COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

Free movement of workers – achieving the full benefits and potential

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1. INTRODUCTION

The aim of the present Communication is to describe in practical terms some of the most important issues for migrant workers and their families, and the way the Commission does and will deal with them, in view of the case law of the Court of Justice of the European Communities ("the Court") and the daily experience of the Commission services in examining complaints from citizens.

It is intended to bring the Union closer to its citizens by informing them of their Community law rights in the field of free movement, and enabling them to better enforce those rights. In this respect it should be noted that the fundamental principle of non-discrimination on grounds of nationality contained in the Treaty is not only binding upon public authorities but also upon private parties.

Free movement of persons is one of the fundamental freedoms guaranteed by Community law and includes the right to live and work in another Member State. Initially, this freedom was essentially directed towards economically active persons and their families. Today the right of free movement within the Community also concerns other categories such as students, pensioners and EU citizens in general[1]. It is perhaps the most important right under Community law for individuals, and an essential element of European citizenship.

Free movement is a means of creating a European employment market and of establishing a more flexible and more efficient labour market, to the benefit of workers, employers and Member States. It is common ground that labour mobility allows individuals to improve their job prospects and allows employers to recruit the people they need. It is an important element in achieving efficient labour markets and a high level of employment

Social security is a key issue for persons exercising their right to free movement[2]. By ensuring that the principle of equal treatment is guaranteed and that persons moving within the Community do not suffer disadvantages in their social security rights this fundamental freedom becomes of real and tangible value. True free movement therefore is not possible without protecting the social security rights of migrant workers and their families, which is one of the aims of Regulation 1408/71[3] on the co-ordination of social security systems for people who move within the Union.

It is, however, true that many practical, administrative and legal barriers still prevent citizens of the Union from exercising their freedom of movement. It is also clear that they stand in the way of the full benefits and potential of geographical mobility for workers and employers. This is borne out by the large number of letters from citizens concerning the correct

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1 For example Case C-184/99, Grzelczyk and Case C-85/96, Martinez-Sala ECR [1998] I-02691

2 See Guide "The Community provisions on social security - your rights when moving within the European Union

3 Council Regulation (EEC) 1408/71 of 14.06.1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5.07.1971 p. 2, last codified by Council Regulation (EC) 118/97, OJ L 28, 30.01.1997

application of the Community rules on free movement or their national implementing measures[4], and the increasing number of judgments of the Court in this field.

The Commission therefore considers that the attention of both citizens and Member States should be drawn to some of the main areas of difficulty which are still encountered in practice by migrant workers and their families. The Commission will explain the way those issues are dealt with, in view of the case law of the Court and the daily experience the Commission services have gained in examining individual cases in this area.

In this respect, in its role as guardian of the Treaties, the Commission is fully committed to ensuring that rights granted by the Treaty or secondary legislation to EU citizens are complied with by the Member States and the public authorities at national, regional and local level.

This Communication follows and complements previous reports and texts related to free movement, such as the Commission's 1990 Communication on Frontier Workers[5], the Report of the High Level Panel on the free movement of persons (the "Veil Report") of 1997, the Commission's Action Plan for Free Movement of Workers[6], the Resolution of the Council and the Member States concerning an action plan for mobility[7], the Recommendation of the European Parliament and of the Council on Mobility[8], Commission Communication on a mobility Strategy for the European Research Area[9], the Communication on New European Labour Markets[10] and the Commission's Action Plan for Skills and Mobility[11].

It will be focused on 4 separate but inter-related issues which cause particular problems for citizens or have been dealt with by the Court. The first deals with some of the current obstacles encountered by migrant workers and their families, such as access to employment, language requirements, equal treatment and social advantages, as well as administrative and legal problems in connection with residence rights. Certain questions concerning taxation, non-statutory occupational pension schemes[12] and family members will also be touched upon. The second issue deals with social security matters with regard to Regulation 1408/71, including residence requirements for benefits, and health care in another Member state. The third item relates to frontier workers who, because they do not reside in the State of employment, constitute a specific category of migrant workers, and face particular problems such as those related to health care, social security and taxation. And finally, as major issues arise in respect of working in the public sector of another Member State, the fourth part therefore deals with questions such as access to the public sector and the recognition of previous professional experience acquired in another Member State.

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4 In 2002 the unit of the Directorate-General for Employment and Social Affairs responsible for free movement of workers and the co-ordination of social security schemes received nearly 2000 letters, the majority of which concerned problems encountered by individual citizens.

5 Communication from the Commission on the living and working conditions of Community citizens residing in frontier regions, with special reference to frontier workers, COM(1990)561 final.

6 COM(1997)586 final.

7 Resolution of the Council and the Representatives of the governments of the Member States of 14 December 2000, concerning an action plan for mobility, OJ C 371, 23.12.2000

8 Recommendation of the European Parliament and of the Council on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers, OJ L 215, 09.08.2001

9 COM/2001/0331 final

10 COM(2001) 116.

11 COM(2002) 72.

12 See the Communication from the Commission launching the first stage consultation of the social partners on the portability of supplementary pension rights (12.06.2002) and the Commission Communication on the elimination of tax obstacles to the cross-border provision of occupational pensions, COM (2001) 214 final, 19.04.2001.

This Communication is not meant to be an exhaustive document covering all the rights deriving from Community law on free movement, and therefore it does not deal with general issues of citizenship.

2. FREE MOVEMENT OF WORKERS

2.1. Introduction

Every national of a Member State has the right to work in another Member State[13]. The term "worker" was not defined in the Treaty, but has been interpreted by the Court as covering any person who (i) undertakes genuine and effective work (ii) under the direction of someone else (iii) for which he is paid. This will cover somebody who works ten hours a week[14] and trainees[15]. However, a person who is the director of a company in which he is also the sole shareholder is not a worker because of the absence of subordination[16]. A person remains a worker even if his salary is lower than the minimum level set in the host Member State for subsistence[17]. As the definition of "worker" defines the scope of the fundamental principle of freedom of movement, it must not be interpreted in a restrictive way[18]. People with fixed-terms contracts will be workers as long as they satisfy the above three conditions. Civil servants and employees in the public sector are also workers in this context. The Community rules on the free movement of workers do not apply to purely internal situations. However, people who have exercised their right of free movement and then return to their Member State of origin are covered by the Community rules[19].

After the enlargement of the European Union, the rules on the free movement of workers will only apply to nationals of the new Member States subject to a transitional period[20]. However, nationals of the new Member States who are legally working with a contract of 12 months or over in a current Member State at the time of accession of their country to the EU will benefit from the right to free access to the labour market of that Member State. In addition, the Community rules on the co-ordination of social security schemes will apply from the day of accession.

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13 Article 39 EC and Regulation 1612/68 (OJ L 257, 19.10.1968), which guarantees for example equal treatment in access to employment (including assistance from employment offices), pay and working conditions, membership of trade unions, housing and access of children to education. Limitations exist in relation to public order, public security and public health, as well as to the public sector (see section 5 below)

14 Case 171/88, Rinner-Kuhn ECR [1989] 2743.

15 Case C-27/91, Le Manoir ECR [1991] I-5531

16 Case C-107/94, Asscher ECR [1996] I-3089.

17 Case 139/85, Kempf [1986] 1741.

18 Case 53/81, Levin ECR [1982] 01035.

19 Case 115/78, Knoors ECR [1979]399, Case C-370/90, Singh ECR [1992] I-4265 & Case C-18/95, Terhoeve ECR [1999] I-00345.

