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FREE MOVEMENT OF WORKERS IN THE EUROPEAN UNION: THE EXEMPTION OF EMPLOYMENT IN THE PUBLIC SERVICE

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Since the foundation of the European Community the content of free movement of workers and the sphere of its application have been constantly expanding along with the implementation of new regulations providing more and more rights for foreign employees. The first step in eliminating restrictions on free movement for workers was made in 1961 which marked the adoption of the Regulation of EEC No 15/61. It allowed six countries within the Community to continue the policy of favouring nationals in the public sector employment process. Only in case of failure to find the right employee for a position during a certain period of time permitted employment of a national from any other Member State without additional limitations. Still more freedom in the process of employing foreigners was allowed under the Regulation (EEC) No 38/64. It has eliminated any employment priority rights of Member State workers over immigrants. Actually, free movement was allowed with the aim to pursue employment after receiving a concrete job offer from a Member State. Workers were still deprived of the right to take their own initiative to migrate in order to pursue employment within the territory of a foreign Member State. Factual limitations were still able to restrict the migrant workers of certain professions wishing to seek jobs in different economy sectors. The final step in completely attaining the freedom of the labour market was made in 1968 with the adoption of the Regulation (EEC) No 1612/68 under which all the workers within the EU were secured the right of free movement without any restrictions as to the job offer.

The main legal norm ensuring free movement of workers is asserted under the Treaty on the Functioning of the EU which regulates movement of workers within the labour market. This provision is of direct application since it provides citizens with the right to refer to this article at the national court. The criterion to apply this Treaty is presence of labour relations irrespective of their legal nature or objectives. Secondary legal acts elaborate on the articles of the Treaty but cannot extend the sphere of its application. Provisions of the Treaty are of the highest legal power which means that secondary law is always derived from the primary law, therefore, can be always amended or abolished if it contradicts the fundamental principles of the Treaty. Moreover, an individual wishing to directly exercise the rights of an EU citizen must own a citizenship of the EU Member State.

Nevertheless, the provisions of the Treaty apply only to those activities of the national subjects that are related to crossing the boarder of one of the Member States and coming to work on the territory of another one. In other words, the EU Acts on free movement cannot be applied to those workers who never exercise the right to freely move as employees within the territory of the EU. Besides, the right to free movement is not limitless and those exercising it have to commit to certain liabilities, i.e. to comply with the laws of the hosting state. The Treaty provides national authorities with the right to apply restrictions to free movement of workers, justified by such imperatives as public order, community safety or health as well as by restrictions to be employed in the public services.

Keywords: *free movement of workers, the public sector, employment in the public service, exercise of powers conferred by public law, protection of state interests.*

Introduction

The Treaty on the Functioning of the European Union, 2008 (further-TFEU) clearly defines three freedoms for free movement of people, which together with the free movement of goods comprise undivided pillars of economic space. These freedoms predetermining the free movement of workers, ensures their establishment and free movement of services. Clearly defined rights depend on the category a person falls under. Undoubtedly, any discussion on a worker's right to reside in a Member State or on restrictions of this right must be held within the context of the EU citizenship concept. With adoption of the Treaty on the European Union and the introduction of a European citizenship policy, the status of the EU citizen and the right to move to another Member State can no longer be interpreted the same as before. The Treaty does not imply that EU citizens, in order to obtain the rights of the Treaty on the Functioning of the EU, could enter into professional or individual activities or work under a contract. The Treaty safeguards the main right of a worker to move to another Member State and settle there (Directive 2004/38). Due to other provisions of the Treaty, in some cases the new definition of the citizenship concept excludes strict application of the TFEU Article 45 on the restriction of free movement of workers. Thus the model of homo economicus has been replaced by the model of homo civitatis. Thereby the practice itself has changed. Naturally, the difference between economically active and non active persons as well as the distinction between the internal state situations and the

matters of the EU including the TFEU non-discriminative principle have lost their relevance.

