Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 23 May 2019[1]

Case C-703/17

Adelheid Krah
v
Universität Wien

(Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria))

(Reference for a preliminary ruling — Free movement of workers — Postdoctoral senior lecturers — Limit of four years on the recognition, upon recruitment, of previous relevant work-related experience — Seniority-based system of remuneration — Seniority accrued with the same employer only — Concept of obstacle to free movement — Justification — Proportionality)

I. Introduction

1. Dr Adelheid Krah ('the Appellant') is a postdoctoral senior lecturer at the University of Vienna. Pursuant to the University of Vienna's internal rules, for the purposes of grading her within the appropriate category of academic staff upon recruitment, only four years of her previous professional experience were taken into account.

2. The University of Vienna ('the Respondent') provides for two ways of taking postdoc senior lecturers' experience into consideration for the purposes of remuneration. First, *upon recruitment*, account can be taken of a maximum of four years of previous relevant professional activity completed at the University of Vienna or for any other employer based in Austria or in another EU Member State. Second, *once in office*, seniority gained at the University of Vienna accrues. That allows academic staff to move gradually, at regular intervals of eight years, from one pay step to another within the same grade.

3. According to the Appellant, the cap on the recognition of previous professional experience upon hiring discriminates against workers coming from other Member States. The seniority-based evolution of remuneration is bound to favour academic staff that have always worked for the same Austrian university, thus mostly Austrian nationals.

4. The present case invites the Court to explore, yet again, the outer limits of the free movement of workers case-law and to be explicit about its underlying logic. Can a national rule that is neutral in its design, in that it does not *directly discriminate* on the grounds of nationality, and is apparently equally neutral in its impact, since no *indirect discrimination* has been established, still amount to an *obstacle*

1 Original language: English.

to free movement? Does the obstacle and rendering-less-attractive approach establish a fully-fledged third category in the case-law on the free movement of workers, which is triggered irrespective of the existence of any discrimination? Will any and every national rule that might render free movement less attractive for a worker be caught by Article 45 TFEU?

II. Legal framework

A. EU law

5. Article 45 TFEU reads as follows:

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

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

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

…

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

…'

6. Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2] reads as follows:

'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.'

B. Austrian law

7. Paragraph 47(1) of the Rahmenkollektivvertrag für ArbeitnehmerInnen an Universitäten (Collective Framework Agreement for Employees at Universities) of 15 February 2011 ('the Collective Agreement'), entitled 'Grading of university science/arts staff', provides as follows:

'All employees within the meaning of Paragraph 5(2)(1) shall be assigned to employment groups A to C according to the nature of the duties agreed in the employment contract.'

8. Paragraph 48 sets out the employment group scheme for university science and arts staff. It reads as follows:

'Employment group A1: University professors appointed under an appointment procedure …

2 OJ 2011 L 141, p. 1.

Employment group A2: Science/arts staff with whom a qualification agreement was concluded.

Employment group B: University Assistants, Senior Scientists, Senior Artists, Senior Lecturer, project staff (Paragraph 28) after completion of a Master's or other graduate study programme relevant to the employment, Lectors. The employment group encompasses pay grades B1 and B2. University Assistants, Senior Scientists, Senior Artists, Senior Lecturer and project staff … shall be included in pay grade B1; Lectors shall be included in pay grade B2.

Employment group C: student staff and project staff not included in B1.'

9. Paragraph 49 of the Collective Agreement lays down the salary scheme for university science and arts staff. It provides that:

'(1) The monthly gross salary in pay grade A1 shall be EUR 4 891.10. That amount shall increase if there is at least one positive appraisal of the employment … in the relevant period,

after 6 years' employment to EUR 5 372.80,

after 12 years' employment to EUR 5 854.50,

after 18 years' employment to EUR 6 336.20

and

after 24 years' employment to EUR 6 817.90.

(2) The monthly gross salary in pay grade A 2 shall be EUR 3 686.70, in the case of employees with a relevant doctorate or Ph.D., EUR 4 288.80. Those amounts shall increase:

(a) after compliance with the qualification agreement … to EUR 4 650.20,

(b) and, if there is at least one positive appraisal of the employment … in the relevant period,

after 6 years' employment as associate professor to EUR 5 131.90,

after 12 years' employment to EUR 5 613.70,

after 18 years' employment to EUR 6 095.40

and

after 24 years' employment to EUR 6 577.00.

(3) The monthly gross salary in pay grade B1 amounts to EUR 2 696.50.

That amount shall increase:

(a) after three years of employment to EUR 3 203.30. The three-year period shall be reduced by periods for which evidence regarding previous work-related experience is produced;

(b) after eight years of employment in the category set out in (a) or in the event of a Ph.D. which was a condition for the commencement of the employment relationship (postdoc position) to EUR 3 590.70;

(c) after eight years of employment in the category set out in (b) to EUR 3 978.30;

(d) after eight years of employment in the category set out in (c) to EUR 4 186.90.'

III. Facts, proceedings and the questions referred

10. The Appellant is a German national who holds a Ph.D. in history. From the winter semester of 2000/2001, she was employed by the Respondent, the University of Vienna, as a visiting lecturer at the Institute for History. Prior to that, she was employed for five years in a professionally relevant teaching post at the University of Munich.

11. Following the submission of her *Habilitationsschrift* (habilitation thesis), by a decision taken on 12 March 2002 by the dean's office of the Respondent's faculty for humanities and cultural sciences, she was offered a teaching position as a university lecturer in medieval history. Subsequently, the Appellant taught at least seven hours per week in each semester on the basis of fixed-term teaching contracts.

12. From 1 October 2010, the Appellant was employed, initially for a fixed term and subsequently for an indefinite duration, as a postdoc senior lecturer for 20 hours per week.

13. On the basis of a decision of the rector of 8 November 2011, it was decided to recognise four years of previous periods of service in relation to senior lecturers/postdocs and senior scientists/postdocs if the employment relationship commenced on or after 1 October 2011. Following that decision, the Appellant was included in employment group B, pay step B1(b).

14. However, the Appellant submits that she accrued 5 years of previous relevant professional experience with the University of Munich and 8.5 years with the University of Vienna, a total of 13.5 years of previous relevant professional experience. Therefore, the Appellant argues that 13.5 years should have been recognised in her case and that she should have been included in a higher salary category.

15. The Appellant sought payment of EUR 3 385.20, which is the alleged difference in pay, together with interest, fees and costs, before the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria), which rejected the order sought. The Appellant subsequently brought an appeal against that judgment before the referring court.

16. It is within this factual and legal context that the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) decided to stay the proceedings and refer the following questions to the Court of Justice:

'(1) Must EU law, in particular Article 45 TFEU, Article 7(1) of [Regulation No 492/2011], and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, be interpreted as precluding a provision under which previous periods of relevant professional service of a member of the teaching staff of the University of Vienna can be recognised only up to a total period of three or four years, irrespective of whether these are periods of service with the University of Vienna or with other national or international universities or similar institutions?