20 The current EU Member States will apply national rules on access to their labour markets for the first 2 years following accession of the new Member States (with the exception of Cyprus and Malta). There will be a review by the Commission at the end of the first 2 years, after which the current Member States can decide to apply the Community rules on free movement of workers to nationals from the new Member States, or they can continue with their national rules for a further 3 years. 5 years after accession nationals of the new Member States should fully benefit from free movement, unless a current Member State experiences serious disturbances on its labour market, or the threat thereof, in which case it can apply its national rules for a further 2 years. For further information see: "Free movement for persons - a practical guide for an enlarged European Union: http://europa.eu.int/comm/enlargement/negotiations/chapters/chap2/55260_practica_guide_including_comments

Under Community law as it now stands[21], third country nationals do not benefit from free movement of workers, although if they are family members of an EU national who has exercised his or her right to free movement (the latter is referred to in this Communication as an "EU migrant worker") they have the right to reside and work in the Member State where the EU migrant worker is employed. The Commission has proposed legislation on the rights of third country nationals to enter the Member States for work purposes, and to extend free movement rights to long-term resident third country nationals[22].

2.2. Residence and expulsion

The right of residence goes hand in hand with the right to work in another Member State and Member States must grant migrant workers a residence permit as proof of the right of residence[23]. The Commission still receives large numbers of complaints from citizens required to produce documents (such as tax returns, medical certificates, salary slips, electricity bills etc) other than those permitted under Community law (identity card or passport and proof of employment). Member States are not allowed to issue temporary permits, for which a fee is payable, before issuing a residence permit[24], a point upon which the Commission also receives complaints.

The right to work is not conditional upon obtaining the residence permit. The Commission continues to receive complaints from citizens who are required to produce a residence permit before being allowed to start working, contrary to Community law.

In addition, the Commission has received numerous complaints from involuntarily unemployed workers who receive social assistance, and who find that the host Member State refuses to renew their residence permit and then threatens them with expulsion. If a five year residence permit has been renewed once, the Member State may not refuse to renew it again on grounds of involuntary unemployment, and therefore may also not expel a person in such circumstances. The Commission considers that workers whose fixed-term employment contract has come to an end should be categorised as involuntarily unemployed. Public policy reasons may not be invoked to justify such expulsions[25].

2.3. Access to employment and equal treatment in employment

An EU national working in another Member State must be treated in exactly the same way as his colleagues who are nationals of that State as concerns working conditions, covering for example pay, training, dismissal and reinstatement.

This right to non-discrimination on grounds of nationality also applies to rules which, unless objectively justified and proportionate to their aim, are intrinsically liable to affect migrant

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21 Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)0257 final

22 Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM (2001) 127 final, OJ C 240E, 28.8.2001, p.79-87 & proposal for a Council Directive on the conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed activities, OJ C (2001) 386 final, OJ C 332E, 27.11.2001, p.248 - 256

23 Case 48/75, Royer ECR [1976] 497.

24 Case C-344/95, Commission v Belgium ECR [1997] I-01035.

25 Communication from the Commission to the Council and the European Parliament on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health, COM(1999)372 final.

workers more than national workers and consequently risk placing migrant workers at a particular disadvantage (usually referred to as "indirect discrimination")[26]. As the Court recently recalled in the Gottardo case [27], this fundamental right to equal treatment requires that when a Member State concludes a bilateral convention on social security with a third country (which provides for account to be taken of periods of insurance in the third country for the acquisition of entitlement to benefits), it must grant nationals of other Member States the same advantages as those enjoyed by its own nationals[28].

The ability to communicate effectively is obviously important, and a certain level of language may therefore be required for a job, but the Court has held that any language requirement must be reasonable and necessary for the job in question, and must not be used as an excuse to exclude workers from other Member States[29]. While employers (whether private or public) can require a job applicant to have a certain level of linguistic ability, they cannot demand only a specific qualification as proof[30]. The Commission has received numerous complaints about job advertisements which require applicants to have as their "mother tongue" a particular language. The Commission considers that while a very high level of language may, under certain strict conditions, be justifiable for certain jobs, a requirement to be mother tongue is not acceptable.

Migrant workers may have problems relying on national qualifications in other Member States, so a system of mutual recognition of qualifications and diplomas was put in place. A national of a Member State who is fully qualified to exercise a regulated profession (i.e. one that cannot be practised without certain specified professional qualifications) in one Member State can have his qualification recognised in another Member State. However if the training or the field of activity of the profession in question is *substantially* different in the host Member State, it can require him to undergo a period of adaptation or to take an aptitude test, the choice being in principle the migrant worker's. Automatic recognition of diplomas is provided only for a few professions, mainly in the field of health professions. Recently the Commission has proposed a directive which will consolidate in a single text the existing directives on the recognition of professional qualifications in order to make the system easier to understand and apply[31]. The proposal also seeks to introduce simple and easy conditions for cross frontier service provision in particular. In addition, the Council[32]has acted to enhance co-operation between the Member States in order to facilitate the transferability of qualifications and skills within the regulated and non-regulated professions, and thus contribute to increased mobility as well as the promotion of lifelong learning.

The Commission is very much aware of the problem that the lack of true "portability" of occupational pensions between Member States causes workers[33]. The initial legislation at Community level on safeguarding the existing occupational pension rights of employed and

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26 Case C-237/94, O'Flynn ECR [1996] I-2617

27 Case C-55/00, judgment of 15.01.2002, nyr

28 The Commission has raised this issue with the Member States in the context of the Administrative Commission on social security for migrant workers

29 Case 379/87, Groener ECR [1989] 3967.

30 Case C-281/98, Angonese ECR [2000] I-04139.

31 COM (2002) 119 final.

32 Resolution on the promotion of enhanced cooperation in vocational education and training of 12 November 2002

33 Communication from the Commission "Towards a single market for supplementary pensions (COM(1999) 134 final) & Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the elimination of tax obstacles to the cross-border provision of occupational pensions, OJ C 165, 8.6.2001 p. 4-13, COM (2001) 214 final

self-employed persons moving within the Community[34] is currently being followed up by a consultation of the social partners on the portability of occupational pension rights[35].

2.4. Tax and social advantages

Migrant workers have the right to the same tax and social advantages as nationals of the host Member State[36]. The Court has held that this means all the advantages which, whether or not linked to a contract, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community[37]. This has been held to cover, for example, public transport fare reductions for large families[38], child raising allowances[39], funeral payments[40] and minimum subsistence payments[41].

Where national law allows tax deductions in relation to contributions for an occupational pension and private sickness and invalidity insurance, it is discriminatory not to allow equivalent deductions in relation to contributions paid in a migrant worker's Member State[42] of origin.

