

ECJ CASE-LAW ON THE CONCEPT OF „PUBLIC ADMINISTRATION” USED IN ARTICLE 45 PARAGRAPH (4) TFEU

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Abstract

According to Article 45 of the Treaty on the Functioning of the European Union (TFEU), „the freedom of movement for workers shall be secured within the Union”. This freedom entails the abolition of any discrimination based on nationality between the workers of Member States as regards to employment, remuneration and other working conditions. However, Article 45 paragraph (4) establishes an exception in the sense that its provisions do not apply to employment in the public administration. The concept of public administration is autonomous in the sense that it is determined by the Court of Justice of the European Union, and not by the Member States.

Keywords: ECJ case-law; the concept of „public administration”; Article 45 paragraph (4) TFEU.

1. Introduction

As already known, one of the main rights of citizens¹ of Member States of the European Union is to be gainfully employed anywhere in the European Union, under conditions equal to those imposed by the host Member State, to its own nationals. This is possible under Title IV – The free movement of persons, services and capital, Chapter 1 - Workers, Article 45 and under the following articles of the Treaty on the functioning of the European Union. Thus, pursuant to Article 45 paragraph (1) „the free movement of workers shall be secured within the Union”. Next, paragraph (3) stipulates the provision meant to give insight to the free movement of workers, namely: „the free movement of workers entails the right:

- to accept real employment offers;
- to move freely for this purpose in the Member States;
- to stay in a Member State for the purpose of employment in accordance with the laws, regulations and administrative provisions governing the employment of workers in that state;
- to remain on the territory of a Member State after

having been employed in that state, under the conditions which will be subject to rules adopted by the Commission”.

„Therefore, the free movement of persons, as a fundamental freedom in the EU, includes the right of every citizen of a Member State of the European Union to move to another Member State with the purpose to accept a genuine employment offer, to reside within the host State for the purpose of employment in accordance with the laws, regulations and administrative provisions governing the employment of workers of that state and to remain in that Member State after having been employed in that state”². However, according to paragraph (4) of the same Article 45 TFEU, „provisions (...) [mentioned] do not apply to employment in the public administration”. Otherwise said, Article 45 paragraph (4) TFEU constitutes an exception from the free movement of workers.

At national level there is, however, a list that includes jobs involving state sovereignty and that can, therefore be reserved only to its own citizens, being thus „closed” for citizens of other European Union Member States. It is the competence of the administration to determine, from case to case, according to the nature of duties and responsibilities involved in the job concerned, whether it can be offered to nationals³ of the European Union, or only to its own

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¹ The provisions of the EU treaties refer to citizenship, and not nationality, and condition the EU citizenship of the existence of citizenship of a Member State (Art. 9 TEU and art. 20 paragraph (1) sentences 2 and 3 TFEU: „any person holding the nationality of a Member State is citizen of the Union. The citizenship of the Union does not replace the national citizenship but it is additional to it”). Thus, in strictly constitutional terms, the citizenship of the Union, established by the Treaty of Maastricht of 1992 and developed by the Treaty of Lisbon of 2007, it is not comparable to that given to a citizen of one of the 28 Member States. EU citizenship puts people under the protection of EU law (according to **Augustin Fuerea**, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 193). EU citizenship confers a number of rights to citizens of the Member States and strengthens the protection of their interests. Systematized, these are: the right to movement and to reside freely within Member States; the right to vote and to be elected to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy, on the territory of a third country in which the Member State of which they are nationals, is not represented, protection by the diplomatic and consular authorities of any Member State under the same conditions as nationals of that State; the right to petition the European Parliament, to apply to the Ombudsman and the right to address the institutions and advisory bodies of the Union, in any of the Treaty languages and to obtain a reply in the same language. For details, see Elena Emilia Ștefan, *Rolul jucat de Ombudsman în îmbunătățirea activității administrației publice*, Revista de Drept Public, no. 3/2014, pp.127-135.

² Augustin Fuerea, *op. cit.*, p. 192.