(2) Is a system of pay that does not provide for full recognition of previous professionally-relevant periods of service, but at the same time links a higher rate of pay to the duration of employment with the same employer, at variance with the freedom of movement for workers in accordance with Article 45(2) TFEU and Article 7(1) of [Regulation No 492/2011]?'

17. Written submissions were lodged by the Appellant, the Respondent and the European Commission. All three of them, together with the Austrian Government, participated at the hearing that took place on 23 January 2019.

IV. Assessment

18. This Opinion is structured as follows. I shall start with several introductory clarifications regarding the Austrian system of remuneration of academic staff, in particular the national rules and those of the University of Vienna on the recognition of senior lecturers' previous professional experience (A). Next, I suggest that limiting to four years the recognition, upon recruitment, of previous relevant work-related experience is compatible with the free movement of workers since it represents neither discrimination nor, in my view, an obstacle to the free movement of workers (B). Finally, I will turn to the rule whereby, once in office, remuneration progresses with seniority accrued within the University of Vienna (C).

A. Preliminary clarifications

19. This case concerns the rules on the remuneration of senior lecturers classed in pay grade B1, as laid down both at national level (in Paragraph 49(3) of the Collective Agreement) and by the University of Vienna (in its internal regulations).

20. The Collective Agreement contains rules regarding the evolution of the remuneration of senior lecturers. Those rules take seniority into account. Once in office, remuneration normally increases, at regular intervals, with the time spent within the same university. In practice, once a certain number of years have been completed (first, three years in office and, subsequently, every eight years), senior lecturers move from one pay step to the next within pay grade B1.

21. However, that system of remuneration is not based solely on seniority/accrual of time. The national rules provide for two exceptions that allow a senior lecturer, upon recruitment, to be graded in a higher pay step than would follow from the mechanical application of the seniority rules. First, for those who obtain a contract as senior lecturer *without* holding a doctorate, the (first) three-year period is reduced by periods for which evidence regarding previous work-related experience is produced. Second, doctorate-holders that are hired as *postdoc* senior lecturers do not have to serve the first three- and eight-year periods in office and are, thus, directly graded in pay step B1(b).

22. As explained by the Respondent and the Austrian Government, the Collective Agreement is the result of a negotiation between social partners. It sets the minimum rules that must be applied by Austrian universities. It does not prevent those universities from internally adopting more favourable rules.

23. At the University of Vienna, the internal regulations provide for a period of up to four years of previous professional experience to be taken into account for the purposes of deciding the initial pay grade of postdoc senior lecturers upon recruitment. According to the Respondent, that latter rule amounts to more favourable treatment offered by the University of Vienna in comparison to those other Austrian universities that merely apply the rules laid down in the Collective Agreement.

24. Against this national and local background, four further clarifications appear warranted.

25. First, even if the focus of the present case is on pay grade B1 (thus the professional category of senior lecturers), that grade cannot be considered in isolation. It forms part of the broader national rules on the remuneration of universities' academic staff. Pursuant to Paragraphs 47, 48 and 49 of the Collective Agreement, the academic staff is divided into a number of professional subcategories

corresponding to specific pay grades, namely university professors (pay grade A1), tenure-track academic collaborators (pay grade A2), assistants, including senior lecturers (pay grade B1), lecturers (pay grade B2) and student collaborators (pay grade C). Each pay grade is itself subdivided into *pay steps*, to which a certain salary corresponds.

26. By its nature, and as emphasised by the Respondent at the hearing, the whole system of remuneration laid down by the Collective Agreement was set up with a view to advancing the academic career of individuals in two different ways, within each grade and between grades. Career advancement *within* each grade is a type of horizontal progression. Although the person remains in the same academic category, the remuneration gradually rises, for instance, on the basis of the seniority accrued with the passage of time.[3] Career advancement *between* grades can be characterised as vertical progression whereby a person will not stay in the same academic category, but will move to a higher one. That change will usually be dependent upon further qualification, for instance, through academic achievements, completing research or passing an examination.

27. Thus, as suggested by the Respondent, the rationale underpinning this system is that academic staff should be incentivised to advance in their careers. For this reason, certain types of career progression are necessarily bound to accessing a higher grade, which in a way includes both strands: the further qualification required for that grade, but also, indirectly, the accrual of a certain period of time needed in order to obtain that qualification. However, those not progressing vertically in their academic careers can still be promoted through seniority/accrual of time, that is, by moving to the next step within the same grade.

28. Second, I agree with the Austrian Government that, for the purposes of assessing the potential existence of an unlawful restriction on the free movement of workers, it is vital to distinguish between two different rules within the Austrian system of remuneration of senior lecturers.

29. The first rule is that up to four years of previous relevant professional experience are taken into account by the University of Vienna *upon hiring* postdoc senior lecturers, for the purposes of determining their initial pay step within pay grade B1 ('the past experience rule'). The second rule is that, *once in office*, during the course of the contract concluded with the University of Vienna, seniority accrued within that job determines subsequent moves from one pay step to another ('the seniority rule'). It is assumed that, in the case of senior lecturers, such moves are automatic and, unlike the past experience rule, do not entail any substantive evaluation of the senior lecturers' respective merits.

30. Certainly, these two rules bear similarities. Both concern the taking into account of previous professional experience and have an impact on remuneration. That is, however, where the similarities end. In order to be clear about who is being compared with whom, at which point of time and for what purpose, both rules must be kept separate.

31. The observations submitted by the Appellant and by the Commission, in particular on the second question referred by the national court, neatly demonstrate the dangers of conflating both of these rules. It makes it impossible to carry out any discrimination analysis, because the question of who exactly is purportedly being discriminated against when compared with whom becomes elusive, not to speak of advancing any grounds for justification. At the time of recruitment, the past experience rule applies for a certain reason and to certain groups of people. By contrast, the seniority rule applies at a different point in time, to a different group of people. The seniority rule will by definition never apply to incoming staff, and its rationale is also different.

3 It appears to follow from the Collective Agreement that that type of career advancement applies not only to senior lecturers but also to some other categories of academic staff, such as university professors although, in the latter case, moving from one pay step to another depends not only on the accrual of time but also on a (positive) appraisal of the employment (see Paragraph 49(1) of the Collective Agreement).

32. Putting both of these different rules into the same basket implicitly requires their simultaneous application: it would mean that the seniority rule should effectively already apply at the moment of recruitment. That is certainly possible as a matter of policy choice but, in that case, there would no longer be two different rules, but only one (and a very different one from that chosen at national level).

33. It is thus imperative to keep those two rules separate for the purposes of the present assessment. I will therefore start with the operation of the past experience rule upon hiring in relation to Question 1, in order only then to move on to the seniority rule in Question 2.

34. Third, in order to answer the referring court's questions, it is necessary to look at the situation of the Appellant as it actually unfolded in the case at hand. A twofold clarification is needed in this regard.