Practical significance of the article. Free movement of workers has been extensively analysed in various literature resources. A. Bogdandy and J. Bast primarily focuses on securing the basic economic Freedoms. According to them, it is necessary to eliminate only those exemptions which can be attributed to the differences in legal systems prevalent among the EU Member States. Whereas M. Nettesheim thinks that all the tools that devalue the status of migrant workers should be regarded as limitations. K. König, when analysing public functions, divides them into two groups: the first to do with imposing the obligatory decisions as a condition for being integrated as a citizen, and the second –regulating the community life. Namely, the activities combined to exercise these functions are no longer applicable to migrant workers. E. Peuker follows the notion of the TFEU Article 45 which allows only the local workers to access those positions that are related to a State's security. Therefore, the exemption should be construed in a broader sense. Lisa – Marie Rohrdantz tend to distinguish the economic aspect of the restrictions to public positions. The EU Member States are interested in reserving certain positions for their citizens and safeguarding them from the foreign competition. This argument is relevant for those states that are facing high unemployment.

This problem has been largely covered in some works of the Lithuanian researchers. The most commonly analyzed topic in their works is the general aspects of the free movement of workers (Žaltauskaitė – Žalimienė, 2002). The works of J. Dauksiene are usually centred around the concept of 'a worker' as well as some peculiarities of law in particular Member States which apply certain restrictions on various public service posts. Though such an aspect as movement of workers in the public sector, which accounts for almost a quarter of all employees of the Member States, tends to be frequently left aside. The public sector as well as the private also creates work places quite attractive for migrant persons. Therefore, this issue claims a more in-depth theoretical and practical consideration. It is expedient to evaluate the current situation of the EU-wide mobility in the public sector and to identify the most commonly faced problems. With this article the author seeks to provide government institutions in Lithuania and its people with the information and assistance that could help to rightfully exercise exceptions for employment in the public sector in accordance with the EU recommendations and institutional practice.

The aim of this article is to highlight the main principles and peculiarities of free movement of workers in the public sector and to identify the measures taken by the EU institutions with a view to modernise this sector.

Object of this article is movement of workers in the EU public sector.

Tasks to pursue this goal:

1. To distinguish between differences and peculiarities in free movement of workers of the public and the private sectors.
2. To determine the scope of application of the concept 'employment in the public sector'.
3. To identify the measures of the European Commission taken to modernise the public sector.

Research methods: special general scientific research literature methods – descriptive method, logical analysis and synthesis.

The Basic Differences and Peculiarities of Free Movement of Workers in the Public and the Private Sectors

Since the foundation of the European Community the content of free movement of workers and the sphere of its application have been constantly expanding along with the implementation of new regulations providing more and more rights for foreign employees. Such a freedom of movement means that any rights of the Member States' workers to employment, salary and other working conditions can bear a discriminative character on the basis of their citizenship.

In 2008, around 2.3 percent of the EU nationals (11.3 mln. people) lived in another Member State but their own country of citizenship. Even a bigger number of people exercise this right at a certain period of their life. Since 2001 this number has increased by more than 40 percent. This results in an overall increase of the number of foreigners, including the EU nationals of other Member States and also non-nationals of the EU. In the 27 countries within the EU 37 percent of residents (11.3 mln. people) are not the nationals of the country they reside in (Commission Communication, 2010). Traditionally, the public sector is subsumed to the sector of public administration or the public authority (Lane, 2001). It is quite common among Member States to construe these concepts differently. In the UK the concept of 'civil service' is used as the synonym for 'public administration' although it does not refer to local government bodies. While in Ireland and Malta public administration both at the local and the national levels is referred to 'public service' (Arbeitsdokument der Kommissionsdienststellen, 2010).

The economists, who tend to separate public and private sectors according to the way they deliver goods, suggest defining public sector in a broader sense than the criterion of power. According to the followers of this theory, its distinguishing feature is that the institutions in the public sector provide public goods or services that are accessible to everyone. A state provides exclusively public goods that cannot be consumed by choice, for instance, a country's defence, sustaining peace, jurisdiction and alike (Parson, 2001). Meanwhile, the European Commission defines public services as market or non-market services that public organisations ascribe to the ones serving a common interest. They are the subject of a specific liability of the public services. The Law on Public Administration of the Republic of Lithuania (1999) defines special municipal public services as the activities of institutions or organizations set up by the State or municipal institutions that are envisioned by law. Finally, the European Commission distinguishes 'services of general economic interest' that are related to market services and involve such activities as transport, energetic and communication.