2.5. Family Members

Family members are defined[43] as the spouse of the worker, their descendants who are under the age of 21 or are dependant, and dependant relatives in the ascending line. The Court has held that "spouse" means married partner[44] and does not cover cohabiting partners[45]. Married partners who are separated but not yet divorced still retain their rights as family members of a migrant worker[46]. The Commission has been asked about same sex marriages celebrated in Member States where such marriages have the same status as "traditional" marriages in relation to free movement rights. The Court has not yet been called upon to pronounce on this specific point, but it has previously held that as there is no consensus among the Member States whether same sex partners can be assimilated to spouses of a traditional marriage, it should be concluded that same sex spouses do not yet have the same rights as traditional spouses for the purposes of Community law on the free movement of workers[47].However, it should be noted that if a Member State accords advantages to its own nationals who live as

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34 Directive 98/49/EC, OJ L 209, 25.07.1998, p. 46, and see Communication mentioned in previous footnote)

35 SEC/2002/597 published on 27/05/2002

36 Article 7(2) of Regulation 1612/68

37 Case C-85/96, Martinez Sala (see footnote 1 above)

38 Case 32/75, Cristini v SNCF ECR [1975] 1085

39 Martinez Sala (see footnote 1 above)

40 Case C-237/94, O'Flynn [1996] I-2617

41 Case 75/63, Hoekstra ECR [1964] ECR 177 & Case 22/84, Scrivner ECR [1985] 1027

42 Case C-204/90, Bachmann ECR [1992] I-249, on the way the Court has since refused to accept as justification the need to ensure the coherence of the tax system, see also Case C-80/94, Wielockx ECR [1995] I-02493 and Case C-130/00 Danner, judgment 03.10.2002, nyr

43 Article 10 of Regulation 1612/68

44 Case 59/85, Netherlands v Reed ECR [1986] 1283

45 Case T-264/97, D v Council ECR staff cases [1999] p.1a

46 Case 267/83, Diatta v Land Berlin ECR [1985] 567

47 Reed case (see footnote 44 above). This reasoning was also reflected in D v Council (footnote 45 above)

non-married couples, under the principle of equal treatment in social advantages (see section 2.4 above) the same advantages must be granted to migrant workers[48].

Family members, whatever their nationality, have the right to reside with the migrant worker and to receive residence permits of the same length as the worker. The Commission receives complaints, in particular concerning third country national family members, on this point. In addition, if third country nationals can prove that they are family members of a migrant worker, and that they present no threat on public policy grounds, the host Member State may not refuse them entry or residence, even if they do not have a valid visa[49]. Where nationals of a Member State have exercised their right of free movement in another Member State, upon return to their home Member State their third country national family members are also covered by the Community rules on residence rights of migrants and their families[50].

The children of migrant workers, whatever their nationality, have the right to education in the host Member State[51]on the same terms as its nationals. This includes a right to equal treatment as compared to children of national workers in relation to study grants[52], even when this means returning to the Member State of origin[53], a topic on which the Commission also receives complaints.

Children will retain their right of residence even if the migrant worker leaves the host Member State, and a third country national parent will retain his or her right of residence, even if he or she is divorced from the EU migrant worker, in order that the children can continue to enjoy their right to education[54]. The spouse and children of the migrant worker have the right to work in the host Member State and benefit from the provisions on the recognition of qualifications[55].

2.6. Future prospects

The basic legal texts on free movement date from the 1960s, which have been supplemented by many judgments of the Court. This situation led the Commission to propose a consolidation of the jurisprudence and a extension of migrant workers' rights in 1988[56], but Member States failed to reach an agreement on this proposal. Ten years later, the Commission, with the support of the European Parliament, presented a new proposal as a follow-up to the 1997 Action Plan, which the Member States have failed so far to discuss[57].

In 2001, the Commission proposed a major piece of legislation to replace most of the existing texts on residence rights of migrant workers and other categories of EU citizens aimed at facilitating their right of free movement[58].

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48 Reed judgment

49 Case C-459/99, MRAX judgment of 25.07.2002, nyr

50 Case C-370/90, Singh ECR [1992] I-4265

51 Article 12 of Regulation 1612/68

52 Case 9/74, Casagrande ECR [1974] 773

53 Case C-308/89, Di Leo ECR [1990] I-4185

54 Case C-413/99, Baumbast, judgment of 17.09.2002, nyr

55 Case 131/85, Gül ECR [1986] 1573

56 COM (1988) 815 final OJ C 100, 21.04.1999, p. 6

57 COM (1998) 394 Final, OJ C 344 12.11.1998, P. 0012

58 Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final

3. SOCIAL SECURITY

3.1. Introduction

Community legislation on social security is a *sine qua non* for exercising the right to free movement of persons. The necessity of a system of co-ordination between the social security systems of the Member States to provide free movement was already recognised in the original Treaty of Rome[59].

Community law provides for co-ordination but not harmonisation in the field of social security and therefore does not detract from the powers of the Member States to organise their social security schemes[60]. Social assistance is not covered by this co-ordination at Community level[61]. Each Member State is therefore free to determine who is to be insured under its legislation[62] and which benefits are granted and under what conditions[63].

To ensure that the application of the different national social security schemes does not adversely affect persons exercising their right to free movement, Regulation 1408/71 establishes certain common rules and principles. The objective of these is to ensure that a person who has exercised his/her freedom to move within the Community is not placed in a worse position than one who has always resided and worked in a single Member State. In order to achieve this goal, co-ordination rules provide for a mechanism based on the following principles:

- equality of treatment between nationals and non-nationals, so that a person residing in the territory of one Member State shall be subject to the same obligations and enjoy the same benefits as the nationals of that Member State without discrimination on grounds of nationality[64].

- aggregation of periods so that periods of insurance, employment or residence completed under legislation of one Member State are taken into account, where necessary, for entitlement to benefits under the legislation of another Member State.

- export of benefits so that benefits can be paid to persons residing in another Member State.

- determination of the Member State whose social security legislation is applicable; in principle only one social security legislation at a time is applied, so that a person may enjoy proper social security coverage without being subject to the legislation of two Member States at the same time and having to pay double contributions, or none at all.

These principles have demonstrated their ability to enable insured persons to move from one Member State to another. For instance, the principle of equal treatment and non-discrimination for Community workers has been held not only to prohibit direct discrimination overtly based on nationality, but also indirect discrimination based on criteria other than nationality which particularly affect nationals of other Member States to their

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59 Article 42 EC (ex article 51).
60 Case C-70/95, Sodemare ECR [1997] I-3395
61 "social assistance" benefits are discretionary payments based on need
62 Case C-349/87, Paraschi ECR [1991] I-4501
63 Joint cases C-4/95 and C-5/95, Stöber and Piosa Pereira ECR [1997], I-511
64 Case C-185/96, Commission v Greece ECR [1998] I-6601

detriment[65]. It also includes the assimilation of facts[66], so that situations which occur in other Member States are to be treated as though they took place in the Member State whose legislation applies[67].

The aim of Regulation 1408/71 being to make it easier for those persons covered by it to exercise the freedoms provided by the Treaty, the Court has always interpreted the provisions of the Regulation in view of the fundamental freedom of movement for workers[68], the freedom of establishment[69] and, more recently, also the free movement of persons[70]. These fundamental freedoms can also preclude the application of national legislation[71]. This is particularly relevant in those cases where, notwithstanding the protection offered by Regulation 1408/71, persons who have moved from one Member State to another lose social security advantages, because Community law leaves in being differences between the social security schemes of Member States. This particularly affects people who move frequently between the various Member States throughout their career.

As this would hamper the right to free movement, and because Member States, national authorities and national Courts have to take all the measures necessary to ensure fulfilment of the obligations under the Treaty, the Court held that national courts must interpret national legislation in the light of these Treaty aims so as not to discourage persons from moving to another Member State[72]. In the Engelbrecht[73] case it even found that if such an interpretation is not possible a national must, if necessary, disapply a provision of national legislation and apply Community law instead.

To take account of the consequences of the Court's interpretations and other developments at Community level, but also in view of the frequent changes at national level, Regulation 1408/71 has been adapted, improved and extended many times: for example it initially only covered workers and members of their family. It was then extended to self-employed persons[74], to every European citizen who had sickness insurance coverage for sickness benefits during a temporary stay[75] and to students[76]. Since 1998, following the ruling in the Vougioukas case[77], special schemes for civil servants have also been included in Regulation 1408/71[78].