35. On the one hand, in contrast to the Collective Agreement, which does not provide for *any* recognition of past professional experience for postdoc senior lecturers,[4] it is the (more favourable) rule in the University of Vienna's internal regulations that was applied to the Appellant's case. Thus, it is that latter rule (rather than the ones laid down in the Collective Agreement) that must be looked at, within the context of the general system of remuneration laid down by the Collective Agreement.

36. On the other hand, on the facts of the case, the Appellant, as a German national, has allegedly been impeded in her right to *enter* the Austrian labour market because of the joint operation of the University of Vienna's past experience rule and the Collective Agreement's seniority rule. In essence, the argument goes as follows: the fact that seniority accrued by postdoc senior lecturers in office within the University of Vienna is fully taken into account for the purposes of remuneration, whereas the past experience of those who previously worked elsewhere is recognised up to a maximum of four years upon recruitment, would dissuade foreign workers from *entering* the Austrian labour market.

37. In a general discussion about the nature and scope of a potential obstacle to the free movement of workers, barriers to exit (from the home Member State) and barriers to entry (into the host Member State) are two sides of the same free movement coin.[5] In the factual context of the present case, that means potential barriers to the Appellant exiting the German job market and entering the Austrian one.

38. It should nonetheless clearly be stressed that, in contrast to the arguments advanced by the Appellant, the hypothetical scenarios of the Appellant potentially being prevented, by the operation of the national rules in question, from exiting the host Member State market (Austria) again, or, even further, after having spent some time elsewhere, from wanting to re-enter the Austrian academic job market, are simply not within the scope of the present case.

39. Fourth, and finally, regarding the EU-law framework of reference for the present assessment, the referring court has phrased Question 2 with regard to Article 45 TFEU and Article 7(1) of Regulation No 492/2011. Alongside these two provisions, Question 1 also refers to Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('The Charter').

4 It was confirmed by the Respondent at the hearing that, under Paragraph 49(3)(a) of the Collective Agreement, recognition of previous professional experience only applies, albeit within a *three*-year limit, to senior lecturers *without* a doctorate.

5 As will be discussed further in points 78 to 85 of this Opinion.

40. According to the Court, Article 45 TFEU and all of the Treaty provisions on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. As a result, Article 45 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by EU nationals of the fundamental freedoms guaranteed by that article. [6]

41. It is also established case-law that Article 45(2) TFEU in particular prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as Article 45(2) TFEU. [7]

42. The past experience rule — and also the seniority rule, to the extent of its limited relevance in the present case — clearly fall within the scope of those provisions in so far as they have an impact on the remuneration of senior lecturers in Austria, which is a condition of employment. The fact that the seniority rules were laid down in a Collective Agreement does not alter that conclusion since the prohibition on discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services. [8]

43. Important as they are in general, I fail to see, in the circumstances of the present case, what additional considerations Articles 20 and 21 of the Charter could bring into the equation that are not already covered, more specifically and in greater detail, by Article 45 TFEU and Article 7 of Regulation No 492/2011.

44. It does not therefore appear necessary to examine the present case specifically in the light of Articles 20 and 21 of the Charter. [9]

B. Question 1

45. By Question 1, the referring court enquires whether Article 45 TFEU and Article 7(1) of Regulation No 492/2011 preclude national provisions under which previous periods of relevant professional service of a senior lecturer hired by the University of Vienna can be recognised only up to a limit of three or four years, irrespective of whether those periods of service were completed with the University of Vienna or with other national or international universities or similar institutions.

6 See, for example, judgments of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited), and of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraph 36).

7 See, for example, judgments of 26 October 2006, *Commission* v *Italy* (C-371/04, EU:C:2006:668, paragraph 17); of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 23); and of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraph 16).

8 See, for example, judgments of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraph 31), and of 10 March 2011, *Casteels* (C-379/09, EU:C:2011:131, paragraph 19).

9 See, in a similar vein, judgments of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraphs 39 and 41), and of 7 April 2016, *ONEm and M.* (C-284/15, EU:C:2016:220, paragraphs 33 to 34).

46. By this question, the referring court focuses on the *past experience rule*, which sets a cap on the recognition of previous work-related activities when deciding the pay step in which a senior lecturer shall be graded at the beginning of the employment relationship with an Austrian university. Question 1 is phrased in such a way that it encompasses both the provisions of the Collective Agreement on the position of senior lecturers *without* a doctorate and those of the University of Vienna's internal regulations regarding *postdoc* senior lecturers. However, it is not necessary, in the circumstances of the case, to specifically address the former provision since it is not applicable to the Appellant's situation.

47. I will therefore only examine the compatibility with the free movement of workers of the (more favourable) university rule that provides for recognition of a maximum of *four years* of previous work-related experience when hiring and grading a postdoc senior lecturer.

48. The referring court notes that by capping the recognition of experience at four years, the past experience rule could be at odds with the free movement of workers. A migrant worker might refrain from changing jobs and taking up work in Austria because their previous professionally relevant periods of service will not be recognised in their entirety for the purpose of their grading and, therefore, their remuneration.

49. According to the Appellant, the cap on the recognition of past professional experience puts workers from another Member State at a disadvantage and equally deters employees of Austrian universities from exercising free movement outside Austria. In extreme cases, up to 24 years of seniority accrued outside the University of Vienna could be lost.

50. According to the Respondent, EU law does not require the compulsory recognition of any previous periods of service. A limit of four years on the taking into account of previous experience is not discriminatory on grounds of nationality because it affects migrant workers and national workers equally. Since over 50% of all senior lecturers and about one third of postdoc senior lecturers employed by the University of Vienna are foreign nationals, the past experience rule does not affect migrant workers' access to the Austrian labour market. The recognition of previous experience, albeit limited, can even be seen as an incentive for anyone, be they Austrian citizens or not, to apply to the University of Vienna.

51. In any event, since senior lecturers mainly carry out teaching activities, the four-year limitation does not go beyond what is necessary to reach the objective pursued, namely, to ensure that senior lecturers can perform their tasks to the best possible standard. That duration is usually appropriate in academia to acquire the requisite knowledge for this purpose.

52. I am of the view that a rule setting a cap of four years on previous relevant professional experience completed anywhere, *including with the University of Vienna*, for the purposes of the initial grading of a newly hired senior lecturer, is not discriminatory on grounds of nationality (1). Nor does it constitute a restriction to the free movement of workers (2). The past experience rule of the University of Vienna is, in any event, clearly justified and appropriate to reach the aim pursued by that rule (3).

1. Discrimination on grounds of nationality

53. *Direct discrimination* implies that the national rule at issue provides for differences of treatment on grounds of nationality so that nationals of other EU Member States are treated less favourably than other nationals in a comparable situation.[10] It is clear in the case at hand that the past experience rule is not directly discriminatory. Nationality is not an explicit ground for differentiation.

10 See, for example, judgment of 16 September 2004, *Commission* v *Austria* (C-465/01, EU:C:2004:530, paragraphs 31 to 33).