The public sector accounts for around 20.36 percent of total employment in Member States. The biggest number of workers is employed in health, education and scientific research sectors. The public sector takes a major part in the labour market, varying from 12% to 33.9% of employees in different states. The number of public workers is the biggest

in Sweden (33.9%), Lithuania (33.3%) and Denmark (32.3%). The lowest number of public workers is in Austria (11.8%), Luxemburg (12%), Portugal (13.1%) and Germany (14.3%). The data on the public sector workers are presented in the Table below.

There are no special EU legal standards regulating the activities within the sector. Though the Treaty refers to the concept of an 'employee', it is not clearly defined. The secondary legal acts provide no such a definition, too. Therefore, in this field the role of the European Commission and the Court of Justice is really important. The concept of 'an employee' in the sense of the TFEU is also applicable to civil servants and public officials (Case Van Poucke, 1994). In German language, for instance, two concepts are in use: der Angestellte (a public servant) ir der Beamte (a civil servant). To evaluate objectively, soldiers are ascribed to the European concept of an employee as well. The provisions of the Treaty are also applied to professional activities that are performed not only within the territory of a Member State but also outside the EU, though retaining close relationship with a territory. This is the case of a person working at an embassy of the third country, a mariner who sails in foreign waters under the flag of another Member State or a member of a crew on a spaceship. When trying to determine whether the relationship with the EU territory is sufficient, many aspects may be under consideration. If a person falls under the category of an employee, he or she may be conferred certain allowances. As a migrant worker he/she may exercise the same rights as a citizen of a host country (Ehlers, 2003).

The first condition determining an employee's category is subordination of the relationship vis-à-vis with an employer.

Table 1. Public Employment in the Member States

State	Number of Employees	% of total
Belgium	905500	20.60
Bulgaria	627600	26.00
Czechia	1003900	19.90
Denmark	922900	32.30
Germany	5699000	14.30
Estonia	155500	23.70
Italy	3611000	14.50
Ireland	373300	17.70
Greece	1022100	22.30
Spain	2598600	14.60
France	6719000	29.00
Cyprus	67100	17.60
Latvia	320100	31.90
Lithuania	430800	33.30
Luxenburg	37,500	12.00
Hungary	822300	29.20
Malta	46900	30.70
Netherlands	1821600	27.00
Austria	476900	11.80
Poland	3619800	26.30
Portugal	677900	13.10
Rumania	1723400	18.40
Slovenia	263400	31.10
Slovakia	519200	22.80
Finland	666000	26.30
Sweden	1267400	33.90
United Kingdom	5850000	20.19

Source: Arbeitsdokument der Kommissionsdienststellen. Freizügigkeit der Arbeitnehmer im öffentlichen Sektor, Europäische Kommission, Brüssel, 2010.

In other words, a relation of an employer to an employee should be based on a kind of subordination when an employer plays the role of a monitor (Daukšienė, 2010). In this case neither the legal nature nor the objective of the labour relations is of any importance. Firstly, the concept of 'an employee' in accordance with the TFEU and its Regulation No. 1612/68 is ascribed to individuals whose relations with an employer are contract-based. This is applicable to all the persons working dependently for their employees, who are paid to perform various economic tasks. The economic nature of such activities cannot be denied on the bases of the fact that they work in public institutions where an employer is a State. In this particular case the availability of labour relations is of a greater importance than their legislative nature or objective.

