eligible for civil and military service, apart from the exceptions which can be made by law for special cases, in that the Decree, and also the project of Decree of the French Community, take non-Belgians' access to public sector jobs as a general rule whereas it should only be limited to particular cases explicitly defined by law (Opinion [50.170/2/V](#); Opinion [50.581/2](#)).¹¹

¹⁰ Unless otherwise indicated the information in this section is based on the reply of Belgium to the Commission services questionnaire of 19.10.2012.

¹¹ Report on the Free Movement of Workers in Belgium in 2011-2012, p.19.

As regards administrative practice, it is up to each federal public service to define post by post which posts are reserved, if the function is part of the exercise of public power or to safeguard the general interests of the State. As regards the functions of management, Service Public Fédéral Emploi et Marché du Travail shall validate job descriptions and, in this context, ask the public services concerned for an explanatory note of reservation of a post for a national. Their attention is drawn to the jurisprudence of the Court of Justice of the European Union and the communication in this regard by the European Commission.

In its judgment of 24 May 2011, the CJEU ruled that 'the activities of notaries as defined in the current state of the Belgian legal system are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC' so that 'the nationality condition required by Belgian legislation for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 43 EC' (judgment of 24 May 2011, *Commission/ Belgium*, C-47/08). As a consequence, the Law of 25 Ventôse Year XI on the organisation of the notarial profession (Loi du 25 ventôse an XI contenant organisation du notariat) was amended so as to comply with this judgment by the Law of 14 November 2011 (*M.B.*, 10 February 2012, p. 10443). In accordance with the revised Article 35, §3, of the Law of Ventôse Year XI, to be appointed as an expectant notary, a person must in particular be Belgian *or* a national of a Member State of the EU. In a reply of 22 May 2012 to a questionnaire, the Belgian Federation of Notaries informed that they do not have statistics as to the number of EU nationals that take part in the competitions for notaries since the commissions that nominate notaries are provided with the information necessary to rule on their professional competence and abilities but are not informed as to the nationality of the candidates.¹²

As regards judicial practice, the federal authorities are not aware of any judicial procedures against the Belgian state concerning access to employment in public services.

¹² Report on the Free Movement of Workers in Belgium in 2011-2012, p. 19-20.

Bulgaria

Assessment of issues of concern in Bulgaria from the Ziller Report¹³

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

Legislation and general regulation of access and employment conditions

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 7* (Art 135-146) contains the provisions on local self government and local administration. The Constitution contains no specific provisions 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), as amended in 2008 provides that appointment as a civil servant is open to Bulgarian citizens or other EU 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. Specific conditions are set by secondary legislation, especially by a *Decree on the Classifier of the positions in administration and the Ordinance on the application of the Classifier of the positions in administration* (Council of Ministers Decree No 129 from 26 June 2012. For public enterprises, general labour law is applicable.

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.

Special requirements for access to employment and working conditions

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 Classifier of the positions in administration*. Art. 2 (2) of the *Ordinance on the application of the Classifier of the positions in administration* 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.

Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience.

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.

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

Available information reveals two issues of compliance with EU law. *First*, the absence of court control on competitions and decisions about recruitment 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

¹³ Ziller Report Part II p. 15, 16-18.

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.

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.

Reforms and Coming Trends

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.

Developments 2009-2012¹⁴

There are no significant changes in the legislation concerning posts reserved for nationals.

Important amendments to the *Labour Code* that took place in 2010 (State Gazette No15 of 2010; in force since 28 August 2010) brought needed clarity to the issue of *period of employment* that is recognized as professional experience in Bulgaria. A new Paragraph 2 to Article 351 of the Labour Code was introduced to stipulate that period of employment is also the period of time of fulfilling civil service or work under a labour contract according to the legislation of another Member State of the European Union, Member State of the EEA or Switzerland, as well as the period of employment in an European Union institution that is evidenced by a certifying act for the initiation and the termination of the employment relationship. Article 352, Paragraph 2 of the Labour Code stipulates that the cases when a term of employment is recognized without actual work on the part of the employee apply also to cases of employment relationship in accordance with the legislation of another Member State of the European Union, Member State of the EEA or Switzerland. Article 354, Paragraph 2 of the Labour Code stipulates that periods of employment without an existing employment relationship are recognized under the same circumstances if those circumstances have occurred in another Member State of the European Union, Member State of the EEA or Switzerland.¹⁵

A new *Law on the Establishment of Periods of Employment and Periods of Social Insurance by the Court* has been adopted in 2011 and published in the Official Gazette No.26 of 29 March 2011. These amendments pave the way to the full application of Article 12 of the *Ordinance on the Structure and the Organization of the Salary*.¹⁶

As regards administrative practice, the Ministry of State Administration no longer exists. The body that is now in charge of general control over the application of the Law on the Civil Servant and secondary legislation is the Council of Ministers and specialized inspections are carried out by the General Labour Inspectorate Executive Agency. The posts EU citizens do not have access to remain unchanged, i.e. high level civil servants, positions connected to the execution of functions in the fields of defence, public order, foreign policy, national security and access to classified information, Member of Parliament, President or Member of the Council of Ministers, judges, state prosecutors, detectives, notaries and military staff, except for positions, determined open for persons with dual citizenship by the Defence Minister.

¹⁴ Unless otherwise indicated the information in this section is based on the reply of Bulgaria to the Commission services questionnaire of 19.10.2012.

¹⁵ Report on the Free Movement of Workers in Bulgaria in 2010-2011, p. 18.

¹⁶ Report on the Free Movement of Workers in Bulgaria in 2010-2011, p. 18.

Cyprus

Assessment of issues of concern in Cyprus from the Ziller Report¹⁷

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

Legislation and general regulation of access and employment conditions

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.

Practice

The *Public Service Commission* 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 Department* seems also in a position to monitor practice of government departments and the *Educational Service Commission* as far as education is concerned. Detailed information on local government practice is not available.

Special requirements for access to employment and working conditions

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.

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.

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

¹⁷ Ziller Report Part II, p. 76, 78-80.

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.

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

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

Reforms and Coming Trends

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.

Developments 2009-2012¹⁸

In general, there were no major developments since 2009 with regards to the legislative framework for the free movement of workers in the public sector. The Council of Ministers is responsible for the reservation of posts in the public service for nationals. Specifically, the Council of Ministers issues Ministerial Decrees which set out the list of posts reserved for nationals in each Ministry/Department/Service. Prior to the issue of Ministerial Decrees, the necessary preparatory work takes place within the framework of a special committee assigned with the task of carefully examining each post in the public service with regard to the nature of the tasks and responsibilities involved so as to assess whether it entails the criteria of direct or indirect participation in the exercise of public authority and safeguarding the general interests of the state.

The Ministerial Decrees issued since 2004 have already covered the vast majority of public posts but the procedure is ongoing to include new posts that may be created each year. Since 2009 there were 2 additional Ministerial Decrees (Order No. 338/2009 and Order No. 177/2010) which set out the following posts as posts reserved only for nationals, based on the above criteria: **COMPETITION PROTECTION COMMISSION:** Director (Scale A15 (i)); **MINISTRY OF DEFENSE:** Head of Technical Services (Scale A14(ii)); Senior Engineer of Technical Services (Scale A13(ii)), Engineers of Technical Services (Scales A9, A11 and A12), Engineers of Technical Services, Class I (Scales A11 and A12) and Class II (Scale A9), Senior Technicians (Scale A9(i)), Technicians (Scales A2, A5 and A7(ii)); **MINISTRY OF LABOUR AND SOCIAL INSURANCE:** **Labour Department:** Chief Labour Officer (Scale A14(ii)), **Social Insurance Services:** Chief Social Insurance Officer (Scale A14(ii)), **Department of Social Inclusion of Persons with Disabilities:** Director (Scale A15 –A16(i)); **TREASURY:** Director of Accounting Services (Scale A15 (i)), Senior Treasury Officers (Scales A13 (ii)), Treasury Officers A' (Scale A11(ii)), Assistants Accounting Officers (Scales A2, A5 and A7(ii)); **MINISTRY OF COMMUNICATIONS AND WORK:** **Civil Aviation Department:** Chief Flight Safety Regulations Unit Officer (Scale A14(ii)), Flight Operations Inspectors (Scale A13 (ii)), Diploma and Licenses Inspector (Scale A13 (ii)), National Supervisory Authority Chief Officer (Scale A14(ii)), National Supervisory Authority Senior Officers (Scale A13 (ii)), National Supervisory Authority Officers (Scales A8, A10 and A11), Senior Internal Auditor (Scale A13(ii)), **Merchant Shipping Department:** Radar Operators (Scales A5 (2nd step), A7 and A8(i)); **MINISTRY OF FOREIGN AFFAIRS:** Director for Communication Policy (Scale A15(ii)); **MINISTRY OF HEALTH:** **Medical and Public Health Services:** Executive Hospital Directors (Scale A16 up to €63.972), **State General Laboratory:** Chief Analyst (Scale A14(ii)).

As regards the administrative practice for reserving public posts for nationals there have not been any significant changes since 2009. There have not been any further procedures/bodies established to solve individual cases or complaints. In case there is a complaint from an EU citizen (non-national) during a recruitment procedure, it is presumed that it will be dealt with by the existing appropriate/legal authorities, i.e., the Public Service Commission, the Legal Service and in the case of appeal, the Supreme Court.

The vast majority of posts have already been examined by the special committee that was assigned with the task to determine whether they entail the criteria of public authority and public interest. It is noted that in general, a very large number of public service posts are open to EU nationals. Only around 18% of all public posts are reserved for nationals and these mostly concern posts that are high up in the hierarchical rank and entail the above criteria. It is not expected that there will be additional posts to examine (at least not in any significant number), since there is a general freeze in

¹⁸ Unless otherwise indicated the information in this section is based on the reply of Cyprus to the Commission services questionnaire of 19.10.2012.

the creation of new posts in the public service. It is also noted that there is a general freeze in the recruitment of first entry posts, and as a result access to the public sector is currently restricted for both nationals and non-nationals. As regards judicial practice, the issue falls under the jurisdiction of the Public Service Commission, the Legal Service and the Supreme Court. However, the Public Administration and Personnel Department have been informed of a court procedure which is currently pending and concerns the request of an EU national to have his previous experience acquired in the public service of another Member State recognized for purposes of promotion in a post in the Cyprus Public Service.

Czech Republic

Assessment of issues of concern in the Czech Republic from the Ziller Report¹⁹

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

Legislation and general regulation of access and employment conditions

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. 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.

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.

Special requirements for access to employment and working conditions

Professional experience

As long as the *Service Act* has not entered into force, and with the exception of some public servants, 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 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.

Seniority

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

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.

¹⁹ Ziller Report Part II p. 19-20, 22-23.

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

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*, where 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.

There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which would allow detecting possible noncompliance 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.

Reforms and Coming Trends

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).

Developments 2009-2012²⁰

The full effect of Act No. 218/2002, on the Service of Public Servants in Administrative Authorities and on the Remuneration of Such Servants and Other Employees in Administrative Authorities, as amended, was deferred to 1 January 2015; a new act shall be submitted and approved in the interim. As far as the forthcoming act is concerned, it is expected that the national citizenship obligation will only apply to positions that involve the direct performance of state administration or the defence of the interests of the Czech Republic. The positions will be assessed on a case-by-case basis and will thus be consistent with the provision of Article 45(4) TFEU pursuant to the opinion of the Court of Justice of the EU. Currently, access to employment is generally regulated in Act No. 435/2004 Coll., on Employment. Under this Act, any discrimination is prohibited and citizens of the European Union and their family members and family members of citizens of the Czech Republic who are not citizens of the Czech Republic or of another EU state have the same legal position in labour relations as citizens of the Czech Republic.