54. However, it is also established case-law that the equal treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result.[11] A provision of national law must be regarded as *indirectly discriminatory* if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question.[12] That follows in particular from Article 45(2) TFEU.[13]

55. In the present case, it is undisputed that the limitation on the recognition of experience applies without distinction to all relevant experience accrued with any employer, whether based in another Member State or in Austria. It was explicitly confirmed at the hearing that it also applies to experience that was acquired at the University of Vienna itself in a different capacity than that of senior lecturer. Thus, it appears that all the potential candidates are treated in exactly the same way, no matter whether they come from another Member State, from another Austrian university, or even from other departments or positions within the University of Vienna.

56. I admit to having a difficulty in seeing how such a completely neutral rule could be qualified as (even) indirectly discriminatory (on the grounds of nationality). The relevant reference groups are those with previous professional experience of (i) under four years and (ii) above four years. It is indeed persons in the second category that could claim that the operation of the past experience rule puts them at a disadvantage: part of their previous experience will not be recognised for the purposes of setting their level of remuneration upon recruitment.

57. However, there is a notable gap between that proposition and any differentiation or impact on the grounds of nationality. It has neither been established nor can it reasonably be claimed that nationals from other Member States are by definition more likely to have over four years of relevant professional experience when applying for an academic job at the University of Vienna.

58. Put differently, from the absence of a discriminatory cause (no hidden ground of differentiation) follows also the apparent absence of any such consequence (no obvious disparate impact).

59. In the case-law of this Court, such a consequence has traditionally been assessed against the standard of a *likely hypothesis*: are workers from other Member States likely to be more affected? Is the protected group bound to be hit harder? The required standard is one of rational likelihood, not the presentation of exact data or statistics to that effect.[14]

60. In the present case, there is neither a credible hypothesis nor any data hinting at indirect discrimination. No plausible explanation has been presented as to how, hypothetically, workers from other Member States would be more likely than Austrian workers to have accrued more than four years of professional experience when hired as senior lecturers. Again, the rule is entirely neutral with regard to all potential categories of workers.

11 See, for example, judgments of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 39), and of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 25).

12 See, for example, judgments of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 41), and of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 45).

13 See, to that effect, judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraphs 16 to 34).

14 But see in this regard, recently, judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraphs 28 and 30).

61. As far as data is concerned, the only available statistics are those put forward by the Respondent,[15] namely that over 50% of senior lecturers and one third of postdoc senior lecturers at the University of Vienna do not have Austrian citizenship. Thus, those statistics do not indicate that a significantly high proportion of non-nationals, compared to nationals, are affected by that rule, but rather the contrary. If correct, it would follow from such figures that a great many foreign workers have entered the Austrian market 'despite' the cap on recognition of previous experience laid down by the University of Vienna.

62. The past experience rule applicable at the moment of hiring thus appears, with regard to entry into the Austrian academic job market, to be neither directly nor indirectly discriminatory on grounds of nationality. That said, can that rule still qualify as a restriction on or obstacle to the free movement of workers, despite the fact that it is entirely nationality blind?

2. An obstacle to free movement?

(a) Restriction to free movement and discrimination on grounds of nationality

63. It follows from the case-law that, beyond the categories of direct and indirect discrimination, Article 45 TFEU encompasses a third category, namely non-discriminatory restrictions.[16] According to the Court, that provision prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but *are liable to hamper or render less attractive* their freedom of movement, including those of the Member State which enacted the measure.[17] Provisions which, even if they are applicable without distinction, preclude or deter nationals of a Member State from leaving their country of origin in order to exercise their right to freedom of movement constitute an obstacle to that freedom.[18]

64. The Court clarified that, as far as free movement of workers is concerned, the obstacle/restriction/deterrence/rendering-less-attractive rationale has its Treaty foundations in Article 45(1) TFEU. Indeed, in contrast to Article 45(2) TFEU, which employs the concept of discrimination, Article 45(1) provides more broadly that 'freedom of movement of workers shall be secured within the Union'.

65. It is therefore necessary to determine, beyond discrimination on grounds of nationality, whether the national rules at issue in the main proceedings constitute an obstacle to the free movement of workers, prohibited by Article 45(1) TFEU.[19]

66. The question that immediately arises, however, concerns the relationship between the category of obstacle to free movement and that of discrimination on the basis of nationality. Are those two categories indeed fully independent, and thus can and must be examined separately? Is the obstacle approach detached from any discrimination logic and its examination? Or is the obstacle approach more of an 'add-on' category, which strengthens and enhances the prohibition on indirect discrimination, but does not really have a life independent from it?

15 Stressing that while that data was not contradicted by any other party to these proceedings, the Court neither requested their production nor verified their accuracy. I would add that, in my view, the decisive test remains one of *likely, rational hypothesis* of a heavier impact, which any statistics produced by the parties might colour, confirm, sharpen, or potentially clearly rebut. Statistical data in itself is, however, not necessarily required in order to establish such likelihood.

16 See, in particular, Opinion of Advocate General Fennelly in *Graf* (C-190/98, EU:C:1999:423).

17 See, for example, judgments of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32), and of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49, paragraph 18).

18 See, for example, judgments of 7 March 1991, *Masgio* (C-10/90, EU:C:1991:107, paragraph 23); of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 96); of 26 January 1999, *Terhoeve* (C-18/95, EU:C:1999:22, paragraph 39); and of 9 September 2003, *Burbaud* (C-285/01, EU:C:2003:432, paragraph 95).

19 See, to that effect, judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraph 16 et seq. when contrasted with paragraph 35 et seq.).

67. This is not just an academic debate, as the present case shows. If, as suggested in the previous subsection of this Opinion, the past experience rule is not even indirectly discriminatory, can it still represent an obstacle to the free movement of workers? Can there be an obstacle if there is not even the slightest hint of a difference in treatment (on grounds of nationality)?

68. Delving into the case-law of this Court shows that, as far as the free movement of workers is concerned, the Court tends to reason employing the language of restriction mainly when national rules constitute *barriers to exit*, but also, to a lesser extent, when it comes to *subnational* rules that may amount to *barriers to entry*.