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65 Case C-124/99, Borawitz ECR [2001] I-7293; it was unlawful for German pension payments to beneficiaries living in another Member State to be lower than those made to beneficiaries living in Germany

66 Case C-45/92, Lepore and Scamuffa ECR [1993] I-6497 & Case C-290/00, Duchon, ECR [2002] I-3567; a migrant worker must be able to rely on national legislation which treats periods of invalidity as periods of active employment for insurance purposes, even if he was working in another Member State when the invalidity arose

67 Case C-131/96, Mora Romero ECR [1997] I-3659, a Member State must take into account military service completed in another Member State for the purposes of entitlement to orphan's benefit

68 Case C-266/95, Merino Garcia ECR [1997] I-3279; Case C-290/00, Duchon ECR [2002] I-3567

69 Case 53/95, Kemmler ECR [1996] I-703

70 Case C-135/99, Elsen ECR [2000] I-10409

71 See e.g. case C-10/90, Masgio ECR [1991] I-1119, joint cases C-4/95 & 5/95 Stöber & Pereira ECR [1997] I-511, case C-226/95, Merino Garcia ECR [1997] I-3279

72 Case C-165/91, van Munster ECR [1994] I-4661

73 Case C-262/97, ECR [2000] I-07321

74 Regulation (EEC) 1390/81 of 12.5.1981, OJ L 143 of 29.5.1981

75 Regulation (EC) 3095/95 of 22.12.1995, OJ L 335 of 30.12.1995

76 Regulation (EC) 307/1999 of 8.2.1999, OJ L 38 of 12.2.1999

77 Case C-443/93, ECR [1995] I-4033

78 Regulation (EC) 1606/98 of 29.6.1998, OJ L 209 of 25.7.1998

These numerous amendments have made the Regulation very complex and difficult to deal with. The Commission recognised that it was essential to make the rules more efficient and user-friendly and presented, in December 1998[79], a proposal to simplify and modernise Regulation 1408/71. This proposal is currently being discussed by the co-legislators, the Council and the European Parliament, on the basis of an agreed set of parameters, i.e. basic options in the light of which the Regulation is to be modernised. Some of these parameters are very specific and aim to improve the rights of insured persons, e.g. by including non-active persons and pre-retirement benefits, by improving cross-frontier access to medical care for retired frontier workers, by extending the unemployment chapter to cover self-employed schemes and by extending pensioners' and orphans' rights as regards family benefits. This proposal is expected to be adopted before the end of 2003. In addition, the Commission's proposal to extend the provisions of Regulation 1408/71 to legally resident third country nationals should come into force at the beginning of 2003[80].

3.2. Non-exportability of special non-contributory benefits

Under Regulation 1408/71, the general rule is that social security benefits must be paid in whichever Member State the beneficiary resides[81]. However this does not apply to a particular category of benefits linked to the social environment of the Member State, called "special non-contributory benefits"[82]. These are benefits which fall between the traditional categories of social assistance and social security, aimed at particular problems such as care for the disabled or the prevention of poverty. These benefits, if listed in a specific Annex of the Regulation (Annex IIa), are subject to special co-ordination rules and are only payable in the Member State that provides them, and cannot be "exported" by a beneficiary to another Member State. However, an EU citizen who moves to another Member State will be entitled to *that* State's special non-contributory benefits, although these may not be equivalent. This is a subject on which the Commission receives many complaints and requests for information.

These provisions have been the subject of a great deal of litigation before the Court. In the Snares case[83] the Court was asked about the validity of the non-exportability of this kind of benefit under Regulation 1408/71, and ruled that this derogation from the principle of the exportability of social security benefits was compatible with EC law.

However, not until 2001 did the Court consider whether the listing of a benefit by a Member State as non-exportable was compatible with Community law. The Court examined whether the particular benefit actually satisfied the conditions for non-exportability, in other words was it truly "special" and non-contributory? Or did it have the characteristics of a benefit falling within the traditional branches of social security systems, which would be exportable? In its judgment in the Jauch[84] case the Court held that payment of the Austrian care allowance (Pflegegeld) could no longer be restricted to Austrian territory. The benefit in question gave a legally defined right to recipients and was intended to supplement sickness insurance benefits. In addition it was indirectly based on contributions paid for sickness insurance. The Court

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79 COM (1998) 779 final, OJ C 38 of 12.02.1999

80 Proposal for a Council Regulation extending the provisions of Regulation (EEC) 1408/71 to nationals of third countries who are not already covered by those provisions solely on ground of their nationality, COM (2002) 59 final, OJ C 126E, 28.5.2002, P. 285-389

81 Article 10 of Regulation 1408/71

82 Articles 4(2a), 10a and Annex IIa to Regulation 1408/71, introduced by Regulation 1247/92, OJ L136, 19.05.1992

83 Case C-20/96, Snares ECR [1997] I-06057

84 Case C-215/99, ECR [2001] I-1901

found that this benefit was neither "special" nor "non-contributory" and that therefore, the normal co-ordination rules should apply. As a result, the care allowance was re-qualified as a cash sickness benefit under the general provisions of Regulation 1408/71, and so had to be paid to beneficiaries living in other Member States. In addition a Luxembourg maternity allowance was also held by the Court to be incorrectly listed as non - exportable[85]. The Court held that in order to be "special" a benefit had to be closely linked to the social environment of the Member State in question, which this was not.

As a consequence of these judgments, and in order to ensure legal certainty and transparency, it is clear that all the benefits currently listed as non-exportable must be re-examined to see if they really are "special" and "non-contributory". In the light of the criteria set out by the Court, it appears that only benefits for preventing poverty and protecting the disabled having a close enough link to the social and economic environment of the Member State should be classified as "special", and therefore non-exportable (assuming that they are properly non-contributory as well). The Commission plans to put forward a legislative proposal to amend Regulation 1408/71 to achieve this aim at the beginning of 2003. In addition, it should be noted that a number of cases are currently pending before the Court on the non-exportability of some Member States' benefits[86]. Furthermore, it should be recalled that the non-exportability of benefits from certain Member States is often not matched by eligibility for equivalent benefits in the Member State to which the person wants to move. While Member States should be able to restrict payment of certain benefits to their own territory, for the sake of legal certainty, this should be strictly in accordance with the clear and objective criteria of the Regulation as interpreted by the Court. In this way compliance with Community law is ensured.

3.3. Health Care

Regulation 1408/71 has specific provisions on health care, setting out the conditions under which individuals have access to it when they move within the European Union.

Simply put, anyone temporarily staying, or residing, in a Member State other than the one where they are insured against sickness, is entitled to receive sickness benefits in kind according to the legislation of this Member State as if he were insured there, but at the expense of the institution of insurance. Depending on the status of the persons and/or the type of stay, there is a right to immediately necessary care[87], to care which becomes necessary[88], or to all sickness benefits in kind[89].

For anyone wishing to go to another Member State specifically to obtain treatment, the costs will, under the co-ordination system set up by Regulation 1408/71, only be covered by the Member State where they are insured if they received prior authorisation. This Member State has broad discretion to grant or refuse the authorisation, but it may not be refused if two conditions are simultaneously met: (a) where the treatment in question is among the treatments provided for by the health scheme of the Member State of insurance and (b) the person cannot be treated within the time normally necessary for obtaining this treatment, taking into account his current state of health and the probable course of the disease. If the authorisation is granted, the care is provided according to the legislation, including tariffs, of

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85 Case C-43/99, Leclere ECR [2001] I-04265

86 Case C-158/02, Marcaletti & Case C-160/02, Skalka OJ C169 13.07.2002

87 e.g. tourists

88 e.g. students and posted workers

89 e.g. workers, self-employed or pensioners residing in a Member State other than the competent one

the Member State where the care is provided, but at the expense of the institution of the Member State in which the person is insured.