As regards administrative practice, there is no data available on the number and types of posts reserved for nationals. Collection of this data was planned to be included in the information system on service and salary under the Civil Service Act, which coming into force has been postponed until 2015. Additionally, there is no information about the experience related to the recruitment of EU citizens or about any disputes in these matters. To present an example from the Ministry of the Interior, which employs, based on employment relationships and agreements on work performed outside of employment, 7 citizens of Slovakia, which represents 0.32 % of the total number of employees (the Ministry has 2,176 employees as of 1 January 2013). It has also contracted 5 Slovak citizens as external personnel. Expressed in percentage, this represents 0.23% of the total number of employees. It is estimated that the same ratio of citizens of the European Union is employed in the whole state administration, but is impossible to make a qualified estimate of the share of EU citizens employed in territorial self-governing units.

As regards judicial practice, in the past 20 years, according to information from the Ministry of Labour and Social Affairs, the authority of second instance that handles appeals against decisions made by employment authorities (labour offices), there have not been any cases regarding not hiring a citizen of the European Union in public administration related to discrimination in access to employment within an administrative appeal procedure. There have actually not been any reported cases of discrimination against a citizen of the European Union in access to employment as such.

There were no reports of problems related to the recruitment and employment of the aforementioned EU citizens at the Ministry of the Interior, the selection procedures were the same as for citizens of the Czech Republic, the vacancy notices did not include the condition of Czech citizenship.

There are no known court cases related to employment in the state administration involving an EU citizen.

²⁰ Unless otherwise indicated the information in this section is based on the reply of the Czech Republic to the Commission services questionnaire of 19.10.2012.

Denmark

Assessment of issues of concern in Denmark from the Ziller Report²¹

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

Legislation and general regulation of access and employment conditions

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. 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 groups*, 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.

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.

Special requirements for access to employment and working conditions

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.

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. 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).

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.

Issues for free movement of workers in the public sector

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

²¹ Ziller Report Part II p. 26, 28-31.

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.

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.

Reforms and Coming Trends

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.

Developments 2009-2012²²

The Danish Constitutional Act, Section 27, which provides that appointment as a civil servant is only possible provided the employee has Danish nationality, has not been changed and reform is not pending. In cases where individuals with Danish nationality are employed as civil servants, individuals without Danish nationality will be employed on *terms corresponding to those of civil servants*, cf section 58c of the Civil Servants Act. This means that regarding all aspects and conditions there is equal treatment between a Danish national and a citizen from another EU/EEA country. The term 'terms corresponding to' is to be understood literally. (S)he will in all aspects be treated like a civil servant, with respect to salary, redundancy pay, pensions, disciplinary proceedings, working conditions etc.

As a main rule there is no requirement of Danish nationality in connection with appointments in central government administration. The few exceptions to the rule with regards to certain positions within the areas of the Ministry of Defence and the Ministry of Justice remain unchanged. The exceptions are restricted to Danish nationals and apply narrowly. The exceptions are only applicable in relation to posts which involve the exercise of public authority and responsibility for safeguarding the general interests of the state.

The Ministry of Defence has informed the Agency of Modernisation for the Public Administration that the employment method described on page 28 in the Ziller report does not reflect the employment procedure in the Danish defence in 2013. The Ministry of Defence does not adhere to these regulations and provisions anymore. Notwithstanding, any regulation and provision, people of all nationalities can apply for any position within the Ministry of Defence and be employed on an equal footing with Danish nationals. Unfortunately, this policy is not yet reflected in all regulations and provisions but work has commenced to make the necessary amendments in order to ensure that the relevant requirement and provisions reflect that there is no requirement of Danish nationality in connection with the employment in a specific position in the Danish Ministry of Defence. When people of another nationality than Danish apply for positions within the Ministry of Defence there is only one criterion that the applicant must meet, namely a work permit and a residence permit in Denmark or a resident card. The Danish Defence Personnel Organisation will then undertake an investigation to determine if a candidate's employment in the Danish Defence would imply any risk of being deemed a criminal act under the laws of the country (or countries) in which the candidate is a citizen. After the new practice has been introduced there are no records of complaints filed by any persons without Danish citizenship, not being able to apply to a position under the conditions of the Danish Civil Servants Act.

Within the Ministry of Justice there has been a change in the recruitment conditions since the Ziller report was published. According to the Ministry of Justice deputy governors of prisons and prison officers are no longer required to be Danish nationals. Only judges and police officers still have to be Danish nationals.

As regards judicial practice, the Agency for the Modernisation of Public Administration is not aware of any judicial cases regarding a citizen from another EU/EEA country not being employed on terms corresponding to those of civil servants or being denied employment in posts reserved for Danish nationals on the grounds that they are not Danish nationals.

²² Unless otherwise indicated the information in this section is based on the reply of Denmark to the Commission services questionnaire of 19.10.2012.

Estonia

Assessment of issues of concern in Estonia from the Ziller Report²³

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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.

Seniority

Seniority was taken into account for remuneration and career purposes in the same way as professional experience.

Language requirements

The Public Service Act 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.

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

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*.

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.

Reforms and Coming Trends

An important reform of Estonian 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

²³ Ziller Report Part II, p. 40, 42-44.

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.

Developments from 2009-2012²⁴

In June 2012, the Parliament adopted a new Public Service Act which will enter into force in April 2013. The general principles regarding the requirements of appointing citizens of other EU Member States in the public service remain the same. Those are that a citizen of a Member State of the European Union who conform to the requirements established by law and on the basis of law may also be appointed as an official. Only Estonian citizens may be appointed to positions which involve exercise of public authority and protection of public interest. Such positions are related to the directing of administrative agencies, exercise of state supervision, national defence and judicial powers, 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. According to the new Public Service Act the definition of the official will be changed so that the support functions will be performed by employees recruited based on Employment Contracts Act. There are no restrictions of appointing a citizen of other EU Member States into the position of a regular employee who performs support functions in the public service.

As regards administrative practice, the public service is decentralised and each organisation is responsible for recruitment of their staff. There is no specific policy aiming at the recruitment of the citizens of the other EU Member States into public service. From available statistics it emerges that the number of officials who had citizenship of another EU Member State was 9 in 2009 (including state and local government administrative agencies). In 2010 the number was 7 (including state administrative agencies), there are no statistics available for 2011.

Action before administrative courts for a judicial review on decisions of public authorities relating to employment under the Public Service Act (including the recruitment of EU citizens into public service) is provided for. The Supreme court to which decisions of subordinate courts may be appealed, also exercises judicial review on the conformity of laws with the constitution. For the time being, there has been one court decision from 2006 on the dismissal of the head of an administrative agency due to non-conformity with the requirements of the citizenship.

²⁴ Unless otherwise indicated the information in this section is based on the reply of Estonia to the Commission services questionnaire of 19.10.2012.

Finland

Assessment of issues of concern in Finland from the Ziller Report²⁵

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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 signaled.

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.

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 julkis-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.

Issues for free movement of workers in the public sector

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.

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.

²⁵ Ziller Report Part II, p. 151-152, 153-154.

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.

Finland – Developments 2009-2012²⁶

No changes have occurred regarding posts reserved for nationals. Section 7 of the State civil servants' act provides a list of the positions for which only Finnish citizens can be appointed, those are:

- 1) the offices of Chancellor of Justice and Deputy Chancellor of Justice, Secretary General and Referendary Counsellor in the office of the Chancellor of Justice when the latter holds the office of Head of Department;
- 2) the office of State Secretary, Permanent State Secretary, Head of Department and Head of Unit, as well as any similar or higher office;
- 3) an office in the foreign affairs administration;
- 4) an office of a judge;
- 5) an office of head of Government agency, however not that of principal of a university;
- 6) an office of Provincial Governor, of Head of Department of a Provincial Government, as well as of Provincial Readiness Director;
- 7) an office involving the duties of public prosecutor or enforcement officer;
- 8) an office of police officer referred to in the Police Act;
- 9) an office in which the appointee is a member of the board of directors of a prison;
- 10) an office with the Ministry of Defence, the Defence Forces and the Frontier Guard;
- 11) an office with the Finnish Security Police, other than a policeman;
- 12) an office with the Customs Administration, which involves the authority to make arrests and an office, which involves participation in the supervision and the defence of Finland's territorial integrity, or which involves criminal investigation and supervision;
- 13) Transport Agency and Transport Safety governors.

No information is available on the administrative or judicial practice concerning access of non nationals to employment in the public sector in Finland.

²⁶ Unless otherwise indicated the information in this section is based on the reply of Finland to the Commission services questionnaire of 19.10.2012.

France

Assessment of issues of concern in France from the Ziller Report²⁷

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

Legislation and general regulation of access and employment conditions

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 Territorial 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 territoriale*) and to the public hospitals (*General Status of the Hospital Civil Service – Statut général de la fonction hospitalière*).

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*), whereas 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 fonction 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.

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 generalization 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.

Issues for free movement of workers in the public sector

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. *Second*, the legislation and regulation relative to the recognition of professional experience provides for taking into account equivalent professional experience acquired

²⁷ Ziller Report Part II, p. 62-63, 65-66.

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.

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 career 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.

Reforms and Coming Trends

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.

Developments 2009-2012²⁸

As regards legislative developments, a circular of 15 April 2011 regarding the methods of recruitment and induction for nationals of Member States of the European Union or of another State party to the European Economic Area agreement into a corps, level of employment or a position in the French public sector applies Decree no. 2010-311 of 22 March 2010. The decree recalls the access routes to the French public sector, including internal competition, and the relevant induction methods. This decree brings together all the rules previously established by six distinct decrees relating to secondment induction and to the classification for each of the three public sectors and therefore repeals the latter. Moreover, it replaces the equivalence committee, created in 2002, with a reception committee for nationals of the European Union or of another State party to the European Economic Area agreement into the public sector, which remains responsible for supporting administrations dealing with an application for induction on secondment of a Union national or an application for consideration of services performed in a Member State of the European Union (or similar) other than France, upon admission to a corps, level of employment or position on secondment or by external competition.

This decree breaks new ground in two respects: on the one hand, the field of competence of the committee now includes the recruitment of Union nationals by internal competition. On the other hand, their referrals that were compulsory are now optional, based on the concern for simplification and decentralization of administrative procedures. The present circular is intended to support administrations in the implementation of this reform by reminding them of the rules applicable in the area of recruitment and induction of Union nationals into the French public sector and by stipulating the procedures to be followed, specifically for the assessment of service completed previously in a Member State of the European Union (or similar). This circular also recalls the methods for taking into account services provided by French nationals in a country of the European Union before their entry into the French public sector. The first part of the circular recalls the general rules applicable with respect to recruitment and induction in terms of secondment, internal competition and classification into the entry corps or level of employment. The second part of the circular describes the entry methods and the procedure to be followed, describing in particular a 'six-step process' for assessing the services performed in a Member State, where the administration has to check: the nationality of the applicant, the place of performance of the services in question, the nature of the tasks of the administration, entity or establishment of the Member State of origin, the legal nature of the commitment that linked the Union national to his employer, the level of the category of corps, the employment or the functions practiced with respect to

²⁸ No additional information was provided by France as a reply to the Commission services questionnaire of 19.10.2012. The sources of information in this section are cited below.

the methods of classification in the entry corps or level of employment and, finally, the duration of the services performed taken into account.²⁹

An important judgment was done at the *Administrative Court of Appeal of Nancy*, 5 May 2011, no. 10NC00690, *Fortier vs. Centre national de Gestion*, regarding recognition of professional experience for access to the public sector. The court did not take into account the training of a British doctor from the United Kingdom to decide on his eligibility for a medical post in a public hospital in France.³⁰

²⁹ Report on the Free Movement of Workers in France in 2010-2011, p. 37-38.

³⁰ Annual European Report: Free Movement of Workers in Europe 2011-2012, p.55.

