UiO : Faculty of Law
University of Oslo

The Legitimacy of the Provision of the Article 45(4) of the Treaty on the Functioning of the European Union

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Table of contents

1. Introduction

The examination of the employment in public sector as an exception from freedom of movement for workers is pointless without reaching a deeper analysis of the related issues, namely freedom of movement of workers, public sector notions as well as the amount and origins of migration.

Nowadays 200 million international migrants, 50 per cent of whom are women and men migrant workers, who have left their homes to find work and better opportunities elsewhere than their home country for different reasons, as to support their families, are recognized.[1] Migration is without any doubt a phenomenon as old as human history: theologians are even pointing to the removal of Adam and Eve from the Garden of Eden as the first instance of forced migration.[2]

The rights of migrants remain a major concern for international human rights law, since a lot of vulnerability issues occur. Various forms of discrimination, including exclusion from a variety of jobs and different standards for working conditions, are likely to segregate nationals from non-nationals. Migrant workers quite often lack job security, while the risk of removal from employment leads to situation that migrant workers together with their families are at a serious disadvantage.[3]

The rights of migrant workers are protected under a number of international human rights instruments. Since limits of this research will not exceed Europe, the main safeguard to overlook is the free movement of workers concept – the fundamental principle of the EU law.

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[1] Rehman, Javaid. *International Human Rights Law*. The United Kingdom, (Pearson Education Limited) 2010, p. 680.

[2] Ibid.

[3] Ibid.

2. Structure of the thesis

The employment in public sector exception of free movement of migrant workers according to article 45(4) of the Treaty on Functioning of the European Union (hereinafter – TFEU)[4] is the main object of the research in this thesis. Generally the analysis of exclusion of employment in public sector from freedom of movement concept will be based on the mentioned provision of the TFEU. The legitimacy of derogation of article 45 TFEU embedded in paragraph 4 will be analyzed not only in legal, but also political, social, philosophical, cultural and other required levels.

Article 45 of the TFEU generally states that freedom of movement for workers shall be secured within the European Union. The provision ensures that such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment. The main object of this thesis – article 45(4) provides that the provisions of this article shall not apply to employment in the public service.

In order to define the concept of public service, its teleological meaning is analyzed. By illustrating the supranational nature of the European Union (hereinafter – EU) law, it is attempted to justify the competence of the Community to interpret this provision. In order to prove the need to define public services in functional method, both institutional and functional approaches are analyzed. The comparative and historical method is used to define the imperative criteria of public services set by the Court – namely public authority and responsibility for safeguarding general interests of the state.

There are several nascent research questions forming the essence of the thesis based on which further analysis is held. Firstly, it is discussed whether the public sector exception set under article 45(4) TFEU breaches the free movement for workers principle. Secondly, analysis is made to find the answer if the public sector exception set under article 45(4) TFEU satisfies the EU citizenship concept. Finally, it is being tried to find answer if the public sector exception set under article 45(4) TFEU corresponds with currently increasing level of integration and globalization in the EU.

[4] *Treaty on the Functioning of the European Union*, signed 13 December 2007, entered into force 1 December 2009.

Not less important are the side-questions, namely what is the notion of the worker, the national, the citizen and the civil servant. Also, why fundamentally are provisions of article 45 TFEU not applied to employment in public sector, does it show that member states fear something?

In order to maintain the logical sequence and answer the following research questions, the structure of the thesis will further be organized according to the system of article 45 of the TFEU, since this provision provides the principal means by which the abolition of obstacles to free movement of workers is achieved.[5]

Paragraph 1 of the latter establishes freedom of movement for workers and requirement that it shall be secured within the Union. The thesis will be started from the territorial, personal and material analysis of this article. Since the definition of worker is still not legally defined, a greater attention will be paid to this concept.

Also, paragraph 2 of article 45 TFEU embeds the prohibition of any discrimination based on nationality between workers, therefore further part of the thesis will discuss the context and limits of discrimination as well as differences between direct and indirect discrimination.

Lastly, the most important issue to research will be the exemption for employment in the public service as it is embedded in the last part of the discussed provision: the aim of this exception and boundaries between public and private sectors will be discussed.

[5] Rogers, Nicola, Rick Scannell and John Walsh. *Free Movement of Persons in the Enlarged European Union*. London, (Sweet & Maxwell/Thomson Reuters) 2012, p. 89.

3. Relevance of the topic

There are a number of arguments why the followed thesis topic is of a great importance. Firstly, the dynamic and responsive nature of the European Community (hereinafter – EC) law itself allows making such conclusion as it changes rapidly according to basic trends of society. Rulings of the European Court of Justice (hereinafter – ECJ) are able to challenge even the accepted rules meanwhile other EU bodies react not less by enacting new or updating the already applicable legislation.

Secondly, the ongoing globalization and regional integration promotes workers to cross boarders in order to search for employment. Taking a glance at the history, initially it was mainly persons from Italy and Spain who moved to richer Northern States on a long – term basis, for example, to work in mines. When the Southern countries became richer, such movement decreased and periods of shorter movement occurred more often. As from 2004, when Central and Eastern European countries acceded to the EU, the third type of movement exposed – workers moved from work to work, and from country to country, wherever they were most needed and earned the most.[6] Consequently, the international migration flows are likely to increase even more – according to statistical records, there are 10.5 million migrant workers in the EU and around one million people crossing EU boarders for work every day.[7]

Thirdly, free movement of workers without restrictions is sometimes seen as a threat to sovereignty of a state or its public interest. This can clearly be illustrated by reactions of member states to the enlargement of the EU in 2004 when especially Germany and Austria demanded for exceptions to free movement for the citizens of new member states. Transitional agreements at that time were being applied to new and existing member states regarding free movement of workers, except Cyprus and Malta where discussed treaty provisions were

[6] Pennings, Frans. *Coordination of Social Security within the EU Context*. In: Social Security and Migrant Workers. Selected Studies of Cross-Border Social Security Mechanisms. Wolters Kluwer, Law and Business, 2014, p. 120.

[7] *Coordination of Social Security Systems in the European Union: an explanatory report on EC Regulation 883/2004 and its Implementing Regulation 987/2009*. International Labour Organization, 2010, p. 1.

immediately applicable.[8] Idea to restrict freedom for workers crossing boarders had also already been used in 1986 when Spain and Portugal joined the EU.[9]

As already noted upwards, although the freedom of movement exists as a fundamental and non-negotiable EU principle, problems still occur. Challenges are still to be met ahead: as surveys and complaints show, practical, administrative and legal barriers still prevent citizens of the EU from exercising their freedom of movement.[10] The lack of awareness when complying with EU rules is quite common for both private and public employers which creates a path for discrimination based on nationality, even though national legislation is compliant. Furthermore, there are not only cultural or socio-economic barriers, but also administrative ones allowing to different recruitment, remuneration or working conditions, also different conditions to access posts or social advantages.

However, despite the mentioned occurring obstacles and unclear definitions regarding concept of free movement for workers, leading to the high relevance of the further analyzed topic, it is without a doubt that free movement of workers is a great success of the EU, having helped to overcome social divide between "us" and "them".[11]

Turning to the particularities of employment in public sector for migrant workers the consistent changes have to be taken into account. The European Commission, acting as complaints handler and upon-request advice giver in this field, still receives complaints connected with access to such employment, recognition of professional experience and diplomas, seniority, etc. What is more, it is still being complained about posts restricted to nationals who obviously do not involve the required criteria, which usually occurs when legislation of the host member state is not fully adapted to the EU law or is adapted incorrectly.[12] Such tendencies show that even though the EU law embeds general principle of free movement, member states still fail to fully comply with it.

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[8] Weiss, Friedl and Frank Wooldridge. *Free movement of Persons within the European Community*. The Netherlands, (Kluwer Law International) 2007, p. 50.

[9] Nyman – Metcalf Katrin. *Free movement of workers and EU enlargement – a fundamental freedom with exceptions?* http://www.snee.org/filer/papers/119.pdf, p. 2.

[10] Monderhoud, Paul and Nicos Trimikliniotis. *Rethinking the free movement of workers: the European challenges ahead*. The Netherlands, (Wolf Legal Publishers) 2009, p. viii.

[11] Op. cit., p. 23.

[12] Op. cit., p. 18.

4. Concept of 'freedom of movement of workers'

Free movement of goods, workers, services and capital are the four freedoms and main elements of the EC and the EU. The free movement has been considered to be a mean to quicken the achievement of particular aims of the EU such as peace or economic growth.

Historically human migration is probably the most widespread form of globalization which has transformed patterns of work and employment as well as social and cultural relations.[13] The right of access to the labour market of other member state implies the right to equal treatment, as well as the right to social, economic and cultural integration in the state of stay.[14] Experience has shown that free movement of workers effectively fills in labour and skills shortages in member states and by increasing worker mobility has a potential to contribute to economic growth.[15] Nevertheless, its impact is hard to define and should not be overestimated in comparison with economic benefits of free movement of goods, capital and services.[16]

Free movement of workers is one of the founding principles of the EC and the essential element of EC internal market creating the unified EU labour system. This concept is regulated under national law of member states, the European Convention of Human Rights (hereinafter – ECHR)[17], the United Nations (hereinafter – UN) treaties as well as a number of bilateral and multilateral agreements.