However, in the recent Vanbraekel[90] case the Court examined the question of which reimbursement rate a person who went to another Member State for planned medical treatment could benefit from, where the reimbursed costs, according to this Member States' legislation, were lower than the person would have been entitled to in the Member State of insurance. Although the Court confirmed that under the rules of Regulation 1408/71 reimbursement could only be made according to the tariffs of the Member State where the treatment was provided, it held that, under the principle of freedom to provide services, the insured person was entitled to additional reimbursement from the Member State of insurance if the latter's legislation would have provided for a higher level of reimbursement had the hospital treatment been received there.

For patients seeking medical treatment in another Member State the Court, in the Kohll[91] and Decker[92] cases, made reference to further fundamental freedoms of the Treaty, i.e. the free movement of goods and freedom to provide services. In these two cases and a further case[93] which – unlike the first two cases – concerned medical treatment in a hospital, the Court confirmed Member States' ability to freely organise their own health care systems but recalled that they have to respect basic Community rules such as the freedom to provide and receive services in doing so. The Court explicitly stated that medical and hospital care were services within the meaning of the Treaties. However the Court also concluded that, although the national system of prior authorisation concerned constituted a barrier to the freedom to provide services, overriding reasons like the maintenance of the social security system's financial stability and of a balanced medical and hospital service open to all could justify such a barrier. Nevertheless, for a prior administrative authorisation scheme to be justifiable it must be based on objective, non-discriminatory criteria which are known in advance. These criteria must circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily. An easily accessible procedural system must ensure that a request for authorisation will be dealt with objectively and impartially and within a reasonable time, and refusals to grant authorisation must be open to challenge in judicial or quasi-judicial proceedings.

This jurisprudence does not mean that insured persons have a general right under Community law, after receiving medical treatment abroad, to be reimbursed for the costs incurred. It is only in respect of treatment which the social insurance system of the Member State where they are insured would normally pay for that patients may ask that the costs of medical treatment abroad be taken in charge or reimbursed.

One of the most frequent reasons why patients seek medical treatment in another Member State is the delay in receiving the treatment required by the insured person's state of health. Although the issue of waiting lists is at stake in a currently pending preliminary question[94], the Court, in relation to the Dutch legislation at issue in the Smits/Peerbooms case, already gave some indications on the notion of "undue delay". In particular it considered that when determining whether an equally effective treatment could be obtained without undue delay, the national authorities must take into account all the circumstances of each specific case, i.e. not only the patient's medical condition but also his past health record.

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90 Case C-368/98, ECR [2001] I-5363
91 Case C-158/96, ECR [1998] I-1931
92 Case C-120/95, ECR [1998] I-1831
93 Case C-157/99, Geraets-Smits/Peerbooms ECR [2001] I-5473
94 Case C-385/99, Müller-Fauré and van Riet

It is now for the Commission and the Member States to take account of this judgment and to face questions of interpretation when implementing it, as well as the related judgments[95], in the light of the patients' interests. In order to have a concerted and coherent approach, the Commission has initiated a constructive dialogue with Member States and other stakeholders. As foreseen by one of the parameters under the proposal for simplifying and modernising Regulation 1408/71, the Commission and the Members States will also think about the need to adapt the Regulation in the light of this case law to make the present rules more transparent and more reliable for patients seeking medical treatment in another Member State.

The Commission has furthermore taken an initiative to establish a high-level reflection process on health care developments in the European Union, including the free movement of patients. The aim is to provide an informal and flexible forum bringing together relevant stakeholders for joint reflection on issues affecting health and health services in the internal market, and to make recommendations to guide future work at Community and Member State level, without duplicating or substituting for discussions within the formal institutional structures of the EU.

The Commission considers that this case law, by enabling insured persons to receive medical treatment in another Member State and by determining rules on the reimbursement of hospital costs, gives additional protection to insured persons and represents a concrete step forward towards achieving a social Europe.

3.4. Social Security Contributions

In order to avail themselves of the right of free movement, it is essential for the persons involved to know in which Member State he or she will be insured, and where contributions will have to be paid. Regulation 1408/71 contains detailed rules on the determination of the Member State whose social security legislation is applicable, based on two basic principles:

- a person is subject to the legislation of only one Member State at a time
- a person is normally covered by the legislation of the Member State where he or she pursues a professional activity (*lex loci laboris)*.

Having to pay contributions in more than one Member State at a time may discourage persons from making use of their right to free movement. Only the Member State where the professional activity is pursued may claim social security contributions. Therefore, if a person pursues a professional activity in one Member State, which is then competent for social security benefits, but resides in another Member State, the Member State of residence may not claim social security contributions. This reasoning was followed by the Court as regards a levy which under national law was construed as a tax: it is to be considered a social security contribution under Community law if it actually serves to directly finance branches of the social security system[96]. The same principle applies for health insurance contributions of pensioners: only the Member State which is responsible for paying for the costs of pensioners' health care may levy the corresponding contributions[97].

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95 Case C-158/96 Kohll, C-120/95 Decker, C-368/98 Vanbraekel

96 Case C-169/98, Commission v France ECR [2000] I-1049 and C-34/98, Commission v. France ECR [2000] I-995

97 Case C-389/99, Rundgren ECR [2001], I-3731 point 53.

It should be noted, however, that under Regulation 1408/71 special rules apply to persons who are simultaneously employed in one Member State and self-employed in another: these persons may actually be subject to the social security legislation of two Member States at a time[98]. Although this implies that they may therefore have to pay social security contributions in two Member States the Court confirmed the validity of this rule in the recent Hervein[99]case. It held that the Treaty does not guarantee that the extension of a person's activities in more than one Member State is neutral as regards social security. However, it recalled that the Member States whose legislation applies simultaneously must nevertheless ensure compliance with the Treaty principles of free movement of workers and freedom of establishment. In particular, each of the Member States concerned must facilitate the aggregation of benefits provided under the two sets of applicable legislation and ensure that it does not charge social security contributions on which there is no return.

4. FRONTIER WORKERS

4.1. Introduction

Frontier workers are people who live in one Member State and work in another. As a general rule, they enjoy all the benefits granted to migrants workers in the Member State of employment. However, frontier workers are entitled to unemployment benefits from the State of residence rather than that of employment[100], and they can chose to be covered for health care in either State[101]. The family members of a frontier worker are only covered by the health care system of the State of residence, and once a frontier worker retires he can no longer be covered by the State of employment, but that of residence. This rather complex arrangement can cause practical problems, for example if a worker starts a lengthy course of treatment in the State where he works, when he retires he will no longer have access to that health care but must find treatment in the State where he lives. The Commission's proposal to modify and simplify Regulation 1408/71[102] envisaged allowing retired frontier workers to maintain their rights to health care in the Member State of previous employment. The Council is now examining this proposal.