Germany

Assessment of issues of concern in Germany from the Ziller Report³¹

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

Legislation and general regulation of access and employment conditions

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 exercise 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 (*Beamte*) 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.

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.

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.

Issues for free movement of workers in the public sector

Available information reveals two potential issues of compliance with EU law. *First*, 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.

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.

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.

Reforms and Coming Trends

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

³¹ Ziller Report Part II, p. 32-33, 36-38.

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.

Developments 2009-2012³²

There have not been any significant legislative changes or changes in administrative practice since 2009.

The definition of persons deemed to meet the personal requirements for being appointed to civil service posts at national/federal, regional and local levels was extended in 2009. Apart from German nationals and nationals of other European Union Member States, nationals of other countries of the European Economic Area have since then also been eligible to be appointed to civil service posts. There are three countries (Iceland, Liechtenstein and Norway) which are not in the EU but qualify for equal treatment as members of the EEA. Where Germany and the EU also grant other countries, e.g. Switzerland, entitlement to recognition of professional qualifications corresponding to those of EU nationals, those countries' nationals are also eligible to be appointed to civil service posts.

The law on the status of civil servants requires as a condition of appointment German nationality or nationality of another EU Member State. Exceptions are made on the condition that the specific task to be performed requires German nationality. The law refers to the EU-principles of public service, mirroring the European Court of Justice's case-law on Article 45(4) TFEU. General rules on access to the public sector are therefore in line with CJEU case law. Following the decision of the CJEU of 24.05.2011 in the case C-54/08 on the compatibility of section 5 of the German Public Notary Regulation with Art. 51 TFEU it is clear from the judgment that the requirement of German nationality in the Federal Regulation is inapplicable with regard to applicants from other EU member states. It is less clear to what extent the judgment, which is based upon Art. 51 TFEU, is to be applied with regard to regulations of the *Länder* providing for a three-year-employment as assisting notary public in order to apply for a host as a notary public. There are also questions on the implications of the judgment with regard to the exercise of a profession as a notary public in the framework of an employment rather than as a self-employed activity. Since the court has assumed that the activities of a notary public are not connected with the exercise of public authority it must be assumed that the requirement of German nationality cannot be upheld whether in the context of an employment or as a self-employed activity.³³

As regards administrative practice, if necessary because of the tasks involved, a civil service post may be reserved for a German national (§ 7(2) of the Federal Civil Service Act for the national/federal level and § 7(2) of the Civil Servants' Status Act for the regional and local levels). This applies to 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 other public bodies and which therefore 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. It is for the appointing authority to decide in each individual case whether the post to be filled meets these conditions. The federal and *Land* authorities have produced a set of criteria as a recommendation for appointing authorities, according to which posts in, for example, the core area of State activity, military and civil defence, or areas involving fundamental State secrecy and security issues come under the above rules. The classification of posts is based on the focus of the activity involved. Classification not in line with the set of criteria may be justified by particular legal provisions or special circumstances.

As regards judicial practice, there are no reports of any court procedures in connection to access of non nationals to positions in the public sector.

³² Unless otherwise indicated the information in this section is based on the reply of Germany to the Commission services questionnaire of 19.10.2012.

³³ Report on the Free Movement of Workers in Germany in 2011-2012, p. 19-20.

Greece

Assessment of issues of concern in Greece from the Ziller Report³⁴

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

Legislation and general regulation of access and employment conditions

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.

Practice

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.

Special requirements for access to employment and working conditions

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 Act 2413/1996, (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.

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 states in the same way as Greek diplomas.

Issues for free movement of workers in the public sector

Available information reveals three specific issue of compliance with EU law. *First*, 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*, 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 states in the same way as Greek diplomas. Detailed examination of the Presidential decrees reserving certain specialties 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.

³⁴ Ziller Report Part II, p. 50-54.

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.

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.

Reforms and Coming Trends

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.

Developments 2009-2012³⁵

There have not been any significant legislative changes or changes in administrative practice since 2009.

The administrative practice regarding reservation of posts for nationals is through publication of presidential decrees. Approximately 35 presidential decrees have been issued in order to specify the posts in the public sector which involve 'direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities and which therefore require a special relationship of allegiance to the state on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality'. Most of them provide that only persons of Greek nationality can be promoted as General Directors, Directors and Seniors of Sections of the Ministry of Finance, as security guards, policemen, firemen, frontier guards, special guards, rural policemen or civil servants of the Police. But in some cases it is doubtful if the specified posts really imply the exercise of public powers or the responsibility to safeguard the interests of the State. It is provided that only persons of Greek nationality can be appointed to the Ministry of Finance as data base-network-software-hardware specialists (P.D. 8/2002) To the Ministry of Transports and Communications as counselors of the Minister, special collaborators and journalists (P.D. 74/2002), and as civil servants of the Fire Brigade (P.D. 88/2002).³⁶

³⁵ No additional information was provided by Greece as a reply to the Commission services questionnaire of 19.10.2012. The sources of information in this section are cited below.

³⁶ Report on the Free Movement of Workers in Greece in 2011-2012, p. 9-10.

Hungary

Assessment of issues of concern in Hungary from the Ziller Report³⁷

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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.

Seniority

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 special conditions for taking seniority acquired abroad into account for the purpose of recruitment. The duration of services abroad should be taken into account 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.

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.

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

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

³⁷ Ziller Report Part II, p.98, 100-102.

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.

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.

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.

Developments 2009-2012³⁸

Since 1st January 2012 Art. XXIII. of the Fundamental Law of Hungary guarantees equal access of Hungarian citizens to public offices. Art. 15., 17. and 18. of the Fundamental Law of Hungary deal with State administration.

Posts in the public sector are reserved for Hungarian citizens only if the function is subject to national security control or if it is justified by the role of the authority/office/institution. Regulations of Ministers can allow *deviation* from the requirement of citizenship if the candidate has *sufficient knowledge of Hungarian*.

Beside public servants engaged by municipalities and budgetary institutions there are civil servants and those in relation of government officials whose legal status is regulated by different Acts. In the reporting period a significant change has occurred in the regulation of the legal status on civil servants. The uniform ruling of civil service by the former Act XXIII of 1992 has been revoked by Act LVIII of 2010 on the legal status of government officials which entered into force in July 2010. The dual system has been terminated by the Act on the Legal Status of Public officials CXIX of 2011 (Kttv.) entered into force on 1 March 2012. The new Act regulates both the relations of civil servants and government officials. The new regulation *has not introduced any changes* concerning the legal conditions for civil service. The criteria for entering into civil service or relation of government officials are following: *Hungarian citizenship*, or in case of administrators except for important and sensitive functions and the post of a head of unit, the right to *free movement and residence/or having nationality of contracting party of the European Social Charta* and possessing *sufficient knowledge of Hungarian* to be able to perform the function required by the post.

As regards administrative practice, the Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities established an Authority that handles proceedings concerning violation of the requirement of equal treatment. Since the establishment of the Authority, no cases have been lodged in which the complainant has claimed that he or she was not employed in the Hungarian public sector because of his or her nationality. Therefore the Authority has not needed to investigate yet whether rights infringement occurred in conjunction with Article 45 (4) of the Treaty on the Functioning of the European Union.

In Hungary there is *no unified central database on personal data of civil/governmental servants*. As a consequence of that, no information on the number of civil servants and government officials with non-Hungarian nationality can be provided. However, as regards the *central administration* there is a *central personal database* and hence it can be confirmed that there are no non-Hungarian citizens employed in the central administration of Hungary. There are around 10 persons with dual nationality.

As regards judicial practice, no judicial proceedings in relation to the free movement of workers in the public sector have been initiated. There have not been any proceeding before Hungarian courts in which the EU regulation Nr. 492/2011 on free movement of workers should have been applied.

³⁸ Unless otherwise indicated the information in this section is based on the reply of Hungary to the Commission services questionnaire of 19.10.2012.

Ireland

Assessment of issues of concern in Ireland from the Ziller Report³⁹

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

Legislation and general regulation of access and employment conditions

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*. The *Public Service Superannuation (Miscellaneous Act 2004* provides for further relevant regulation.

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.

Special requirements for access to employment and working conditions

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.

Seniority

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

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

³⁹ Ziller Report Part II p. 46-49.

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

Issues for free movement of workers in the public sector

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.

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.

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.

Developments 2009-2012⁴⁰

There have not been any changes in eligibility for Civil Service competitions since 2009 other than to allow access for nationals of Romania and Bulgaria in line with the Government policy announced in July 2012 to lift restrictions on nationals those Member States. In July 2012 the Irish Government decided to cease restrictions on Bulgarian and Romanian nationals. The decision was taken for a number of reasons including the findings of a review which found that the labour market was unlikely to be adversely impacted upon by ceasing restrictions. Other factors included the legal and administrative difficulties in maintaining dual employment permits regime and the fact that the labour market would be opened from January 2014 in line with the Treaties of Accession.

Access to posts in the Irish Civil Service is open to all suitably qualified citizens of the EU and EEA and to non EEA nationals holding the appropriate work permit or immigration status. The only exception is posts in the Irish Diplomatic Service. Ireland in 1967 ratified the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963. These two international treaties codify what is perhaps one of the oldest and most accepted fields of international law, namely the formal relations between states and their official representatives. As is stated in the preamble to the Vienna Convention on Diplomatic Relations, *"peoples of all nations from ancient times have recognised the status of diplomatic agents"*. The effect of these conventions is that appointment of Irish diplomats and diplomatic agents is restricted to Irish nationals.

Nationals of other EU/EEA Member States are now eligible to join An Garda Síochána, the national police service. On 13 March 2012, the Government approved new regulations which would allow senior positions within An Garda Síochána to be filled by officers of the Police Service of Northern Ireland ('PSNI') on a permanent basis. Prior to this, PSNI officers could only be seconded to An Garda Síochána. These new regulations further implement the Inter-governmental Agreement on Policing Cooperation which was signed almost 10 years ago and has been implemented on a progressive basis. Under these new regulations, those in the PSNI who are ranked at Inspector level or higher are entitled to compete for senior positions in An Garda Síochána (<http://www.justice.ie/en/JELR/Pages/PR12000060>).⁴¹

There is no record of litigation or court proceedings regarding access of non nationals to employment in the public sector.

⁴⁰ Unless otherwise indicated the information in this section is based on the reply of Ireland to the Commission services questionnaire of 19.10.2012.

⁴¹ Report on the Free Movement of Workers in Ireland in 2011-2012, p. 19.

Italy

Assessment of issues of concern in Italy from the Ziller Report⁴²

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

Legislation and general regulation of access and employment conditions

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. 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. **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.

Special requirements for access to employment and working conditions

Professional experience

There are no general rules on the recognition of professional experience and seniority. Collective agreements mentioned above 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.

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.

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.

Issues for free movement of workers in the public sector

⁴² Ziller Report Part II, p.70-71,73-75

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 above, 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.

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.

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 easier 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.

Developments 2009-2012⁴³

With Law 234 of 24 December 2012 on "General regulations on the participation of Italy in training and on the implementation of legislation and EU policies" Art. 2 of Legislative Decree 165 of 30 March 2001 was amended. In this article it is foreseen that Public Administrations should foster and encourage their staff to have a work experience in European Institutions, international organisations as well as in Member States and in other States with which Italy maintains collaborative relations, in order to ensure an international exchange of administrative experiences and to strengthen the link between the sending and the hosting administrations. Art. 38 of the above-mentioned Legislative Decree 165/01, on access to employment in the public sector on the part of nationals from EU Member States, has however remained unchanged. Under this provision EU citizens can access jobs in the public sector, subject to limitations associated with the exercise of public power and national interest.

As regards administrative practice, there are specialised procedures regarding the issue and any claims are dealt with through legal avenues.