It is worth mentioning that the TFEU regulations have effect only on the activities of the subjects in national public sectors who cross-border one member State and come to work in the territory of another one. Provisions of free movement cannot be applied in situations that take place within the territory of one Member State (Case Hofner, 1991). In other words, the EU legal acts on free movement cannot be applied to those public sector workers who have never exercised

the right to freely move within the EU territory. Moreover, Article 23 of the Directive 2004/38 even provides the family members of an EU resident who are the citizens of the third country with the right to get employed or work independently in the public sector of the host country. Whereas Article 24 of the Directive allows the application of special provisions that are clearly envisaged in the Treaty and secondary legal acts for the EU citizens residing within the territory of the host country (Directive, 2010). With a view to different aspects of free movement it is necessary to single out the basic differences between free movement of workers in public and private sectors:

- Based on the provisions of the TFEU, the rules and legislations related to the principle of free movement are not applicable for employment in public sector posts. This means that some member States may choose to employ their nationals over foreign candidates in the public sector. Public institutions and enterprises of Member States have a double role. They perform the functions of an employer and at the same time act as monitoring institutions. In both cases they have to follow the legal provisions of the EU.
- Legislation of the EU remains neutral as regards the internal arrangements of its Member States. Universally they are called 'the autonomy principles of procedures and organizations of Member States'. According to it, Member States, when developing various systems of their public sector and employment, may rely on provisions of internal legal system (Constitution). The main attention in these systems is given to professional competence and an official's loyalty to a State. These are the main criteria when recruiting persons for the public sector. These traditional systems are well established in France and Germany. Meanwhile in the Netherlands and most of the Northern European countries public authorities tend to focus on suitability and competence of candidates (Arbeitsdokument der Kommissionsdienststellen, 2010). Nevertheless, all Member States shall comply with the legal provisions of the EU and the exemptions of the Treaty.
- Free movement of workers comprises all the levels of the Member State public sectors. Each sector within Member States is of a different structure: they are subject to distinct levels of government power (central, regional, communal), public administration and public enterprises are delegated different tasks. In each country there is a number of enterprises, administrative institutions and executive agencies that are formally free-standing from the Government or other ruling of governmental institutions. Some agencies lie with ministries but are free as to their actions. The others operate as independent organization units that have no formal connection with ministries. Then there are also agencies established at a time when governments start introducing new functions or providing new public services. The general functions of agencies may be described as regulative, advisory on the issues of public policies, providing public services, collecting taxes, performing functions of police or carrying out scientific research. Public sector employees are ascribed different legal provisions (Schick, 2002).

In several Member States certain elements of public sector structures have no relation to free workers'movement and are not regulated whatsoever with regard to their employees'experience or age when applying for a position or negotiating salary against working conditions. In principle, an employee's experience should be an important factor determining employment possibilities. In theses cases an employer should always remember to treat migrants the same as nationals.

Positions that Member States May Rightfully Reserve for the Nationals

The rules and rights of free mobility are not applicable when public authority posts are concerned. This means that Member States may give nationals the priority to access employment in the public sector. Such an exception is based presuming the existence of a special relationship of allegiance to the State. Some posts are too important to be open for foreigners and may lawfully be reserved for nationals. The question is - which posts and activities should fall under this category?

Defining the scope of exceptions for applying the general rule of access to 'employment in the public service' is a very complicated issue. In different Member States public authorities have assumed economic and social obligations or are involved in the activities that cannot be considered as conventional functions of public service but, because of their nature, fall under the application of the provisions of the Treaty. Having expanded the application of this exception and thus restricting employment in the posts that are assigned the category of public institutions which are regulated by public law but have no direct relations with the duties of civil services, the principles of the Treaty should not be applied to some jobs. Otherwise, the practice might create inequality among Member States resulting from diversities in the organization of certain economic and public sectors (Case Grahame, 1997).

The concept of an institution used within the EU defines 'public service' referring to the specificities of each Member State. This concept, contrary to the concept 'ordre public' ('public order'), has not been elaborated on by any of the secondary legal acts of the EU. Up till now the question of the exception to the employment in the public sector has been debatable as to whether it may be considered as a kind of institutional force. Functional interpretation of the public service means that Member States provide their citizens the restricted access to certain positions. The restrictions shall not be applied for the staff of these institutions which are involved in performing administrative, technical or service functions. Whereas systemic approach to public sector employment has been approved by the Member States that seek to reserve the maximum number of public posts to their nationals (Frenz, 2011). Such a systemic attitude (when a pubic institution and its entire staff are considered as a whole) prevails in Luxemburg, Belgium, Italy and some other states.