69. The typical cases in the first category are home-state measures that dissuade *nationals of that State* from exercising free movement by leaving their home State, thus rendering access to the employment market of another Member State impossible or excessively difficult. The judgment in *Bosman* is illuminating in this respect. The case concerned national rules on the transfer of football players (applicable to transfers of players between clubs belonging to different national associations within the same Member State) that required the new club to pay a fee to the old club, even after the expiry of the player's contract with the old club. Although those rules were in no way discriminatory on grounds of nationality, the Court held that they were likely to restrict the freedom of movement of players who wished to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong.[20]

70. Another (seemingly) non-discriminatory barrier to exit could be a home-state measure that makes it harder for a national of that State, who has exercised free movement, *to return* there. For instance, the *Köbler* case was about a special length-of-service increment granted by the Austrian State *qua* employer to university professors who had carried on that profession for at least 15 years with an Austrian university, as opposed to a university of another Member State. In this regard, the Court held that that absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it deters the latter from leaving the country to exercise that freedom.[21]

71. Within the second category, the Court has also approached in a similar way obstacles to free movement in the specific form of *subnational measures*, either those taken by regional or other local entities within a Member State, or those providing for special rules applying to local entities. For instance, in the so-called '*SALK*' case[22] — quoted several times by the parties — the Court examined Austrian rules under which, in determining the reference date for the purposes of advancement, public hospitals in the Land of Salzburg were to take into account all uninterrupted periods of service for that *Land* as employer, but only a proportion of the periods completed with other employers, whether within Austria or in another Member State. The Court assessed those rules through the lenses of *both* (discriminatory) barriers to entry *and* (non-discriminatory) barriers to exit.[23] It held, respectively, that those rules were 'liable to affect migrant workers more than national workers, placing the former at a particular disadvantage' and 'to preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement … even if they apply without regard to the nationality of the workers concerned'.[24]

20 Judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraphs 97 to 100). See, for a similar logic, also judgments of 17 March 2005, *Kranemann* (C-109/04, EU:C:2005:187, paragraphs 28 to 30), and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 35).

21 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 74). For another example, see judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32).

22 Judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799).

23 When a national rule may be characterised both as a barrier to exit and as a barrier to entry, the Court tends to deem such a rule as being both discriminatory on grounds of nationality *and* an obstacle to free movement. See, for example, apart from *SALK*, judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 73 to 74).

24 Judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraphs 28 to 32). See also judgment of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraphs 40 to 41).

72. Admittedly, subnational measures do not square easily with the traditional reasoning regarding free movement. It is more difficult to arrive at the conclusion that they are indirectly discriminatory on grounds of nationality. [25] Their more limited geographical scope also makes them disadvantageous for nationals of the home Member State coming from different regions. Nevertheless, as far as subnational measures are concerned, even if their connection with indirect discrimination on grounds of nationality is rather tenuous, it is still, according to the traditional logic of likely impact, [26] possible to assume such discrimination: subnational measures are more likely to affect foreign nationals for the simple reason that the majority of the residents of a local area are likely to be nationals of the Member State at issue.

73. Thus, in the case of subnational measures, indirect discrimination may perhaps be less obvious, but it is still likely to lurk in the background. Employing the language of restriction in such cases does not therefore mean that there would be no discrimination whatsoever on the grounds of nationality. There is still some sort of differentiation indirectly connected with nationality, which makes it difficult or impossible to gain access to employment. [27] In this respect, the Court already stated that restriction on freedom of movement is prohibited even if it is of *limited scope or minor importance*. [28] Put differently, subnational provisions that primarily deter *internal* mobility within a Member State can still be caught by the free movement provisions if they also render *external* mobility (between Member States) less attractive. [29]

74. To sum up, although perhaps not always explicitly examined, there is still some sort of comparability and differentiation analysis going on in cases in which only restriction to the free movement of workers is being assessed. [30] Thus, the case-law of the Court does not support the proposition that the logic of obstacles to free movement is to be cut loose entirely from considerations of discrimination. There still is, in all of the cases analysed in this section, some sort of difference in treatment. But what exactly is then supposed to be analysed under the heading of obstacles?

(b) Discrimination between 'movers' and 'non-movers'

75. In my understanding, the logic of Article 45(1) TFEU and the case-law on obstacles to the free movement of workers is still based on differentiation and thus on the concept of discrimination. But the ground for that discrimination is not (just) nationality and not (just) the moment of either exit from a job market or entry into the market of another Member State viewed in isolation. The focus is on discrimination between 'movers' and 'non-movers' in the internal market.

25 See, to that effect, Opinion of Advocate General Saugmandsgaard Øe in *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2018:627, point 44).

26 See above, point 59.

27 See judgments of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraph 39), and of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 35).

28 See, for example, the judgments of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs* (C-514/12, EU:C:2013:799, paragraph 34), and of 3 December 2014, *De Clercq and Others* (C-315/13, EU:C:2014:2408, paragraph 61).

29 See, by analogy, with regard to free movement of goods, judgment of 9 September 2004, *Carbonati Apuani* (C-72/03, EU:C:2004:506, paragraphs 22 to 23).

30 See in this regard most recently, for example, judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193), in which the Court states that the analysis in paragraphs 35 to 41 is one of obstacles to free movement, and no longer one of discrimination on the grounds of nationality (carried out previously in paragraphs 16 to 34), but then necessarily employs, in paragraph 38, a comparison of the situation of the workers active in a Member State other than their Member State of origin (that is non-nationals) with the conditions to which workers of that Member State (namely nationals) are subject, extending that prohibition of discrimination on the basis of nationality both to exit rules and entry rules in paragraph 39.

76. The prohibited ground for differentiation is therefore between movers and non-movers. Thus, even in the absence of discrimination on grounds of nationality for the purposes of defining 'non-discriminatory restrictions', the logic of discrimination is still present, but restated at a different level. Advocate General Fennelly captured that concept well by referring to discrimination at that level as 'discrimination on grounds of migration', whereby differences of treatment result from the very exercise of free movement. [31]

77. According to the Court's settled case-law, all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union. [32] Within that logic, it appears that a finding of a restriction on the free movement of workers still requires that one group of persons be placed at a disadvantage as compared to another group. But the ground for that differentiation does not necessarily have to be nationality. This seems to be the common thread running through the taxonomy developed in the case-law, discussed in the previous section of this Opinion.

78. Next, there are naturally two sides to free movement: *exit* from the home Member State and *entry* into the job market of the host Member State. If, on either of those sides, a worker is put at a disadvantage when compared to the relevant groups of non-movers within that State, that amounts to an obstacle.

79. Thus, a worker cannot be impeded or deterred from moving to another Member State through national rules that could be characterised as either 'people-retention rules' (on exit), or 'people-repellent rules' (on entry). However, in assessing the existence of both such types of rules, there is still the need to *establish a difference in treatment* between the relevant groups of people in question: those who are moving cross-border as opposed to those staying with regard to exit rules, and those who have moved as opposed to those who were already there with regard to entry rules.

80. Understood in this light, the concept of an obstacle to the free movement of workers is far from encompassing any national rule that is likely to render the exercise of free movement (subjectively) less attractive for a given worker. If detached from any actual difference in treatment between objective groups of workers, free movement could indeed become a tool for challenging any national or subnational rule in whatever field (or even just an unfavourable individual contract), which happens, in the constellation of an individual case, to play out to the detriment of a given worker. As a consequence, if a person moved to take up a new job in another Member State, the employer in that host State would always be obliged, by virtue of EU law, to provide at least the exact same treatment as that which the migrant worker enjoyed in the previous Member State, presumably irrespective of what the national law of the host Member State says on the subject.