As regards judicial practice, the law constantly reiterates the defence of the principle of free movement in the EU, often referring to this principle in judgments of acceptance or rejection. In the last two years there have been some claims concerning unlawful infringement of the principle of free movement of workers, mainly in the education sector. The Supreme Court has expressed its opinion on the claims, underlining the fact that the denial of admission to employment or the lack of recognition of qualifications or skills and of former curricular activities acquired in other Member States, constituted a violation of Union law on the free movement of workers. Referring also to the case law of the Court of Justice of the European Union, it affirms the principle according to which the breach of Art. 45 TFEU does not configure only in the case of overt discrimination on grounds of nationality – as regards the free movement of workers – but also in those cases of disguised violations that, on the basis of other criteria, however reach the same result.

⁴³ Unless otherwise indicated the information in this section is based on the reply of Italy to the Commission services questionnaire of 19.10.2012

Latvia

Assessment of issues of concern in Latvia from the Ziller Report⁴⁴

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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.

Seniority

The comments on professional experience apply to seniority as well.

Language requirements

Language requirements for access to the public sector are provided by *Official Language Law* and Regulation of Cabinet of Ministers Regulation No 733 regarding the Amount of the Knowledge of the Official Language and the Procedures for Examination of the Knowledge of the Official Language for the Performance of Professional Duties and Duties of Office, Receipt of the Permanent Residence Permit and Obtaining of the Status of a Long-term Resident of the European Union and the State Fee for Examination of the Knowledge of the Official Language. 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 have a certain defined level of proficiency 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.

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

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 be faced by the adoption of specific laws or regulation. However, as special proactive effort in making

⁴⁴ Ziller Report Part II, p. 82, 84-85.

known how the right to free movement of workers applies in the Latvian public sector would be necessary in order to ensure full compliance.

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, but does not prove that proportionality is not taken into account

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.

Developments 2009-2012⁴⁵

There have not been any significant legislative changes or changes in administrative practices since 2009.

Posts reserved exceptionally for Latvian citizens according to the special laws remain unchanged. The posts are those of civil servants, judges, court bailiffs, notaries, prosecutors, officials of the system of interior and place of imprisonment, police officers, officers of state security institutions, fire fighters, border guards, national guards, civil employees in military service and soldiers, civil servants or employees of the State Revenue Office, servants and officials of the diplomatic and consular services and executives of sports federations.⁴⁶

As a consequence of the global financial crisis, the Latvian government slashed public spending, made redundant 24% of its civil servants and reduced salaries of those remaining. On January 27, 2009, the Cabinet of Ministers approved the instruction "Procedures for Functional Audit Planning and Performance in Public Administration Institutions". The goal of the functional audit in public administration institutions was to ensure effectiveness of decisions about decrease in number of employees in public administration institutions and their expenditure. The audit tasks were to evaluate usefulness of functions of the institutions, their rationality and efficiency, as well as to prevent overlapping and doubling of functions and optimize structure and number of employees in public administration institutions thus increasing their productivity. The goal of the government reforms was to reorganize the government and to establish efficient and economic public administration through revision of institutional functions handing over functions of separate institutions to ministries and merging several institutions. The above mentioned reforms in the public sector were made with the main aim to ensure a well functioning public administration in the period of limited financing from 2008 to 2012. Facilitation of the free movement of workers in the public sector, was not one of the reform priorities during this period.

⁴⁵ Unless otherwise indicated the information in this section is based on the reply of Latvia to the Commission services questionnaire of 19.10.2012.

⁴⁶ Report on the Free Movement of Workers in Latvia in 2011-2012, p. 20-21.

Lithuania

Assessment of issues of concern in Lithuania from the Ziller Report⁴⁷

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working condition

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 above there are no legal provisions on the recognition of previous professional experience for the public service.

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.

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 practicing the profession in the Republic of Lithuania". 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.

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

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

⁴⁷ Ziller Report Part II, p.86, 89-90.

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.

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.

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.

Developments 2009-2012⁴⁸

On 21 December 2011 the Law on Public Service was amended with regards to the Lithuanian language of exams for access to public service. There is an explicit Lithuanian language requirement following from paragraph 2 of Article 9(1) of the Law on Public Service, which mentions requirements for admission to public service. The law does not specify proficiency of language level, but reference could be made to Lithuanian language exam, which is mandatory when requesting citizenship of Lithuania or EU long-term residence permit. The level of proficiency for language exam is based on European Council A2 level, which means that the person understands short and clearly structured sentences, is able to speak about concrete known issues, able to fill simple forms of documents or write informal communication.⁴⁹

As regards administrative practice, the Lithuanian civil service includes both state (civil) servants and employees working by employment contracts. The management system for human resources is decentralized, therefore there is no database regarding those state servants and employees working by employment contracts, who are working under rules of free employees' movement in public sector.

The Ministry of Justice of the Republic of Lithuania has never been involved in administrative or legal procedures, which include questions related to the access of citizens of other European Union member states to become employed in the public sector in Lithuania. The citizenship requirement in Lithuanian laws is established not only regarding civil servants, but regarding prosecutors and judges as well. Activities of these officials are closely related to the implementation of the official authority of the state, participation in enforcing duties, regulated by public laws, and also have a function to ensure state interests. The officials mentioned above are obliged to take an oath to the Republic in Lithuania before acceding.

⁴⁸ Unless otherwise indicated the information in this section is based on the reply of Lithuania to the Commission services questionnaire of 19.10.2012.

⁴⁹ Report on the Free Movement of Workers in Lithuania in 2011-2012, p. 26.

Luxembourg

Assessment of issues of concern in Luxembourg from the Ziller Report⁵⁰

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

Legislation and general regulation of access and employment conditions

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. 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.

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.

Special requirements for access to employment and working conditions

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.

Issues for free movement of workers in the public sector

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.

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.

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.

⁵⁰ Ziller Report Part II, p. 92-93, 95-96.

Reforms and Coming Trends

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.

Developments 2009-2012⁵¹

As regards legislative changes, with the coming into force on 1 January 2010 of the Law of 18 December 2009 which amended the general status of civil servants, the principle for recruiting other EU citizens as civil servants was inversed. As a general rule, EU citizens may now be employed as Luxembourg civil servants. Solely by exception, only Luxembourg citizens have access to positions which involve direct or indirect exercise of public authority, or which safeguard State interests or that of other public legal entities.

A regulation of 27 February 2011 now opens positions as communal employees (*employé communal*,) including a direct or indirect participation in the exercise of public authority, to EU citizens, thus abolishing the former nationality requirement also at municipality level. The position of a State employee (*employé de l'Etat*) is open to EU citizens since the coming into force of law of 18 December 2009, but still requires adequate knowledge of the three official languages.

As regards administrative practice, a Grand-Ducal Regulation of 12 May 2010 lists the positions that are considered to belong to sectors and activities relating to the State's exercise of authority. Newspaper advertisements still expressly request applicants to furnish their full 11-digit State registration/identification number, which could be seen as an indirect discrimination against EU citizens who live abroad and who may not be registered in Luxembourg, but apply for a position as a Luxembourg civil servant. However more and more positions are now offered to non-Luxembourgers by those advertisements. Sometimes it is not clear whether the jobs proposed for Luxembourgers really match the list of exclusive positions that are reserved for Luxembourgers. Therefore, the list of reserved positions must be monitored and checked with the law and the Grand-Ducal regulation on a longer term. It is too early to assess whether the progress that has been achieved so far is significant enough, due to the limited time of application of the new law.⁵²

⁵¹ No additional information was provided by Luxembourg as a reply to the Commission services questionnaire of 19.10.2012. The sources of information in this section are cited below.

⁵² Report on the Free Movement of Workers in Luxembourg in 2010-2011, p. 13-14.

Malta

Assessment of issues of concern in Malta from the Ziller Report⁵³

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

Legislation and general regulation of access and employment conditions

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. The legislation and the non-legally binding *Public Service Management Code* mentioned under 2.1 are applicable for access and employment conditions.

Practice

The *Public Service Commission*, 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.

Special requirements for access to employment and working condition

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.

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.

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

⁵³ Ziller Report Part II, p. 104-108.

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.

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

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.

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.

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*.

Developments 2009-2012⁵⁴

As regards legislation, in 2009, the Public Administration Act (Chapter 497 of the Laws of Malta - <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8963&l=1>) was enacted. Article 49(f) thereof empowers the Prime Minister to make regulations to provide for, *inter alia*, 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 may be reserved for Maltese nationals. Article 49(f), which gave legal form to the already established practice in Maltese public administration, reflects Malta's treaty obligations vis-à-vis free movement of workers in so far as public administration is concerned.

Legal Notice 315/2011 entitled "Nationality Requirements for Appointments in Public Administration Regulations", (<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=22450&l=1>), published on 2nd August 2011, was issued in terms of article 49(f) of the Public Administration Act. Sub-regulation 5(1) empowers the Principal Permanent Secretary (Head of the Public Administration) to issue directives and guidelines in terms of the Public Administration Act to ministries, departments, agencies, government entities and boards or commissions, to reserve for Maltese nationals any **posts involving the exercise of public authority and the safeguarding of the general interests of the State**. Examples of the posts which may be reserved for Maltese nationals are given within sub-regulation 5(1) at paragraphs (a) to (h).

As regards administrative practice Sub-regulations (2) and (3) of regulation 5 of the "Nationality Requirements for Appointments in Public Administration Regulations", empower the Principal Permanent Secretary to establish procedures to determine whether or not vacancies in posts to which sub-regulation (1) applies should be reserved for Maltese nationals.

Eligibility requirements, including those relating to nationality, are set out in the official text of each call for applications as published in the Malta Government Gazette. When drafting a call for applications, the responsible Ministry is required to frame the eligibility parameters relating to nationality according to whether or not the Ministry is of the view that the post should be reserved for Maltese nationals in terms of the provisions of paragraphs (a) to (h) of sub-regulation 5(1).

Up to 15th November 2012, all calls for applications in the Public Service were issued centrally through the Public Service Commission (PSC)⁵⁵ following verification by the Office of the Prime Minister (OPM). The administrative practice adopted at this time was for Ministries to sign a declaration, when submitting draft calls for applications for verification by OPM and subsequent issue by the PSC, to the effect that the provisions of LN 315/2011 had been taken into consideration in the drafting of the call.

Authority to issue calls for applications was delegated to Ministries with effect from 15th November 2012. Hence, responsibility and accountability for the reservation of posts for Maltese nationals now falls under the remit of the Permanent Secretary in each Ministry, who is bound to act according to the provisions of LN 315/2012.

Maltese nationality restrictions are adopted by exception, and a number of EU citizens as well as third country nationals are already employed in the Public Service. All recruitment is open to Maltese and EU nationals, subject to the

⁵⁴ Unless otherwise indicated the information in this section is based on the reply of Malta to the Commission services questionnaire of 19.10.2012.

⁵⁵ The Public Service Commission is an autonomous body appointed in terms of article 109 of the Constitution of Malta. It regulates staffing and discipline in the Public Service of Malta.

exceptions stipulated under article 45(4) TFEU, in accordance with the criteria set out by the jurisprudence of the European Court of Justice, namely: posts which involve the exercise of powers conferred by public law; and posts which involve responsibility for the safeguarding of the general interest of the State. A list of posts which meet these criteria has been drawn up centrally and determines when a Maltese-only nationality requirement is inserted in a call for applications. These are now reflected in article 5(1) of the Nationality Requirements for Appointments in Public Administration Regulations (2011) and include:

- a) 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 any Permanent Secretary;
- b) posts involving the preparation of expert advice in the field of prosecution of offences or lawmaking, and posts entailing responsibility for advisory constitutional bodies;
- c) posts involving the sovereignty of the State, including diplomatic and foreign representation;
- d) posts in the Office of the Prime Minister and the Ministries of Finance, Justice, Home Affairs and Foreign Affairs;
- e) posts within departments charged with the protection of the economic interests of the State, including tax authorities;
- f) positions in the Senior Executive Service;
- g) posts in the disciplined forces and offices responsible for defence matters; and
- h) posts in the security services and in the field of civil protection and defence.⁵⁶

In 2012 there were 79 vacancies of reserved posts in Malta (32 of them concerned the position of Correctional Officer). Applicants who are deemed not eligible for reserved posts on account of their nationality, and who disagree with such a decision, may submit their representations to the PSC, in line with the general principle, emanating from the Public Service Commission Regulations (<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&item-id=8969&l=1>), whereby applicants for vacancies in the Public Service are entitled to contest selection decisions before the Commission. There are no such pending cases.