In the EU frame freedom of movement of workers was established more than 50 years ago. Currently, as mentioned, article 45 of TFEU) (ex – article 39 of the EC Treaty[18]) embeds the essence of a right not only to accept a job offer in another member state and reside there for purpose of employment, but also to go to another member state to look for a job and to

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13 Note 8, p. 1.

14 Jorens, Yves, Barbara De Schuyter and Cindy Salamon. *Towards a rationalization of the EC Co-ordination Regulations concerning Social Security?*(Academia Press) 2007, p. 3.

15 Note 10, p.vii.

16 Op. cit., p. 23.

17 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, enacted 1950-11-04, in force 1953-09-03.

18 *Treaty establishing the European Community*, signed 25 March 1957, entered into force 01 January 1958.

reside there while looking for it, as long as a genuine chance of being engaged can be proven.[19]

Notion of free movement of workers was also consequently developed by secondary legislation – article 46 of the TFEU requires European Parliament and the Council to issue directives or regulations regarding free movement of workers. Regulation (EEC) 1612/68 on freedom of movement for workers within the Community[20] is one of the principal measures which implements rights for migrating workers such as to seek and accept work in another member state and emphasizes the right to equal treatment. At the moment Regulation 1612/68 is replaced by Regulation 492/2011[21]. Another effective measure concerning the discussed issue is Directive 2004/38/EC on the abolition of restrictions on movement and residence within the Community for workers of member states and their families[22]. Jurisprudence of the ECJ which has a task to ensure, by its case law, the uniform interpretation of the rules, is with no doubt of a great importance.[23] Also, the action of European Commission in this field is not less relevant.

The mentioned provisions ensure the right to move and reside freely for work purposes within the EU and guarantee equal treatment in work-related factors and conditions. As has been declared by the Council of the EU, free movement of workers is a powerful, positive and concrete example of the added value offered to the EU citizens, bringing them more freedom, unifying Europe, overcoming prejudices among nations and eliminating xenophobic trends.[24]

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[19] Verschueren, Herwig. *Do National Activation Measures Stand the Test of European Law on the Free Movement of Workers and Jobseekers?* In: European Journal of Migration and Law. 12 (2010) 81 – 103, p. 84.

[20] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers Within the Community.

[21] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on Freedom of Movement for Workers within the Union.

[22] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members.

[23] Pennings, Frans. *Coordination of Social Security within the EU Context*. In: Social Security and Migrant Workers. Selected Studies of Cross-Border Social Security Mechanisms. Wolters Kluwer, Law and Business. 2014, p. 117.

[24] Note 10, p.vii.

5. Scope of freedom of movement of workers

5.1 Territorial scope

Generally, rules of the TFEU concerning free movement apply to the territories of member states of the EU, at the moment 28 of them – article 355 of the TFEU sets out the territorial application including areas of territorial sea, economic zone and continental shelf.[25] What is more, article 355 lists specific rules for particular territories, for instance: special rules apply for Madeira, Azores, Canary Islands or Gibraltar, meanwhile free movement of workers is not applicable to Faroe Islands, Greenland or United Kingdom's Sovereign Base area in Cyprus.

Right to move and reside freely is applicable not only to the territory of the EU, but also to the European Economic Area (hereinafter – EEA) countries, namely Iceland, Liechtenstein and Norway. By entering into force on 1st January 1994 the EEA Agreement brought together the EU and EEA member states into a single market. Such rules are also applicable to Switzerland, since it has a bilateral agreement with the EU. Therefore, member states in this research will refer not only to the EU members, but also EEA member states as well as Switzerland.[26]

The substantive condition of the operation of free movement of workers is the requirement for the activity to take place in the territory where rules of the EC Treaty apply.[27] According to the case law of the ECJ, this notion may be exercised even when work is done outside the Community if work relations were started in it – in *Walrave and Koch v. Association Union Cycliste Internationale* (36/74) the Court stated that rule of non-discrimination applies for all legal relationships provided that they are in the territory of Community either because started or take effect there.[28] Also, the ECJ has ruled that activities

[25] White, Robin C. A. *Workers, Establishment, and Services in the European Union*. New York,(Oxford University Press) 2004, p. 24.

[26] *Bilateral Agreements I*, signed 21 June 1999, entered in force 01 June 2002.

[27] Op. cit., p. 26.

[28] The European Court of Justice, Luxembourg, 1974.

temporarily taking place outside the Community are not sufficient to exclude such application unless there is no close link to member state, see *Boukhalfa v. Germany* (C-214/94).[29]

5.2 Personal scope

5.2.1 Definition of 'worker'

In its case law, the ECJ has consistently stated that obligations arising under article 45 TFEU were not confined to only public entities but applied to rules of any private association or body that were aimed at regulating gainful employment in a collective manner.[30]

Taking a look to a migrating individual, it becomes not less important to answer what features a person has to meet in order to fall within the scope of article 45 of the TFEU as no legal term for worker can be found in the legislation so there is plenty of space for interpretation. Generally, this provision secures a migrant engaging in an economic activity or, in other words, a worker. Even though the economic nexus has been broken down within time when the ECJ and legislature began to emphasize a human dimension in this field, it is still inevitable to define the worker under the EU law. It should be noted, that 'migrant worker' in this document refers to the EU and the EEA citizens working in another member state, not covering third-country nationals.

First step when looking for the Union concept of who can be considered to be a worker, relates to answering who has the authority to define it. As already mentioned above, no strict legal definition may be found in the EU legislation, so the jurisprudence of the ECJ has an important role to establish the main guidelines here.

As the Court has ruled in *Hoekstra v. The Netherlands* (75/63)[31], the definition of worker for the purpose of article 45 TFEU is a matter of the EU law and it must not come from national concepts. The Court stated that competence to interpret this definition is not left for member states since there would be a risk to adopt restrictive definition and eliminate particular categories of people in such case. By that it was declared that the concept of worker has to be interpreted broadly. So, when the time came to define the concept of employment relationship and worker in the sense of the EU law and choose between contractual or

[29] The European Court of Justice, Luxembourg, 1996.
[30] Note 10, p. 46.
[31] The European Court of Justice, Luxembourg, 1964.

statutory definition, the ECJ preferred the second option and defined worker on a broad and permanent basis, leaving basic elements of concept of worker: the provision of labour, remuneration and economic dependence.[32]

The three essential criteria determining whether the person is a worker in terms of article 45 of the TFEU were identified in *Lawrie-Blum v. Land Buden-Wurttemberg* (66/85)[33]. The person must perform services effectively and of some economic value, which must be done for and under the direction of another person and, not the least, the person must receive remuneration. It is important to notice that the list of requirements is exhaustive, because, according to the Court, the Community legislation does not prompt any additional factors for a classification as a worker, see *Brown v. Secretary of State for Scotland* (197/86).[34]

Firstly, the analysis of economic value requirement should start from the perspective of the employer – if the assumption is that any, though not marginal, economic value is felt also by another party, the activity would be said to be effective and genuine.[35] Such test was clearly illustrated in the already mentioned *Lawrie-Blum v. Land Buden-Wurttemberg* (66/85), where trainee teachers were hired to teach pupils. Although they were practicing and not acting as factual employees, the Court ruled that provided service is of some economic value as otherwise the school would have been required to hire other teachers to work.

The second requirement of economic dependence has not been likely to cause many problems in practice as the direct relationship is relatively easy to evaluate. The illustrating case contained one person who was the director and the only shareholder of the company, therefore no direct subordination was found by the Court, see *Asscher v. Staatssecretaris van Financien* (C-107/94).[36] However, people in similar as mentioned cases are likely to be found to work as self – employed and benefit from free movement provisions in any event.[37]

Thirdly, it follows from the ECJ case law that remuneration is an essential element for worker status and it cannot be interpreted narrowly. This means that there is no requirement for remuneration to be in particular form or level. In *Levin v. Staatssecretaris van Justitie*

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32 Carlier, Jean-Yves and Michel Verwilghen. *Thirty years of free movement of workers in Europe. Proceedings of the conference Brussels, 17 to 19 December 1998*.Belgium,2000, p. 71.

33 The European Court of Justice, Luxembourg, 1986.

34 The European Court of Justice, Luxembourg, 1988.

35 Note 5, p. 93.

36 The European Court of Justice, Luxembourg,1996.

37 Note 5, p. 94.

(53/81) the Court has rejected that remuneration has to reach a certain degree to enable person to be a worker and held that part-time workers are not excluded from the scope of article 45 by repeating the main rule in this field: provided their work involved genuine and effective activities that cannot be considered as marginal or ancillary.[38] The ECJ, in the mentioned *Hoekstra v. The Netherlands* (75/63), has also noted the importance of part time work for a lot of people as it is one of the effective ways to improve their living conditions.