³ In the Romanian law, the concept of „national” is defined in Law no. 157/2005 ratifying the Treaty of Accession of Romania to the European Union, art. 3 according to which “within the meaning of the Accession Treaty, of the Treaty establishing a Constitution for Europe,

citizens. This situation is compounded by the fact that, at EU level, the content of the concept of „public administration” is not in the content of primary or secondary legislation. That is why the „basic principles of interpretation of Article 45 paragraph (4) have been set⁴ „judicially”.

2. The scope of the exception regarding the „public administration”

In 1973, the Court of Justice in Luxembourg⁵ was asked the question „whether, under the exception provided in Article 48 paragraph (4) of the Treaty [now Article 45 paragraph (4) TFEU] can be excluded from the rule of non-discrimination⁶ formulated (...) [in a legal instrument of secondary law] workers employed in the public service of a Member State (...) under an employment contract governed by private law”⁷. To answer that question, the Court considered it necessary to establish the scope of the exception relating to public administration. Thus, according to the Court, „the scope of the exception provided in Article 48 paragraph (4) can be determined by the setting of the legal relation between the employee and the administration which employs him/her⁸. In the absence of any difference in the above provision, there is of no interest whether a worker is employed as a worker, employee or official⁹, much less if the employment relation is subject to public law or private law [and that is because] those legal classifications vary depending on national laws, and therefore cannot provide the requisite criteria of interpretation of Community law”. The Court held that the „exception under that provision envisaged employment only for jobs in public administration and that the legal nature of the relation between worker and administration was irrelevant in that regard”¹⁰.

Therefore, under the Court of Justice of the European Union, „in the system of the Treaty, the principles of free movement and equality of treatment of workers within the Community, exemptions permitted [Article 45 paragraph (4) TFEU] cannot cover a scope going beyond the purpose for which that

exemption clause was introduced. Interests that it protects allow Member States to respect them through the possibility of restricting the admission of foreign nationals to certain activities in the public administration. This provision cannot justify discriminatory measures on remuneration and other conditions of employment against workers, once admitted in the administrative service”¹¹.

3. Limits of the notion of „public administration”

The Court of Justice of the European Union was not pleased only with identifying the scope of the exception relating to public administration and, in 1982, it resumed the issue of the exception provided in Article 45 paragraph (4) TFEU in the case *Commission v./Belgium*¹². In the present case, the Commission brought an action to declare that Belgium, „by requiring or permitting the imperative claim of the Belgian citizenship as a condition of recruitment for jobs not covered by Article 48 paragraph (4) EEC Treaty [now Article 45 paragraph (4) TFEU] did not fulfill its obligations under Article 48 of the Treaty and Regulation (EEC) No. 1612/68 on the free movement of workers within the Community”¹³. In fact, holding the Belgian citizenship represented a condition of access to jobs in the Belgian local authorities and public enterprises, regardless of the nature of duties that were to be fulfilled. Examples of such jobs were those of unskilled workers in rail, nurses and guards at night. The permanent Representation of the Kingdom of Belgium replied to the accusations which were brought, in particular, that:

- „the condition of citizenship found in dispute meets the requirements of the Belgian Constitution, which states that” ... only Belgians can be admitted to be employed in the civilian and military service, with some exceptions that can be established by law, for special cases”;
- the Commission’s interpretation of Article 48 paragraph (4) of the Treaty requires establishing a

the Treaty establishing the European Community, the Treaty establishing the European Atomic Energy Community and the Treaty on European Union and other legally binding Community rules, the following terms are defined as follows:

- a) national of a State means a natural or legal person having the citizenship or nationality of that State in accordance with its national law;
- b) Romanian national means a natural or legal person having the Romanian citizenship or nationality, according to Romanian legislation”.

⁴ Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene, comentarii, jurisprudență și doctrină*, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 950.

⁵ On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

⁶ To analyze the concept of „discrimination”, see Elena Comșa, *The principle of freedom and equality*, Lex et Scientia no. 1/2009, Prouniversitaria Publishing House, Bucharest, 2009.

⁷ Judgment of the Court of February 12, 1974, *Giovanni Maria Sotgiu v./ Deutsche Bundespost*, Case 152/73, ECLI:EU:C:1974:13, pt. 6.

⁸ *Ibid.*, pt. 5.