⁵⁶ Report on the Free Movement of Workers in Malta in 2011-2012, p. 12-14.

The Netherlands

Assessment of issues of concern in the Netherlands from the Ziller Report⁵⁷

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

Legislation and general regulation of access and employment conditions

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. There are no general rules on e.g. professional experience and seniority.

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.

Conditions for employment and access to advantages and benefits linked to employment

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 know whether experience abroad is treated in the same way as experience in the Netherlands.

Seniority

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.

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.

Issues for free movement of workers in the public sector

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.

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.

⁵⁷ Ziller Report Part II p.110-111, 112-114.

More generally, the lack of statistics on the number of posts reserved to nationals and 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.

Reforms and Coming Trends

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.

Developments from 2009-2012⁵⁸

The posts reserved for nationals in the public sector are defined in Article 125e of the Dutch Civil Service Act. According to this article only Dutch citizens may be appointed in functions of confidence. This has not been changed since the last questionnaire of 2009. There are no reforms pending or planned on the issue of posts reserved for nationals.

A Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in June 2012. However, the government has promised to introduce a new Bill that will reestablish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States only. The new Dutch act mentioned above includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary. On 1 December 2011 the CJEU decided in the infringement procedure against the Netherlands on this issue in accordance with the other earlier decided cases. A nationality requirement is not allowed.⁵⁹

As regards administrative practice, there is no statistical information available about the number of posts reserved to nationals.

As regards judicial practice, there are no reports of court proceeding regarding access of non nationals to employment in the public sector.

⁵⁸ Unless otherwise indicated the information in this section is based on the reply of The Netherlands to the Commission services questionnaire of 19.10.2012.

⁵⁹ Annual European Report: Free Movement of Workers in Europe 2011-2012, p.54.

Poland

Assessment of issues of concern in Poland from the Ziller Report⁶⁰

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

Legislation and general regulation of access and employment conditions

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.

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 information about the implementation of free movement of workers in the public sector.

Special requirements for access to employment and working conditions

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...).

Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience.

Language requirements

According to Art. 5 of the *Act of 21 November 2008 on Civil Service*, a non-Polish national may be employed in particular positions 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.

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

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

⁶⁰ Ziller Report Part II, p. 122, 124-126.

EU Member States. This is not as such a breach of EU law, but the absence of legislative or regulatory provisions should be compensated 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.

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.

Reforms and Coming Trends

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.

Development 2009-2012⁶¹

The administrative practice regarding posts reserved for nationals is based on the duty of implementing Article 5 of the Act on Civil Service. The role lies with general directors of the offices and managers of the offices implementing tasks of the general director. Before providing the advertisement on recruitment that extends to non nationals, they are obliged to carry out an analysis of the post in terms of tasks implemented and rights of the employee, and to assess, if a person who does not have Polish citizenship may apply for the given post. This analysis is carried out at level of the office, which is interested in employing a person, taking into account the premises following the provisions of Act on Civil Service. The effect of the analysis is to establish whether the person who does not have Polish citizenship may apply for a given post. In case of a decision that a person who does not have Polish citizenship cannot apply for a post, the recruitment advertisement, in which one of the requirements is Polish citizenship will be published. However, when allowed the office is obliged to address a request to the Head of Civil Service, which is subject to the analysis which should guarantee that the statutory conditions referred to in Article 5(2) of the Act. If the Head of Civil Service agrees to indicate a given post, the advertisement will be published including information that pursuant to Article 5 of the Act on Civil Service people who do not have Polish citizenship may also apply for the post. Provisions of the Act do not provide the right to appeal against the decision of the Head of Civil Service in this respect. Situations, when the Head of Civil Service does not express consent for indication of posts are exceptional and concern only posts where the tasks performed and the range of rights granted fully exhaust the premises referred to in Article 5(2) of Act on Civil Service. It happens most often in case of posts in the tax administration, in which the most of the tasks performed are related to the protection of general interests of the State (in the field of finances) and to governance (against taxpayers). Additional limitations in access to posts in civil service resulting from the provisions on classified information protection in accordance with which people who do not have Polish citizenship cannot be allowed to work or to serve in posts or perform tasks which involve classified information with the classification "secret" or "top secret".

Due to the diverse nature of posts and tasks performed in the government administration it is not possible to create one central registry of posts which may be applied for also by people who do not have Polish citizenship, or posts reserved for Polish citizens only on the basis of the name of a given post or office, in which it functions.

A discernible increase of offices requesting the Head of Civil Service for indication of posts, for which foreigners may apply is a result of actions taken in 2009-2012 by the Head of Civil Service consisting in a consequent raising of awareness among the general directors of the offices and managers of the offices implementing tasks of the general director in terms of need for implementation of provisions of the Act on Civil Service and rules of free movement of employees of public sector within the EU. Under these actions general directors of the offices received three statements on the need for application of Article 5 of the Act on Civil Service. The issue of application of Article 5 of the Act was also presented in the Forum for Directors General, which is the consultant and advisory body of the Head of Civil Service and also in "Przegląd Służby Cywilnej" – electronic bimonthly of civil service published by the Head of Civil Service. Simultaneously, a mechanism was introduced for the publicly available Internet advertisement base on job vacancies in the civil service that enables sorting of advertisements on the basis of availability for foreigners criterion. By marking the appropriate options, it enables one to display only these advertisements, for which apart from Polish citizens also people who do not have Polish citizenship may apply. It should be noted that the interest of foreigners in posts in the civil service, which were indicated as posts, for which people without Polish citizenship may apply is scanty. Since the introduction of the provisions that permit employment of people who do not have Polish citizenship in the

⁶¹ Unless otherwise indicated the information in this section is based on the reply of Poland to the Commission services questionnaire of 19.10.2012.

civil service, Only five candidates have submitted applications in response to the advertisements directed to foreigners pursuant to Article 5 of the Act on Civil Service. In the recruitment procedures in which people without Polish citizenship participated, none of these people was employed.

The posts that require a Polish citizenship, which fall into the exceptions referred to in Article 45(4) and Article 51 of the Treaty, are judges, assistant judges, referendaries, prosecutors, jurors, probation officers, bailiffs, Civil Service employees and Prison Service employees. The justification for keeping the citizenship requirement calls for an analysis of individual tasks performed by a representative of a given profession. The justification for this limitation concerns only the most significant elements of actions performed by people of these professions.

Since the Act on Civil Service came into force, the Head of Civil Service has not received any complaints regarding the application of Article 5 of the Act on Civil Service.

As regards judicial practice, the Civil Service Department of the Chancellery of the Prime Minister provided information about one case resolved by the common court on application of Article 5 of the Act on Civil Service. By lawsuit of 31 May 2010 against the Ministry of Culture and National Heritage in Warsaw a claimant, an EU citizen, requested compensation of 7,902 PLN for discrimination in employment. The claimant applied for a job in the Ministry of Culture and National Heritage for a post of a specialist for cooperation with the European Union in International Cooperation Department. He fulfilled all the employment criteria, except for one, he could not show a document confirming his Polish citizenship. Therefore, he was not allowed to participate in the recruitment procedure. Referring to Article 32 of the Constitution of the Republic of Poland and the Labour Code regulations, the claimant complained that the defendant violated the prohibition of unequal treatment against them and violated free movement of employees specified in Article 45 of TFEU. In response to the lawsuit the defendant, Ministry of Culture and National Heritage in Warsaw, made a request for full dismissal of the action. After examination of the case on 2 November 2010, the District Court decided for compensation of 3,951 PLN to the complainant for violation of the prohibition of unequal treatment.

Portugal

Assessment of issues of concern in Portugal from the Ziller Report⁶²

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

Legislation and general regulation of access and employment conditions

Legal sources

Art. 15 of the Constitution is devoted to “*Foreigners, stateless persons, and European Citizens*”; Art. 47 to the “*freedom to choose 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. 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.

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.

Special requirements for access to employment and working condition

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 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*).

Seniority

The indications given above 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.

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

⁶² Ziller Report Part II, p. 128, 131-133.

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 assess whether the principle of proportionality is duly taken into account in applying language requirements.

Issues for free movement of workers in the public sector

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.

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.

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. 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.

Developments 2009-2012⁶³

There are no legislative changes reported during the period.

One aspect of the administrative practice on access to public employment is competitions. Some competitions 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 Article 22(1)(a) of Decree-Law 139-A/90 (Career Statutes for nursery school, teachers for primary and secondary school levels), which expressly foresees EU citizens' access to the teaching profession in State schools. In those 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. However, open public competitions usually repeat Article 8 of Law 12-A/2008, of 27 February, which demands, as an admission requirement, 'the Portuguese nationality of the applicants, except when exempted by the Constitution, by a specific legislation or by an international convention' [see, for instance the public job offer for a technical job in the Prison Services, published in the Official Journal (*Diário da República*) of 21 March 2012, p. 10412]. This is a clear case of a competition that should be open to both Portuguese and EU citizens. However, the announcement only expressly refers the Portuguese nationality. The lack of a direct reference to EU citizens may lead the administration to follow the interpretation that the post is reserved to Portuguese nationals. For other competitions, there are no express legal provisions concerning linguistic abilities, although some demand foreign linguistic knowledge for the proper fulfillment of the job duties. For instance, the public job offer for a technical job in the Portuguese Environmental Agency, published in the Official Journal (*Diário da República*), of 21 April 2011, p. 18018, mentions proficiency in the English language as a preferential admission requirement.

Competitions that give access to a training or to a post in the public sector are very common in fields that are not open to EU citizens, such as police forces and judicial bodies. Due to the fact that the fields of activity of the public sector opened to EU citizens are predominantly technical (mainly, teachers for primary and secondary school levels), Portuguese authorities generally take into consideration the principle of the *Burbaud* judgement, according to which a EU worker who is already fully qualified in the field of activity concerned does not have to participate in a competition procedure which gives access to a training and afterwards to a post in the public sector. In 2011 and 2012, budget cuts severely restricted access to the public sector in Portugal. During this period, the vast majority of competitions were opened only to applicants having already a permanent work relation with the Portuguese State. These internal competitions do not allow applications from public servants based in other Member States.

⁶³ No additional information was provided by Portugal as a reply to the Commission services questionnaire of 19.10.2012. The sources of information in this section are cited below.

An examination of the case-law databases of the Administrative Courts revealed that in 2011 and 2012 there was no case-law pertaining to nationality condition for access to the public sector.⁶⁴

⁶⁴ Report on the Free Movement of Workers in Portugal in 2011-2012, p. 16-17.

Romania

Assessment of issues of concern in Romania from the Ziller Report⁶⁵

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

Legislation and general regulation of access and employment conditions

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” and “in the conditions of accession of Romania to the European Union, EU citizens who meet the organic law have the right to elect and be elected to local government authorities”, under **paragraph (4)** of the same article of the Constitution. Other provisions relevant to employment in the public sector: Law no. 7/2006 on the Statute of parliamentary civil servants, with subsequent amendments and additions, 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 Law no. 53/2003 - Labour Code, as republished, subsequently modified and completed, applies to public sector employees under labour contract.