However, in a relatively similar case, French national was refused to be identified as a worker when she was employed in the other member state on an on-call contract with no monthly working hours guarantee and had worked only 60 hours in an eight months period, see *Raulin v. Minister van Onderwijs en Wetenschapen* (C-357-89).[39] The Court stated that the irregular nature and limited duration of the services were actually performed under a contract for occasional employment in this situation, although the nature of the contract cannot be viewed to be a reason of the conditions of employment as a rule.

What is more, as the Court found – neither the level of productivity, nor the origin of the funds from which it is paid can have any consequence in regarding a person as a worker. Meanwhile in the other case it was confirmed that the nature of the remuneration does not matter – a person paid by a share may also be treated as a worker, see *The Queen v. Ministry of Agriculture, Fisheries and Food, Ex p. Agegate Ltd.* (3/87).[40]

Even though the economic activity requirement is reflected in the definition of workers under the EU law, asking for the real and genuine behavior in exchange of remuneration, the expansive interpretation exercised by the ECJ on free movement allowed some non-economically active individuals to fall within the scope of article 45 of the TFEU, namely former workers and work seekers.

The ECJ has constantly repeated that broad interpretation of article 45 of the TFEU is oriented to promote free movement, mobility of labour as well as to improve living standards of workers. In *Meints* (C-57/96)[41], where a person was working in the Netherlands although continued to live in Germany, not an exception was found. After losing job person was refused to be included in the general compensation scheme because he was not a resident in the

[38] The European Court of Justice, Luxembourg, 1982.
[39] The European Court of Justice, Luxembourg , 1992.
[40] The European Court of Justice, Luxembourg, 1989.
[41] The European Court of Justice, Luxembourg, 1997.

Netherlands. The ECJ decided that such conclusion was wrong and the right to compensation was guaranteed because of the prior recent employment relationship.

The general rule concerning non-economically active persons was clearly illustrated by the Court as in one of its cases it held that former workers fall into the scope of article 45 TFEU if they have exercised genuine and effective occupational activity before. In the particular case a former worker could rely on free movement provisions in order to be entitled for employment benefits, see *Commission v. Belgium* (C-278/94).[42]

In the situation where an individual had not been a worker before, but was accepted to study in another member state, the Court had to decide if provisions guaranteeing free admission only for nationals of that state are discriminatory. The ruling embedded idea that individual in such case does not fall into the scope of free movement provision but can rely on the general prohibition against discrimination in article 18 TFEU (ex – article 12 of the EC Treaty), see *Gravier* (293/83).[43]

Turning to a category of first-time job seekers, a number of questions arise, namely if article 45 of the TFEU talks about accepting offers of employment actually made or is it only restricted to those who actually have found a job? In *The Queen v. Immigration Appeal Tribunal Ex p. Antonissen* (C-292/89), the Court rejected such opinion saying that it would exclude job seekers from free movement concept in general.[44] Here a person was not accepted to be a worker after looking for a job period of 6 months as member states could prescribe such period. However, the ECJ noted that it could be denied if after such time person proves that he continues to seek employment and has real chances to be hired. The Court has held that they fall within the scope of the discussed provision regarding free movement. However, they are not granted the same scope of rights as workers, namely limitations to access the job market, see *Lebon* (316/85).[45]

From the arguments set out above it can be concluded that terminology of article 45 TFEU and relevant secondary legislation is undefined. Therefore, it was left to the ECJ to define the meaning and limits of worker status and in such way to decide who is entitled to fall within the scope of provisions regarding free movement.

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42 The European Court of Justice, Luxembourg, 1996.
43 The European Court of Justice, Luxembourg, 1985.
44 The European Court of Justice, Luxembourg, 1991.
45 The European Court of Justice, Luxembourg, 1987.

5.2.2 Definition of 'national'

All member states of the European Union which decide to reserve a part of the posts in public sector to their own nationals, justify such position on a traditional nation-state philosophy.[46] Article 45(4) TFEU, which is the research object of the thesis, allows such reservation. It is important to stress that sources of this provision are found back in 1950s when due to historical reasons sovereignty and nationality concepts were defined completely differently than today. Therefore, it becomes obvious that the analyzed provision is in need of being reformed.

In order to lessen the amount of inequality of all kinds in society, discrimination is prohibited under a number of international legal instruments and TFEU is not an exception. Ethnic origin happens to be one of the grounds based on which discrimination is illegal. Although certain posts in state's public sector may be reserved for nationals, the definition of national seems to be not a questionable concept. For example, ethnic minorities such as people from Surinam often work in public sector in the Netherlands, since they create the biggest ethnic minority in the country. In 2001 around 7.7 per cent of employees in the Dutch central government belonged to ethnic minority.[47] What is more, the Netherlands even have a quota of 8 per cent of ethnic minority employment which has to be met by every employer in the country – consequently meaning that access to all posts is open for such candidates.[48] Hence, the rhetorical question arises – why some of the public employment posts may then be restricted for EU national migrating within the Union?

Former migration brings even more complicity to the discussion. One group creating uncertainty contains migrants who have not spent a lot of years in the country and subsequently have not created tights bonds enough. For example, although Russian migrants in Germany are regarded as immigrants by other states, Germany considers them to be Germans with all the consequences it brings – German citizenship, rights and duties. People

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[46] Demmke, Christoph and Uta Linke. *Who's a National and Who's a European? Exercising Public Power and the Legitimacy of Article 39 4 EC in the 21st Century*. In: Eipascope. 2003. http://aei.pitt.edu/810/1/scop2003_2_1.pdf, p. 6.

[47] Ibid.

[48] Ibid.

born in the country but have not lived there for long may be viewed as another group. One more illustrative example in this case may be – Ireland, where not so long ago all newborns were given Irish citizenship.

Cross – national marriages when Europeans marry non-EU nationals is an increasing occurrence leading to the fact that societies are becoming more and more multinational and multicultural. Germany's case is relevant: in 1960 almost every marriage was between two Germans, while in 1995 about 15 per cent of all were mixed.[49]

The mentioned figures and examples demonstrate that it is increasingly difficult to define national of the member state of the EU nowadays. As a consequence, it is becoming more and more difficult to interpret and justify the provision of article 45(4) TFEU.

[49] Note 46, p. 7.

6. Discrimination in freedom of movement of workers

Non-discrimination on the basis of nationality is very closely related with the free movement of EU citizens and the prohibition of it is crucial for workers travelling within the member states. The obligation to avoid discrimination because of nationality generally materializes the principal of equal treatment.

Within the range of the analyzed topic of this thesis, it is relevant to research whether elimination of public sector from strict rules in the field of freedom of movement of workers does not breach the equal treatment concept. Also, if the prohibition of discrimination against workers is not covered by article 45(4) TFEU, is the principle of equal treatment relevant to this article at all? Also, are migrants, working in public sector posts not reserved for nationals of the host member state, secured by law from non-discrimination? Consequently, it becomes inevitable to define the concept of discrimination.

Discrimination is a Latin definition meaning division or separation, also defined as reduction or withdrawal of rights from persons because of language, religion, political beliefs, nationality or social dependence, wealth status, place of birth, etc.[50] In other words, discriminating a person means treating him worse than others.

The general prohibition to treat individuals differently on various grounds, namely sex, racial origin, religion, age, etc., is declared in the most significant human rights documents. Article 2 of the Universal Declaration of Human Rights[51] (hereinafter – UDHR) and article 14 of the ECHR contain lists of the mentioned grounds.

There are various forms of discrimination, of which relevant for this thesis are direct and indirect. The ECJ case law and other EU non – discrimination legislation tend to define concept of direct discrimination as the situation where one person is treated less favorably than another is, has been or would be in a comparable situation.[52]According to the European Court of Human Rights (hereinafter – ECtHR), direct discrimination amounts to "difference in the

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50 *Oxford Dictionaries*. http://www.oxforddictionaries.com/definition/english/discrimination.

51 *The Universal Declaration of Human Rights*, enacted 1948-10-12.

52 *Discrimination of migrant workers at the workplace*. European Parliament; Directorate General for Internal Policies; Policy Department A: Economic and Social Policy. April 2014. http://www.europarl.europa.eu/RegData/etudes/note/join/2014/518768/IPOL-EMPL_NT(2014)518768_EN.pdf.

treatment of persons in analogous or relatively similar situation based on identifiable character", see *Carson and Others v. UK* (42184/05).[53] Whereas the Eurofound takes a slightly different view and defines direct discrimination as "different treatment of individuals or groups based on arbitrary ascriptive or acquired criteria".[54]

Although in case of direct discrimination the subject is an individual, indirect discrimination requires exaggerate not the treatment itself, but the effects of it which differ for people with different features. In *D. H. and Others v. the Check Republic* (57325/00) the ECtHR has described indirect discrimination as disproportionately prejudicial effects of a general policy or measure which, though concluded in neutral terms, discriminate against a particular group.[55] In order to indicate indirect discrimination there are a few matters to be kept in mind, such as a neutral practice applied to everyone, which is a disadvantage to a protected ground and, what is more, such effect must be compared between different groups so as to show that the effect is more negative for the protected group.