⁹ For details, see Elena Emilia Ștefan, *Reflections on the European Dimension of the Public Office*, Elsevier, Procedia Social and Behavioral Sciences, Volume 92, 10 October 2013, pp. 899-902 (<http://www.sciencedirect.com/science/article/pii/S1877042813029042>).

¹⁰ *Ibid.*, pt. 6.

¹¹ *Ibid.*, pt. 4.

¹² Judgment of the Court of May 26, 1982, *Commission of European Communities v./ Kingdom of Belgium*, Case 149/79, ECLI:EU:C:1982:195.

¹³ *Ibid.*, pt. 1.

distinction within each administrative entity, between jobs related to the exercise of public authority and those which do not belong to it, and thus raises a problem the solution of which should be found by all Member States, at Community level¹⁴.

In turn, the Commission argued that the exception concerning the public administration¹⁵ „refers only to jobs the practice of which requires effective participation in public authority, implying the existence of the power of decision on persons of private law or which questions the national interests, especially those involving the internal or external security of the state. In addition, the Commission added that the conditions for applying that exemption clause were not met for jobs such as those covered by the offers of jobs concerned¹⁶.

According to the Court, Article 45 paragraph (4) TFEU „brings out of the scope of the first three paragraphs of this article, several jobs involving direct or indirect participation in the exercise of public power and functions which are meant to protect the general interests of the State or of other public authorities. Such jobs involve, indeed, from the holders' side, the existence of a special solidarity relation with the State, as well as reciprocity of rights and obligations, which represent the ground of the citizenship bond. Thus, depending on the objective pursued by [art. 45 paragraph (4) TFEU] (...) it must be set the scope of the exemption that the article brings to the principles of free movement and equal treatment enshrined in the first three paragraphs of that article. Determining the scope of the article [Article 45 paragraph (4) TFEU] generates, however, particular difficulties because, in different Member States, the public authorities assume responsibilities with economic and social character or engage in activities that cannot be identified with those of the typical functions of the public administration, but which, on the contrary, by their nature, are within the scope of application of the Treaty. Under these conditions, the extent of the exception provided by [Article 45 paragraph (4) TFEU] on functions related to the State or other bodies governed by public law, but which, at the same time, does not involve any association with tasks of the public administration itself, would result in the circumvention of the application of the Treaty principles, of a considerable number of jobs and in creating inequalities between Member States, depending on the disparities that

characterize the structure of the State and certain sectors of economic life¹⁷.

The Court remained consistent to this view, resuming it in other cases. Thus, in *Lawrie-Blum*¹⁸ case, the Court stressed that „the positions in the public service within the meaning of Article 48 paragraph (4) excluded from the scope of paragraphs (1) to (3) of this article, mean in fact a series of jobs involving direct or indirect participation in the exercise of public powers and functions which are conceived to protect the general interests of the State or of other public collectivities and involving therefore, from the holders' part, the existence of a special solidarity with the State, and reciprocity of rights and obligations grounding the bond of citizenship. The jobs excluded are only those which, having regard to their respective duties and responsibilities, may take specific characteristics of administration activities in the areas described above¹⁹. In the case of *Allué and Coonan*²⁰, the Court answered the national Court that „jobs for teachers do not involve a direct or indirect participation in public authority and functions which aim at protecting the general interests of the State and other public authorities, and do not imply the existence of a special relation of solidarity with the State and the reciprocity of rights and obligations underlying the bond of citizenship²¹.

Also, in the case *Commission v./Luxemburg*²², the Court noted that „according to its case-law, (...) [the notion of public administration] for jobs involving direct or indirect participation in the exercise of public authority and functions designed to protect the general interests of the State or other public authorities, and which entails assuming from those occupying them, the existence of a special relation of solidarity with the State, and reciprocity of rights and duties that are the foundation of the citizenship bond. However, the exception provided in Article 48, paragraph 4, does not apply to jobs which, although covered by the State or other public bodies, still do not involve any association with tasks within the public administration itself²³.

The Court held in Case *Bleis*²⁴ that jobs excluded from the scope of Article 45 paragraph (4) TFEU „are those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above²⁵.

¹⁴ Ibid, pt. 6.

¹⁵ For details, see Elena Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ nr.1/2015, pp. 132-139.

¹⁶ Ibid pt. 7.