The definition of the concept 'public service' should constrict interpretation of this exception. It cannot be left out at a sole discretion of a Member State. For instance, any reference to the Constitution of the Republic of Lithuania or any other internal legislation with the aim to restrict the application area of the EU legal provisions might impair unity

and efficiency of the legal system, and therefore, cannot be admissible. This rule, underlying the existence of the EU, should also be considered when defining the sphere and scope of exception application. As held by the Court of Justice, this concept shall cover the posts which involve direct or indirect participation in the exercise of powers or functions conferred by government bodies, which are designed to safeguard the general interests of the State or of other public authorities. The employees in such posts are related to a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality. The exception may be applied only to those positions that with regard to the tasks and responsibilities involved bear the nature of special civil service activities discussed above (Case Sotgiu, 1974).

The given wording for the definition of the employment in the public service is presently confirmed and accepted as official. This formulation covers the two main criteria determining 'employment in public service: 1) posts related to direct or indirect participation in the performance of public authority functions, and 2) positions related to safeguarding the interests of the State. Both criteria are not alternative but cumulative. The English translation of the concept 'performance of public authority functions' reads as 'exercise of powers conferred by public law'. The French language version says 'exercice de la puissance publique'. Whereas the German language version uses the concept of 'Ausübung hoheitlicher Befugnisse'.

The EU institutions, actually, have made no in-depth analysis of the content of these criteria. They tend to assess them on a case-to-case basis. In literature the theorists of law and politics try to concretize those criteria. The first criterion involves two elements: adoption of solutions that are mandatory for every citizen as well as regulation of a society's life. It means that the exception will be applied when a civil servant accepts solutions that are mandatory for a citizen and are demanding obedience (police officers, tax inspectors, legal officers) directly (independently). Moreover that a State may delegate some of its functions to private subjects: water, gas, electricity supplies and the sectors such as telecommunication, water and air transport. In principle this means that allowing migrants access to these functions is not expected to impend the security of a State (Daukšienė, 2005).

While the indirect participation means that a public worker may only influence (as a counsellor) decision-making. Giving advice on technical and economic issues is not treated as indirect participation in executing public authority functions. The second criterion defining public service is a position related to safeguarding the interests of a State which implies no direct relationship with the execution of public administration or authority functions. However, Member States consider such a post of a major importance. It is associated with the relations of a public worker with a State indicating to the existence of the exclusive rights and duties. This is why institutions of the Member States are not willing to entrust these posts to migrants. Interpretation of the concept itself causes a lot of uncertainty because the EU institutions do not make frequent comments on it. Some authors insist that these posts, first of all, should be concomitant with the security of a State. (Daukšienė, 2005).

The implication is that this concept does not apply to any post in a public institution. Only the main posts are being kept away from migrant employees. Nurses, teachers, electricians, university lecturers do not fall under the category of a public servant. The concept 'public service' also dismisses the posts related to safeguarding general interests of a society (provision of energy, transport, water) as well as institutions of culture, education and research. Besides, uncertainty may arise as regards jobs in the private sector that bear elements of public authority. So the European Commission has repeatedly noted that, for instance, security guards working in the private sector cannot be referred to as public servants and therefore are not subject to the provisions of the Treaty. Despite the restriction established by the TFEU, public sector employees in accordance with the article of the Regulation 492/20117 are entitled to equal salary and equal working conditions.