Frontier workers often face specific problems, because of residence conditions, in particular as regards social security and social advantages, as the Commission has noted on a number of occasions[103]. The justification of residence clauses for social advantages is that they aim to help the integration of the migrant worker and his family in the host Member State. As frontier workers do not live in the State of employment, Member States have argued that they should not benefit from the same social advantages as "normal" migrant workers. These arguments have been rejected by the Court, which held that no residence requirement could be applied to the child of a frontier worker, who was entitled to tuition under the same conditions as applicable to children of nationals of the State of employment[104]. The Commission is

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98 Article 14(c) of Regulation 1408/71

99 Joint cases C-393/99 and C-394/99, Hervein and Lorthiois ECR [2002], I-2829, paragraphs 60 and 61

100 Article 71 Regulation 1408/71

101 Article 20 Regulation 1408/71

102 COM (1998) 779 final

103 Communication from the Commission on the living and working conditions of Community citizens residing in frontier regions, with special reference to frontier workers, COM(1990) 0561 final, 1997 Action Plan on Free movement of workers, & the Commission's proposal to amend Regulation 1612/68 (COM(1998) 394 final, OJ C 344 12.11.1998 p. 0012) which envisaged lifting residence clauses for social advantages for frontier workers

104 Case C-337/97, Meeusen ECR [1999] I-3289

considering infringement procedures[105] against several Member States which impose residence conditions on social advantages for migrant workers.

4.2 Retired frontier workers

The above-mentioned problems are particularly acute for retired frontier workers, whose State of residence does not change upon retirement, and therefore do not benefit from the ban on discrimination which applies to migrant workers who retire in the Member State where they worked[106]. However, the Court has ruled that retired workers may claim social advantages from the State where they previously worked, such as special compensation payments for losing a job[107], as long as these relate to their previous employment. In such circumstances Member States may not make payment of social advantages subject to a residence condition. However, the Court has held that new rights which are unrelated to the previous experience, such as child raising allowance, do not have to be granted by the Member State where the frontier worker was previously employed[108]. The Commission's 1998 proposal to amend Regulation 1408/71 envisaged lifting, for pensioners, residence clauses for all family benefits, not only for family allowances as is the case at present.

4.3. Taxation

The ability of frontier workers to rely on the right of equal treatment can also apply to questions of income tax. For example, a frontier worker employed in one Member State but living with his family in another State cannot be required to pay more tax than a person living and working in the State of employment, where that worker's main family income comes from the State of employment[109]. In addition, rules which make it more beneficial to be taxed as a couple than as a single person must apply to frontier workers in the same way as for couples in a similar situation in the Member State of employment and may not be conditional upon both spouses being resident in the State of employment.[110].

5. PUBLIC SECTOR

5.1. Introduction

As civil servants and employees in the public sector are workers in the sense of Article 39 EC, the rules on free movement of workers in principle apply to them. However, there is one exception and some specific problems:

- Member States authorities are allowed to restrict to their own nationals those posts in which the exercise of public authority and the responsibility for safeguarding the general interest of the State is involved (Article. 39(4) EC).

- In several Member States rules exist which are very specific to public sector employment (e.g. about access, recognition of professional experience and seniority;

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105 under article 226 EC

106 Regulation 1251/70, OJ L 142, 30.06.1970

107 Case C-57/96, Meints ECR [1997] I-6689

108 Case C-43/99, Leclere ECR [2001] I-04265 and Case C-33/99, Fahmi & Esmoris Cerdeiro-Pinedo ECR [2001] I-02415

109 Case C-279/93, Schumacker ECR [1995] I-225

110 Case C-87/99, Zurstrassen ECR [2000] I-03337

recognition of diplomas etc) and therefore cause additional problems of discrimination which do not occur in the same way in the private sector.

The Commission still receives large numbers of complaints on this issue, particularly concerning the taking into account of professional experience acquired in another Member State as regards the access to the public sector and the determination of salary etc. Therefore the Commission proceeds with numerous infringement procedures against the Member States concerned. At the request of the Member States, the Commission also advises the Member States' authorities in the framework of an intergovernmental working group established by the Member States' Directors General for Public Administration.

5.2. Access to employment in the public sector

For a long time problems in relation to the free movement of workers in the public sector concerned exclusively access and nationality conditions. Article 39(4) of the ECTreaty provides that the free movement of workers does not apply to employment in the public service. However, the derogation has constantly been interpreted in a very restrictive way by the Court[111] and the Commission has actively promoted increased access to the public sector, and continues to do so. In a number of early judgments the Court developed its interpretation of Article 39(4) EC: the Member States are only allowed to restrict public service posts to their nationals if they are directly related to the specific activities of the public service, namely those involving the exercise of public authority and the responsibility for safeguarding the general interest of the State including those of public bodies such as local authorities. These criteria have to be evaluated in a case-by-case approach in view of the nature of the tasks and responsibilities covered by the post. In these judgments the Court ruled that e.g. jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be restricted to nationals of the home State. In order to monitor the application of this jurisprudence, in 1988 the Commission launched an action[112]which was focussed on access to employment in four sectors (bodies responsible for administering commercial services, public health care services, teaching sector, research for non-military purposes). The sector-approach was an important starting point for the control of the correct application of EC law which was followed by numerous infringement procedures initiated by the Commission. The effect of the 1988 action and the infringement procedures was that the Member States undertook extensive reforms opening their public sectors. Only three infringement procedures finally had to be referred to the Court, which fully confirmed, in 1996[113], its previous jurisprudence.

Free movement of workers in the public service is independent of any specific sector; it is only post-related. Therefore only two categories of posts can be distinguished: those which do involve the exercise of public authority and the responsibility for safeguarding the general interest of the State and those which do not.

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111 Case 152/73, Sotgiu ECR [1974] 153; Case 149/79, Commission v Belgium I ECR [1980] 3881; Case 149/79, Commission v Belgium II ECR [1982] 1845; Case 307/84, Commission v France ECR [1986] 1725; Case 66/85, Lawrie-Blum ECR [1986] 2121; Case, 225/85 Commission v Italy ECR [1987] 2625; Case C-33/88, Allué ECR [1989] 1591; Case C-4/91, Bleis ECR [1991] I-5627; Case C-473/93, Commission v Luxembourg ECR [1996] I-3207; Case C-173/94, Commission v Belgium ECR [1996] I-3265; Case C-290/94, Commission v Greece ECR [1996] I-3285

112 "Freedom of movement of workers and access to employment in the public service of Member States - Commission action in respect of the application of Article 48(4) of the EEC-Treaty" OJ C-72/2 of 18.03.1988

113 Case C-473/93, Commission v Luxembourg ECR [1996] I-3207; Case C-173/94, Commission v Belgium ECR [1996] I-3265; Case C-290/94, Commission v Greece ECR [1996] I-3285

An additional question arises in relation to private sector posts which involve some exercise of public authority. In a recent judgment the Court stated that private security guards do not form part of the public service and that therefore Article 39(4) EC is not applicable to them, whatever the duties of the employee[114]. Whether the same reasoning applies to private sector posts to which the State assigns public authority functions (e.g. captains/first officers of merchant and fishing ships who exercise police functions) is currently at stake in preliminary questions pending before the Court[115].

Although these developments have led to a fairly wide opening of the public sectors to EU nationals [116]in the Member States, the benefit of the principles derived from the Court's jurisprudence is not yet always guaranteed to migrant workers.

The Commission still receives complaints about posts restricted to nationals of the host Member State which clearly do not involve public authority and responsibility for safeguarding the general interests of the State (e.g. gardener, electrician, librarian etc). In these cases the legislation has either not or not totally been adapted to EClaw or the application is not correct; e.g. national framework rules on opening up the public sector have not yet been transposed by adopting the necessary application rules. Therefore these Member States must either amend their existing legislation and/or better control internally its application.