81. That cannot be a reasonable approach to the concept of an obstacle. [33] Drawing a parallel with the free movement of goods, in that case, the case-law on the free movement of workers would find itself in a *Dassonville* [34] era and in urgent need of its own *Keckian* moment. [35]

82. In this context, it is necessary to note that the Court has already limited the all-encompassing potential of Article 45(1) TFEU under the obstacle approach in two ways.

31 Opinion of Advocate General Fennelly in *Graf* (C-190/98, EU:C:1999:423, point 21).

32 See, for example, judgments of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited), and of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraph 36).

33 I cannot but refer again to the persuasive analysis of Advocate General Fennelly in *Graf* (C-190/98, EU:C:1999:423, point 31).

34 Judgment of 11 July 1974, *Dassonville* (8/74, EU:C:1974:82, paragraph 5).

35 Judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905).

83. First, catering partially to the latter concern, the Court has made clear that national measures that merely govern an economic activity without setting conditions regarding access to employment cannot usually be regarded as restrictions under Article 45 TFEU.[36] In particular, Article 45 TFEU does not grant to the worker the right to rely, in the host Member State, on the conditions of employment which he enjoyed in the Member State of origin under the national legislation of the latter State.[37] In other words, free movement does not necessarily mean social neutrality given the disparities between national laws in certain areas. Hence, rules which are the necessary consequence of objective and non-discriminatory legislative choices in fields that are not harmonised across the European Union cannot be characterised as restrictions ('no social neutrality guarantee').[38]

84. Second, according to the Court, the characterisation as an 'obstacle' within the meaning of Article 45 TFEU cannot depend on the realisation of 'too uncertain and indirect' events. In other words, the prospect of national legislation being regarded as liable to hinder freedom of movement cannot be too remote or, a fortiori, hypothetical ('the requirement of proximity').[39]

85. Thus, for there to be an obstacle to the free movement of workers, it must be established that the rule at issue (i) discriminates between (the groups of) movers and non-movers on either exit or entry and (ii) thus, in a material way, affects access to employment in another Member State, meaning that the rule and its operation are not too remote to be taken into account when making the decision whether or not to exercise the right of free movement.

(c) The present case

86. Assessed against this framework of analysis, the Appellant's argument fails to establish the existence of any obstacle to free movement because of differentiation between movers and non-movers on either exit or entry.

87. The Appellant maintains that the past experience rule would create an obstacle to free movement for those (nationals or non-nationals) that worked as senior lecturers (or a relevant equivalent) for many years outside Austria. The limited recognition of past experience by the University of Vienna would be a *barrier to entry* for nationals of other Member States. It would also be a *barrier to exit and a barrier to (re-)entry* for Austrian nationals.

88. Addressing the latter scenario first (a barrier to exit and (re)entry for Austrian nationals), suffice it to state again that that scenario is not only not the subject matter of the present proceedings,[40] but it is also simply too uncertain and indirect, and thus too remote, within the meaning of an obstacle to free movement just outlined. The existence of an 'obstacle' under Article 45(1) TFEU would indeed depend on the realisation of a hypothetical event, namely that an Austrian worker decides *not* to leave Austria to pursue an academic career in another Member State because he anticipates that were he to return to Austria at a later date, his accumulated experience would not be fully taken into account.

36 See, to that effect, judgment of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49), in the light of the Opinion of Advocate General Fennelly in that case (EU:C:1999:423, point 32), who notably stated that 'neutral national rules could only be deemed to constitute material barriers to market access, if it were established that they had actual effects on market actors akin to exclusion from the market'.

37 See judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 35).

38 See, for example, judgments of 29 April 2004, *Weigel* (C-387/01, EU:C:2004:256, paragraph 55), and of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 36).

39 See, for example, judgments of 7 March 1990, *Krantz* (C-69/88, EU:C:1990:97, paragraph 11), and of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49, paragraphs 24 to 25). It is to be noted that, in the recent judgment of 13 March 2019, *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2019:193, paragraphs 37 and 40), the Court referred to both limits.

40 Above, point 38.

89. By contrast, in the former scenario (*barrier to entry*), the limited recognition of past experience can reasonably be assumed not to be too indirect and uncertain to be taken into account by a national of another Member State, such as the Appellant, who worked for several years as a senior lecturer (or equivalent) in another Member State and who would like to move to Austria. Indeed, it may reasonably be assumed that criteria and considerations pertaining to the calculation of the initial — and also, by definition, subsequent — remuneration are important factors in such a decision.

90. However, even then such a national rule does not amount, in my view, to an obstacle to the free movement of workers, for a rather simple reason: it does not discriminate between movers and non-movers on either exit or entry.

91. As for the argument as to movers potentially being dissuaded from leaving their home Member State in the first place in order to work at the University of Vienna, and thus a *barrier to exit* from Germany, again not only is this not the subject matter of the present case, since formally speaking no German rule is being assessed, but it also requires a leap of faith that has not been established in the present case, namely, that if the Appellant were to apply to any other university in Germany or a Member State other than Austria, her previous professionally relevant periods of service would be fully recognised. That fact has, however, not been established.

92. Next, as far as the argument on the potential *barrier to entry* to the Austrian job market is concerned, it need only be recalled that there is apparently no discrimination between (Austrian) nationals and non-nationals, or even between movers and non-movers. Every individual hired, and the recognition of their relevant past experience, is subject to exactly the same conditions. Thus, not only has it not been established that such a rule would in any way have a greater impact on non-nationals,[41] it is also not clear why it would affect movers from other Member States harder. Similar to what was already stated above, the suggestion that movers are more likely to have more than four years of previous experience is not a credible hypothesis, nor is there any data confirming that; it is simply an argument extrapolated from the particular situation of the Appellant. But pointing to an individual case is very different from revealing structural differentiation that would put the group of movers at a particular disadvantage.

93. In my view, the analysis of the Court should stop here, concluding on the absence of any obstacle to the free movement of workers. However, I consider it useful to add a few closing remarks in response to the arguments of the Appellant and the Commission which essentially state that the failure to recognise the full extent of previous relevant professional experience is likely to deter professional mobility of academic staff in the European Union, in order to illustrate in that particular sectoral context some of the consequences and dangers of too broad an approach to the concept of an obstacle.[42]

94. As a matter of reality, there is no integrated labour market for academic staff in the European Union. The frameworks for academic staff, including their conditions of employment (whether as regards hiring, advancement or remuneration), simply differ from one Member State to another, or even from one university to another within the same State.

95. Thus, mobility in such a fragmented market can be advanced by allowing for and strengthening competition, while insisting on the opening of national markets and the removal of indirect entry barriers in the form of national or even nationalistic particularities, which at present might have very little to do with the objective qualifications for the job. Sometimes, traditions that were originally justified might gradually turn into unnecessary relics, and then into (in)direct barriers to entry.