Practice

According to the Government Decision no. 500 from 27th of May, 2011, regarding the general registry of employees, the employment of a person complies with the provisions of Law no. 53/2003 – the Labour Code, as republished, only by concluding an labour individual contract. On its basis, the natural person as an employee, must work for and under the authority of an employer, natural or legal person, on the basis of a remuneration called wage.

Each employer has the obligation to set up and send to the territorial labour inspectorate a general registry of employers and to present it to the labour inspectors, by request. This document is elaborated in an electronic form. The Labour Inspectorate ensures the access of public authorities and institutions to the data from the registry, according to specific conditions, work procedures and access limits to the information established by the Labour Inspectorates by means of cooperation protocols concluded with the concerned institutions and authorities.. There are no specific tools monitoring only EU citizens working in the public sector.

Special requirements for access to employment and working conditions

Professional experience

According to the Law 188/1999 on the status of civil servants, as republished, 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 year”. 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.

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 above, or in case a person does not own a labour book, at request by the legal

⁶⁵ Ziller Report Part II, p. 134, 136-138.

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.

Language requirements

According to Art. 54 of the *Law 188/1999 on the status of civil servants*, 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.

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

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 abovementioned 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. 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. In the Romanian public sector two types of personnel can be distinguished: civil servants (large majority) and contractual employees. The position of these contractual employees is governed by general labour legislation and is open for EU citizens.

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.

Development 2009-2012⁶⁶

The basic law, no. 188/1999, as republished, governing access to public service has not been reformed during the period to the effect that the conditions for access to employment in the public sector have been changed. An additional requirement for access to public positions was added by article 72 and article 247 of Law no. 187/2012, as of February 1, 2014 (date of entry into force of Law no. 286/2009 on the Criminal Code). Article 54, paragraph h) is amended and now requires that a public servant "*has not been convicted of a crime against humanity, against the State or against authority, offenses of corruption and service, offenses impeding the administration of justice, offenses of forgery or an intentional offenses which would make it incompatible with public office*".

In the context where the reform of public administration is a central point in taking measures whose goal is to bring stability to the socio-economic situation and to improve and complete the legislative and institutional framework, in order to bring efficiency in public administrative activities, including in everything that is related to the decentralization of public administration, based mainly on decentralization, legislative changes in this field have occurred, as follows:

LAW NO. 188/1999 on the Status of civil servants, as republished. . In the context of adapting to the needs of the society and to the demands of the European legal framework in this field, the Status of public clerks has been changed and this process continues. Moreover, the legislation part is continuously enlarged and implemented in the field of public service through numberless normative documents.

The following acts have been modified:

- **Government Emergency Ordinance no.105/2009** on some measures relating to public office;
- **Law no. 41/2010** to reject the Government Emergency Ordinance no. 37/2009 regarding some measures to improve public administration activities;
- **Law no. 49** as of 19th of March 2010 on certain measures in the area of employment and social security;

⁶⁶ Unless otherwise indicated the information in this section is based on the reply of Romania to the Commission services questionnaire of 19.10.2012.

- **Law no. 140/2010** for the amendment and completion of Law no. 188/1999 regarding the Status of civil servants (published in the Official Gazette, Part I, No. 471 of July 8th, 2010);
- **Law no. 155/2010** on the organization and functioning of the local police;
- **Law no. 264/2010** approving Government Emergency Ordinance no. 105/2009 regarding some measures in public office, and to strengthen management capacity at decentralized public services of ministries and other central government bodies of territorial-administrative units and other public services, and for regulating measures on cabinet officials from central and local public administration, office of prefect and local elected office;
- **Law no. 284/2010** – Law regarding the framework of unitary remuneration of personnel paid from public funds;
- **Law no. 76/2012** for the enforcement of Law 134/2010 regarding the Civil Procedure Code
The Law No. 76/2012 is intended to harmonize the existing civil procedure laws with the provisions of the new Civil Procedure Code, and to settle the conflict of laws arising out of the entry into force thereof;
- **Government Emergency Ordinance no. 44/2012** regarding the amendment of article 81 from Law no. 76/2012 for the enforcement of Law 134/2010 regarding the Civil Procedure Code (published in the Official Gazette no. 606 of 23 August 2012);
- **Law No.132 of 18.07.2012** approving Government Emergency Ordinance no. 16/2012 regarding some measures to reorganize the public central government;
- **Law No. 187/2012** for the enforcement of the law. 286/2009 concerning the penal code was published in the Official Gazette, part I, no. 757, dated 12 November 2012;
- **Government Emergency Ordinance No. 4/2013** amending Law No. 76/2012 for the enforcement of the Law. 134/2010 - Code of Civil Procedure, as well as for the modification and completion of some legal acts related to - it was published in the Official Gazette, part I, no. 68, of 31 January 2013;
- **Law no. 2/2013** on certain measures for relieving courts and to prepare the implementation of Law no. 134/2010 regarding the Code of Civil Procedure.

Slovakia

Assessment of issues of concern in Slovakia from the Ziller Report⁶⁷

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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.

Seniority

Seniority is taken into account s in the same way as professional experience.

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.

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

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*, where 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.

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.

⁶⁷ Ziller Report Part II p. 145-149.

Reforms and Coming Trends

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.

Developments 2009-2012⁶⁸

There have not been any legislative changes since 2009, an amendment of Regulation No. 410/2009 Coll. designating the sectors of civil service is however currently being prepared.

The scope of civil service positions which are reserved for citizens of the Slovak Republic is defined by Regulation of the Government of the SR No. 411/2009 Coll. This adopted regulation stipulates the sectors tied to citizenship of the Slovak Republic but reduces the scope of such sectors considerably. The employment in the public service sector is governed in accordance with the Labour Code (Law No. 311/2001 Coll.).

The Sectors in which positions are reserved for Slovak citizens are the following:

Civil Sectors:

- a)
 - Justice
 - Defence
 - Industrial property
 - Interior
 - Protection of personal data / Privacy policy
- b)
 - the Supreme Audit Office of the Slovak Republic,
 - the Ministry of Foreign Affairs of the Slovak Republic,
 - the General Prosecutor's Office, regional prosecutor's offices, Higher Military Prosecutor's Office and district prosecutor's offices
 - the Office of the Government of the Slovak Republic
- c) civil service positions of special importance
- d) civil services for which authorization is required for becoming familiar with classified information

Relating to sectors listed under part a) and b) the general precondition of Slovak citizenship is required due to specific positions, competences, character of the duties performed in the area of civil service.

The condition of Slovak nationality must be met for employment in the Civil Service of the Armed Forces and other Civil Services enforcing the public order and observing of rules. That is, court guards and prison warden's corps, the Railway Police, the Fire and Rescue Service, the Mountain Rescue Service, the Police Force, the Civil Service of members of the diplomatic body, justice and tax bodies. Notaries can only be Slovak citizens.⁶⁹

There is a language requirement that applies to soldiers. It is embodied in Article 13 (1) of the act No. 346/2005 on Civil Service of Professional Soldiers of Armed Forces of Slovak Republic. According to this provision, those speaking Slovak may be accepted as professional soldiers. Citizens of other EU countries are allowed to enter armed forces, provided that he/she has permanent residence in Slovakia and speaks Slovak.⁷⁰

As regards administrative practice, fulfilment of the legislative tasks and the supervision of the implementation of Act No. 400/2009 Coll. is performed by the Ministry of Labour, Social Affairs and Family, in particular the Civil Service Department in the competency of the Labour Section. Other duties stipulated by the law are handled at the level of the service offices of individual departments and other state administration bodies.

In the case of employment in the public sector of the Slovak Republic, migrant workers – nationals of EU Member States as well as the EEA countries and Swiss Confederation – are treated in the same way as nationals of the Slovak Republic whether concerning access to employment, working conditions or tax and social benefits. The scope of employment of EU/EEA nationals in the public sector is low due to lower wage conditions in comparison to the wage conditions in the private sector.

As regards judicial practice, there is no information about civil proceedings or citizens litigating in courts in relation to restrictions of access to the civil service in the Slovak Republic.

⁶⁸ Unless otherwise indicated the information in this section is based on the reply of Slovakia to the Commission services questionnaire of 19.10.2012.

⁶⁹ Report on the Free Movement of Workers in Slovakia in 2011-2012, p. 13-14.

⁷⁰ *Ibid.*

Slovenia

Assessment of issues of concern in Slovenia from the Ziller Report⁷¹

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

Legislation and general regulation of access and employment conditions

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. It 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.

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 particularly helpful in getting information about the implementation of free movement of workers in the public sector.

Special requirements for access to employment and working conditions

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).

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 above. 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

⁷¹ Ziller Report Part II, p. 139-143.

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).

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.

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

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.

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.

Reforms and Coming Trends

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.

Development 2009-2012⁷²

There have not been any legislative changes or changes in the administrative practice that would have an impact on the free movement of workers in the public sector since 2009. Furthermore, there is no relevant judicial practice in this field.

⁷² Unless otherwise indicated the information in this section is based on the reply of Slovenia to the Commission services questionnaire of 19.10.2012.

Spain

Assessment of issues of concern in Spain from the Ziller Report⁷³

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

Legislation and general regulation of access and employment conditions

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.

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.

Special requirements for access to employment and working conditions

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".

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.

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.

⁷³ Ziller Report Part II, p. 56-57, 59-61.

Issues for free movement of workers in the public sector

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.

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 (*Castilian*). This does not enable to assess whether the practice complies with the principle of proportionality.

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.

Reforms and Coming Trends

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.

Developments 2009-2012⁷⁴

There have not been any legislative changes during this period.

As regards administrative practice, for the opening up of the Public service to the citizens of other EU Member States, the National Institute of Public Administration (INAP) manages the selection procedures for staff in the following categories and grades: **Through boards:** Senior Civil Service Administrators; Senior Information Systems and Technologies Staff for Central Government; Technical Management Grades in Autonomous bodies. **Managed by the Permanent Selection Committee:** Civil Service Management Staff; Systems and Informatics Management Staff of Central Government; Management Grades in Independent Bodies; General Administrative Staff for Central Government; Informatics Technical Services Staff of Central Government; General Services Staff of Central Government. The requirements for entering the selection procedures managed by the Permanent Selection Committee of INAP and applying for staff positions in the Ministry of Finance and Public Authorities, i.e. as Senior Civil Service Administrators and Information Systems and Technologies Staff for Central Government and Technical Management Grades in Autonomous Bodies, are regulated by Order PRE/2061/2009 of July 23 which modifies Order APU/3416/2007 setting out the common standards governing selection procedures for entry or access to general central government grades.

The positions and grades to which only Spanish citizens have access under paragraph 1(2) include, by way of example, in the area of central government: Technical Engineers in Navy Arsenal and Navy Arsenal Officials, both attached to the Ministry of Defence; Officials of the Customs Surveillance Service and the Technical Staff of the Customs Surveillance Service attached to the State Tax Administration Agency, the Higher Grades of Technical Nuclear Safety and Radiological Protection Staff of the Nuclear Safety Council and other positions.

Royal Decrees 1694/2012, of December 21 (Official Gazette of December 29), and 218/2013 of March 22 (Official Gazette of March 22), whereby the public offer of employment in the State Administration for 2012 and 2013 was approved with 345 posts distributed in free access posts and those with internal promotion and those for professional staff and those for auxiliary staff. The announcement does not refer to the requisite of nationality to access these posts. This Royal Decree was implemented by Order PRE/1740/2010, of June 21, whereby selective processes for joining or accessing Corps and Ranks of the State Administration, and its implementation is entrusted to the Permanent Selection Commission (Official State Gazette 30.6.2010). Despite the fact that there is no reference to nationality, the limitations included in Royal Decree 543/2001 must be taken into account. Royal Decree 543/2001 of 18 May listed the State public service post not open to EU citizens: Diplomatic corps, Armed forces, Judiciary, State economists, State tax authorities, prison civil servants, etc. Furthermore, different Decrees of the Autonomous Communities (i.e, Madrid) added to their own list the post of firemen or forestall agents and they set up their post. In relation to access to the

⁷⁴ Unless otherwise indicated the information in this section is based on the reply of Spain to the Commission services questionnaire of 19.10.2012.