¹⁷ Ibid, section. 10-11.

¹⁸ Judgment of the Court dated July 3, 1986, *Deborah Lawrie-Blum v./ Land Baden-Württemberg*, Case 66/85, ECLI:EU:C:1986: 284.

¹⁹ Ibid, pt. 27.

²⁰ Judgment of the Court of May 30, 1989, *Pilar Allué and Carmel Mary Coonan v./ Università degli Studi di Venezia*, Case 33/88, ECLI:EU:C:1989:222.

²¹ Ibid, pt. 7.

²² Judgment of the Court of July 2, 1996, *Commission of the European Communities v./ Grand Duchy of Luxembourg*, C-473/93, ECLI:EU:C:1996:263.

²³ Ibid, pt. 2.

²⁴ Judgment of the Court of November 27, 1991, *Annegret Bleis v./ Ministère de l'Education nationale* C-4/91, ECLI:EU:C:1991: 448.

²⁵ Ibid, pt. 6.

In the judgment *Colegio de Oficiales de la Marina Mercante Española*²⁶, the Court stated that 'the concept of public administration, within the meaning of [Article 45 paragraph (4) TFEU] must be interpreted and applied uniformly in all Member States of the [European Union] and therefore this cannot be left entirely to the sole discretion of Member States'²⁷. This is why further, the Court repeats that the exception provided in Article 45 paragraph (4) TFEU „does not apply to jobs, which, although related to a public body or otherwise, does not involve any association with tasks of the public administration itself"²⁸. According to the Court, a Member State can reserve to its nationals, the job of captain and first mate on ships from the private field, flying its flag only if the rights and powers conferred under public law are effectively exercised regularly and do not represent a very small part of their activities.

Therefore, „a State cannot fit certain activities, for example, of economic or social type, within the derogation provided by the Treaty, by simply including them in the field of public law of the State and by their implementation"²⁹. The Court held that „regardless of their classification in the Member State, nurses, teachers – of primary school or high school - as well as language assistants at universities are not employed in the public service"³⁰ within the meaning of Article 45 paragraph (4) TFEU and that is because there is no „special bond of loyalty and reciprocity of rights and obligations between the State and the employee"³¹. From the Court's case-law, it results that „jobs of which it can be said that they require such loyalty and that they depend on the nationality bond"³² shall include, cumulatively, two aspects, namely: 1. the participation in the exercise of powers conferred by public law and

2. it must assume duties designed to protect the general interests of the state"³³.

4. Conclusions

Under a constant case-law of the Court of Justice of the European Union, the concept of „public administration" within the meaning of Article 45 paragraph (4) TFEU concerns the employment which implies direct or indirect participation in the exercise of public powers and duties which have as object the preservation of the general interests of the State or of other public authorities and imply, thus from their holders, the existence of a special solidarity relation with the State, as well as reciprocity of rights and obligations which underlie the bond of citizenship. These criteria must be evaluated, from case to case, depending on the nature of the tasks and responsibilities involved in the job in question.

However, the notion of „public administration" within the meaning of Article 45 paragraph (4) TFEU must be given a uniform interpretation and application throughout the Union and cannot therefore be left to the sole discretion of Member States. In addition, this exception must be given an interpretation which limits its scope to what it is strictly necessary in order to preserve the interests which the Member States can protect.

The case-law of the Court of Justice of the European Union should be taken into consideration by Member State authorities when they decide which jobs of the public sector are reserved for nationals. This aspect has been recognized including by the European Commission³⁴.

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²⁷ Ibid, pt. 38.

²⁸ Ibid, pt. 40.

²⁹ Paul Craig, Grainne de Burca, *op. cit.*, p. 952.

³⁰ Allan Thatham, Eugen Osmochescu, *Dreptul Uniunii Europene*, Arc Publishing House, Chișinău, 2003, p. 180.

³¹ Paul Craig, Grainne de Burca, *op. cit.*, p. 952.

³² Idem.

³³ Idem.

³⁴ Communication of the Commission to the Council, European Parliament, European Economic and Social Committee and the Committee of Regions, *Reaffirming the free movement of workers: rights and major developments*, Brussels, 13.7.2010 COM (2010) 373 final, p. 10.

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