41 Above, in points 56 to 62.

42 Generally discussed above in points 75 to 85.

96. By contrast, I am bound to agree with the Austrian Government that to insist in cases like the present one that the free movement of workers effectively guarantees that any change of employers will be neutral [43] could have rather the opposite consequences to those apparently desired by the Commission: if anything, it would be likely to impede free movement of academic staff.

97. First, as far as the specific rule is concerned, such a far-reaching interpretation could indeed push the social partners and/or Austrian universities not to take into account *any* past professional experience, which would not be to the benefit of any worker.

98. Second, more generally, if the host Member State employer could only hire a senior lecturer coming from a different Member State on the condition of providing exactly the same treatment and recognition of experience as acquired in her home Member State, the expense involved could in fact render such persons ultimately 'unemployable' (for the type of work they are applying for). This would likely produce not only an effective obstacle to cross-border mobility, but also, at some stage, a social (age-related) barrier, because the more senior of the senior lecturers may find that their ability to move is severely curtailed (in view of their 'price' on the market).

99. Third, from a structural standpoint, another problematic consequence of such a sweeping concept of an obstacle would be to punish universities in those countries that go to the effort of trying to be open in terms of hiring academic staff from other Member States. It is perhaps no secret that, in terms of the openness of academic job markets, there is indeed a multi-speed Europe: there are not only open academic job markets in Europe, but also those that are seemingly open, and those that do not even pretend to be open (or if they do, they are not that good at it). If the professionally open universities or systems were forced, by public decree, to modify their (otherwise reasonable and neutral) hiring policy, in order to accommodate the specific and diverse needs of potential employees from other Member States, the perhaps not acknowledged but quite natural reaction would likely be to no longer hire from other Member States.

100. In sum, what perhaps lies at the bottom of all that differentiation are somewhat opposing visions. On the one hand, there is essentially the vision of the Commission wishing to see the European academic job market as one big 'European civil service', in which officials should have the right to move freely. The logic underpinning that mobility would then be one of transfer or secondment within a single civil service system. On the other hand, there is the vision of the European academic job market as a competitive market place, in which informed actors make their own choices about where they wish to go and why, while moving between various and necessarily different national markets.

101. Without even going into any of the further problems associated with such conflicting visions — such as the striking degree of paternalism and interference with any (residual) contractual freedom in negotiating a contract, or the question of how any of that would then be transposable with regard to non-public universities or other private employers — the problems associated with the desire to transplant the first policy choice onto the diverse reality of open, semi-open, and closed, but, in any case, fragmented markets through a very broad conception of an obstacle to free movement become readily apparent. To put it bluntly, in order to be successful, any attempt at social engineering that aims at changing reality needs to acknowledge that reality as its point of departure.

43 In the sense of 'social neutrality' discussed above in point 83.

102. For all these reasons, it is my view that Question 1 must be answered as follows: Article 45 TFEU and Article 7(1) of Regulation No 492/2011 do not preclude a provision under which previous professionally relevant periods of service of a senior lecturer when being hired at the University of Vienna can be recognised only up to a total period of four years, irrespective of whether these are periods of service with the University of Vienna or with another higher education institution based in Austria or in another Member State.

3. Potential justification and proportionality

103. In view of the answer just proposed to the first question posed by the referring court, the issue of potential justification and proportionality should not arise. There is, however, no disguising that the exact scope of the concept of an obstacle to the free movement of workers is not a paragon of analytical clarity. Thus, in order to fully assist the Court, a few closing arguments on potential justification and proportionality may be offered as well.[44]

104. It is settled case-law that national measures which are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty or make it less attractive may be allowed only if they pursue an objective in the public interest, are appropriate for ensuring the attainment of that objective and do not go beyond what is necessary to attain the objective pursued.[45]

105. According to the Appellant and the Commission, limiting recognition of past experience to four years is disproportionate since, in some extreme cases, it would entail the loss of many years of past experience as a senior lecturer or equivalent outside the University of Vienna. In particular, the Commission considers that an evaluation of relevant past experience should be carried out on a case-by-case basis.

106. According to the Respondent and the Austrian Government, EU law does not require any recognition of past experience. The Respondent has decided to recognise up to four years of that experience in view of the added value that the latter represents for senior lecturers in carrying out their tasks. The cap at four years is primarily justified by the fact that that duration is useful and suitable to ensure the quality of teaching. Longer periods of past experience will not usually improve the quality of teaching any further. If senior lecturers want to advance further in their careers at the university, they must apply to another position corresponding to a higher pay grade.

107. When assessing the justification and proportionality of the past experience rule applicable at the moment of recruitment, I am bound to agree with the Respondent and the Austrian Government.

108. According to the Court, rewarding experience acquired in a particular field, which enables the worker to perform his duties better, constitutes a legitimate objective of pay policy.[46] It is thus clearly legitimate for the Respondent, on hiring postdoc senior lecturers, to evaluate their past experience for the purposes of remuneration through a specific pay scale. That specific aim also appears to be in line with that of ensuring the quality of higher education, which the Court has already considered as a legitimate aim.[47]

44 While adding that such a way of proceeding neatly underlines the blurry nature of the categories of obstacle — legitimate aim — proportionality, with most of the arguments appearing under one heading being later rehearsed and restated under the other heading, and thus again underlining the need for clarity in relation to the concept of an obstacle. For similar issues in the context of the freedom of establishment, see my Opinion in *Hornbach-Baumarkt* (C-382/16, EU:C:2017:974, in particular points 28 to 44 and 128 to 134).

45 See, for example, judgments of 12 September 2013, *Konstantinides* (C-475/11, EU:C:2013:542, paragraph 50), and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 29).

46 See, for example, judgments of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381, paragraph 47 and the case-law cited), and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 39).

47 See, for example, judgment of 13 November 2003, *Neri* (C-153/02, EU:C:2003:614, paragraph 46).

109. Is it, however, proportionate to cap the taking into account of previous experience at four years? I am of the view that it is.

110. The argument advanced by the Respondent is that the choice of four years is proportionate in view of the specific objective of providing high-quality education since the necessary skills of a (good) senior lecturer are presumably mainly acquired during the first years of teaching. Certainly, there could always be an argument that since one person might have already acquired such skills after 1 year, and another not even after 10, there should therefore be an individual assessment of some sort. But if a general rule in this regard is to be allowed, which it certainly should be, I see nothing disproportionate in choosing to set such a period at four years.

111. The Commission challenged that approach, suggesting that there should be no *fixed* cap on recognition of previous professional experience and that it should rather be decided on a case-by-case basis in order to determine what is suitable and proportionate in each individual case.

112. I do not agree with the Commission on this point. First, interpreting the criterion of proportionality in such a way that it effectively bans any general rules and instead requires case-by-case assessments in all instances is as far-reaching as it is structurally wrong. National laws, as well as EU law, frequently operate by transforming overall experience and assumptions into general legal rules. The assessment of the proportionality of such rules is then necessarily also abstract in the sense of making sure that the rule does not lead in the majority of cases to incorrect results, and not that it is spot on in every individual case.[48] Second, clear rules have the advantage of foreseeability and avoidance, as much as possible, of the arbitrary. Again, both of these principles actually favour free movement in the sense of a potential mover being able to see clearly and *ex ante* the criteria and conditions that will be applicable to her, and thus being able to make an informed choice about the opportunity of making the move in the first place.