Armed Forces, *Royal Decree 35/2010, of January 15*, was approved, whereby the Regulations for joining, promotion and the organisation of training in the Armed Forces was approved, article 15.1 requires Spanish nationality but it again permits that nationals from Spanish American countries can access in the terms stipulated in its section 2 when it establishes that, “those who do not have Spanish nationality but are the nationals of countries from Annex 1 determined in the announcement can participate in the selection processes in order to train to become a professional in the Armed Forces as troops and sailors, or non-commissioned officers and second lieutenants in the Military Health Corps in the specialty of Medicine. In these cases, the quota of posts will be established in the annual provision. Apart from what is stated in the previous section, they must also accredit the following requirements: a) be a temporary or long-term resident in Spain. b) be of legal age in accordance with the stipulations in the national law of the applicant. c) have no criminal record in previous countries of residence due to offences which exist in Spanish legislation. d) not be subject to refusal of entry in the territorial areas of countries with which Spain has signed treaties in this regard.”⁷⁵

As regards judicial practice, no appeals have been submitted regarding access by citizens of the Union to calls for applications managed by INAP.

⁷⁵ Report on the Free Movement of Workers in Spain in 2010-2011, p. 15-16.

Sweden

Assessment of issues of concern in Sweden from Ziller Report⁷⁶

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

Legislation and general regulation of access and employment conditions

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 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.

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.

Special requirements for access to employment and working conditions

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 into account professional experience gained abroad. There is no information on practice, and no relevant court cases are signalled.

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.

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.

⁷⁶ Ziller Report Part II, p. 155-156, 158-159.

Issues for free movement of workers in the public sector

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.

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.

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.

Development 2009-2012⁷⁷

The Swedish constitution (Regeringsformen) was amended with effect from January 1st 2011. The general rule that a head of an agency within the government sector (i.e. Director General) must be a Swedish citizen was abolished. Since then it is up to the Government to decide in which cases a demand for citizenship should be required. Within a certain government ordinance it is now specified that about 60 of the positions as head of an agency no longer require Swedish citizenship. The total number of agencies is approximately 200 at the moment. The vast majority of agencies without requirement for a Swedish citizenship are universities, high schools and museums within the government sector.

As regards administrative practice, prosecutors, policemen and defence personnel (regardless if they are officers or civilians) must be Swedish citizens. In total this means that about 35.000 positions have this requirement. Furthermore, different positions all over the government sector require that anyone who applies for such a job must pass a security clearance from the police. Compared to the total number of employees within the government sector (some 235.000 employees) the latter group is small, and estimated not exceeding one per cent of the workforce.

Within the constitution there is a general rule stipulating that recruitment within the government sector must only be based on objective criteria such as merits and skills. Anyone who has applied for employment within the government sector and is dissatisfied with the outcome of the recruitment process is entitled to appeal against the decision taken. The appeal will be processed by the appeal board for the government sector (Statens överklagandenämnd) and if the board finds out that the plaintiff had better merits and skills than the person employed, the board can obviate the prior decision and instead decide that the plaintive should be offered the employment. The members of the appeal board are mainly highly qualified lawyers.

As regards judicial practice, the appeal board processes hundreds of complaints every year. It is not unusual that the board revokes the prior decision in favour of the complainant. In 2012 there were 1191 appeals of which 14 were revoked in favour of the complainant. It should be noticed that sometimes one person can appeal a number of recruitments and so inflate the number of appeals.

⁷⁷ Unless otherwise indicated the information in this section is based on the reply of Sweden to the Commission services questionnaire of 19.10.2012.

The United Kingdom

Assessment of issues of concern in the United Kingdom from the Ziller Report⁷⁸

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

Legislation and general regulation of access and employment conditions

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 Council* 1995, the *Civil Service Management Code* (which includes the Civil Service Code), the *Carltona Principle*, the *Armstrong Memorandum*, and the *Osmotherly Rules*.

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.

Special requirements for access to employment and working conditions

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 above 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.

Seniority

There are no specific provisions on seniority. As far as applicable, the indications given for professional experience above may be transposed on seniority.

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.

Issues for free movement of workers in the public sector

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.

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

⁷⁸ Ziller Report Part II, p. 161-165.

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.

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 Bill*, 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.

Developments 2009-2012⁷⁹

No legislative developments have occurred in the United Kingdom since 2009. Reforms are not planned or pending while the criteria is already set in legislation and reflected in administrative rules.

The UK Civil Service has a policy of opening up as many posts as possible to all those eligible to work in the UK Civil Service, therefore European nationals and family members have access to posts in the Civil Service and no further reform is required at this stage. Posts that can be reserved for nationals are governed by a Statutory Instrument, if a post does not fulfill the required criteria by which it can be reserved for UK nationals, then it cannot be reserved.

Approximately 90%-95% of posts are open to European nationals; 5% - 10% reserved for UK nationals. The types of posts reserved are typically those involving matters of national security.

The administrative practice regarding reserving a post is that each department decides on the individual posts, if any, which need reserving. The post will be assessed against the criteria in the Statutory Instrument. If it falls within the criteria, the responsible Minister will decide whether the post should be reserved for UK nationals only. If it falls outside the criteria, it cannot be reserved so no decision is to be taken.

Cabinet Office own the policy (Civil Service Nationality Rules) so any complaint by an individual would be raised with the Cabinet Office or alternatively potentially a claim to Employment Tribunal. Currently there are no reports of complaints/individual cases/cases outstanding.

⁷⁹ Unless otherwise indicated the information in this section is based on the reply of The United Kingdom to the Commission services questionnaire of 19.10.2012.

4. Comparative analysis of developments in Member States from 2009-2012

An overall assessment of the developments reported in the Member States during the period 2009-2012 indicates several accounts of legislative reform, however limited information is available on administrative practices concerning access of non nationals to posts in the public service, in particular with respect to monitoring of administrative practices and statistical information. In only five Member States there have been court proceedings or administrative board reviews regarding the issue.

Changes in Legislation

A large number of Member States provide information on legislative changes regarding freedom of movement of workers as regards access to employment in the public sector. However, in several cases these changes occurred before 2009 or in 2009 and 2010, and some of them are not directly related to the issue of access of non nationals to posts in the civil service and the public sector. Only the legislative developments that occurred after 2009 and were not reflected in the Ziller Report and those who do have a direct impact on the access on the free movement of workers in the public sector are highlighted below.

In **Austria**, the access to public service posts which are not reserved for Austrian nationals was considerably simplified in 2011 by amendment to the Public Service Act. The legal situation in respect to public service posts which are reserved for Austrian nationals however remains unchanged. As regards posts reserved for Austrians, that is posts in the field of the sovereign administration of the Republic of Austria, e.g. police and customs, armed forces, diplomatic service, judiciary and external representation of the State. There is neither an exhaustive list nor a list of examples of the posts concerned. Decisions on reserved posts are made in individual cases.

In **Belgium** there have not been any legislative changes on the federal level concerning posts reserved for Belgian nationals, at the regional level Ordinances have been adopted which open to EU citizens and citizens of other EEA Member States and Switzerland posts which do not involve participation in the exercise of public authority and in the safeguarding of the general interests of the authorities.

In **Cyprus** two additional Ministerial Decrees (Order No. 338/2009 and Order No. 177/2010) which identify posts reserved only for nationals have been issued since 2009.

In the **Czech Republic**, the full effect of Act No. 218/2002, on the Service of Public Servants in Administrative Authorities and on the Remuneration of Such Servants and Other Employees in Administrative Authorities, as amended, has been deferred to 1 January 2015.

In June 2012, the **Estonian** Parliament adopted a new Public Service Act which will enter into force in April 2013. The general principles regarding the requirements of appointing citizens of other EU Member States in the public service remain the same. Only Estonian citizens may be appointed to positions which involve exercise of public authority and protection of public interest.

The law on recognition of professional experience, professional and academic diplomas for access to posts in the public sector has been amended in **Italy**. The issue is regulated by Article 38 paragraph 3, of Legislative Decree no. 165 of 2001, which has been amended by Art. 8 of Decree-Law 9-2-2012 no. 5, turned into Law 4-4-2012 no. 35. With this amendment to the law, professional experience or professional diploma acquired by EU nationals and is necessary to participate in open competition or to be appointed in the public sector, is recognized by a Decree of the President of the Council of Ministers – Department for the Civil Service, after the positive opinion of the Ministry for Education, University and Research. The same procedure applies when it comes to recognition of academic diplomas or seniority for access to the open competition or to be appointed in the public sector.

In **Hungary**, the uniform ruling of civil service by the former Act XXIII of 1992 on the civil service has been revoked by Act LVIII of 2010 on the legal status of government officials which entered into force in July 2010. The dual system has been terminated by the Act on the Legal Status of Public officials CXCI of 2011 which entered into force on 1 March 2012. The new Act regulates both the relations of civil servants and government officials. The new law has not introduced any changes concerning the legal conditions for civil service. The criteria for entering into civil service or relation of government officials are following: *Hungarian citizenship*. In case of administrators except for administrators in important and sensitive functions and in the post of a head of unit, the criteria of entering service are having right to *free movement and residence*/or having *nationality of contracting party of the European Social Charta* and possessing *sufficient knowledge of Hungarian* to be able to perform the function required by the post.

Nationals of other EU/EEA Member States are now eligible to join An Garda Síochána, the national police service in **Ireland**. On 13 March 2012, the Government approved new regulations which would allow senior positions within An

Garda Síochána to be filled by officers of the Police Service of Northern Ireland ('PSNI') on a permanent basis. Prior to this, PSNI officers could only be seconded to An Garda Síochána.

In **Luxembourg**, a regulation of 27 February 2011 opens positions as communal employees (*employé communal*), including a direct or indirect participation in the exercise of public authority, to EU citizens, thus abolishing the former nationality requirement also at municipality level.

An additional requirement for access to public positions was added to the Criminal Code in **Romania**, the provision stipulates that a public servant must not have *"been convicted of a crime against humanity, against the State or against authority, offenses of corruption and service, offenses impeding the administration of justice, offenses of forgery or an intentional offenses which would make it incompatible with public office."*

The **Swedish** constitution was amended with effect from January 1st 2011. The general rule that a head of an agency within the government sector (i.e. Director General) must be a Swedish citizen was abolished. Since then it is up to the Government to decide in which cases a demand for citizenship should be required.

Appointment as a notary

Several national reports on the Free Movement of Workers in 2011-2012, provide information on the position of notaries. In many Member States notaries are self-employed, but in other Member States they are employed in the public service.⁸⁰ In 2008 the Commission brought infringement procedures before the Court of Justice of the EU against six Member States (*Austria, Belgium, France, Germany, Greece and Luxembourg*) concerning the nationality requirement for appointment as a notary. (See C-47/08, C-50, 51, 53 and 54/08 and C-61/08)

On 24 May 2011 the CJEU ruled that Member States may not reserve access to the profession of notary to their own nationals. Even if the activities of notaries pursue objectives in the public interest, they are not connected with the exercise of official authority within the meaning of the EU Treaty.

As a consequence in **Austria**, the Notarial Code was amended (Federal Law Gazette I No. 104/2011), so that the access to the profession of notary is now open not only for Austrian citizens but for citizens of any Member State of the EU/EEA and the Swiss Confederation.

Also in **Belgium**, the law on the organisation of the notary profession was amended so as to comply with this judgment. In accordance with the revised rules, to be appointed as an expectant notary, a person must in particular be Belgian *or* a national of a Member State of the EU. Following the judgment of the CJEU, a parliamentary question was addressed to the Minister of Justice, asking if Belgium had invoked Article 95, § 4, indent 3, 4° of the electoral code, which provides that presidents of the polling stations are designated *inter alia* among notaries. The Minister replied that Belgium did not rely on the electoral code and that, anyway, the article aforementioned would not have brought the CJEU to change its mind since presiding a polling station is not as such related to the professional activity of notaries.