While article 19 of TFEU makes provision to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, article 18 is directed only towards equal treatment of nationals and non-nationals.

The principal of equal treatment, embedded in article 18 TFEU, applies to both economically active and non-active EU citizens, whereas article 45(2), covering only workers, is considered to be a special rule opposite to the article 18 of the TFEU. So, the main notion of non-discrimination set in article 18 TFEU is repeated in article 45(2) as well as the secondary legislation of the EU law. Concerning non-discriminating environment for migrant workers, it has to be said that together with provisions of the TFEU, Regulation 492/2011 (for social advantages) and Regulation 883/2004 [56] (for social security) (previously – Regulation 1408/71[57]) are also applicable.

It should be noted that the fundamental principle of non-discrimination on grounds of nationality contained in the TFEU is not only binding upon public authorities, but also upon

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53 The European Court of Human Rights, Strasbourg, 2010.

54 Note 52.

55 The European Court of Human Rights, Strasbourg, 2007.

56 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems.

57 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the Application on Social Security Schemes to Employed Persons, to Self-employed Persons and to Members of Their Families Moving within the Community.

private parties. It is meaningful to remember that such prohibition to discriminate applies only within the scope of application of the TFEU Treaty itself. To answer whether discrimination falls within the scope, two matters have to be overlooked.

Firstly, to find whether individual falls within the personal scope of the norm, article 20 of TFEU has to be considered. Since it establishes the union citizenship, all EU citizens are included to exercise the protection from discrimination set in article 18. Subsequently, EU citizens lawfully residing in another member state or visiting it and being recipients of services, would fall under the protection of equal treatment principle.[58] Secondly, the material scope sphere is much more problematic, but still be dependent on different factors, including the nature of activity and the reason of individual's residence in another member state.[59]

The ECJ in *Commission v. Italy* (13/63), when explaining article 18 of the TFEU, has defined discrimination as a situation when persons are treated differently despite the same conditions or otherwise.[60] In the other case the Court added one more requirement – that similar conditions cannot be evaluated differently if such evaluation cannot be justified by objective criteria, see *Hochstrass/Gerichshof der Europaischen Gemeinschaftencase* (147-79).[61] Accordingly, it can be considered that unlawful behavior is a relevant element for discrimination.

Direct discrimination can be described as a provision where the nationality requirement is directly written and in the way considering nationals above foreigners in the discussed context. While the identification of direct discrimination does not usually pose many problems in practice, article 18 TFEU contains phrase 'any discrimination', and it becomes obvious to be more forms of it, which definitely causes much more uncertainty than the clearly expressed unequal behavior.

The TFEU forbids the indirect discrimination which is usually invisible, but notwithstanding puts different rules for the same situations. Indirect discrimination arises where a provision of a legal act is likely to affect the EU citizens disproportionately if they exercise their rights. The concept of indirect discrimination was quite broadly analyzed and described by the ECJ. For instance, in *Biehl* (C-175/88), according to the legal act of

58 Note 5, p. 209.
59 Ibid.
60 The European Court of Justice, Luxembourg, 1963.
61 The European Court of Justice, Luxembourg, 1980.

Luxembourg on income taxation, employees who have not lived in the country for the whole are not able to return the accounted taxes for the period when they were staying abroad. The Court considered this rule to be an indirect discrimination since foreigners are far more likely to leave the country before the year ends.[62]

Moreover, in *John O'Flynn* (C-237/94), the ECJ analyzed whether the provision of Ireland's legal act, stating that funeral benefit is paid only if funeral takes place in the territory of the United Kingdom, is incompatible with the EU law. The Court here also discovered the indirect discrimination, giving similar arguments that foreigners are more likely to bury their relatives in their home countries outside the United Kingdom.[63] It is very important to note that according to the case law of the Court, provision to be liable to make the effect is enough and no need to have done that in practice is required. The ECJ has also identified the refusal to evaluate the comparable work periods in the public service of a different member state of EU citizen participating in a competition for a university job in Italy as an indirect discrimination, see *Scholz* (419/92).[64]

It is rather difficult though to monitor and identify such concerns, since many migrants are not aware of actual legislation forbidding discrimination in job advertisements. As a result, they rarely notice it and even more rarely – report.[65] Unfortunately, the phenomenon of discrimination in practice still occurs. For example, direct negative discrimination towards migrant workers is proved by practical experiments when curricula vitae (CV), identical in all areas but not the name of a candidate, was sent to possible employers. These experiments have shown that candidates having declared foreign – sounding names were treated less favorable than candidates with native – sounding names. Precisely, in Germany, Belgium, France, Ireland and the Netherlands native named candidates were more likely to be invited to job interviews than foreigners. To be fully fair, it has to be said that in Germany such direct discrimination disappeared in case of the same professional background of candidates.[66]

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62 The European Court of Justice, Luxembourg, 1990.
63 The European Court of Justice, Luxembourg, 1996.
64 The European Court of Justice, Luxembourg, 1994.
65 Note 52.
66 Ibid.

7. Concept of 'public service'

As member states of the EU have become parties of it after they have negotiated, signed and ratified EU treaties, they have specific rights and duties. Apart from very important principle of sincere cooperation, established under article 4 of the Treaty Establishing Union (hereinafter – TEU)[67], principles of mutual respect and conferral are also relevant. The EU law framework does not limit member states to their state authorities, but otherwise – extends it to all public authorities, namely regional, local or autonomous public bodies.[68]

Member states have a dual role in the field of free movement of workers as well as public authorities in the member states have also a dual function. Public organizations may act as regulators of employment in the public sector or as employers themselves. It is important to stress that in both functions public authorities must comply with the principles of the EU law and fulfill duties assumed by member states.

According to article 45(4) of the TFEU, provisions of article 45 do not apply in the public service which excludes employment in public sector from application of freedom of movement of workers. In other words, this legal rule set as an exception of the fundamental principal of the EU means that, in principle, access to employment in public service may be restricted to nationals of member state.

The importance of this rule can be clearly indicated by statistics[69] on the scope of the public sector in member states. Although some states show that less than 14 per cent of total employment is formed in public sector (Austria – 11.8 per cent, Luxembourg – 12 per cent, Portugal – 13.10 per cent), in most member states this rate reaches more than 20 per cent. What is more, there are a number of countries where employees working in public sphere create not less than one-third of the whole employment, for instance Sweden (33.90 per cent), Lithuania (33.30 per cent) or Denmark (32.30 per cent).

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67 *Treaty on European Union*, signed 7 February 1992, entered into force 1 November 1993.

68 Ziller, Jacques. *Free movement of European Union Citizens and Employment in the Public Sector*. In: Online Journal on free movement of workers within the European Union. 2011.

69 *Free movement of workers in the public sector*. European Commission Working Document. Brussels, 2010, p. 6.

There is no specific legislation regarding employment in public sector which would broaden general rules stated in article 45 TFEU and in secondary legislation, namely already mentioned Regulation 1612/68, Directive 2004/38 and, additionally, Directive 2005/36[70]. Therefore, the decisive role of the ECJ is again very important in interpretation of the EU law in this sphere.

The conception of public service is defined neither in primary, nor in secondary EU legislation. Being the most important interpreter of legal rules here, the ECJ has created a number of main principles for interpretation of article 45(4). In *Giovanni Maria Sotgiu v. Deutsche Bundespost* (152/73)[71] the Court ruled that public service notion should be interpreted as narrowly as possible and only by the EU authorities. Although competence to interpret provision set in article 45(4) TFEU is left to the EU, in order to define the concept of public service, it is still relevant to take a look at national legal acts by comparing and contrasting them.

Court's position to leave competence for interpretation in supranational level becomes not surprising after looking how differently member states define the concept of public sector. The extent to which member states have reserved particular types of employment for their own nationals has varied dramatically: in some states it was usual for employment by all state authorities to be limited to national level, while in other states a much more cosmopolitan view was regularly taken.[72] Consequently, if it was members' competence to interpret public service notion in the free movement framework, the different EU law interpretation would be likely to occur, which is not acceptable since the uniformity and autonomy are fundamental rules of the Community law. What is more, allowing states to rely on their domestic legislation to limit the scope of the EU legal norms would even be likely to threaten the unity and effectiveness of the EU law itself.[73]

Public service has traditionally been a national matter not affected by modernization trends. Definition of it is much more complex today than before and separation between state

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70 Directive 2005/36 EC the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional Qualifications.