The Commission still considers (as stated in 1988) that the derogation in Article 39(4) EC covers specific functions of the State and similar bodies such as the armed forces, the police and other forces of the maintenance of order, the judiciary, the tax authorities and the diplomatic corps. However, not *all* posts in these fields imply the exercise of public authority and responsibility of the safeguarding the general interests of the State; for example: administrative tasks; technical consultation; maintenance. These posts may therefore not be restricted to nationals of the host Member State.

In relation to posts in State ministries, regional government authorities, local authorities, central banks and other public bodies, which deal with the preparation of legal acts, their implementation, monitoring their application and the supervision of subordinate bodies, the Commission takes a stricter approach than it did in 1988. These functions were then described in a general way giving the impression that all posts linked to such activities were covered by the derogation of Article 39(4) EC. This would have allowed Member States to restrict nearly all posts (apart from administrative tasks, technical consultation and maintenance) to their nationals, a point of view which has to be re-examined in the light of the Court'sjurisprudence of the 1990's. It is important to note that even if management and decision-making posts which involve the exercise of public authority and responsibility for safeguarding the general interests of the State may be restricted to nationals of the host Member State, this is not the case in relation to all jobs in the same field. For example, the post of an official who helps prepare decisions on granting planning permission should not be restricted to nationals of the host Member State.

Member States are also not allowed to exclude migrant workers from recruitment competitions unless all posts accessible via that competition fulfil the criteria of Article 39(4)

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114 Case C-283/99, Commission v Italy ECR 2001 I-4363

115 see pending Case C-405/01 and Case C-47/02

116 More information about Member States' rules and administrative practices concerning access to the public sector can be found in the Report of the Mobility Group adopted by the Directors General for Public Administration in November 2000 in Strasbourg.

EC (e.g. a competition for judicial posts could be restricted to nationals, whereas a competition for senior posts in general administration should in principle be open to migrant workers). After the competition the hiring authority then has the duty to evaluate the fulfilment of those criteria according to the tasks and responsibilities of the post in question.

Member States do not have to open up internal recruitment procedures to migrant workers, as long as nationals who are not working in the same service of the public sector would also not be allowed to apply to these kind of posts or competitions. All other recruitment procedures have to be open; for example, it is not acceptable if numerous organisations (e.g. 15 state hospitals) are regrouped for the purposes of recruitment and only staff already working for one of the organisations may apply for posts in one of the other organisations.

Furthermore, Member States are not allowed to refuse migrant workers the status of civil servant, if relevant, once they have been integrated in the public sector.

On all these points the Commission intends to monitor closely the relevant national rules and practices and take the necessary steps to ensure effective compliance with Community law, including starting infringement procedures if necessary. In addition, while Article 39(4) EC authorises Member States to reserve specific posts for their nationals, it should be recalled that there is no obligation to do so and Member States are called upon to open their public services as much as possible in order to facilitate the mobility of workers.

With the exception of the posts that may be restricted to nationals of the host Member State, migrant workers are entitled to apply for work in the public sector of another Member State under the same conditions as apply to nationals of the Member State concerned, for example they can be subject to the same recruitment or competition procedure. However, a specific issue arises in relation to competitions used to recruit people for specific training with a view to filling a post in the relevant field of public service activity (e.g. in the education and health sectors). EU migrant workers who are already fully qualified in the field in question must be exempted from the training in question, in view of the training and the professional experience already acquired in their Member State of origin. The question whether they can be subject or not to the same competition is currently being examined by the Court in the context of a preliminary ruling [117].

The Commission is frequently asked by public sector workers whether Community law gives an absolute right to be seconded or have direct access to the public sector of another Member State. Although this is not the case, for many years the Commission has appealed to Member States' authorities to enhance the mobility of their personnel. Member States have as a consequence introduced numerous bilateral possibilities for secondment and exchange of workers between their services[118].

5.3. Recognition of professional experience and seniority

It should be recalled that the recognition of professional experience and seniority is not a question falling within the derogation of Article 39(4) EC. If a post may not be restricted to the nationals of the host Member State according to Article 39(4) EC, a migrant worker may

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117 Case C- 285/01, Burbaud; Conclusions of the Advocate General of 12.09.2002, nyr

118 For more information interested citizens are advised to contact the national authorities in their home state and in the state in which they intend to work.

not be treated differently to nationals as regards other aspects of access to the public sector and to working conditions, once he has been accepted into the public sector[119].

Following the Court's case law, the Commission considers that migrant workers' previous periods of comparable employment acquired in another Member State must be taken into account by Member States' administrations for the purposes of access to their own public sector and for determining professional advantages (e.g. salary, grade) in the same way as applies to experience acquired in their own system. This raises the following issues:

- In some Member States professional experience or seniority are either a formal condition of access to a recruitment competition or additional points are awarded for it during such a procedure (this places candidates at a higher position on the final list of successful candidates).

- In many Member States professional advantages (e.g. grade, salary, holiday entitlement) are determined on the basis of the previous professional experience and seniority.

If the professional experience and seniority acquired by a worker in another Member State are not correctly taken into account these workers consequently either have no or a less favourable access to the other Member State's public sector or they must restart their career from the beginning or at a lower level. The Commission still receives a large number of complaints from migrant workers, and has therefore launched infringement procedures.

The Court has already ruled several times that provisions of national law that prevent previous periods of employment in the public service of other Member States from being taken into account, constitute unjustified indirect discrimination, for example in relation to access to the public sector[120]. In its further judgments about taking into account professional experience and seniority for the purposes of determining salary, the Court stated that "previous periods of comparable employment completed in the public service of another Member State″ must be equally taken into account[121]. It also ruled that requirements which apply to periods spent in other Member States must not be stricter than those applicable to periods spent in comparable institutions of the Member State[122].

The Court has not yet accepted any of the justifications put forward by Member States, such as the specific characteristics of employment in the public sector; to reward loyalty (under certain conditions); differences in career structures; reverse discrimination; difficulties in making a comparison; principle of homogeneity.

In practice the comparing and taking into account of professional experience and seniority causes numerous problems for migrant workers. In order to ensure a non-discriminatory application of Member States' rules in this area, the Commission would like to emphasise that the expression "previous periods of comparable employment" must be seen in the context of each Member State's system. Therefore, if the host Member State has rules taking into account professional experience and seniority, these same rules must be applied equally to the periods of comparable employment acquired in another Member State without causing

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119 Case 152/73, Sotgiu ECR [1974] 153

120 Case C-419/92, Scholz ECR [1994] I-00505

121 Case C-15/96, Schöning ECR [1998] I-00047 and Case C-187/96, Commission v. Greece [1998] I-01095

122 Case C-195/98, Österreichischer Gewerkschaftsbund ECR [2000] I-10497

prejudice to the migrant worker. The above-mentioned case law does not require that a new concept (on periods of comparable employment) has to be introduced in the Member States' legislation; however, the Member States must adapt their legislation/administrative practice in order to bring them into conformity with this principle. Due to the great diversity of the organisation of Member States' public sectors and their rules about taking into account professional experience, and the fact that the Member States alone are competent to organise their public sectors, provided that EClaw is respected, the Commission has refrained from proposing detailed rules to be applied identically in all Member States.

However, the Commission considers that in line with the Court's jurisprudence the following guidelines at least have to be respected when adapting national rules/administrative practice:

- Member States have the duty to compare the professional experience/seniority; if the authorities have difficulties in comparing they must contact the other Member States' authorities to ask for clarification and further information.