In **Luxembourg**, consequently, access to the profession of notary had to be modified so as to take into account this judgement. In order to guaranty a satisfactory level of a notary's service, it seems possible to set up language requirements which a candidate for notary must satisfy. Given Luxembourg's amendment to the Grand-Ducal Regulation of 10 June 2009 on the organization of legal internships and regulating access to the notary profession, the Commission closed its case against Luxembourg on 22 March 2012.

The Grand-Ducal Regulation amendment now states that the completion of a professional internship by interns and candidates from a European Union Member State is one of the requirements to be admitted to the notary profession, and that access to the exam at the end of the internship requires that candidates provide a copy of their identification card proving Luxembourg citizenship, or citizenship of another European Member State.

In **Germany**, it is clear from the judgment of the CJEU that the requirement of German nationality in the Federal Regulation is inapplicable with regard to applicants from other EU Member States. It is less clear to what extent the judgment, which is based upon Art. 51 TFEU, is to be applied with regard to regulations of the lender providing for a three-year-employment as assisting notary public in order to apply for a host as a notary public. There are also questions on the implications of the judgment with regard to the exercise of a profession as a notary public in the framework of an employment rather than as a self-employed activity. Since the court has assumed that the activities of a notary public are not connected with the exercise of public authority it must be assumed that the requirement of German nationality cannot be upheld whether in the context of an employment or as a self-employed activity.

In **Greece**, the Code on the organisation of the notary profession was amended so as to comply with the CJEU judgment. In accordance with the revised rules, to be appointed as a notary, a person must in particular be Greek *or* a national of a Member State of the EU.

In **Portugal**, as a result of the threat of an adverse judgment of the CJEU, following the opinion of the Advocate-General, the Parliament (see Law 45/2010, of 3 September) authorized the Government to change the Notary Statute in order to grant notaries already working in a EU Member State the right to establish and provide services in Portugal

⁸⁰ In Denmark and the UK a notary can be employed as a worker. In Bulgaria, Czech Republic, the Netherlands, Poland, Romania, Slovakia and Slovenia a candidate notary can be employed as a worker.

without the need to successfully complete an admission exam and, after that, a period of training in Portugal. Article 1-A(1)(c) of the Notary Statute (approved by Decree-Law 15/2011, of 15 January) now states that notaries registered in another EU may work in Portugal as long as they fulfill the conditions set forth in the Statute.

In **The Netherlands**, the Bill abolishing the requirement of Dutch nationality for the appointment as a notary has been adopted in June 2012. However, the government has promised to introduce a new Bill that will re-establish the nationality requirement for third-country nationals, effectively restricting the exemption to nationals of Member States only.

On 1 December 2011 the CJEU decided in the infringement procedure against the Netherlands on this issue in accordance with the other earlier decided cases. A nationality requirement is not allowed.

In **Poland** there is still a requirement to possess Polish nationality for notaries, unlike for legal counselors and advocates, but a reform proposal is pending.

In **Romania** from 1 January 2013 the nationality requirement for the appointment as a notary is abolished, but there will be a residence requirement and a language requirement.

An explicit statutory language requirement for notaries is also mentioned in the reports on **Estonia, Luxembourg** and the **Netherlands**. The new Dutch act mentioned above includes a provision requiring knowledge of the Dutch language as an explicit condition for appointment as a notary.⁸¹

Administrative practice

There are significant changes in the administrative practice of three Member States.

The Ministry of State Administration in **Bulgaria** no longer exists. The body that is now in charge of general control over the application of the Law on the Civil Servant and secondary legislation is the Council of Ministers and specialized inspections are carried out by the General Labour Inspectorate Executive Agency.

The Ministry of Defence in **Denmark** has reformed the employment procedure in the Danish defence since 2009. People of all nationalities can now apply for any position within the Ministry of Defence and be employed on equal footing with Danish nationals. When people of another nationality than Danish apply for positions within the Ministry of Defence there is only one criterion that the applicants must meet, namely a work permit and a residence permit in Denmark or a resident card. Within the Ministry of Justice in **Denmark** there has been a change in the recruitment conditions since 2009. According to the Ministry of Justice deputy governors of prisons and prison officers are no longer required to be Danish nationals. Only judges and police officers still have to be Danish nationals.

In **France** a circular of 15 April 2011 regarding the methods of recruitment and induction for nationals of Member States of the European Union or of another State party to the European Economic Area agreement into a corps, level of employment or a position in the French public sector greatly simplifies the procedures for access of non nationals to the public sector. The circular is intended to support administrations in the implementation of this reform by reminding them of the rules applicable in the field of recruitment and induction of Union nationals into the French public sector and by stipulating the procedures to be followed, specifically for the assessment of service completed previously in a Member State of the European Union (or similar).

Less than a handful of the Member States gather statistical information on the posts reserved for nationals and/or the number of non nationals in the civil service.

In **Cyprus** around 18% of all public posts are reserved for nationals and these mostly concern posts that are high up in the hierarchical rank.

In the **United Kingdom** approximately 90% - 95% of posts are open to European nationals; 5% - 10% are reserved for UK nationals. The types of posts reserved are typically those involving matters of national security.

From available statistics in **Estonia**, the number of officials who had a citizenship of another EU Member State was 9 in 2009 (including state and local government administrative agencies); in 2010 the number was 7 (including state administrative agencies); there are no statistics available for 2011.

In **Hungary**, there is a *central personal database* for the *central administration*. According to the data it provides, there are no non-Hungarian citizens employed in the central administration of Hungary. There are around 10 persons with dual nationality.

The total number of positions in **Sweden** that require Swedish citizenship is 35.000, that is 14.9 % of the total number of employees in the Government sector which is 235.000.

In **Malta** in 2012 there were 79 vacancies of reserved posts (32 of them concerned the position of Correctional Officer).

In **Poland** since the beginning of validity of solutions enabling to employ people who do not have Polish citizenship in civil service in response to the advertisements directed to foreigners pursuant to Article 5 of the Act on Civil Service only eight candidates have submitted their offers. In recruitment, in which people without Polish citizenship participated, one person was employed

⁸¹ Annual European Report: Free Movement of Workers in Europe 2011-2012 p.53-54.

From the information submitted by Member States, and the lack of available statistics from most Member States, it seems that none of them have set up a specific monitoring system to systematically and regularly monitor issues that arise regarding access of non nationals to the civil service and employment in the public sector.

Several of the Member States report on a temporary halt in recruitment to the public sector.

In **Cyprus** there is thus a general freeze in the creation of new posts in the public service. It is also noted that there is a general freeze in the recruitment of first entry posts, and as a result access to the public sector is currently restricted for both nationals and non-nationals.

As a consequence of the global financial crisis, the **Latvian** government slashed public spending, made redundant 24% of its civil servants and reduced salaries of those remaining.

In 2011 and 2012, budget cuts severely restricted access to the public sector in **Portugal**. During this period, the vast majority of competitions were opened only to applicants having already a permanent work relation with the Portuguese State. These internal competitions do not allow applications from public servants based in other Member States.

Judicial practice

Most of the Member States that responded to the questionnaire informed that they had no reports of complaints or judicial proceedings regarding access of non nationals to employment in the public sector during the period from 2009-2012. Two Member States, Poland and France gave information about court cases.

In **Poland**, a law suit was filed against the Ministry of Culture and National Heritage in Warsaw by an EU citizen who was not admitted to participate in recruitment procedures while he could not prove Polish Nationality. He had applied for a post of a specialist for cooperation with the European Union in International Cooperation Department. The District Court decided for compensation of 3,951 PLN to the complainant for violation of the prohibition of unequal treatment.

In **France**, the *Administrative Court of Appeal of Nancy*, gave a decision in a case regarding recognition of professional experience for access to the public sector. The court did not take into account the training of a British doctor from the United Kingdom to decide on his eligibility for a medical post in a public hospital in France.

There have in the last two years been some claims of unlawful infringement of the principle of free movement of workers in **Italy**. This has mainly occurred in the education sector and the Supreme Court has expressed its opinion on the claims, underlining the fact that the denial of admission to employment or the lack of recognition of qualifications or skills and of former curricular activities acquired in other Member States constituted a violation of Community law on the free movement of workers.

The appeal board for the government sector in **Sweden** (Statens överklagandenämnd) received 1191 appeals in 2012. Fourteen of them were revoked in favour of the complainant. It is noted in the report from Sweden that one person can appeal on a number of recruitments and thereby inflate the number of appeals, it is however not clear how many of these appeals are in relation to access of non nationals to public sector employment.

In **Cyprus** there is a court procedure currently pending and concerns the request of an EU national to have his previous experience acquired in the public service of another Member State recognized for purposes of promotion in a post in the Cyprus Public Service.

5. Overall Assessment - The need for further reform

The legislative changes in Member States that occurred during the period 2009-2012 are outlined in the section 'Changes in legislation' above. Legislation that was identified in the Ziller Report as 'problematic' in several Member States as regards compliance with Article 45(4) however remains unchanged.

In **Bulgaria** the criteria for the application of Article 45(4) TFEU is not complied with whereas all posts in the Ministry of Interior are reserved for Bulgarian citizens. With the adoption of the new Public Service Act in **Estonia**, the requirements for appointing a citizens of other EU Member States remains unchanged and is based upon the nature of the agency in which the person would be working. Such an arrangement does not correspond to the criteria for the application of Article 45(4) TFEU. The new law in **Hungary** on the legal status of public officials retains the criteria that Hungarian citizenship is a condition for taking up 'important and sensitive functions'. The criteria allows for more discretion than the criteria for application of Article 45(4) TFEU. The Civil Service Act in the **Netherlands** stipulates that 'functions of confidence' can be reserved for nationals. This provision which does not coincide with the criteria for the application of Article 45(4) TFEU remains unchanged. In **Slovakia**, the definition of posts reserved for nationals is still based on the 'legitimate interest of the Slovak Republic' and the sector in which the person is working. This does not correspond to the criteria for application of Article 45(4) TFEU. The practice of reserving access to particular career groups in **Spain** may result in non compliance with the application of Article 45 (4) of the TFEU.

In some Member States, such as **Belgium** and **Germany** vaguely worded legislation or unclear wording combined with limited information on administrative practices make it difficult to assess whether the criteria of Article 45(4) TFEU is complied with.

The absence of a comprehensive list of posts reserved for nationals in **Austria** and **Slovenia** is an impediment to assessing whether there are any obstacles in access of non nationals to employment in the public sector.⁸² The criteria used in **Finland** for establishing the list of positions reserved to nationals has not been made available which makes it difficult to assess whether EU law is complied with in the reservation of posts. In **Romania**, the law in force requires a person to have legal domicile in the country to become a civil servant, this requirement is a potential obstacle to the access of non nationals to employment in the public sector.

The limited information provided by the Member States as a reply to the Questionnaire on administrative practices, the lack of statistical information on the number of non nationals employed in the public sector as well as the fact that no Member State appears to have a comprehensive monitoring system on access of non nationals to employment in the public sector, makes it difficult to gain an overview of the situation and assess whether there is no discrimination or obstacles to free movement in the practices of Member States. To remedy this, Member States are encouraged to start monitoring the administrative practices governing access to employment in the public sector and regularly gather statistical information on the numbers of non nationals that apply for employment in the public sector and non nationals that are employed in the public sector.

⁸² The kinds of posts reserved to Austrian nationals result from § 42a Civil Servants' Service Act 1979 and from the Communication from the Commission "Free movement of workers: achieving the full benefits and potential" (COM/2002/0694 final), p. 20ff.