71 The European Court of Justice, Luxembourg, 1974.

72 Note 25, p. 79.

73 Juneviciene, Ona and Algis Junevicius. *Free movement of Workers of the European Union Public Sector: Regulation and Improvement Possibilities*. *Public Policy and Administration, issue*. In: Central and Eastern European Online Library. 2012, p. 38.

and private sectors is becoming less evident. Subsequently, a unified European model of public administration is unlikely to be established. Reasons for different public sector conceptions can also be easily found taking a glance back to history of member states. Nowadays every member state is still willing to keep its own concept of public employment based on traditions, culture and history. Article 45(4) TFEU may be understood as created to serve autonomy to states as a consequence.

Another reason for different interpretation of the discussed provision of the TFEU may depend on very different amount and percentages of public law posts which might fall under public employment restriction – for instance, in France almost five million employees are considered to be civil servants under public contracts, in Germany – 1.7 million, while in the United Kingdom this number reaches only half million.[74] Not only numbers play a decisive role here – the interpretations of the concept of public sector and civil servant face a huge variety towards member states.

Before overlooking the variety of public service concept between member states, it is relevant to name how public employees or in other words – civil servants are different from employees in private labour market. Though, some argue that such separation is unfair while not only public employees carry tasks for general interests. They claim, for instance, doctors at private hospital perform functions creating the same value in this regard as tax officers. However, there are still a number of reasons separating the two sectors, namely different powers and responsibilities entrusted for civil servants as they usually set standards to citizens and may intervene directly into their basic rights. Also, workers in public services are financed from public funds. They carry out specific functions which require impartiality, loyalty and neutrality, since their work may have important consequences to the society. Civil servants face specific working conditions, ethnical requirements which are essential in order to reduce danger of political influence and corruption.

Usually public sector is equivalent to public administration or public authority and contains both legal and executive branches of government. However, different states define it differently because of varying legal systems, administrative structures and in many cases – definitions of public sector and civil servant set in the Constitution. For example, in the United Kingdom term "civil service" means public administration but does not cover local authorities,

[74] Note 46, p. 4.

while in Ireland or Malta public administration is understood and defined as public service. Generally, English version says "the public service", whereas French, German and Italian alternatives use "the public administration".[75] Lithuania, for instance, embeds public sector as public administration covering state and local governments' institutions.[76]

What surprises even more, is the variety of how member states interpret and apply article 45(4) TFEU. Despite the ECJ's continuous repetition of a need to interpret this provision very strictly and to apply such restriction on a case by case basis, many states decide to ignore such position. For example, Polish legislation states that "any person who is a Polish citizen may be employed with the civil service", which is the same in Lithuania. While in Romanian legal acts it is stated that "the functions and the public dignities can be occupied only by persons who have Romanian citizenship".

Besides, almost all member states of the EU reserve posts to their nationals in certain sectors or positions. While the Czech Republic restricts access to the armed forces, in France in specific conditions only nationals can become employees in ministries of defence, budget, economy, finances, justice, interior, policy and foreign affairs.[77]

[75] Ibid.

[76] Law on Civil Service of the Republic of Lithuania. http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=260891&p_tr2=2.

[77] Note 46, p. 5.

8. Institutional and functional approach of public sector

Varying definitions lead to varying approaches towards employment in public sector, namely institutional and functional. Proponents of the institutional approach affirm that employment in public sphere applies to all posts of a particular body and the fact is determined by characteristics of the employer. Usually member states seeking to reserve the more the possible posts to their own nationals state that public authorities together with its staff build the public sector. Luxemburg, Belgium and Italy can be examples of such position.[78]

However, the ECJ time and again has held that provision of article 45(4) TFEU has to be interpreted as narrow as possible and on case by case basis which presupposes the other – functional approach. The Court decided to focus on the nature of tasks which are undertaken by employees rather than the character of the employer. The functional approach means that employment classification depends on the nature of functions and their significance for state sovereignty and security, therefore it is crucial to identify the performed functions in every situation separately.

Consequently, this eliminates the institutional approach from being applied here since otherwise member states could reserve posts only for their national in spheres which do not influence state decision making and implementation. Having that mind, it logically follows that limitations for free movement of workers in public service cannot occur in administrative, technical or maintenance fields. Paradoxically, institutional approach means that cleaner's or electrician's post might fall under article 45(4) TFEU scope.

Member states relying on the institutional approach refer to grammatical and systemic interpretation of legal provisions. They claim that different formulations of norms ground that article 45(4) TFEU has to be viewed broadly. Talking about the right of establishment TFEU uses concept of performance of public functions, while concerning freedom of movement of workers, notion of service in public sector is used. However, as already mentioned above, provision set in article 45 TFEU has to be understood according to its aims – to limit free movement for workers only in those posts of public service, which are crucial for state's security.

[78] Note 25.

In *Commission v. France* (307/84), the ECJ found France to have breached the free movement of workers principle as a nationality requirement was put to apply for nurse position in a public hospital. France argued for institutional approach, however, the Court confirmed to follow the functional approach.[79]

[79] The European Court of Justice, Luxembourg, 1986.

9. Differences and particularities between public and private sector

To answer why free movement of workers in public sector remains distinct from the movement in private sector, a number of particularities and legal aspects are to be noted.

To begin with, although provisions of free movement set in article 45(4) TFEU do not apply to employment in public service, it is not an absolute derogation. In the already mentioned *Giovanni Maria Sotgiu v. Deutsche Bundespost* (152/73) the ECJ has cleared that such exception is of limited scope and has to be understood narrowly. According to the Court, it only covers restrictions of access to certain posts in public service to the national of another member state. What limits its scope even more is that unequal treatment is possible only for access of employment in public sector, while all other conditions and stages have to be guaranteed to treat migrants the same as nationals. Mentioned limitations might become important contra-arguments for the opponents declaring that possibility to eliminate posts in public sector for migrants does not comply with the principles of united and free EU.

Free movement of workers in the public service is independent of any specific sector being only post related which means that only those posts which meet certain criteria can be distinguished from others. It covers all levels of public service sphere despite the strong fragmentation of the national public sectors in member states.[80] This fragmentation is visible in different levels of government (central, regional, local) or different functions ascribed to public administration institutions. Also, even though workers can be employed under varying grounds in public sector, namely as civil servants, public sector employees, under private law contracts or collective agreements, the analyzed free movement provisions are applicable.

Furthermore, the organizational and procedural autonomy principle determines neutrality of the EU towards internal administration in member states. As a result, they are free to choose organizational types of their public sector, in particular career or post-based systems. Besides internal organization types, member states may decide upon different recruitment systems, ways to attract professionals to public sector and, what is very important

[80] Note 67, p. 52.

in the discussed topic, to decide whether to use the public service exception of free movement of workers at all.[81]

[81] Note 69, p. 10.

10. Employment in public service according to the ECJ

The principal case of the ECJ which created a path for analysis of future situations was *Commission v. Belgium* (149/79).[82] In this judgment the Court attempted to disclose the content of public service concept by formulating two main criteria for interpreting the notion of public it. The Court held that article 45(4) TFEU covers posts involving direct as well as indirect participation in the exercise of powers conferred by public law and duties assigned to safeguard the general interests of the state. The Court also stressed that such posts presume the existence of a special relationship of allegiance to the state and reciprocity of rights and duties forming the bond of nationality.

So, in order to ascertain employment in public service, two requirements, which will further be discussed in more detail, have to be fulfilled, namely direct or indirect participation in exercising of public powers and safeguarding the general interests of the state. In subsequent judgments the ECJ has every time confirmed the two criteria and noted them being not alternative, but cumulative.[83] This means that in order to be recognized as employment in public service, the functions of the particular post have to involve both participation in exercise of public powers and protection of state interests.

After overlooking the following jurisprudence on the discussed topic it is clear that the Court has never specified the main criteria mentioned, but has always explained it on a case-by-case basis. On the one hand, such position may be criticized: if certain posts in public sector were still not analyzed by the ECJ, it might remain unclear for authorities of member states, whether article 45(4) TFEU is applicable for them. On the other hand though, such method of creating case law may be positively evaluated since the Court only sets general principles leaving broader space for law interpretation which complies with the dynamic character of the EU law.

So, according to the ECJ, the exception embedded in paragraph 4 of the article 45 TFEU has to be interpreted strictly. Moreover, after analysis of Court's jurisprudence, the conclusion can be made that the ECJ continuously holds that these following positions in the

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82 The European Court of Justice, Luxembourg, 1980.