When analysing this formula it is worth paying attention to the fact that the persons in the post must be loyal to the State and safeguard its interests. It is not always relevant, as in case of a lecturer working at a university or an electrician working for a municipality. These jobs have little to do with patriotism or the defence of a country. No exact list of professions, related or non-related to the public sector services has been provided. Anyway, if the authorities of the Republic of Lithuania decided to apply restrictions on public service employment, then such restrictions would deprive migrants from access to employment in courts, police, tax inspection, military force, government bodies and alike. In most Member States the ministries of Foreign Affairs, Defence, Economy, Justice and Finance reserve their posts for the nationals only. These posts are to be given only to those people whom a State can trust. Before accepting them to work, the potential employees may undergo a check-up. But even in these cases not all the posts are directly related to public authority and safeguarding of the general interests of a State. The ones that deal with the performance of administrative tasks, technical consultation and maintenance cannot be reserved exclusively for nationals of a host State [1, S. 11-12]. Anyway, a Member State is absolutely free not to exercise this exemption and open up all levels of the public sector for the employees from other Member States. For instance, lately Denmark, Greece, Ireland and the Netherlands accounted for only 10 percent of the posts in the public sector restricted for non-nationals. Whereas France, Belgium, Italy and Luxemburg tend not to confide these posts to citizens of other Member States (Junevičius, 2005).

It is worth paying attention to the fact that the citizens of Lithuania may confront national rulings, whether already exercising the right of free movement or having exercised it, with reference to the EU provisions on the free movement of employees. This is relevant in the cases of 'a migrant's return', when a national has received a diploma in a State other than the State of citizenship or the public sector employee who is a non-national returning to his/her native country. A person, having returned to the State of citizenship from another Member State, may wish to undertake a new activity. However, the native country may set different requirements for a returnee without recognizing professional qualifications acquired in another Member State. A citizen of Lithuania might not get interested in leaving his State of origin with the aim to start working in the territory of another Member State,

if upon his/her return the EU provisions on free movement of workers are not applicable.

The Interpretation of the European Commission

The European Commission, which is the initiator of the majority of cases against Member States for the infringement of the Treaty, lately has been analysing legal acts of Italy (Case EK/Italy, 2007), France (Case EK/France, 2008) and Spain (Case EK/Spain, 2008), which limit access of migrant workers to such posts as captain and chief mate on any ship flying the Member State's flag. The Commission indicated that such requirements of Member States contravene the principle of free movement of workers established by the Treaty. These limitations may be justified only in those cases where the rights related to the assigned powers are to be applied on a regular basis and do not comprise only a minor part of their activities (Arbeitsdokument der Kommissionsdienststellen). In the opinion of the European Commission, when deciding on the posts in the public sector to be reserved exclusively for the nationals, the institutions of Member States should consider the circumstances mentioned above.

The Communication declared by the European Commission in 2002 and the Working Document of 2010 provided a more concretized spheres of applying the exemption as regards the access to the public sector posts. It is affirmed that the requirement to reserve certain posts to nationals can be applied only in the case of employment in the institutions that carry specific national functions such as army, police or other forces responsible for maintaining public order, including courts and diplomatic service (Communication from the Commission to the Council, 2002). Most countries within the EU are more or less in favour of such provision. In this respect the European Commission itself holds a strictly functional attitude towards the public service [9].

Whilst taking into account the challenges of globalization processes and attempting to modernize the public sector, the European Commission seeks to encourage member states to open all levels of this sector to the nationals of other states as much as possible. In cases when migrants are allowed to work in the public sector, Member States must ensure that they receive equal opportunities as long as they are related to other aspects of employment. For instance, this way the institutions of the Republic of Lithuania permitting foreign employees to work in the public sector must treat their similar previous working experience in other member states no differently than they would treat the experience gained in the host country.

As regards competitions to select persons for specific training with the view to fill certain posts of the public sector after training, there is a notion that migrant employees being qualified in the field must not participate in the specific training, given the training and professional experience already gained in the country of their origin [6]. Lithuanian institutions cannot require those migrant workers to take part in such competitions but must practice different methods of recruitment.