113. Finally, emphasis must be put again on the fact that the recognition of past experience is a discretionary policy choice made by the University of Vienna, which is already quite favourable compared to the provisions of the Collective Agreement.[49] As suggested by the Austrian Government at the hearing, holding that Article 45 TFEU precludes limiting the recognition of past experience to four years would probably lead employers not to take into account *any* past experience if their choice is actually confined to either taking all past experience into account or none of it. According to the Court, Member States enjoy a broad discretion in the choice not only of the pursuit of a specific social policy and employment aim but also in the determination of measures for achieving that aim.[50]

C. Question 2

114. By Question 2, the referring court essentially enquires whether a system of remuneration that is based on seniority accrued with the same employer, while not providing for full recognition of previous periods of relevant professional service completed elsewhere, is compatible with the free movement of workers.

115. On the one hand, that question is linked to Question 1 since it also refers to the past experience rule. On the other hand, it also adds an additional layer, namely the seniority rule contained in the Collective Agreement under which, *once in office* in an Austrian university, remuneration (of senior lecturers) rises with the time spent within that university.

48 See, for example, a similar discussion as to the proportionality of the (generally applicable) age limit of 65 years for certain categories of pilots, where such a rule could also be challenged by saying that some pilots might be very fit even at the age of 66, in the judgment of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraphs 57 to 68).

49 See point 35 of this Opinion.

50 See, for example, judgments of 12 October 2010, *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 41) and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 45).

116. The Appellant and the Commission maintain that the *combined* application of the two rules by the University of Vienna constitutes indirect discrimination on grounds of nationality. Most of the salary progression depends on the uninterrupted exercise of a job within the same Austrian university. Since only those who have worked for the University of Vienna from the beginning of their career and who have decided not to move can benefit from the taking into account of the entirety of their previous periods of service, those staff (who are more likely to be Austrian citizens) are at an advantage. In extreme cases, up to 24 years of seniority could be lost upon return following a departure from that university, so that employees are likely to be deterred from leaving. Should they decide to leave that university and come back later, only up to four years of their periods of activity completed in another Member State would be taken into account. Yet, it is expected and presumed that exchanges or transfers of staff will occur in the course of a normal academic career.

117. According to the Respondent and, to some extent, the Austrian Government, the system of salary progression laid down in the Collective Agreement does not provide for the recognition of previous periods of service but for a progression based on the passage of time. The Appellant did not differentiate between the recognition of previous periods of service and the progression of time in the salary scheme. The Appellant's arguments are at odds with the entire Austrian system of collective agreements as well as with public service law given that any form of time progression would become impermissible.

118. As already discussed in the preliminary remarks to this Opinion,[51] the way that the two rules and the two different matters have been bundled together by the referring court generated quite a degree of confusion in the submissions of the interested parties and at the hearing. Two different rules, applicable to different groups of people at different times, and pursuing different aims, have been put together with references to hypothetical scenarios that are not the subject matter of the present case.

119. Indeed, by putting those two rules together, the argument goes considerably beyond any discrimination or obstacle logic. It rather represents a request for a full-scale redrafting of national rules: for nationals coming from other Member States, the seniority rule that is normally applicable, after an appropriate passage of time, to everybody within the institution should be applied immediately upon hiring, thus effectively replacing the past experience rule normally applicable at that moment.

120. In this Opinion, I preferred to address the past experience rule applicable upon hiring first, and only then, in the context of the second question, turning to the seniority rule applicable only and exclusively with the passage of time within the University of Vienna. Otherwise, the examination of comparability and discrimination would be impossible, as would be any discussion on potential justification, because both of the rules pursue different aims.

121. Indeed, as suggested by the Respondent and the Austrian Government, unlike the past experience rule, the seniority rule does not aim at taking into account relevant past experience for the ultimate purposes of ensuring the quality of education. Its objective is twofold: allowing some career advancement (horizontal mobility) for those academic staff that do not wish or are not able to become tenure-track collaborators or university professors, while ensuring loyalty towards a single employer.

122. In general, the Court has already ruled that the employment policy objective of rewarding loyalty to a single employer constitutes a pressing public-interest requirement.[52] As underlined by the Commission itself, rewarding loyalty can justify a restriction to free movement: the feeling of belonging to an undertaking may indeed be necessary for a durable economic activity and thus fosters the freedom to conduct business and workers' motivation.

51 Above, in points 28 to 33.

52 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 83 and 85) or order of 10 March 2005, *Marhold* (C-178/04, not published, EU:C:2005:164, paragraph 34).

123. Moreover, most systems of remuneration are likely to take seniority into account in one way or another. As stated by the referring court, the Member States and the social partners at national level enjoy a broad margin of discretion when defining social and employment policy objectives as well as the appropriate measures to achieve them. [53]

124. With those general statements, and allowance having been made for the relevance of seniority within an institution for the calculation of remuneration, I would suggest that the Court declare the second question inadmissible.

125. First, according to the Court, a purely hypothetical prospect of exercising free movement does not establish a sufficient connection with EU law to justify the application of EU provisions. [54]

126. In the circumstances of the present case, Question 2 is hypothetical inasmuch as it raises, *in the abstract*, the issue of senior lecturers who decide to move from an Austrian university to another university and to return to Austria at a later stage. As rightly argued by the Respondent, the fact that the seniority rule might potentially be a *barrier to exit* for Austrian nationals or, more broadly, workers employed in an Austrian university, has nothing to do with the present case. The Appellant is a German national who exercised free movement by coming to Austria in order to work at the University of Vienna. Her potential future departure from that university in order to work in another university abroad (and her even more hypothetical return) remain at present at the level of conjecture.

127. Second, by Question 2, the referring court essentially enquires into the existence of 'the free movement of *previous professional experience*', but not of 'the free movement of *seniority*', strictly speaking. However, the issue of the recognition of relevant previous professional experience has already been addressed above under Question 1 in quite some detail, while repeatedly underlining why those two rules simply cannot be put in the same basket. [55]

V. Conclusion

128. In the light of the foregoing considerations, I propose that the Court answer the questions posed by the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) as follows:

– Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union do not preclude a provision under which the previous periods of relevant professional service of a senior lecturer, when being hired at the University of Vienna, can be recognised only up to a total period of four years, irrespective of whether these are periods of service with the University of Vienna or with another higher education institution based in Austria or in another Member State.

53 Judgments of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 65), and of 5 July 2012, *Hörnfeldt* (C-141/11, EU:C:2012:421, paragraph 32).

54 See, for example, judgment of 29 May 1997, *Kremzow* (C-299/95, EU:C:1997:254, paragraph 16).

55 Above, points 28 to 33 and 118 to 120.