83 Note 69, p. 11.

public sector do not fall within the scope of the discussed exception: postal services: workers (see *Giovanni Maria Sotgiu v. Deutsche Bundespost* (152/73)); railways: loaders, drivers, plate-layers, signalmen, office cleaners, painter's assistants, assistant furnishers, battery services, coil winders, armature services, night watchmen, cleaners, canteen staff, workshop hands (see *Commission v. Belgium* (149/79)); municipal councils: joiners, garden hands, hospital nurses, children nurses, electricians, plumbers (see *Commission v. Belgium* (C-278/94)); state hospitals: male and female nurses (see *Commission v. France* (307/84)); state education: trainee teachers (see *Lawrie-Blum v. Land Buden-Wurttemberg* (66/85)), secondary school teachers (see *Bleis* (4/91)[84]), foreign language assistants in universities (see *Allue v. Coonan* (33/88)[85]), civil researchers (see *Commission v. Italy* (13/63)).[86]

One of the two imperative features of the employment in public sector exception is performance of public functions. According to the doctrine of the EU, it requires existence of subordinate relations between the state authorities and citizen. Some of the authors believe that public functions involve adopting mandatory decisions for citizens, which outflows from the general competence of a state, and also regulation of society's life.[87]

Surprisingly, the Court has failed to define the exercise of public authority. According to some authors, consequently a definition given by Advocate General in *Jean Reyners v. Belgium* (C-2/74)[88] has to be trusted: "official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens".[89] Some inaccuracies occur about the definition itself, since English translation of the mentioned judgment embeds exercising powers conferred by public law, but French or German translations correspond to exercise of public authority.[90]

In another case the ECJ was hearing, General Advocate has also expressed opinion that article 45(4) TFEU is applicable when public worker has a power to adopt volitional act. Such acts being mandatory for citizen, require a certain degree of obedience from him. Otherwise,

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84 The European Court of Justice, Luxembourg, 1991.
85 The European Court of Justice, Luxembourg, 1993.
86 Note 46, p. 3.
87 Dauksiene, Inga. *Free movement of workers and exception of employment in public service*. In: Jurisprudence, 2005, p. 94.
88 The European Court of Justice, Luxembourg, 1974.
89 Note 25, p. 85.
90 Note 68.

the enforcement of such acts is administrated by force, see *Commission v. France* (307/84).[91] Public sector fields, falling into the scope here are, for example, police, judiciary or tax authorities.

In *Commission v. Belgium* (149/79) conclusions might be made that once a state is willing to give a particular function for private persons, such functions have to be open for workers from other member states also. Precisely, if functions can be transferred to private sector, the presumption states that they are not so important to be able to breach state's sovereignty or become a threat to state's security. For instance, foreign or defense policy of the state cannot be entrusted to private organizations.

What is more, exercise of public functions has to amount to the biggest part of employee's functions, opposite to being episodic or occurring in exceptional cases. The ECJ has ruled that the requirement for ship captain to be a national is unlawful. Even though his functions are connected to the exercise of public functions, namely assuring safety, if necessary acting as police or notary, they only constitute a small amount of daily routine or are only performed on exceptional occasions, see *Colegio de Oficiales de Marina Mercante Espanola* (C-405/01).[92]

Furthermore, as the Court has stressed – the above discussed public functions might be performed directly or indirectly. Direct performance means independent realization of public functions, whereas indirect means a real possible influence to such realization. The ECJ has consistently held that such influence has to be effective and of a certain degree, therefore technical or household advices are not assessed as such, see *Commission v. Italy* (225/85).[93]

Although it is now accepted that the realization of the first criteria to fulfill requirements of article 45(4) TFEU can be exercised both directly or indirectly performing public functions, the case law of the ECJ has not always been this consistent. For example, in the already mentioned *Jean Reyners v. Belgium* (C-2/74) the Court ruled on the public service derogation based on the exercise of official authority by deciding that for the application of this derogation there has to be a direct and specific connection with the exercise of official authority.

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91 The European Court of Justice, Luxembourg, 1986.
92 The European Court of Justice, Luxembourg, 2003.
93 The European Court of Justice, Luxembourg, 1987.

The jurisprudence of the ECJ reveals that a number of attempts to prove exercise of official authority fail. For instance, Greece failed to prove that activities of traffic-accident expert fall within 45(4) TFEU exception, while Italy unsuccessfully tried to argue that operating computer system for national lottery and transport consulting contain public authority functions.[94] Moreover, arguments brought by Belgian authorities that auditors of insurance companies were public officials exercising official powers, were rejected by the Court in *Thijssen v. Controledienstvoor de Verzekeringen* (C-42/92), because such powers were not definitive, but rather monitoring and reporting.[95]

Safeguarding general interests of the state issue was hardly ever analyzed in detail by the ECJ. On the one hand, it creates a space for misunderstandings while on the other hand, the small number of cases concerning this issue brought to the Court might mean it to be quite clear. Although the ECJ has not explained the concept of interests of state and limits of safeguarding them, in the already mentioned *Commission v. Italy* (13/63) the Court stated that functions, held by state research service to advice the government on economic and technical basis, are not connected to security of state interest under the scope of article 45(4) TFEU.

The Court has also defined the analyzed issue to be duties designed to safeguard the general interests of the state or of other public authorities. Consequently, the phrase "or of other" makes clear that posts falling under application of article 45(4) TFEU are not limited to state public administration of central government, but may also be in local or regional government.[96] Consequently, it can be concluded, that such participation is not necessarily because of decision making powers, but may also result from possible influence in advice giving.

94 Note 25, p. 86.
95 The European Court of Justice, Luxembourg, 1993.
96 Note 68.

11. Aims of the provision of article 45(4) TFEU

To start the research about whether non-application of free movement principle for employment in public sector meets up-to-date level of integration in the EU and does not breach the mentioned fundamental principle itself, the aims of incorporating such exception are crucial to overlook.

Firstly, to answer the question it is important to note the supranational character of the EU. For reaching common goals for the whole Union, member states open and share their particular sovereign rights, but not their sovereignty, which lets them to keep specific fields to their own competence. The EU legislation is hierarchically higher than national legal acts. Despite the fact that the decreasing number of spheres remain to be the exclusive competence of member states, the ones having special state nature cannot be affected by the EU. The exclusive fields left for member states to deal with are, for instance, internal state administration, national identity, military structure, national public administration. The fact that employment and management of public sector is seen as competence of member state comes from the assumption that the main state functioning tasks can only be well done by the nationals of the member state.

Secondly, sources of the decision to let member states to decide if migrants are able to work in public sector can be found in the XIX century, when nationalism ideas were highly prevalent. The possibility to reserve posts for nationals in a way illustrate the non-confidence for comers. On the one hand, the discussed position is grounded by stating that migrant can try to avoid liability hiding in his home country in case of unlawful behavior. On the other hand, since public service contains the obligatory decisions, nationals are sometimes thought to feel uncomfortable in case they must fulfill obligatory commandments given by migrants.

Moreover, in order to safeguard state sovereignty, state is willing that the highest public authority will be exercised by its nationals who act with loyalty and faith for their home country. This argument is even more relevant in case of state security interests as it may contain very important documents as well as those containing state secrets. Nationals are believed to act with unconditional faith, while migrants are still sometimes seen as posing a threat to the state.

Last but not least, economic motive can be found in the law doctrine. The possibility to reserve posts in public sector is seen as a safeguard from international competition helping nationals and it becomes quite important for member states experiencing employment problems. However, as was indicated before, the highest levels of employment in public sector in member states hardly reach more than 30%, therefore the economic motive is at the end not so important.

Nevertheless, the above stated arguments nowadays seem to be a bit old-fashioned and not complying with the reality of increasing migration in the world and especially the EU in this case. These arguments, such as fear that migrant would hide from liability or act not as loyal as national, seem to be not rational.

On the other hand, the rule that provisions of article 45(4) TFEU shall not apply to employment in the public service may be examined in light of the dual citizenship of the EU and member state, established by the Maastricht treaty.[97] Professor Jacques Ziller, for example, argues that when text of article 45 TFEU was written in the EEC treaty in 1957, all member states had provisions in their domestic law, according to which citizenship or nationality was a condition for access to their civil service or public administration. It is not surprising that states subsequently agreed on the idea about removing public sector from free movement principle. What is more, professor states that most member states understand access to civil service or public administration as directly linked to the citizenship, in the similar way as, for instance, electoral rights.

Although principles for interpretation of article 45(4) TFEU have changed since 1960s, the concept of the EU citizenship with no doubt is a decisive factor in the field of free movement of workers as being an essential element of it. The main idea of the EU citizenship is to create one Europe without borders with no obstacles to work, reside, move or live in any of the member state. All in all, it is still doubtful whether aspiration to remove such obstacles does not contradict with the discussed exception of free movement.

[97] Note 68.

12. Specific situation of Luxembourg

As was indicated above, Luxembourg is an example of a country applying institutional approach towards derogations from free movement of workers regarding public sector. Because of its specific situation, it is beneficial to overlook how the mentioned norm is applied there. The following record is based on information written in article "Access to Employment and Equal Treatment in the Public Sector: the Case of Luxembourg".[98]

Luxembourg stands out from other countries in Europe for its unique geographical position: small territory is surrounded by Germany, France and Belgium, which might have influenced the same three official languages there. Consequently, upon request of the enquirer, answers from public service institutions have to be given in the same language, which means that in order to work in the public service of Luxembourg a person is required to show an adequate level of such knowledge. What is more, candidates are asked to demonstrate their knowledge of history of Luxembourg.