The European Commission notices that free movement within the EU market is further burdened by language barriers. In principle, a required level of language should be considered discriminating but generally it is justifiable. Due to the nature of a certain position, the institutions of a member state might require a proof of language competence. Persons with certified qualification must speak the languages necessary for professional activities in the host country as established by Article 3 of the Regulation 492/2011 and Article 53 of Directive 2005/36. The European Commission considers that legal norms of Member States defining the level of language required from lecturers working in public education institutions are in no conflict with the EU requirements. Furthermore, the statement is supported by the fact that teaching process itself and exclusive nature of relations with students are of utmost importance for the development of national consciousness and preservation of cultural values (Case Groener, 1988). Notwithstanding, Lithuanian employers both in public and private sectors are forbidden to demand from persons applying to participate in a recruitment competition to submit only one certain diploma approving their language skills that is issued by one certain province of a Member State. In such a case as the one of Agonese, this aspect has been more thoroughly disclosed. Romao Angonese, an Italian national, whose mother tongue is German, graduated in Austria and applied to take part in a competition for a post with a private bank Cassa di Risparno in Bolzano, Southern Tyrol. One of the conditions of the competition was a specific certificate of bilingualism, issued exclusively by one public authority of the town. R. Angonese was not admitted to the competition because he could not produce the certificate issued in Bolzano. He was in possession of another certificate providing evidence of his knowledge of German and Italian languages (Case Angonese, 1998).

Institutions in Lithuania recruiting migrant workers from other Member States must follow the provision that language requirement should be well-grounded and compulsory for performing the tasks implied in an actual post as well as not discriminative to migrants. Employers cannot demand a specific qualification while producing certification and systemic language tests designed in a standard form. It is considered to be in conflict with the principle of proportion. Although under certain circumstances and for concrete positions the language requirement can be justified, the European Commission maintains that granting these positions to the native speakers only is an unacceptable practice.

Conclusions

- The EU Law remains neutral with regard to the internal organization of the Member States. When forming the systems of public sector and various occupancies, the Lithuanian public authorities can invoke the provisions of internal legal systems. The main attention is paid to a civil servant's special allegiance to the State as well as professional competence. These are the key factors when selecting young candidates to occupy the posts in the public sector. However, in all cases the institutions of the Republic of Lithuania must comply with the legal provisions of the EU and the exemptions of the Treaty.
- The rules and rights related to free movement of workers in the public sector are not applicable for employment in the public service. This means that when assigning to public service posts Lithuania is free to give employment priority to its nationals. This exemption is backed-up by the presumption of the nationals having a higher degree of allegiance to

the State. Certain public authority functions are too important to be open for foreigners. Therefore, public establishments may rightfully be reserved for the nationals.

- The definition of the concept 'public service' cannot be left exclusively to discretion of the Member States. The EU institutions interpret them in consideration with the peculiarities of each State. This concept, unlike the concept 'ordre public' ('public order'), is not elaborated on by any secondary legal acts of the EU. It has to be apprehended as the one to cover the positions that are involved directly or indirectly in exercising duties and functions of public authority with the aim to safeguard national or any other general interests. Those persons who are to occupy such posts must assume the existence of a special relationship of allegiance to the State and the reciprocity of rights and duties which form the foundation of the bond of nationality.
- Due to globalization challenges and pursuing modernisation of the public sector, the European Commission urges the Member States, as far as possible, to make all levels of this sector accessible for migrant workers. In those cases where migrant workers are allowed access to the employment in the public sector, Lithuania must ensure them equal opportunities as far as employment aspects are concerned. The Lithuanian public institutions, for instance, when giving permission to work in the public sector, must qualify all former experience of migrant workers in similar working fields the same as their professional experience acquired while working in the internal system.
- The general conclusion of this article is that some legal acts of Member States provide for the requirement of citizenship when applying for a certain position within the public sector. However, these positions, as a rule, are not related to direct or indirect participation in exercising the duties and functions of public authorities. They are involved in safeguarding the interests of the State or other public authority institutions. The persons occupying them are assumed to have no special relationship of allegiance to the State and the reciprocity of rights and duties which form the foundation of the bond of nationality. In principle, when having to make a decision which posts in the public sector are to be left exclusively for nationals, the Lithuanian institutions tend to invoke the practice of the EU institutions.

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