- If professional experience/seniority in any job in the public sector is taken into account, the Member State must also take into account experience acquired by a migrant worker in any job in the public sector of another Member State; the question whether the experience falls within the public sector must be decided according to the criteria of the home Member State. By taking into account any job in the public sector the Member State in general wants to reward the specific experience acquired in the public service and enable mobility. It would breach the requirement of equal treatment of Community workers if experience which, according to the criteria of the home Member State, falls into the public sector were not to be taken into account by the host Member State because it considers that the post would fall into its private sector.

- If a Member State takes into account specific experience (i.e. in a specific job/task; in a specific institution; at a specific level/grade/category), it has to compare its system with the system of the other Member State in order to make a comparison of the previous periods of employment. The substantive conditions for recognition of periods completed abroad must be based on non-discriminatory and objective criteria (as compared to periods completed within the host Member State). However, the status of the worker in his previous post as civil servant or employee (in cases where the national system takes into account in a different way the professional experience/seniority of civil servants and employees) may not be used as criterion of comparison[123] .

- If a Member State also takes into account professional experience in the private sector, it must apply the same principles to the comparable periods of experience acquired in another Member State's private sector.

The complaints and Court cases so far have only concerned the taking into account of professional experience acquired in the public sector of another Member State. Nevertheless, the Commission wants to point out that due to the very varied organisation of public duties

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[123] See Case 152/73, Sotgiu ECR [1974] 153, in which the Court held that it is of no interest whether a worker is engaged as employee or as civil servant or even whether the terms on which he is employed come under public or private law; these legal designations can be varied at the whim of national legislature and therefore cannot provide a criterion for interpretation appropriate to the requirements of Community law.

(e.g. health, teaching, public utilities etc) and the continuous privatisation of those duties, it cannot be excluded that comparable professional experience acquired in the private sector of another Member State also has to be taken into account, even if private sector experience is in principle not taken into account in the host Member State. If an obstacle to free movement is created by not taking into account such comparable experience, only very strict imperative reasons could justify it.

5.4. Recognition of qualifications and diplomas

The system of mutual recognition of qualifications and diplomas (see section 2.3) is equally applicable to the public sector in relation to regulated professions.

Directives 89/48/EEC and 92/51/EEC[124]are only applicable if the diploma required for the practice of a given profession testifies to training that prepares specifically for the exercise of the profession. Posts within the public sector of a Member State often call for a different type of diploma, i.e.:

- a diploma attesting to a certain level of education without the content being specified (e.g. university degree, school-leaving certificate plus three years' higher education, etc.) or,

- a diploma attesting to a level of education that meets certain content-related criteria without the content in question constituting vocational training within the meaning of Directives 89/48/EEC and 92/51/EEC (e.g. a requirement to have a diploma in either economics, political science, science or social sciences, etc.).

As these cases do not fall within the scope of Directives 89/48/EEC and 92/51/EEC only Article 39 EC may be invoked. The Commission's view is that, to comply with Article 39 EC, the relevant procedures must comply with the following principles:

- Diploma awarded on completion of a certain level of education or training without a specific content being required

When only the *level* of study for which a diploma is awarded is significant, the authorities of the host Member State are not entitled to take the *content* of the training into account. Only the level of the diploma may be taken into account by the authorities of the host Member State.

To evaluate this level, it is advisable to look first of all at the rules in the Member State of origin. Where a diploma of a certain level gives access to a public-sector post in that Member State or to a selection procedure for a post in a particular category, it should also give access in the same way to a selection procedure for a post in an equivalent category in the public sector of the host Member State.

To decide what is an equivalent category, the nature of the functions to which this category provides access (management, policy-making, policy implementation, etc.) must be taken into account. The actual denomination of the category is irrelevant. As with the general system for the mutual recognition of qualifications and diplomas, there could be a safety mechanism to protect against too great a disparity between requisite diplomas, e.g. school-leaving certificate in the Member State of origin and university degree in the host Member State

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[124] OJ L019, 24.01.1989 p.16 & L209, 24.07.1992 p.25

– Diploma attesting to a level of training meeting certain content-related criteria without the content in question constituting vocational training within the meaning of Directives 89/48/EEC and 92/51/EC

The Commission's view on evaluating the level of the diploma is the same as that given above.

As regards assessment of the actual content of the training, it is generally the case that, where an academic content is required, for example economics, political science, etc., the basic aim is to recruit somebody with a general knowledge of the field in question, the ability to think critically, adapt to a certain environment, etc. In other words, there will not necessarily be a perfect match between the content of the training received by candidates and the tasks they will be required to perform. As long as the diploma was awarded on completion of education or training in the required subject, the equivalence of the diploma should be recognised.

Recognition procedure

As far as possible, migrants should be able to submit their application for a diploma to be recognised at any time, without having to wait for a post to be advertised. The aim is to give them the necessary time to prepare for a selection procedure. A problem that migrant workers frequently encounter is the length of time taken to recognise diplomas and qualifications. Member States are called upon to ensure that such procedures are completed as quickly as possible, in order to maximise mobility and not endanger the career prospects of individuals.

6. CONCLUSION

Despite the fundamental character of the right to free movement, a number of obstacles still appear to exist, even after more than 30 years, which may endanger the ability to effectively exercise the right to free movement. The very technical and complicated nature of the existing legislative framework, coupled with the extensive case law of the Court, can make the interpretation and correct application of Community law in the area of free movement of workers difficult. A joint effort by Member States, European institutions and employers (public and private sector) is therefore required.

Many of the problems signalled above can be solved by the provision of accurate and up-to-date information. The Commission is confident that the publication of this Communication, which is part of that process. will help to clarify the interpretation and application of the rules in this area for all those involved[125].

Member States of course are responsible for ensuring that Community law is properly implemented, at all levels of the administration. The Commission calls upon the Member States to ensure that the necessary national measures are taken so that *all* the Community rules on free movement are properly respected.

Improved information will also enable individuals to better enforce their Community law rights and thus to enhance the opportunities for effective mobility. Better enforcement starts at the national level, and may include legal proceedings by individual workers. In addition to the

[125] See also the planned Commission "one stop" mobility web-site and the updated Guide on social security rights when moving within the Community.

Administrative Commission on Social Security for Migrant Workers[126], the Commission has set up a number of networks at Member State level dealing with specific free movement related issues by which problems can be solved in a more informal manner[127].

Employers should avoid discriminating, directly or indirectly. The Court has held that the Treaty rules on non-discriminatory access to employment are directly applicable, which means that an individual can rely upon them before the national courts to challenge an employer who has refused him a job[128].

It goes without saying that the Commission will propose new legislative acts or amendments as necessary, to simplify, improve and update existing legislation[129]. The Commission calls on the co-legislators to discuss and adopt such proposals as quickly as possible.

Last but not least, the Commission services will monitor the Member States' national rules and their application and take the necessary steps to ensure effective compliance with the fundamental freedoms of the EC Treaty, including bringing matters before the Court on the basis of Article 226 of the EC Treaty.

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126 Set up under Regulation 1408/71 and made up of Member State representatives

127 See for example the SOLVIT network for cross-border problems (COM(2001) 702) and the NARIC network on the academic recognition of diplomas (http://europa.eu.int/comm/education/socrates/agenar.html) and the contact points for the recognition of professional qualifications http://europa.eu.int/comm/internal_market/en/qualifications/contact.htm & EURES advisor network

128 Case C-281/98, Angonese ECR [2000] I-04139

129 See for example the Commission's proposal to modernise and simplify Regulation 1408/71, footnote 79 above