Despite the fact that Luxembourg was a founding member of the European Community and is known for trying to transfer the EU legislation quickly, the reluctance to open posts in public sector to other EU nationals is quite clearly visible. The EU legislation concerning the discussed issue is not always applied especially at the local government administration level. Also, EU citizens are recruited as employees of state, separately from civil servants. Current situation does not seem to be respecting principle of equality between European citizens as too many positions are banned for non-Luxembourgers.

Domestic legislation of Luxembourg embeds that nationality requirements do not apply to certain posts in teaching, postal and telecommunications fields, however, police, army, judiciary, diplomatic careers, tax administration and administrative posts of government are reserved to nationals.

The ECJ has also analyzed the case brought by the Commission against Luxembourg in 1996, see *Commission v. Luxembourg* (C-473/93).[99] This case concerned the reservation for

[98] Moyse, Francois. *Access to Employment and Equal Treatment in the Public Sector: the Case of Luxembourg*. In Rethinking the Free Movement of Workers: the European Challenges Ahead. The Netherlands, (Wolf Legal Publishers) 2009, p. 167 – 171.

[99] The European Court of Justice, 1996.

Luxembourg nationals for various posts in teaching, health, research, postal, telecommunications and utilities sectors. Although the government argued that the Court should view employment in public sector as under national law as well as to take the institutional approach, it was rejected since such posts were remote from criteria set in the Court's case law on this topic.

A research, carried out 5 years ago, showed formal determination and no real consideration of the duties of posts being widely exercised in Luxembourg. The overview of relevant recruitment advertisements in press revealed that only 13 of 50 jobs were open for other EU citizens, while they only belonged to the Ministry of National Education and Vocational Training. Accordingly, such positions as stitcher in prison or computer specialist in Labour Inspectorate are expected to be taken by Luxembourgers. In conclusion, situation in Luxembourg seems not to be typical to the rest of Europe and opening of public service to more EU citizens is seen as necessary.

13. Position of the European Commission

European Commission has always played an important role in the free movement of workers issues especially because of its competence to initiate proceedings against member states in the ECJ for possible non-compliance with the EU legislation in this field. Also, the Commission regularly issues acts or communications regarding free movement of workers and, what is relevant in this research, the exception of public service.

In 1988 the Commission has adopted the Communication[100] concerning the application of article 45(4) TFEU (article 48(4) EC then) which created a path for further interpretations being a start point for monitoring application of the EU law. Also, it was followed by a number of infringement procedures: after this Communication, the Commission brought proceedings against two member states, namely Luxembourg and Greece, which led to restrictions imposed to them.[101]

The Communication focused on migrant workers public employment in the EU and even managed to exclude few particular spheres which cannot be restricted to nationals of the host state. In particular, the four sectors decided by the Commission were management of commercial services, public health care, teaching in state educational establishments and civil research for non-military purposes.

Although such sector enumeration is seen as a progressive step taken by the Commission, quite big freedom is still left for member states to decide which positions are to be reserved for nationals. It follows that setting a strict and clear, justified list of positions which are open to EU workers, would reduce problems occurring because of differences in national legislation of member states. It is argued in the doctrine also that the Commission should reinforce the sectoral approach and specify the criteria for determining whether post includes special features typical for public sector exception as well as to define more accurately sectors and level of posts in them, where nationality may become a condition to

[100] *Freedom of workers and access to employment in the public service of Member States*. European Commission action in respect of the application of Article 48(4) of the EEC Treaty, OJ C-72/2, 18 March 1988.

[101] Note 8, p. 53.

access.[102] The position of the Commission as regards interpretation of article 45(4) TFEU has developed since 1988 following to the stricter and more precise one today.

The Commission has expanded the sector-based approach in its 2002 Communication[103] where the functional approach, established by the ECJ, was confirmed to be very important. The exclusion of public sector post from freedom of movement provisions have to be assessed in every individual situation separately, and in no wise on a sector basis. Despite the fact that the Commission declares its official opinion on which sectors can include posts to be reserved only for nationals or sectors which must be open for EU migrants, the criteria set by the ECJ have to be evaluated every time individually. It means that although the derogation in article 45(4) TFEU was seen as covering specific functions of state authorities carried out by the armed forces, the police and other forces for maintenance of order, the judiciary, the tax authorities and the diplomatic corps by the Commission in 2002, not all posts are to be included. For instance, administrative tasks, secretarial jobs, technical consultation and maintenance will probably not fulfill the criteria of public authority exercise and security of general interests of state, therefore such positions may not be reserved for nationals. Consequently, it becomes crucial to view Commission's position regarding the application of article 45(4) TFEU in specific sectors as guidelines and ambition to facilitate as well as unify the application of the discussed provision. In addition, it is worth noting that not all posts which involve the exercise of public authority and responsibility for safeguarding the general interest should be reserved for nationals – according to the Commission, the post of an official helping to prepare decisions on granting planning permission shall be banned for foreigners.

Unfortunately, despite such efforts, member states still keep breaching their liabilities under the EU treaties. In 2010 the Commission made a conclusion that there were still national provisions and job advertisements directed to nationals but not fulfilling necessary criteria, such as gardener, electrician or librarian no matter in which sector. What is more, several member states keep reserving all posts in specific ministries, namely foreign affairs, budget, economy and other. High and middle management level of government posts are usually banned for EU migrants in some countries, the same as civil servant posts in some other.[104] It

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[102] Ibid.

[103] *Free movement of workers – achieving the full benefits and potential*. Communication from the Commission, COM (200) 694 final, 11 December 2002.

[104] Note 69.

is also illustrated by statistics since it was estimated that between 10 and 40 per cent of public posts are restricted.[105] For example, this would amount to more than one million restricted positions in France which seems to be much higher than it should be if followed by strict interpretation of the ECJ.

Summarizing the attitude expressed by the Commission regarding the scope of the article 45(4) TFEU and public service employment within, it has to be said that the Commission sees a number of spheres falling into the scope here. These are namely armed forces, police and other law enforcement bodies, judiciary, tax authorities, diplomatic corps, jobs in state ministries, regional authorities, local authorities, central banks, other public bodies where the duties of the post involve the exercise of state authority. As already noted, the expressed position has developed and become more precise and duties of the particular civil servant now have to involve preparation, implementation and monitoring of legal acts as well as supervision of subordinate bodies.

[105] Note 46, p. 4.

14. Legitimacy of the provision of article 45(4) TFEU

As already mentioned before, the exception from free movement of workers in the EU stated in article 45(4) TFEU is highly connected with the principles of sovereignty and nationality of member states of the community. Therefore, the discussion about the legitimacy of this article as well as its advantages and disadvantages has to be viewed both from national and European perspective.

Although in the 21st century article 45(4) TFEU is becoming more and more difficult to justify, there are a number of arguments why it should be included as an exception of free movement in the EU. It is quite misleading to admit that non-nationals are allowed to work in nuclear power stations as well as weapon industry, but not in particular positions in the public service. There are political, legal and even economic reasons suggesting a discussed provision to be an artificial obstacle in the unity of Europe and workers migrating freely here. However, deeply rooted cultural and philosophical reasons prompt that part 4 cannot be erased from article 45 TFEU. Pros and cons of excluding public sector from freedom of movement concept will be analyzed in the following section.

To begin with, it has to be noted that to answer what do member states nowadays still fear while excluding civil servants from free movement principle, is not an easy task once one realizes that 2014 strongly differ from 1945 when a fear of betray was actual. Hence, today the sense of excluding public administrations from free movement principle is not completely justifiable already only because the EU is based on democracy, union citizenship and internal market.

The preservation of democracy and rule of law principle is often mentioned as an argument for article 45(4) TFEU, suggesting the idea that some functions, traditions and principles would be violated if carried out by a foreigner. Even if such reason was relevant before, today, however, it is legally incorrect. It is embedded in the TEU that the main principles of the Union are liberty, democracy, respect for human rights and fundamental freedoms.[106] What is more, it is also provided that every person holding the nationality of a member state is a citizen of the EU and therefore shall enjoy rights and be subject to duties

[106] Note 67.

imposed by the EU treaties.[107] The mentioned provisions of the treaty basically allow denying the legitimacy of public services exclusion from free movement principle.

Furthermore, the occurring examples of cooperation between member states in various fields illustrate the growing need to reform concept of migrant workers elimination in the state employment. For instance, the Elysee Treaty between France and Germany promotes the exchange of officials at all levels meaning tremendous progress in administrative, diplomatic and legal cooperation between these countries.[108] The essence of this treaty goes so far that both countries have agreed to regularly exchange staff of the national police, consult on preparation of important law projects and even discuss the possibility of having dual nationality.

Sharing and exchanging employees in particular areas is not a new idea seen only in the Elysee Treaty. On the national level, more and more police officers are being employed outside their home country, especially when they are expected to deal better with foreigners than national policemen. In addition, it is interesting to mention, that politicians continue to promote the idea of European Common and Foreign Security Policy.[109] Such practices create new legal reality and enable to think about the new concept of state sovereignty.

Despite mentioned arguments why the exclusion of employment in public sector from free movement of workers concept may be seen as an artificial obstacle to it, it has to be admitted that article 45(4) TFEU although needs an immediate reform, but definitely not erasure. There are a number of reasons confirming this idea, mostly based on cultural and philosophical grounds. Moreover, the ECJ has justified article 45(4) TFEU explaining special relationship of allegiance to the state and reciprocity of rights and duties from the foundation of the bond of nationality.[110]

Firstly, the paradox of today's societies when people keep expecting their governments and other state authorities to be in charge of stabilization of economy, unemployment, poverty, illness, etc. Despite globalization and modernization tendencies, exactly state authorities are expected to protect societies and improve their life. Even if such point seems to be not completely realistic, it has to be admitted that international organizations and the EU in the

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107 Ibid.
108 Note 46, p. 5.
109 Op. cit., p. 6.
110 Note 82.

discussed case are not likely to replace the classical nation state.[111] Such nation state concept will mostly likely continue to exist because of people's needs: it is seen as an entity with two very important human values: belonging and individuality, therefore, people need to know the boundaries in order to build their identities. This was quite clearly illustrated by statistical data in 2003 – 90 per cent of the EU population felt attached to their countries, while only half of them, 45 per cent, felt attached to the Union as it was seen as an instrument of modernity opposite to stability and identification.[112]

Secondly, people in favor of setting employment in public sector as an exception from freedom of movement use principle of democracy and rule of law as an argument. Since people are the primary source where the power of state is provided, according to the mentioned principles the implementation and interpretation of law should also be done by the same people, nationals of the state, representing their nationality.[113]

In addition, argument about cross-border migration also supports the need of provision of article 45(4) TFEU. The integrity, individuality and independence of the state are main notions which are possible to be intervened if too many civil servants are allowed to work in the public service. Of course, such risk is mostly dangerous for small countries, namely Luxembourg, Malta or Slovenia.

The arguments listed above presuppose that free movement of workers principle should not be fully opened though. It is not difficult to imagine consequences if the EU nationals would be granted access to all work positions in all member states – the worldview, beliefs, traditions and finally way, methods of working are brought from early education and general lifestyle in the home country. It may be hard to imagine that in practice French officials would represent the United Kingdom in a Council of Ministers or Irish officials negotiating on behalf of German Government.[114] However, nowadays more and more people choose to gain studying, working or other staying abroad experience, they become more and more open-minded and start viewing world not only in a national, but also international social, political, legal level.

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111 Note 46, p. 8.
112 Ibid.
113 Ibid.
114 Ibid.

15. Conclusions

15.1 General conclusions

Rights of migrants are a major concern in international human rights law. As migration flows constantly grow, it is becoming more and more important. What is more, dynamic responsive nature of the European Community as well as ongoing globalization and regional integration lead to the situation when free movement of workers and ensuring their rights is crucial.

Freedom of movement of workers means the possibility to accept job offer in another member state, to reside there for employment or to go to another member state to seek for employment as long as a genuine chance of being employed can be proven. Although numbers vary from country to country, statistics show that on average around 20 – 30 per cent of employment in the member states is formed in public sector. Nevertheless, migration of civil servants in the EU is quite low, which suggests that even erasure of article 45(4) TFEU would not lead to a higher rate of mobility.

The free movement of workers migrating within the member states is closely related with the non-discrimination on the basis of nationality. Article 18 TFEU being a general rule provides equal treatment for both economically active and non-active EU citizens, while article 45(2) is considered to be a special rule ensuring non-discrimination because of nationality for migrant workers. There are different reasons why discrimination in the freedom of movement field against migrant workers occurs: on the one hand, they tend to stay a vulnerable group of society and, as a result, they are afraid to report incidents when being treated less than local workers. On the other hand, circumstances such as poor foreign language skills, unknown legal system, lack of funds do not allow them to notice and identify the occurrence of discrimination.

The inclusion of part 4 to article 45 TFEU can be justified by political, economical, legal and historical reasons. It may be viewed from the middle of 20th century perspective, when states in Europe were willing to keep individuality – states reserving a part of public posts to nationals used to base it with national nation state philosophy. Realizing that 2014 differ strongly, the discussed derogation from freedom of movement of workers seems to

create artificial obstacles and to be a bit old-fashioned. Moreover, the promoted Union citizenship, which guarantees same rights and possibilities for citizens of all the member states, partly denies the validity of such exclusion. Despite the openness of freedom of movement idea, workers migrating in the EU still face several obstacles regarding employment in public service, namely foreign language requirements, recognition of their professional experience or diplomas.

15.2 Conclusions regarding interpretation of article 45(4) TFEU

Definition of public service is given neither in the primary, nor in the secondary EU legislation, therefore, the competence to interpret it, is left to the particular EU institutions. As a result, article 45(4) TFEU may be seen as serving autonomy to the member states side by side to cooperation and mutual respect. Consequently, the ECJ has drawn limits to public service concept stating that it has to involve exercise of powers conferred by public law as well as duties to safeguard interests of the state. Nevertheless, the ECJ has failed to consistently define several concepts, for example, the exercise of public authority.

The ECJ has consistently held that article 45(4) has to be interpreted narrowly on a case by case basis which may mean not fully consistent or not fully comprehensive practice. Thus quite big freedom for interpretation here is left, however, reality shows that member states fail to completely comply with the case law. One of the relevant proposals to benefit the situation could be creating a more consistent and comprehensive practice regarding definition and limits of public service in the EU countries.

The Court focuses on the nature of tasks held by the public employer. Such position of the Court means that the public service exception from free movement of workers can be applied only to those posts in public sector which might have a real influence to the state interests. Consequently, the functional approach confirmed by the ECJ indicates that limitations for immigrants from EU cannot be applied for posts in state administrative, technical, maintenance and similar fields that do not contain adoption of significant decisions. The presumption derived by the ECJ is that once a particular function might be transferred to private persons, it can also be performed by foreign workers.

Thus according to the European Commission, management of commercial services, public health care, teaching in state educational establishments and civil research for non-military purposes cannot be restricted to nationals.

It is important to stress that derogation from freedom of movement principle set in article 45(4) TFEU is by no chance a necessity – it aims to facilitate member states' as they are free to choose if to take an advantage of it. Furthermore, the provision set in article 45(4) TFEU is not an absolute derogation. Restrictions are applied to access only certain public posts for a national of another member state and they can only be invoked no later than access stage. Consequently, equal treatment has to be guaranteed in all later stages and conditions.

The ECJ has also drawn clear guidelines of who can be considered to be a worker since it is undefined in other legislation. The Court has specified an exhaustive list stating that a worker has to create an economic value, to act under supervision and direction of another person and to receive remuneration.

15.3 Suggestions for improvement

A number of suggestions to improve the situation in the freedom of movement field and reduce chances of discrimination based on nationality in this field are to be stated. Firstly, employers have to be educated in the right direction and should not have reasons to treat citizens of the host country differently from immigrants. Also, the effective and available controlling mechanism needs to be established, meaning that available information should be given in understandable language and under affordable price. Effective mechanism includes not only effective monitoring, but also real power to oblige offenders to restitute. Lastly, the legislative framework of the member state in the freedom of movement of workers has to meet the criteria set by the EU legal acts and decisions of the ECJ.

The ECJ being the legislator, the European Commission is seen as an executor in discussed field. The Commission plays a very important role because it has powers to initiate proceedings against member states for non-compliance with the EU legislation. Even though statistically not too many cases regarding immigration labour law reach trials, foreign workers tend to stay a vulnerable group of society rights of which are being violated even if not apparently. Therefore, it is crucial for the Commission to become more active. The European Commission acts not only as an executor, but also as a semi-legislator since it issues

explanatory documents. Such communications have a major significance and should be further issued firstly because they set very clear guidelines for member states to follow and secondly because infringement procedures are brought afterwards.

Misfortunately, EU bodies demonstrate a comparatively weak position towards actions of member states against foreigners' employment in public sector. Only new proceedings regarding discrimination in public sector because of nationality and, consequently, new consistent case law would probably improve the situation. However, it is uncontested that to improve the situation is a difficult, expensive and long procedure since most EU and EEA member states embed criteria for becoming a public servant in the most powerful legal act, the Constitution, which can only be changed after voting in referendum.

All in all, after the analysis made in the thesis, it can be stated that article 45(4) TFEU does not need an erasure, but requires reforms in the requirements and control changes. The need for public sector exception from freedom of movement of workers is supported not only by the fact that international organizations will not replace a classical nation state but also by the cross-border migration which is especially relevant for small-size countries.

For the sake of consistency, one of the suggestions for formulation of article 45(4) TFEU is as follows: "The provisions of this article shall apply to private and public employment. However, member states are allowed to restrict them for certain posts in armed forces, diplomatic corps, judiciary and ministries involving not only public legal decisions and judgments making, but also interpretation and implementation of them".

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